



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

REASONED ORDER

UPON the Class Representative's application dated 12 February 2024, and supporting evidence, for an order that the Defendants provide specified data, documents and other requested information (the "Application")

AND UPON discussing the Application at an informal case management conference on 29 February 2024 (the "informal CMC")

AND UPON the Reasoned Order of the Tribunal dated 15 March 2024 in relation to the Application

AND UPON reading the parties' submissions on costs dated 22 March 2024 and 27 March 2024 respectively

IT IS ORDERED THAT:

1. The Defendants shall pay 65% of the Class Representative's costs of the Application, to be assessed if not agreed.
2. There be liberty to apply.

REASONS

1. The Class Representative seeks her costs of the Application against the Defendants, in which the Class Representative maintains that she was successful and should be entitled to costs. There is no application for costs to be awarded on a summary basis. The Defendants invite me to order that costs should be in the case, or alternatively that the Class Representative should only be awarded a small percentage of her costs.
2. The history of the disclosure application is as follows:
 - (a) The Class Representative first made an application on 22 November 2023 for disclosure of financial data and information which was considered at a case management conference ("CMC") on 14 December 2024. The disclosure was sought to allow the Class Representative's experts to progress their analysis of costs and revenues in the Defendants' App Store, which is the subject of an excessive pricing claim in the Class Representative's case.
 - (b) At that CMC, the parties agreed to a process, which was recorded in an order dated 19 December 2023, by which the Class Representative would provide a list of questions for the Defendants to answer by way of a witness statement. The order also made provision for an extended longstop date (varying an earlier order), of 24 January 2024, by which the Class Representative was to make any specific requests for disclosure.
 - (c) On 12 February 2024, the Class Representative made the Application.
 - (d) On 29 February 2024, the Application was discussed at the informal CMC. It was agreed that the Class Representative would reformulate her request in the form of a "Redfern" schedule, which was duly completed by the parties and was the subject of a Reasoned Order dated 15 March 2024 (the "Reasoned Order"), in which I granted a number of the Class Representative's requests for

disclosure.

3. The Defendants make a number of points about the way in which the Class Representative has approached the Application, which can be summarised as follows:
 - (a) The Class Representative did not comply properly with the timetable set by the Tribunal for raising issues about disclosure.
 - (b) The Class Representative waited until the last possible moment to make the Application, preventing proper engagement between the parties to reduce the scope of the Application (especially given the other obligations the Defendants had at the time to prepare evidence in these proceedings).
 - (c) Many of the requests related to matters already addressed in the Defendants' evidence or disclosure and, once the Defendants were able to respond, further requests were not pursued, including as a result of constructive engagement by the Defendants with the requests.
 - (d) The scope of the Application was unreasonably wide until it was narrowed as a result of the Tribunal's observations at the informal CMC.
4. The Class Representative submits that the Defendants characterisation of her approach is unfair and that she has met all required timeframes and has responded reasonably to emerging information from the Defendants (most notably in the witness evidence served by the Defendants on 12 January 2024). She challenges the assertion that the Defendants have been constructive and points out that she has been successful and the usual rule as to "loser pays" should apply.
5. In the Reasoned Order, I expressed the view that the approach of both parties to the disclosure application had been unsatisfactory. To expand on that:
 - (a) My impression is that the Class Representative's approach has lacked focus and has been reactive to deadlines. The Application was unreasonably wide in its scope and could not reasonably have led to agreement from the Defendants. There have been a multitude of requests, many of which have fallen by the wayside, no doubt in some cases for good reason but also apparently in other

cases because they were not sensible requests.

- (b) I have also been left with the impression that the Defendants have not been as constructive as they should have been, leading to misunderstandings being perpetuated between the parties and delay in issues being resolved. The Defendants are of course best placed to provide clarity about their own documents, but even at the informal CMC I found it difficult to understand what documents might exist that were responsive to the Class Representative's legitimate requests. It should be noted that the Defendants are engaged in litigation in a number of jurisdictions on issues similar to those in these proceedings, so one would expect them to have a good understanding of the relevant documentary material.
6. As a matter of principle, the Application was successful and the Class Representative should be awarded her costs to reflect that. However, in my judgment those costs should be reduced to reflect the overly broad and somewhat fragmented approach, while bearing in mind that the Defendants' conduct has contributed to that outcome in some respects. It is difficult to attribute responsibility in any precise way, given the many moving parts and the way the application developed. I must therefore approach the matter as an exercise of broad discretion, based on my overall impressions, as informed by the CMCs and relevant correspondence and submissions.
7. On that basis, I order that the Defendants pay 65% the Class Representative's costs of the Application (being a deduction of 35% to reflect the matters referred to above), to be assessed if not agreed.