



**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

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**REASONED ORDER**

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**UPON** the Class Representative's application of 12 February 2024 (the "Application"), and supporting witness statement of Michael Davis date 12 February 2024, that the Tribunal order the Defendants to provide specified data, documents and other information requested by the Class Representative

**AND UPON** the Class Representative's schedule of 8 March 2024 setting out the Class Representative's refined requests, the Defendants' response and the Class Representative's reply

**AND UPON** reading the Application and the Schedule, correspondence from the Defendants relating to the Application and discussing the Application at an informal case management conference on 29 February 2024

**IT IS ORDERED THAT:**

1. The Defendants shall, by 4 pm on Tuesday 2 April 2024:
  - a) provide disclosure and inspection of the documents and/or data specified in the confidential Annex to this Order; and
  - b) file a disclosure statement detailing the enquiries and/or searches conducted in the course of providing the disclosure at sub-paragraph (a) above.
2. There be liberty to apply.

## **REASONS**

3. The Class Representative seeks disclosure of specific documents following a review of a general disclosure exercise carried out by the Defendants. That exercise has principally been focused on sets of documents already produced by the Defendants in other proceedings in other jurisdictions (the “Production Sets”).
4. In part, the requests from the Class Representative are based on documents identified in the general disclosure already carried out and amount to a request for other similar documents or the underlying material (for example spreadsheets) used to create those documents. The Class Representative also seeks disclosure of revenue and costs information relating to a business unit known as ISS (Internet Software & Services, now apparently known simply as Services), which is the business division within which the App Store sits.
5. The essential basis of the requests is that the Class Representative seeks to analyse revenue and cost information for her excessive pricing claim in the collective proceedings in relation to the Defendants App Store. The Defendants maintain that they do not account for costs in particular at the App Store level. However, the Class Representative has identified some documents already produced by the Defendants which are apparently presentations containing an analysis of costs at the App Store level. The Application and schedule seek a proportionate search for, and disclosure of, other similar documents, including outside the Production Sets. The Class Representative also seeks material used to prepare the presentations.
6. Revenue and costs data which is capable of being analysed at the App Store level is obviously of considerable relevance to the excessive pricing claim. In circumstances where the Defendants do not maintain management accounts at that business unit level, the next best source of data is likely to be revenues and costs at the ISS level, and

evidence of the approach taken by the Defendants themselves when they carry out any allocation exercise of revenue and costs at the App Store level. The Defendants have explained (in witness statements filed earlier in the year) that these allocation exercises are incomplete and unreliable. They are nevertheless the best information available about the Defendants' approach to allocation of revenue and costs at the App Store level.

7. The Defendants also maintain that it would be disproportionate to carry out the detailed searches necessary to identify the material requested, especially to the extent that this material sits outside the Production Sets.
8. The approach of the parties to resolving these issues has been unsatisfactory, as I made plain at the informal CMC on 29 February 2024. It is also, as a practical matter, unhelpful that there is no accounting expert instructed by the Defendants to act as a counterpart to the Class Representative's expert in this area. I would ordinarily expect the respective parties' experts to be co-operating to ensure that the best possible evidence was available to the Tribunal. While it is a matter for the Defendants as to whether they instruct an accounting expert, it is undoubtedly unhelpful from a procedural perspective for that dynamic of co-operation to be absent.
9. There is now considerable time pressure to resolve these disclosure issues as the expert reports are to be served by 26 April 2024 and the conclusions of the accounting expert are a necessary input into the economic expert reports due at that time.
10. Taking all these matters into account, I have granted the Class Representative's Application to the extent shown in the confidential Annex attached to this order. I have done so because:
  - a) The Tribunal will be assisted by having as much information about these matters as can sensibly be provided at the trial of these proceedings. Notwithstanding that some of the material may have limitations, it is better to have it, and understand those limitations, than not to have it in evidence.
  - b) The focus on the Productions Sets as the main vehicle for disclosure has been a pragmatic approach. It should not artificially limit the obligation of the Defendants to search for and disclose other material which is of sufficient importance to the proceedings to warrant that effort.
  - c) In relation to proportionality, it should be possible (as indicated in the Annex) to

approach the searches in a contained and therefore proportionate way.

11. The Defendants should therefore conduct a reasonable search for the documents identified in the Annex and should disclose those by 4 pm on Tuesday 2 April 2024.
12. The Class Representative seeks her costs of the application. The Defendants should provide by 4 pm on Friday 22 March 2024 any submissions as to why that should not be the position and the Class Representative may reply with any further observations by Wednesday 27 March 2024.

**Ben Tidswell**  
Chair of the Competition Appeal Tribunal

Made: 15 March 2024  
Drawn: 15 March 2024