



Neutral citation [2021] CAT 37

Case No: 1403/7/7/21

IN THE COMPETITION
APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 December 2021

Before:

THE HONOURABLE MR JUSTICE MORRIS
(Chairman)
BEN TIDSWELL
DR. WILLIAM BISHOP

Sitting as a Tribunal in England and Wales

BETWEEN

DR. RACHAEL KENT

Applicant /
Proposed Class Representative

- v -

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

Respondents /
Proposed Defendants

Heard remotely on 14 December 2021

RULING
(DISCLOSURE OF FUNDING ARRANGEMENTS)

APPEARANCES

Ms Ronit Kreisberger QC and Mr Matthew Kennedy (instructed by Hausfeld and Co. LLP) appeared on behalf of Dr. Rachael Kent.

Mr Brian Kennelly QC and Mr Hugo Leith (instructed by Gibson, Dunn & Crutcher UK LLP) appeared on behalf of Apple Inc. and Apple Distribution International Ltd.

A. INTRODUCTION

1. By claim form filed on 11 May 2021, Dr Rachael Kent, the Proposed Class Representative (“the PCR”) applies for a collective proceedings order (“CPO”) pursuant to section 47B of the Competition Act 1998 (“CA 1998”) on behalf of approximately 19.6 million consumers who, it is contended, have suffered loss due to the abusive conduct of Apple Inc and Apple Distribution International Ltd (together “Apple”), the proposed defendants, in relation to app distribution and payment processing services on certain Apple devices which are provided via its App Store.
2. Following the first Case Management Conference (“CMC”) in these proceedings, this is the Tribunal’s Ruling on certain disputed issues concerning disclosure of the PCR’s funding arrangements.
3. In support of her application for a CPO, the PCR has served, inter alia, a Litigation Funding Agreement (“LFA”), her after-the-event insurance policy (“the ATE Policy”), a litigation plan and “a litigation budget to trial” (“the Litigation Budget”). Pursuant to rule 101 of the Competition Appeal Tribunal Rules 2015 (the “CAT Rules”), the PCR requested confidential treatment for, (and accordingly redacted) certain parts of the LFA and the ATE Policy on one or more of three grounds: commercial confidentiality, strategic sensitivity, and privilege.
4. Apple objected to these redactions. In addition, in correspondence Apple had requested information about the conditional fee arrangements (“CFAs”) made between the PCR and her solicitors and counsel, contending that information about those arrangements is needed in order to calculate the amount of funding required for the litigation. (In opening, Mr Kennelly QC for Apple suggested that the issue is very closely related to the issue of the ATE premia.)
5. In advance of the hearing of the CMC, the parties reached agreement on a number of the redactions to the LFA; the redactions relating to the action costs cap in clause 1.2, the priorities deed in Appendix 3 and the bank account details of the PCR’s solicitors are accepted by Apple and are to remain in place; whilst

the Funder's return in clause 9.2 of the LFA is to be disclosed fully into the confidentiality ring (which has now been agreed).

6. Thus, at the outset of the hearing, there were four remaining categories of disputed information; namely (1) the premia payable under the ATE Policy (2) the Solicitors Excess Provision in clause 7.6 of the LFA; (3) the PCR's CFAs; and (4) the original version of Appendix 1 to the LFA, an excel spreadsheet which monitors actual costs against budgeted costs on an ongoing basis.
7. However following Ms Kreisberger QC's opening submissions, Apple withdrew its objection to the withholding of the information set out in the last two of these categories: i.e. CFAs and Appendix 1 to the LFA. Apple is no longer seeking disclosure of the CFAs and it is agreed that Appendix 1 to the LFA will remain redacted.
8. In those circumstances, that left two disputed categories for our determination, namely:
 - (1) The premia payable under the ATE Policy (and in particular the deposit premia); and
 - (2) The Solicitors Excess Provision (clause 7.6 of the LFA).

The ATE premia

9. Under the ATE Policy, four insurers participate in providing the PCR with insurance cover in respect of her liability to pay Apple's costs of the proceedings up to a total limit of £10 million. The terms of the ATE Policy are disclosed in the proceedings, save for a limited number of redactions. As regards the premium, the ATE Policy provides for a deposit premium and a contingent premium. The former is payable at the policy commencement date, is not contingent upon a successful outcome and is non-refundable. By contrast, the latter is payable only in the event of a successful outcome. These premia are payable by reference to two stages: at inception of cover and after the Tribunal certifies the collective proceedings. The amounts of the deposit premium and

contingent premium payable to each insurer participating in the policy are redacted from the ATE Policy filed in the proceedings.

The LFA and the Solicitors Excess Provision

10. The LFA is an agreement between the PCR and Vannin Capital PCC for and on behalf of Project Greve PC (“the Funder”) pursuant to which the Funder has agreed to provide funding in respect of the PCR’s costs of pursuing the proceedings as set out in the Litigation Plan Budget at Appendix 1. Clause 7 of the LFA makes provision for a “Funding Notice”, being notice given by the PCR to the Funder claiming payment for costs in respect of a particular period, and requiring the Funder to pay the amounts so claimed.

11. Clause 7.6 makes provision in circumstances where Solicitors’ fees exceed the amounts provided for in the Litigation Plan Budget, as follows:

“Other than in respect of sums provided for in the Litigation Plan Budget, the Class Representative acknowledges that no Funding Notices shall be presented to the Funder in respect of the Solicitor’s fees, until the amounts provisioned for the Solicitors’ fees in the Litigation Plan Budget have been exceeded by [redacted] (“the **Solicitors Excess Provision**”). [... **rest of clause redacted**]

12. In oral argument, Ms Kreisberger explained that, in general terms, the Solicitors Excess Provision operates as follows. For each stage of proceedings, the Litigation Plan Budget provides for a budgeted amount of solicitors’ fees. Where, for any stage, the solicitors’ fees exceed that budgeted amount, then the Funder will not fund that excess up to a certain amount, but in respect of fees incurred beyond that excess, the Funder will pay those fees, in addition to the original amounts funded. In other words, fees in the amount of the stated excess are never paid by the Funder and are at the solicitors’ risk.

The Litigation Budget

13. Whilst the Litigation Plan Budget in Appendix 1 to the LFA remains redacted, the Litigation Budget, a separate document has been filed, (with redactions only for the amounts of the ATE premia). That spreadsheet shows budgeted costs

for solicitors, counsel, experts and others for each of 15 phases of the litigation, and total costs figures. “Total Through to Trial” costs are stated to be just over £15.3 million. That figure *excludes* the ATE premia. “Total Funded Amount” (i.e. the amount provided by the Funder) is stated to be just under £11.3 million. That figure, by contrast, *includes* the ATE premia. The spreadsheet further states that all solicitors and counsel are engaged under partial CFAs, distinguishing between their “full hourly rate” and their “CFA hourly rate”. The difference between the two hourly rates is the element of lawyers’ fees deferred under the terms of the CFA (“the deferred element”) and subject to a successful outcome. The figure of £15.3 million for “Total Through to Trial” includes the deferred element; the sum of £11.3 million for “Total Funded Amount” excludes that deferred element.

B. THE RELEVANT LEGAL BACKGROUND

The issues at CPO hearing

14. At the CPO hearing, which has now been fixed to commence on 3 May 2022, amongst the issues which the Tribunal will have to decide is whether to authorise the PCR to act as the class representative pursuant to section 47B(8)(b) CA 1998 and rule 78 of the CAT Rules. In so doing, it must consider, inter alia, whether the PCR would be able to pay the Apple’s costs if ordered to so (rule 78(2)(d)). Further, paragraph 6.33 of the Tribunal’s *Guide to Proceedings* (2015) provides that, by extension, the PCR’s “*ability to fund its own costs of bringing the collective proceedings*” is also relevant, and in that regard, the Tribunal will have regard to the PCR’s “*financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers. The costs budget appended to the collective proceedings plan referred to above is likely to assist the Tribunal’s assessment in this regard*”. A further issue will be whether the PCR will be under any conflict of interest as between funders and class members.

Privilege and confidentiality

15. Legal professional privilege comprises legal advice privilege and litigation privilege. Legal advice privilege applies to confidential communications between client and lawyer which are made for the purpose of giving or obtaining legal advice. Where a document is covered by legal professional privilege it cannot be disclosed to anyone absent the consent of the client. Such privilege is a bar to disclosure and any part of a document which is covered by that privilege may be properly redacted.
16. As regards documents or information which are not subject to legal professional privilege, but which are or may be confidential, rule 101 of the CAT Rules provides for a procedure for requests for the confidential treatment of any document or part of a document provided in the course of proceedings before the Tribunal. In the event of a dispute, the Tribunal must decide the matter, *having regard to* the need to exclude information of the kind referred to in paragraph 1(2) of Schedule 4 to the Enterprise Act 2002 Act. Such information includes commercially confidential information. Schedule 4 does not impose an absolute duty to exclude; but rather a duty to have regard to the need “*so far as practicable*”.
17. Thus, outside privilege, we consider that whether the information should be redacted or disclosed, into confidentiality ring as a minimum, is a question for the discretion of the Tribunal, balancing the relevance of the information with the interests of confidentiality.

Case law on disclosure of funding arrangements and ATE insurance

18. We have been referred to some authorities relevant to issues of disclosure of litigation funding arrangements (including CFAs and ATE insurance policies (generally, and with respect to premium)): first, in the context of general litigation: *Arroyo and others v BP Exploration Company (Colombia) Limited* [2010] EWHC 1643 (QB) (Senior Master Whitaker); *Excalibur Ventures LLC v Texas Keystone and others* [2012] EWHC 2176 (QB) ; *In re RBS Rights Issue Litigation* [2017] EWHC 463 (Ch) (“RBS”) and *Hollander: Documentary Evidence* (14th edn) §26-07; secondly, specifically in the context of CPO proceedings in this Tribunal, transcripts of hearings in two cases: *Justin*

Gutmann v First MTR South Western Trains Limited and others transcript of the CMC 9 April 2019; and *Michael O’Higgins FX Class Representative Ltd v Barclays Bank Plc* transcript of the CMC 6 November 2019 and transcript of the day 4 of CPO hearing itself 15 July 2021.

19. Although the position is not entirely settled by the case law, from the general authorities we derive the following general propositions:

(1) In considering disclosure generally, three issues are likely to arise (in the following order): (i) relevance of the documents; (ii) if relevant, whether they are privileged; and (iii) if relevant and not privileged, whether, as a matter of discretion, they should be disclosed either wholly or subject to redaction: *Excalibur*, §5.

(2) In principle, disclosure may be refused as a matter of discretion where disclosure might give the opposing party a tactical advantage in relation to various aspects of the conduct of litigation. Such tactical advantage may be derived from matters wider than knowledge of legal advice and might include, but is not limited to, knowledge of the assessment of merits risk on the part of funders and insurers: *Excalibur*, §§24 to 26 and *Hollander*, supra. This basis for withholding might appropriately be described as “strategic sensitivity”.

(3) As regards a party’s funding arrangements, (including but not limited to an ATE policy as a whole):

(i) They are not subject to litigation privilege: *Excalibur* §§13 to 23 and *RBS* §111.

(ii) It is not clearly established that they are subject to legal advice privilege; compare *Excalibur* §23 (privileged if disclosure gives an indication of the legal advice sought or given); and *RBS* §§111 and 112 (ATE policy is not, of itself, likely to reflect legal advice given as to prospects and tactics and in general unlikely to attract such privilege).

- (iii) Even if not privileged, the exercise of discretion may fairly take account of any unfair tactical advantage to the opposing party: *Excalibur* §§24 to 26.
 - (4) Turning specifically to *the premium* payable under an ATE policy:
 - (i) Whilst not subject to litigation privilege, it *may possibly* attract legal advice privilege and require redaction on the basis that it might allow the reader to work out what legal advice had been given the reader: *RBS* §112.
 - (ii) Even if not privileged, disclosure of the premium reflecting the insurer’s assessment of the merits might give rise to an unfair tactical advantage and thus discretionary grounds to refuse disclosure: *Excalibur* §25(1).
- 20. Whilst the above analysis of the general position provides us with a useful framework, we recognise however that it cannot automatically be read across to the very specific context of collective proceedings where the Tribunal has a specific and express duty to examine the PCR’s funding arrangements, and where, as a matter of course, substantial aspects of those arrangements and the ATE insurance are necessarily disclosed to the proposed defendant and the Tribunal.
- 21. As regards disclosure of the ATE premium specifically, at the CMC in *Gutmann Roth J*, whilst indicating that there was no reason for the policy as a whole to be confidential, considered that the premiums¹ were obviously confidential as they will “*betray an assessment of risk*”;² and more generally suggested the provisions which “*disclose the risk assessment*” can properly be kept confidential³. In the CMC in *O’Higgins*, Marcus Smith J observed that premiums should be kept confidential because they “*show a certain insight into*

¹ The plural form of “premium”, alternative to “premia”.

² *Gutmann*, Transcript at page 5, lines 30 to 31.

³ *Gutmann*, Transcript at page 8, lines 6 to 7.

the risk that is being attributed to the success or failure of the litigation”⁴. Whilst it does not appear that in either case argument was addressed to any question of privilege, in our judgment, these observations support the existence of the distinct discretionary ground of “strategic sensitivity”, wider than privilege. Further in no CPO case to date has the Tribunal specifically ordered disclosure of the premium. It is the case that subsequently in the *O’Higgins* case, the premiums were disclosed. However, disclosure was volunteered in the context of a “carriage dispute” between competing PCRs.

C. THE ATE PREMIA

The Parties’ submissions

22. The PCR submits that the premia should remain redacted either because they were subject to privilege and/or because of their strategic sensitivity (as in *Gutmann*). They give rise to the risk of betraying an assessment of merits. Moreover, disclosure of the premia will enable Apple to identify the deferred element in the CFAs. In any event, Apple has not made out its case that the premia are relevant to the CPO proceedings; the only question for the Tribunal is whether the amount of £15.3m for Total Through to Trial is a sufficient estimate to meet the PCR’s costs to trial; the amount paid by the Funder is not relevant, as the balance is at the risk of the PCR’s legal team.
23. Apple submits that the premia are relevant, not privileged and, as a matter of discretion, on balance, should be disclosed at least into the confidentiality ring. Without knowing the deposit premia, it will not be possible for the Tribunal to know from the Litigation Budget how much is available to the PCR from the Funder. Disclosure of the premia will not in fact disclose advice on merits. Premia are likely to be set by reference to an array of different factors. Apple placed particular emphasis on the position where the PCR loses at trial. At the close of hearing, Mr Kennelly additionally argued that the Tribunal should be concerned with the relative size of the deferred element of the lawyers’ fees, and particularly if it is disproportionately high compared with the non-deferred

⁴ *O’Higgins*, Transcript of the CMC of 6 November 2019 at page 19, lines 14 to 17.

element, and that that, in turn, can only be determined from the Litigation Budget if the amount of the premia is disclosed.

Discussion

24. Taking the issue of *relevance* first, we do not accept the essential premise of Apple's case as to why ATE premia are or might be relevant to any question which the Tribunal will have to decide at the CPO hearing.
- (1) First, if the PCR succeeds at trial, then on the basis of the figures in the Litigation Budget, it is not necessary to know the amount of the premia in order to assess whether the PCR will have adequate funds to meet her costs to trial. The difference between the Total Through to Trial (£15.3m) and the Total Funded Amount (c£11.3m) is covered by the lawyers' deferred element *and* that deferred element includes an amount equivalent to the premia (deposit and contingent). The deferred element is not just the £4m difference between £15.3m and £11.3m. (i.e. assume that the premia amount to £x, then the deferred element is £4m + £x.).
- (2) Secondly, if, on the other hand, the PCR goes to trial and loses, the amount available to pay her lawyers is the Total Funded Amount minus the premia (i.e. £11.3m - £x). But in that event, the lawyers' fees are Total Through to Trial minus the deferred element (i.e. £15.3m - (£4m + £x) = £11.3m - £x). Thus, the amount available to pay lawyers' fees is the same as the lawyers' fees themselves.
25. As regards the risk of the PCR running out of funds and the effect on the ability of Apple to recover its costs, those costs are covered in any event (up to a certain limit) by the ATE Policy itself. To the extent that Apple's costs exceed that cover and are unrecoverable, that is the position in any event where the PCR's claim fails (whether at the end of trial or because she is not adequately funded).
26. Accordingly, we are not satisfied that knowledge of the premia is relevant to any issue which the Tribunal will consider at the CPO hearing.

27. Secondly, as regards *privilege*, whilst in certain circumstances disclosure of premia might allow the reader to work out what legal advice has been given to the PCR (or even to the insurers), on the evidence before us, we are not satisfied that this is the case here. Whilst it might disclose assessment of risk by insurers, that assessment is likely to be multi-factorial and not based wholly on advice on the merits.
28. Thirdly, however, we do consider that there is a risk that disclosure of the premia might disclose the assessment of risk and in that way confer tactical advantage on Apple. Assessment of risk and even of merits is not necessarily the same thing as legal advice on the merits. Even if it does not clearly disclose legal advice on merits, it might give an insight into the perceptions of the insurers. We consider that it is possible to gain insight into the thinking about the strength of an opponent's case without necessarily being privy to the legal advice it has received. It was on this basis that in *Gutmann Roth J* accepted that ATE insurance premiums should not be disclosed.
29. Further, in the present case the effect of disclosure of premia would be to disclose the essence of the CFAs with PCR's solicitors and counsel and the deferred element of their fees. That might give insight into the perception of the lawyers, and thus further tactical advantage to Apple. Yet Apple has withdrawn its application for direct disclosure of *that* information, having heard Ms Kreisberger's argument resisting its provision, both on grounds of relevance and strategic sensitivity. Ms Kreisberger had argued that disclosure of CFAs (and indeed Appendix 1) would give an indication of the PCR's/lawyers assessment of risk and thus tactical advantage. and that, in any event, the deferred element of the lawyers' fees will not be paid out of the funded amount, but rather by an order for costs against Apple. She contended that disclosure of the deferred element was not relevant to the amount of funding required of the Funder for the litigation, which will be the issue at the CPO hearing. Apple did not take issue with these arguments.
30. Thus, even if it could be said that the premia might have some limited relevance, as a matter of discretion, we consider that the tactical disadvantage would outweigh such peripheral relevance, and disclosure is declined on that basis too.

31. As regards Apple's further late argument concerning the relative size of the deferred element, we are not satisfied that this warrants disclosure of the premia. First, without such disclosure, it is already known that the deferred element is at least £4m, and that is more than 25% of the Total Through to Trial. Secondly, whilst this might lead the Tribunal to be interested in the terms upon which CFAs operate and in particular any risk that the lawyers might withdraw, this is not the basis upon which Apple has put its case for disclosure of the premia and in any event Apple has withdrawn its request for disclosure of the CFAs.
32. In summary, we are satisfied that the amount of the ATE premia should remain redacted. Whilst on the evidence before us we are not satisfied that the premia are subject to legal advice privilege, we are not persuaded that the precise amount of the insurance premia will be relevant to any question that the Tribunal will be required to decide at the CPO hearing, where the PCR has already disclosed the amount of cover provided for under the ATE Policy. Further, and in any event, we exercise our discretion not to order their disclosure, on the basis that to do so would confer an unfair tactical advantage on Apple.

D. THE SOLICITORS EXCESS PROVISION

The Parties' submissions

33. The PCR submits that the redacted wording concerns the funding of costs above budgeted amounts and as such could give an indication of the assessment of litigation risk by the Funder and by the PCR's solicitors. It is therefore privileged (to the extent that it reveals an assessment of merits) and/or strategically sensitive. She also contended that the information is commercially sensitive as it could harm the solicitor's legitimate business interests vis-à-vis competing solicitors. She also submits that it is not relevant.
34. Apple submits that the excess is relevant to determining how much money is actually required to fund the litigation and the amount of the excess could reveal the solicitors' appetite for risk; the lower that appetite, the more exposure is placed on the Funder. The level of the excess goes to the amount that the Funder

is expected to provide and the manner in which it is needed in the course of the proceedings.

Discussion

35. The effect of the Solicitors Excess Provision is that there is a “slice” of cost above the budgeted amounts which the Funder never pays, and which are at the solicitors’ risk. Those costs are not recoverable from anyone save if the claim is ultimately successful, in which event they are recovered out of damages. Costs *above* the excess limit are additional costs which the Funder does pay for. The level of the excess (i.e. size of the slice) may indicate the solicitors’ assessment of the prospects of success. If the level of the excess is small, that might indicate that the solicitors are not prepared to take the risk of those costs and thus their view of merits. If the level of the excess is large, that might indicate that they view the prospects of success as strong.
36. First, we do not consider that Apple has sufficiently articulated its case that disclosure of the Solicitors Excess Provision is *relevant* to the issues at the CPO hearing. (Indeed, in argument Mr Kennelly accepted that his case here was less clear and the Provision required further explanation). In the light of the explanation which was then given (as set out in paragraphs 12 and 35 above), we agree with the PCR’s submission that this excess is an amount above the budgeted sums and at the solicitors’ risk, and it is not an amount which is relevant to the issue of whether the PCR has the ability to fund her own costs.
37. Secondly, we consider (without deciding) that, in principle, disclosure of the level of the excess might disclose legal advice on merits and thus in principle might be privileged. In any event, it is likely to disclose the solicitors’ assessment of risk and thus has strategic sensitivity. Furthermore, and significantly, as regards tactical advantage, knowledge on the part of Apple of the level of excess would give it the opportunity to engage in litigation tactics to drive up costs beyond the budgeted amounts for any stage of the litigation and thereby put pressure on the PCR’s solicitors, knowing that they would bear those costs. Whilst Mr Kennelly suggested that the Tribunal would control any such “gaming” tactics, we are less sure that the Tribunal would necessarily be

able to identify, and thus prevent, such tactics. For these reasons, even if Apple had demonstrated some peripheral relevance of the redacted parts of the Solicitors Excess Provision, we would have declined to order its disclosure as a matter of discretion on grounds of strategic sensitivity.

E. CONCLUSION

38. In the light of our conclusions at paragraphs 32, 36 and 37 above, the amounts of the premia in the ATE Policy and the identified parts of clause 7.6 shall remain redacted.

The Hon. Mr Justice Morris
Chairman

Ben Tidswell

Dr William Bishop

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

Date: 21 December 2021