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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1403/7/7/21

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Friday 17<sup>th</sup> January 2025

Before:  
Ben Tidswell  
Dr William Bishop  
Tim Frazer

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

Dr. Rachael Kent

**Class Representative**

v

Apple Inc. and Apple Distribution International Ltd

**Defendants**

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**A P P E A R A N C E S**

Mark Hoskins KC, Tim Ward KC, Michael Armitage, Matthew Kennedy, Antonia Fitzpatrick  
(Instructed by Hausfeld & Co. LLP) On behalf of Dr. Rachael Kent

Marie Demetriou KC, Brian Kennelly KC, Daniel Piccinin KC, Hugo Leith, Hollie Higgins  
(Instructed by Gibson, Dunn & Crutcher UK LLP) On behalf of Apple Inc. and Apple  
Distribution International Ltd

Friday 17 January 2025

(10.31 am)

THE CHAIRMAN: Good morning, Mr Kennelly.

MR KENNELLY: Good morning, sir. We call Mr Kosmynka.

TRYSTAN KOSMYNKA affirmed

THE CHAIRMAN: Please sit down, Mr Kosmynka. You should

have some water there as well, if you need it.

Thank you very much.

Examination-in-chief by MR KENNELLY

Q. Mr Kosmynka, you should have in front of you a hard copy bundle and behind tab 1 a copy of your witness statement?

A. Yes.

Q. Just so you can see it electronically as well, it is {C2/6/1}. So this is your witness statement, Mr Kosmynka?

A. Yes.

Q. Could we go to page 30 {B2 6/30}, please, which is the same in the hard copies and the electronic version.

A. Yes.

Q. Is that your signature?

A. That is.

Q. Apart from what I understand is one small correction that you want to make, is this evidence true to the

1           best of your knowledge and belief?

2       A.    Yes.

3       MR KENNELLY:   Dealing very briefly with that correction,  
4           I need to address the Tribunal for a moment because  
5           it is a confidential number.  It is a single number  
6           on page 23 of this statement.  Perhaps, Mr Kosmyнка,  
7           you can turn that page up and the Tribunal can see  
8           it too.  Paragraph 85.

9       THE CHAIRMAN:  Has this been made available to Dr Kent's  
10          chambers?

11       MR KENNELLY:  Yes, and I have discussed this with  
12          Mr Kennedy.

13           In paragraph 85, in the redacted section,  
14          Mr Kosmyнка wishes to make a correction to the  
15          number, there is only one number in that redacted  
16          part.  Mr Kosmyнка wishes to correct it.

17       THE CHAIRMAN:  I presume we are going to go into closed  
18          session at some stage are we, Mr Kennedy?

19       MR KENNEDY:  We will, sir, but not for a while.

20       THE CHAIRMAN:  Maybe we should just do it then, is that  
21          the easiest thing?  We can ask Mr Kosmyнка to  
22          correct it.  It is not going to be material in the  
23          meantime, presumably.  Then we can make sure we have  
24          the right number in there.

25       MR KENNELLY:  I am obliged.  I have no further questions

1           for you.

2                           Cross-examination by MR KENNEDY

3       Q.    Good morning, Mr Kosmynka.  I will be asking you  
4            questions on behalf of the Class Representative.

5            Can I check two preliminary points, am I pronouncing  
6            your name right?

7       A.    Yes, Kosmynka.

8       Q.    We are off to a good start.  The other matter is one  
9            that Mr Kennelly just adverted to.  I am conscious  
10           that some of the matters I am going to ask you about  
11           are confidential to Apple.  If I show you a  
12           document, I will identify any information that Apple  
13           has already identified as being confidential and for  
14           some parts of my cross-examination we may go into a  
15           private session, at which point we will be able to  
16           talk about the confidential information freely.  If  
17           at any time you think you are unable to answer my  
18           question without revealing confidential information,  
19           please let me know before you answer and we can make  
20           arrangements, but I do not want you to be in  
21           difficulty answering the question because you have  
22           some information that is proprietary to Apple that  
23           you want to share.

24       A.    Thank you.

25       Q.    Mr Kosmynka, I want to start asking you some

1 questions about your role at Apple. If you could  
2 turn to paragraph 9 of your witness statement, which  
3 is {B2/6/2}. You have a hard copy there, on page 2.  
4 You say:

5 "I joined Apple at that time" -- this is the  
6 first sentence -- "as an engineering manager, a role  
7 in which I remained until 2016."

8 Two questions Mr Kosmynka. This was in 2014  
9 that you joined Apple; is that correct?

10 A. Correct.

11 Q. You had not worked for Apple prior to that?

12 A. Correct.

13 Q. Can I ask you briefly to describe your role as an  
14 engineering manager and the enhancements to App  
15 Review tooling and process that you worked on in  
16 that first role?

17 A. Yes. So I joined Apple 2014 as an engineering  
18 manager responsible for our analytics product for  
19 developers, also some aspects of TestFlight, our  
20 beta testing service, and crash reporting. As apps  
21 crash, developers need to get information on those  
22 crashes. I ran those teams as well. I believe late  
23 2014 I was approached with the opportunity to run  
24 App Review tools, and so I took that leadership  
25 position as well.

1 Q. What sorts of tools were you involved in when you  
2 took that later position?

3 A. We had a number of tools that were tools designed  
4 for app reviewers to review an app, so these at the  
5 point, I believe, was an iPad application and there  
6 was also some automation services as well.

7 Q. So would it be fair to describe those tools as  
8 assisting the human element of the App Review, was  
9 that the intended function in doing that?

10 A. Yes.

11 Q. You became the director of App Review in 2016?

12 A. That is right.

13 Q. You are now the senior director of App Review?

14 A. That is correct.

15 Q. You have given one witness statement in these  
16 proceedings which is the one you have there, and you  
17 made that witness statement in response to an expert  
18 report which was filed on behalf of the Class  
19 Representative by Dr Lee, is that correct?

20 A. Correct.

21 Q. If we could start with some basic concepts, not  
22 basic for you, basic for me, but I understand that  
23 the human review element is comprised of static  
24 analysis and dynamic analysis; is that correct?

25 A. The computer review portion is comprised of static

1           and dynamic analysis, correct.

2       Q.   We are just focusing on computer review.  We will  
3           come to human review in due course, but for that  
4           part it is static and dynamic; correct?

5       A.   Yes.

6       Q.   Static analysis is where the code, and other  
7           materials submitted by a developer to Apple are  
8           reviewed without actually running the app?  Would it  
9           assist to see your witness statement?

10      A.   Yes.  The code is reviewed and the assets that are  
11           part of the app are reviewed.  We are also  
12           extracting information to assist human review later  
13           on.  So it is not that a decision is made at static  
14           analysis level.  Information is extracted from the  
15           computer system to aid with the human review  
16           downstream.

17      Q.   The distinction I am trying to draw is between  
18           static and dynamic, where static the app is not run,  
19           but with dynamic code is run, someone loads it and  
20           looks at it in run time, is that correct, that is  
21           the distinction?

22      A.   Yes, the distinction for static, as you said, we are  
23           not running the code, we are looking at the code  
24           with computer systems.  Dynamic both is run by human  
25           beings that are exercising it, but we also have

1 automation to run the software and see what the  
2 results of running the software is.

3 Q. Static analysis is commonly used in software review  
4 processes not limited to App Review, correct?

5 A. Yes.

6 Q. Likewise, dynamic analysis is also commonly used in  
7 software review processes?

8 A. Yes.

9 Q. You say at paragraph 46, this is {B2/6/14} and the  
10 relevant paragraph is not confidential, second  
11 sentence you say:

12 "Apple does not use third-party software to  
13 conduct its malware scanning or other parts of the  
14 app review process."

15 Do you mean at present Apple does not use  
16 third-party software as part of the app review  
17 process?

18 A. At the time of writing the witness statement is what  
19 I intended with not using third-party software, so  
20 at the time of the witness statement.

21 Q. Has the position changed since the time of the  
22 witness statement, which I think was 14 September or  
23 thereabouts 2024, or 15 September and today?

24 A. No.

25 Q. But in the past Apple has used third-party software



1           as part of the App Review process?

2       A.    I am not aware of third-party software we may have  
3           used.

4       Q.    If we could then go to {H2/7/1} and for you  
5           Mr Kosmyнка that is in page 44 of the hard copy  
6           bundle. I do not believe it is marked as  
7           confidential, but someone will tell me if I am  
8           wrong.

9       A.    Page 44, or tab 44?

10      MR KENNEDY: If we can just pause for a second,  
11           Mr Kosmyнка. Is there any concern about  
12           confidentiality?

13      MR KENNELLY: Sorry to interrupt if you give us a second.

14      THE CHAIRMAN: Is the issue because it is US proceedings?

15      MR KENNELLY: It is not a commercial confidentiality  
16           issue. It is the US protective order that I meant.  
17           I am sorry, Mr Kennedy.

18      THE CHAIRMAN: Of course, I understood.

19      MR KENNEDY: Mr Kosmyнка, look at the EPE screen, just  
20           possibly to resolve the question mark. If we can go  
21           to {D1/223/2}, which is tab 45 in your hard copy  
22           bundle, whilst we resolve this particular question.  
23           If we go -- I have lost my reference.

24      THE CHAIRMAN: Just while you are doing that Mr Kennedy,  
25           did we get an answer Mr Kennelly in relation to

1           that?

2       MR KENNELLY: I am waiting myself, sir.

3       THE CHAIRMAN: Okay.

4       MR KENNEDY: Mr Kosmyнка, I have given you a bad  
5           reference, it is tab 43 of your hard copy bundle.

6       A. I am on 43, thank you.

7       Q. At the bottom of page 2, middle of page 2, you will  
8           see someone signs off, "Thanks Peter". Then you  
9           will see an e-mail from somebody called Cindy Lin,  
10          the name is not confidential but the e-mail is  
11          confidential. She says:

12                "Hi Peter, I'm checking with App Review to see  
13                what they do for detecting Malware as part of  
14                review."

15                Then over the page marked at 4.44, again Cindy  
16                Lin, she says:

17                "Hi Peter, Ape Review" -- which is a  
18                typographical mistake I assume -- "does take apps  
19                that we detect as having .exe's and .dll's ... and  
20                scan with Norton iAntiVirus and ClamXAV."

21                Do you see that, Mr Kosmyнка?

22       A. Yes.

23       Q. And that e-mail suggests, this was 2013, that Apple  
24           was using third-party software to review for malware  
25           as part of App Review, yes?

1       A.    Sorry, I am reading the entire document just to  
2            familiarise myself. I do have an answer.

3       MR KENNELLY: I do have an answer. The transcripts are  
4            confidential and I apologise, they should be marked  
5            as such. I apologise to my learned friend for that.  
6            They are confidential because of the US protective  
7            order and so they should be treated -- as they are  
8            marked, they are Outer Confidentiality Ring.

9       THE CHAIRMAN: What does that actually mean, Mr Kennelly?  
10           Does that mean we can use them? I thought the whole  
11           point of the US proceedings was whether we could use  
12           them or not.

13       MR KENNELLY: We can use them, but the contents are  
14            treated as confidential, therefore they should not  
15            be opened in open session.

16       CHAIRMAN: So Mr Kennedy, it sounds like you would have  
17            to come back to if that is possible.

18       MR KENNEDY: Over the page I have got an inner ring  
19            confidential document that I might need to go to, so  
20            I do not know whether you are content --

21       THE CHAIRMAN: So you are already there, are you?

22       MR KENNEDY: I am throwing the towel in, sir, with your  
23            permission.

24       THE CHAIRMAN: Is that going to be the pattern from now  
25            on in?

1 MR KENNEDY: Sir, it is a mixture and I have done my best  
2 to try to rearrange things so that I try to  
3 concentrate the non-confidential material, but the  
4 difficulty is that often, depending on what  
5 Mr Kosmyнка says, I may need to go to a document  
6 which is inner ring to show to Mr Kosmyнка. So it  
7 is patchwork.

8 THE CHAIRMAN: We do not want Mr Kosmyнка to be at a  
9 disadvantage either. So in that case, should we go  
10 into closed session now?

11 MR KENNEDY: I think so, sir, and I think there are inner  
12 ring documents, I do not know if that affects who  
13 within the court at the moment can remain in, but it  
14 is not just outer confidential material, it is also  
15 inner.

16 THE CHAIRMAN: So we will go into private session. Can  
17 we turn off the livestream please. So we need to  
18 clear the court of everybody except inner ring, is  
19 that right?

20 MR KENNEDY: I think that is going to be easiest because  
21 there are documents which contain both inner and  
22 outer.

23 THE CHAIRMAN: So we should do that, yes. So is there  
24 anybody in court who is not in the Inner  
25 Confidentiality Ring? No? Okay. We will just need

1           to put the sign up outside.

2           (For confidential session, see separate transcript)

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