



IN THE COMPETITION APPEAL
TRIBUNAL

Case No: 1570/5/7/22 (T)

BETWEEN:

JJH ENTERPRISES LIMITED
(TRADING AS VALUELICENSING)

Claimant

- v -

(1) MICROSOFT CORPORATION

(2) MICROSOFT LIMITED

(3) MICROSOFT IRELAND OPERATIONS LIMITED

Defendants

CONSENT ORDER

UPON reading the Defendants' submissions of the parties relating to the establishment of a confidentiality ring

AND UPON hearing Counsel for the parties at a case management conference held at the Competition Appeal Tribunal on 9 October 2023

AND UPON reading the correspondence exchanged between the parties on this matter

AND UPON the parties having agreed to the terms of this Order

IT IS ORDERED BY CONSENT THAT:

1. For the purposes of this Order:
 - (a) **“Confidential Documents”** are documents containing Confidential Information (whether in whole or in part). For the avoidance of doubt, any notes, copies, reports, submissions or other documents containing, reproducing or reflecting the content of Confidential Documents are themselves Confidential Documents unless all Confidential Information contained in them has been redacted. Documents that use Confidential Information in Confidential Documents (for example, to provide an aggregation of Confidential Information) but which do not reveal the content of Confidential Information shall not be Confidential Documents.
 - (b) **“Confidential Information”** means (i) information the disclosure of which would be contrary to the public interest; (ii) commercially sensitive information, the disclosure of which would or might significantly harm the legitimate business interests of the undertaking(s) to which it relates (which, for the avoidance of doubt, may include undertaking(s) other than the Designating Party); and/or (iii) information relating to the private affairs of an individual, the disclosure of which would or might significantly harm that individual’s interests. Confidential Information shall exclude information which is, at the time of disclosure, already published or generally available to the public or, after the time of disclosure, is published or becomes generally available to the public, other than through the act or omission of a receiving Party or a Permitted Person (as defined below).
 - (c) **“Designating Party”** shall mean, in relation to any document, the Party that disclosed or filed that document.
 - (d) **“External Permitted Person”** shall mean a Permitted Person who is an external legal or other professional adviser to a Party and who is listed in Schedule A and has provided an undertaking in the form set out in Schedule B.
 - (e) **“Internal Permitted Person”** shall mean a Permitted Person who is an officer or employee of a Party and who is listed in Schedule A and has provided an undertaking in the form set out in Schedule B.
 - (f) **“Party”** shall mean any of the Claimant or Defendants in these proceedings.
 - (g) **“Permitted Persons”**:

- (i) **“Permitted Persons”** shall mean:
 - (aa) those persons listed in Schedule A (as amended from time to time pursuant to the terms of this Order and/or by the Tribunal) that have provided signed undertakings in the form set out in Schedule B to all Parties;
 - (bb) necessary secretary, business services or other support personnel, including for the avoidance of doubt internal providers of eDisclosure or litigation support services (not including trainee solicitors or paralegals), IT, reprographics staff and clerks, acting under the supervision and/or instructions of the persons identified at paragraph 1(g)(i)(aa) above for the purpose of the Proceedings, provided that such personnel have been informed of the confidential nature of the Confidential or Restricted Documents and the terms of Schedule B to this Order; and
 - (cc) any external eDisclosure or litigation support provider engaged by any Party for the purpose of the Proceedings to provide eDisclosure or similar services in support of those persons identified at paragraph 1(g)(i)(aa) above, who may have access to the Confidential or Restricted Documents as a necessary consequence of the provision of their services, provided that such providers have been informed of the confidential nature of the Confidential or Restricted Documents and the terms of Schedule B to this Order.
- (h) Permitted Persons include Internal Permitted Persons and External Permitted Persons. External Permitted Persons so listed shall be a Permitted Person in respect of all Confidential Documents and all Restricted Documents. Save as otherwise agreed in writing, an Internal Permitted Person shall not be permitted to receive or to see documents which have been designated by a Party as Restricted Documents and they shall not be permitted to see Restricted Information.
- (i) **“Restricted Documents”** shall mean documents which contain Restricted Information. For the avoidance of doubt, any notes, copies, reports, submissions or other documents containing, reproducing or reflecting the content of Restricted Documents are themselves Restricted Documents unless all Restricted Information

contained in them has been redacted. Documents that use Restricted Information in Restricted Documents (for example, to provide an aggregation of Restricted Information) but which do not reveal the content of Restricted Information shall not be Restricted Documents.

(j) “**Restricted Information**” is information that is so sensitive that its disclosure by one Party to another and/or to third parties would create a substantial risk of causing the undertaking(s) to which it relates (which, for the avoidance of doubt, may include undertaking(s) other than the Designating Party) to suffer monetary or non-monetary injury or competitive or commercial disadvantage. A Party may designate a document as a Restricted Document in accordance with paragraph 4 below.

(k) “**Tribunal**” shall mean the Competition Appeal Tribunal.

2. This Order shall apply to all documents disclosed or filed with the Tribunal in the Proceedings. Subject to this Order, the restrictions in Rule 102 of the Tribunal Rules shall not apply to prevent any Party from using those documents in any Individual Proceeding.

3. Confidential or Restricted Documents and Confidential or Restricted Information shall be provided by one Party to another only in accordance with this Order.

Designation of Confidential and Restricted Documents

4. Any Confidential or Restricted Document shall be designated as such by the Party that discloses or files it in the Proceedings. Any document which is designated as a Confidential or Restricted Document may be subject to challenge in accordance with paragraph 6 of this Order.

5. Each Party shall be responsible, in respect of any document containing Confidential or Restricted Information belonging to them which is disclosed or filed with the Tribunal, for labelling and highlighting any Confidential or Restricted Documents and Confidential or Restricted Information in the following ways:

(a) Each Confidential or Restricted Document shall be marked as “Confidential” or “Restricted” on each page of the document and will identify the Party or Parties to which Confidential or Restricted Information in that Confidential or Restricted Document relates.

(b) Any text and/or extract which contains Confidential or Restricted Information will be highlighted in yellow or some other prominent colour (that does not obscure the

information underneath it), and square brackets must be inserted around the Confidential or Restricted Information.

- (c) To the extent that any Confidential Document or any Restricted Document is included in a hearing bundle, the bundle index shall state which documents are Confidential Documents and which are Restricted Documents and shall identify the Party or Parties to which the Confidential or Restricted Information in those Confidential Documents or Restricted Documents relates.

Challenge to Confidential and Restricted Documents

- 6. The designation of a Confidential or Restricted Document by a Party may be challenged in accordance with the terms below.

- (a) If a Party wishes to challenge the designation of a Confidential or Restricted Document, that Party shall do so by providing written notice to the Designating Party. The Parties shall make reasonable endeavours to ensure that any such challenges are brought, insofar as possible, in manageable batches and with reasonable expedition.
- (b) In the event that a challenge is made pursuant to paragraph 6(a), the Designating Party may respond in writing to the challenge, providing a written explanation as to why the document has been designated a Confidential or Restricted Document, or confirming that the designation will be modified. Such response shall be given as soon as reasonably possible but in any event within seven (7) days of receipt of the notice.
- (c) Absent a response in accordance with paragraph 6(b), each document in question shall be deemed not to be a Confidential or Restricted Document after the expiry of the seven (7) day period, or any extension to the seven (7) day time limit that has been agreed in accordance with paragraph 6(e).
- (d) If the Party challenging confidentiality wishes to maintain its challenge following receipt of the Designating Party's response pursuant to paragraph 6(b), it shall provide written notice to the Designating Party setting out its reasons for doing so within seven (7) days of receipt of the Designating Party's response. The Party challenging the designation of a Confidential or Restricted Document may apply to the Tribunal for determination of whether or not the document qualifies as a Confidential or Restricted Document. Any such application must be made as soon

as reasonably possible but in any event within fourteen (14) days following receipt of the Designating Party's response pursuant to paragraph 6(b). For the avoidance of doubt, a document in respect of which an application is made shall continue to be designated a Confidential or Restricted Document until such time as the challenge is upheld by the Tribunal.

- (e) The deadlines in this paragraph 6 may be extended by agreement between the challenging Party and Designating Party. Consent to a request for an extension shall not be unreasonably withheld.
- (f) For the avoidance of doubt, to the extent that the Tribunal asks for submissions as to why a document qualifies as a Confidential or Restricted Document, it will be a matter for the Designating Party to address this.

Disclosure and inspection of Confidential or Restricted Documents

- 7. Subject to this Order, the Party receiving Confidential or Restricted Documents shall permit those documents to be inspected only by the Permitted Persons in respect of that document and only on the basis that:
 - (a) the recipient Permitted Person has provided to the Designating Party a signed copy of the undertaking at Schedule B;
 - (b) the Confidential or Restricted Documents will be treated by each such Permitted Person as confidential and will be used by each such person solely for the purpose of the proper conduct of the Proceedings; and
 - (c) no such Permitted Person will, save as expressly provided for below at paragraph 8, discuss, disclose, copy, reproduce or distribute any Confidential or Restricted Document or any Confidential or Restricted Information contained therein.
- 8. Provided it is for the purpose of the proper conduct of the Proceedings, nothing in this Order shall prohibit any such Permitted Person from:
 - (a) making notes or copies of, or preparing reports, submissions or other documents concerning, containing or reflecting any Confidential or Restricted Document or its content (which notes, copies, reports, submissions or other documents would themselves be Confidential or Restricted Documents); and/or

- (b) disclosing or discussing any Confidential or Restricted Document to any other person who is a Permitted Person in respect of that document, or any Confidential or Restricted Information to any other person who is a Permitted Person in respect of a document containing such information, provided that no Confidential or Restricted Information shall be otherwise directly or indirectly disclosed in the conduct of the Proceedings beyond the relevant Permitted Persons.
- 9. During any hearing in respect of the Proceedings, each Party wishing to refer to a Confidential or Restricted Document shall be responsible for indicating to the Tribunal that the document contains Confidential or Restricted Information and asking the Tribunal to put in place arrangements for the maintenance of any such Confidential or Restricted Information.
- 10. Nothing in this Order shall prevent or prohibit a receiving Party from taking any action (including in particular disclosing Confidential or Restricted Information and/or Confidential or Restricted Documents to a person who is not a Permitted Person and/or referring to such documents or information in open court) which has been authorised in writing by the Designating Party or which a Party in receipt of Confidential or Restricted Documents is required to take by applicable law or by a court of competent jurisdiction.
- 11. In the event of any disclosure of Confidential or Restricted Information and/or Confidential or Restricted Documents other than in a manner authorised by this Order, including any unintentional or inadvertent disclosure, solicitors for the improperly disclosing Party shall immediately notify the improper recipient(s) and the solicitors for the Party which provided the Confidential or Restricted Documents in the Proceedings, and the improperly disclosing Party shall use all reasonable endeavours to prevent further unauthorised disclosure including (to the extent possible) seeking to retrieve all copies of the Confidential or Restricted Information and/or Confidential or Restricted Documents from the improper recipient(s) thereof and seeking to secure the agreement of such recipient(s) not to further disseminate the Confidential or Restricted Information and/or Confidential or Restricted Documents in any form.

Addition or removal of Permitted Persons

- 12. A Party seeking to designate an additional person as a Permitted Person by adding that additional person to Schedule A must:
 - (a) request permission from the Parties in writing for the additional person to be designated as a Permitted Person and added to Schedule A;

- (b) provide in such request details of that proposed Permitted Person's role and an explanation of why his or her designation as a Permitted Person is necessary;
 - (c) state in such request if that person is to be an Internal Permitted Person or an External Permitted Person; and
 - (d) upon the Parties' agreement to the designation of the additional Permitted Person, provide the Tribunal and all Parties with a copy of the Schedule B Undertaking signed by the proposed Permitted Person and an up-to-date list of the Permitted Persons in Schedule A.
13. Each Party, other than the Party requesting that the additional person shall be designated as a Permitted Person, shall confirm within three (3) working days of the request pursuant to paragraph 12.1 whether they consent to the additional person being designated as a Permitted Person. Such consent shall not be unreasonably withheld.
14. If a Party refuses consent to the additional person being designated a Permitted Person in accordance with paragraph 13, then that Party must provide written reasons (copying in all Parties) for why consent is refused at the same time as providing its refusal.
15. If a Party neither confirms nor refuses consent in accordance with paragraph 13 and 14 above, then following the expiry of three (3) working days, the additional person shall be designated as a Permitted Person.
16. If there are any disputes which cannot be resolved by the Parties, the Party seeking to include the additional person as a Permitted Person may apply to the Tribunal to have the issue determined, provided written notice of such application is given to the other Party. The additional person will become a Permitted Person if the Tribunal so orders.
17. If a Party wishes a Permitted Person to be removed from the Confidentiality Ring, they shall inform the Tribunal in writing (copying the representatives of the Parties) and provide the Tribunal and other Parties with an up-to-date list of the Permitted Persons in Schedule A. The Party must also comply with paragraph 20 (subject to paragraph 21) by notifying the person to be removed as a Permitted Person that they must immediately destroy (insofar as technologically feasible) or make inaccessible all Confidential or Restricted Documents in their possession. For the avoidance of doubt, a Party may only remove a Permitted Person from their own Party.
18. For the avoidance of doubt, there shall be no requirement to amend this Order upon the addition or removal of Permitted Persons.

Copies of Confidential or Restricted Documents

19. The production of further copies of the Confidential or Restricted Documents shall be limited to those required by the Permitted Persons to whom they are disclosed.
20. Subject to the exceptions at paragraph 21 below, each Party and Permitted Person must destroy copies of all Confidential or Restricted Documents provided pursuant to this Order (in both hard and soft copy) (insofar as technologically feasible) or make them inaccessible at the conclusion of the Proceedings (including the determination of any appeals), or when the Party or Permitted Person ceases to be involved in the Proceedings. At such time, that Party shall notify its Permitted Persons that they must destroy (insofar as technologically feasible) or make inaccessible all Confidential or Restricted Documents in their possession. Each Party shall notify the other Party within a reasonable time that the Confidential or Restricted Information has been destroyed (insofar as technologically feasible) or made inaccessible (as appropriate).
21. The obligation in paragraph 20 above is subject to the following exceptions:
 - (a) Paragraph 20 does not apply to solicitors' or counsel's notes;
 - (b) Paragraph 20 does not create an obligation to search for transitory or deeply stored soft copies of Confidential or Restricted Information which may exist on the computer system of the receiving Party and which cannot be recovered without special measures, provided that such documents and/or information will be promptly deleted in the event of the restoration of such copies;
 - (c) Paragraph 20 does not apply to Party's copies of pleadings, evidence, skeleton arguments, transcripts, applications, draft orders, correspondence referred to at trial or in a hearing or submitted in the Proceedings as well as lawyer work product referring to Confidential or Restricted Documents, subject to continued compliance with the terms of this Order in respect of the Confidential or Restricted Information contained within such documents; and
 - (d) Paragraph 20 does not apply to a Party in respect of the Confidential or Restricted Documents it provided.

Notices

22. Any notice, consent or objection to be given under or in connection with this Order (each a "**Notice**" for the purpose of this paragraph) shall be in writing.

23. Service of a Notice must be effected by email.
24. Notices shall be addressed as follows:
- (a) Notices for the Claimant shall be marked for the attention of Charles Fussell & Co LLP, and sent to:
- harryprebensen@charlesfussell.com; jonathancohen@charlesfussell.com and charles@charlesfussell.com

Reference: 3723/261248801

- (b) Notices for the Defendants shall be marked for the attention of CMS Cameron McKenna Nabarro Olswang LLP and sent to:

MicrosoftValueLicensing@internal.cms-cmno.com

Reference: KNHE/CLGP/EMCR/KIGA/O10816.12100

General provisions

25. The confidentiality terms in this Order are intended to apply unless or until superseded by a subsequent order of the Tribunal.
26. In the event of any anticipated or actual breach of this Order, any Party may seek to enforce this Order.
27. The Parties may agree and/or any Party may apply to the Tribunal to terminate the operation of this Order, vary the terms of this Order, remove any document from the category of Confidential Documents (including, for the avoidance of doubt, the category of Restricted Documents), or vary the lists of Permitted Persons in Schedule A following an application by a Party made under paragraph 16 of this Order.
28. Nothing in this Order or the terms of the Schedule B undertaking shall prevent or prohibit any Permitted Persons (as may be extended from time to time) from acting in other fee related matters arising under the Proceedings.
29. The costs of compliance with and of drafting this Order shall be costs in the case.
30. There shall be liberty to apply.

Justin Turner KC

Chair of the Competition Appeal Tribunal

Made: 25 January 2024

Drawn: 25 January 2024

SCHEDULE A: PERMITTED PERSONS

Proposed Permitted Persons

External Permitted Persons
On behalf of the Claimant:
<i>Solicitors and legal advisors</i>
Jonathan Cohen
Charles Fussell
Harry Prebensen
Elizabeth Stoppelmoor
Simon Winter
Tatiana Novikova
<i>Counsel</i>
Maya Lester KC
Max Schaefer
Andris Rudzitis
Matthew Lavy KC
<i>Economists</i>
Derek Holt, Iona McCall, Polyxeni Chardouveli, Guillaume Aimard, Rebecca Ly, Justine Dri, Ruby Bloom,
On behalf of the Defendants:
<i>Solicitors and legal advisors</i>
Kenny Henderson
Clive Gringras
Brian Sher
Siobhan Kahmann
Lisa Fox

External Permitted Persons
Oscar Webb
Polly Jackson
Claire Barraclough
Sarajah Sathivelu
Christiane Sungu
Mihaela Ungureanu
Amir Kenbar
Virginia Sanchez-Eguibar
Tycho Orton
Nicola Devine
Grant Arnold
Ingrida Jakuseva
Francesca Mullen
Shabbir Bokhari
Christopher Baldwin
Alex Donose
<i>Counsel</i>
Robert O'Donoghue KC
Nikolaus Grubeck
Michael Armitage
Sarah O'Keefe
<i>Economists</i>
James May
Peter Gerrish
Avantika Choudhury

External Permitted Persons
Grant Sagers
James Thomas
Thomas Nau
Adrien Cervera-Jackson

Internal Permitted Persons
On behalf of the Claimant:
Jonathan Horley
On behalf of the Defendants:
David Smutny
Erin Flaucher

SCHEDULE B: CONFIDENTIALITY UNDERTAKING

The terms used but not defined in this document shall have the meaning given in the Order for the proceedings attached to, or accompanying, this document.

I, [NAME], of [ORGANISATION], being a [delete as applicable: Internal / External Permitted Person] [and regulated so far as my professional conduct is concerned by [insert regulatory body]], undertake to the Parties and to the Tribunal that:

1. I have read a copy of the Order and understand the implications of the Order and the giving of this undertaking;
2. I will treat all Confidential or Restricted Documents and/or any information contained in such Confidential or Restricted Documents made available to me for the purpose of the proceedings as confidential and will use any such Confidential or Restricted Documents and/or information only for the purpose of the proper conduct of the proceedings;
3. Except as expressly contemplated by the Order, I will not use, disclose, discuss, copy, reproduce or distribute any such Confidential or Restricted Documents and/or their content or authorise, enable or assist any person to do so;
4. The Confidential or Restricted Documents containing the Confidential or Restricted Information will remain in my custody or the custody of another Permitted Person at all times and be held in a manner appropriate to the circumstances so as to prevent unauthorised access or disclosure.
5. I will take all such steps as may be necessary or expedient on my part to comply with any request made under or pursuant to the terms of the Order; and
6. I will otherwise comply with the terms of the Order and/or, as the case may be, take all steps within my power to ensure that the terms of the Order are complied with (including by not disclosing, other than to other Permitted Persons, any Confidential or Restricted Documents and/or any information contained in such Confidential or Restricted Documents, or assisting or enabling any person to do so).

7. Save for the exceptions set out in paragraph 21 of the Order and where the written consent of the Designating Party has been obtained, any and all copies of the Confidential or Restricted Documents in paper form containing the Confidential or Restricted Information will either be returned to that Designating Party at the conclusion of the present proceedings, or be destroyed at the conclusion of the present proceedings (it being the discretion of the Designating Party whether the Confidential or Restricted Documents are to be destroyed or returned to the Designating Party); any copies of the Confidential or Restricted Documents containing the Confidential or Restricted Information in electronic form will be deleted or, where that is not possible, will be rendered inaccessible from any computer systems, disk or device so that the Confidential or Restricted Information is not readily available to any person.
8. The present proceedings for these purposes shall include any further appeal from the Tribunal to a higher court, save in so far as that higher court orders otherwise.
9. Save that none of the requirements listed above shall prevent Permitted Persons from disclosing Confidential or Restricted Information to persons who have already legitimately seen it.

PROVIDED ALWAYS that nothing in this document shall prevent or prohibit me from taking any action which has been authorised in writing by the Designating Party or which I am required to take by applicable law or by a court of competent jurisdiction.

Signed:

Dated:
