Neutral citation [2023] CAT 22

IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 April 2023

Before:

BEN TIDSWELL
(Chairman)
WILLIAM BISHOP
TIM FRAZER

Sitting as a Tribunal in England and Wales

BETWEEN:

DR RACHAEL KENT

Class Representative

- v -

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

Defendants

- and –

THE COMPETITION AND MARKETS AUTHORITY

Intervener

Heard at Salisbury Square House on 20 March 2023

RULING (EXPERT EVIDENCE)

APPEARANCES

Ms Ronit Kreisberger KC, Mr Matthew Kennedy and Ms Antonia Fitzpatrick (instructed by Hausfeld & Co. LLP) appeared on behalf of the Class Representative.

Ms Marie Demetriou KC and Mr Hugo Leith (instructed by Gibson, Dunn & Crutcher UK LLP) appeared on behalf of the Defendants.

Mr Nicholas Gibson (instructed by the Competition and Markets Authority) appeared on behalf of the Intervener.

1. This Ruling concerns applications for permission to provide expert evidence, made by the Class Representative and the Defendants (who we will refer to as Apple) at a case management conference on 20 March 2023.

A. THE PROCEEDINGS

2. Apple is well known as the creator of devices such as the iPhone and the iPad, along with its proprietary mobile operating system (the "iOS"). The Class Representative alleges that Apple has contravened the Chapter II prohibition contained in section 18 of the Competition Act 1998, and Article 102 of the Treaty on the Functioning of the European Union, by engaging in exclusionary and exploitative abuses of dominant positions in the market for the distribution of individual iOS software applications ("apps") and the associated payment processing market.

3. In essence, the Class Representative alleges that Apple has foreclosed all competition from potential or actual rivals through its restrictive terms and conditions, and other restraints, imposed in the iOS, so that it is dominant (and indeed holds a monopoly position) in app distribution and payment services. The Class Representative contends that Apple has abused that dominant position by: imposing restrictions on app developers, to force them to distribute iOS apps exclusively via its proprietary store; charging excessive and unfair prices in the form of the commission charged on transactions; and requiring payments for app purchases to be made using Apple's proprietary payment system. The Class Representative claims that significant parts of the overcharged commission have been passed onto consumers, being iOS device users.

4. The Class Representative brings the proceedings on an opt-out basis on behalf of all users of iOS devices (iPhones and iPads) in the UK, which was estimated at filing to include some 19.6 million UK consumers, who have made purchases relating to apps.

5. Apple denies every aspect of the Class Representative's claim. It denies that it is dominant in any relevant market and says that, in any event, it has not engaged

in conduct that would constitute an abuse of any dominant position in any relevant market. It also says that the abuses alleged by the Class Representative have not caused the class any loss in aggregate.

B. THE APPLICATIONS

6. Subject to the Tribunal's approval, the parties are agreed that permission should be given to provide evidence from the following experts:

   (1) Two experts in competition economics.

   (2) One expert in accounting.

   (3) One IT/mobile/internet security expert.

7. It is said that the extent of the issues which the competition experts will need to cover justifies two experts for each party. We agree that is appropriate and give permission for that, as well as for the accounting and IT/mobile/internet security experts.

8. The Class Representative seeks permission to call expert evidence in relation to (i) the app industry; and (ii) the payment systems industry. Apple resists those applications.

9. Apple seeks permission to call expert evidence in relation to (i) the economics of digital markets; and (ii) intellectual property. Apple also seeks permission to call a second IT/mobile/internet security expert, if that proves necessary. The Class Representative resists those applications.

(1) Legal Principles

10. The relevant legal principles were common ground. Rule 21(d) of the Competition Appeal Tribunal Rules 2015 provides that the Tribunal may give directions as to "whether the parties are permitted to provide expert evidence". The Guide to Proceedings states at paragraph 7.65:

> "As regards expert evidence, the Tribunal will take into account the principles and procedures envisaged by Part 35 of the CPR, notably that expert evidence should be restricted to that which is reasonably required to resolve the proceedings. … It is for the party seeking to call expert evidence to satisfy the Tribunal that expert evidence is properly admissible and relevant to the issues which the Tribunal has to decide and would be helpful to the Tribunal in reaching a conclusion on those issues."

11. Under CPR 35.1, expert evidence "shall be restricted to that which is reasonably required to resolve the proceedings." The case law on CPR Part 35 provides that two conditions must be met for permission to rely on expert evidence to be given: "(i) is the evidence admissible; and (ii) is the evidence reasonably required to resolve the proceedings?" *RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch), paragraph 11, Hildyard J.

12. As to admissibility, both parties relied on the observations of Evans-Lombe J in *Barings and another v Coopers & Lybrand and others* [2001] PNLR 22 at paragraph 45:

> "…expert evidence is admissible… in any case where the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues."

13. Ms Kreisberger KC for the Class Representative drew our attention to the following extract from *Hodgkinson & James on Expert Evidence: Law and Practice* (5th ed) at 1-023, commenting on the passage above in *Barings*:

> "The phrase "recognised expertise governed by recognised standards and rules of conduct" will have to be interpreted in a broad way if it is to reflect the modern practice of the English civil courts. […] It is now commonplace for experts to give evidence in fields that are more arts than science and which often have no real organised branch of knowledge but rely on an educated but ultimately subjective impression. For example artists, art critics, museum officials, dealers and restorers have given evidence on whether the display of a gift in a will is calculated to be for the advancement of education or otherwise for the benefit of the community or the artistic merit of a work of art. Equally tradesmen, professionals and businessmen routinely give evidence about the practice in their trade, profession or business."

14. On the question of whether expert evidence is "reasonably required", this condition will be met where the evidence is "necessary" to resolve the pleaded issues, but it may also be met if the evidence is of assistance to the court (even

if not necessary). In the latter case, the Court or Tribunal should consider a range of factors, including the value of the claim. Warren J explained in *British Airways Plc v Spencer* [2015] Pens LR 519 at [68]:

> "…it is necessary to look at the pleaded issues and, unless and until a particular issue is excluded from consideration under CPR 3.1(2)(k), the court must ask itself the following important questions: (a) The first question is whether, looking at each issue, it is *necessary* for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted. (b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it (just as in Mitchell the court would have been able to resolve even the central issue without the expert evidence). (c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. In that case, the sort of questions I have identified in paragraph 63 above will fall to be taken into account…."

15. Paragraph 63 of *British Airways* (which was cited in paragraph 68) states that:

> "A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date)."

(2) App and Payments Industry Experts

16. The Class Representative says that she should be permitted to provide evidence from these experts for the following reasons:

(1) Experience of a particular trade or industry is sufficient to establish an expertise, given the broad interpretation of "recognised expertise governed by recognised standards and rules of conduct". The experts will have the required experience of the app and payments industries respectively. The situation is similar to the collective proceedings in *Mark McLaren Class Representative Limited v MOL (Europe Africa)*

Ltd & Others [2022] CAT 10, where the class representative relies on evidence from experts in the automobile industry.

(2) The proposed experts will give evidence or express opinions based on their experience in the relevant industry, so it will be properly characterised as expert evidence. A single expert in each industry is proportionate.

(3) The Class Representative is not in a position to provide factual evidence, and even if she was that might be considered unsatisfactory by analogy with the observations at [62] of the Court of Appeal in *London & South Eastern Railway Limited and others v Justin Gutmann* [2022] EWCA Civ 1077, where the Court of Appeal cast doubt on the probative value of a Class Representative calling evidence from a small number of carefully selected class members.

(4) By contrast, Apple is able to provide factual evidence on the alleged app and payments markets and so the Class Representative is at a disadvantage if she cannot call experts, which would be unfair.

17. Apple's objection is to the admissibility of the evidence. According to Ms Demetriou KC, the Class Representative has failed to establish that a recognised expertise governed by recognised standards and rules of conduct exists in relation to either industry. Ms Demetriou did not go so far as to exclude the possibility that a recognised body of expertise could be established in either industry, but argued that the Class Representative has failed to meet the evidential requirements to establish that point and should not be given permission in those circumstances.

18. We are persuaded that the Class Representative should be permitted to provide evidence from an expert in the app industry and an expert in payment systems.

19. In relation to the app industry expert, the evidence we anticipate them giving will include an explanation, based on their observation, comprehension and description of the industry, of things like the commercial drivers in the

relationships between platforms and developers and the likely responses of market participants to the changes which the Class Representative will put forward in her counterfactual case.

20. We agree with Ms Demetriou that the expert will need to meet an admissibility requirement so as to justify their evidence being treated as expert evidence. However, we also agree with Ms Kreisberger that, as set out in the extract from *Expert Evidence: Law and Practice*, the modern hurdle for admissibility does not require an "organised branch of knowledge". The question is what qualifications or experience the particular person has to satisfy us that we are able to treat their evidence as deriving from a recognised expertise with some identifiable rigour in both their knowledge and their approach.

21. So, for example, an academic who has studied the industry may be able to rely on the range of data they have accumulated and the usual standards that accompany academic work. A consultant who has worked across various aspects of the industry may be able to speak to a range of assignments and the patterns apparent from that. A person who has wide and deep experience of the industry from working in it for an extended period of time may be able to speak of invariable practice.

22. At this stage we have no idea who the Class Representative's proposed expert will be. That person may or may not be able to persuade us that their experience and approach qualifies their evidence as admissible. Ms Demetriou invited us to refuse permission until that position was clear. We prefer in this instance to give permission on the basis that (as with all permission to provide expert evidence) it is qualified until the evidence is actually produced and assessed by the Tribunal, including with reference to any objections as to admissibility based on the specific report.

23. In relation to the payments systems expert, it seems to us that the points made above apply with equal, if not greater, force. It is also clearly an area of some technicality and we anticipate that there will be individuals who are able to satisfy us that they have recognised expertise in the industry and how it operates.

24. As we are permitting the Class Representative to provide expert evidence on these subjects, it follows that Apple should also be entitled to call an expert in relation to each industry. However, it is also open to Apple to choose not to do so, and instead to respond with factual evidence from its own employees with knowledge of the industries. That is a matter for them to decide upon.

(3) Economics of Digital Markets Expert

25. Apple seeks permission to provide evidence from an expert in the economics of digital markets. Apple has identified this expert as Professor Lorin Hitt, who is the Zhang Jindong Professor of Operations, Information and Decisions at the University of Pennsylvania, Wharton School. We are familiar with Professor Hitt and his work, as he provided expert evidence in support of Apple's application to strike out the Class Representative's unfair pricing claim – see [2022] CAT 28.

26. The argument between the parties concerns the potential for overlap between Professor Hitt's evidence and that of the two competition economics experts which each party already has permission to provide. Apple says that Professor Hitt's relevant area of expertise for these purposes is distinct: he specialises in the economics of digital markets and the empirical data analyses he proposes to conduct would correspond to that particular specialisation. The Class Representative says that there is considerable, if not complete, overlap between what Professor Hitt is proposing to deal with and the areas to be covered by the competition economists.

27. We agree with the Class Representative. We were unable to distinguish much of what it was said that Professor Hitt would cover from the work that we would expect the competition economists to cover. Apple submitted (skeleton, [15(b)]) that:

> "Professor Hitt would not be instructed to address the competition issues in general (such as the allegation of abuse of dominance). He would, as Apple's application explains, conduct empirical data analysis, utilising his specialised expertise. The analyses would be relevant to assessing market definition, dominance and effects on competition, but his evidence would concentrate on that analysis and its direct implications for those issues. The analyses are likely

> to be a useful input on which the competition economists would rely (as was the case in the U.S. proceedings)."

28. This seems to us to describe the very work we would expect the competition economists to cover – market definition, dominance and the effects of that on competition. We do not understand the reference to "empirical data analysis" to mean anything other than the type of data analysis that the competition economists should normally be concerned with.

29. In the expert report submitted for the strike out application, Professor Hitt described himself as follows:

> "7. I have been retained as an expert witness on matters involving smartphones, tablets, laptops, other mobile devices, and personal computers as well as the underlying technologies within these products, such as microprocessors, LCD displays, memory devices, and communications chipsets. I have also worked on issues related to pricing and competition in a variety of software products including security software, database products, content creation software, and operating systems. Some of my more recent work has also addressed issues related to the value of information security and privacy on mobile devices and apps. I have been previously involved in antitrust litigation related to an alleged price-fixing conspiracy in LCD displays and the effects of such conspiracy on wholesale and retail prices, and an antitrust case against Microsoft in which I evaluated competition in operating systems and complementary products prior to and during the period when smartphones were first introduced."

30. Ms Kreisberger relied on this passage to demonstrate that Professor Hitt is in fact a competition economist with a very respectable antitrust heritage. We also note that Professor Hitt was deployed in the strike out application in answer to points made by Mr Holt, the Class Representative's competition economist. That also seemed to be the role that Professor Hitt has played in some of the US litigation in which he has given evidence.[1]

31. It may well be the case (as Apple argues) that Professor Hitt has a deep specialism in digital markets in these areas and that his analysis would be useful to the competition economists. However, we were not persuaded that he is

[1] See the Rule 52 Order made by Judge Yvonne Gonzalez Rogers on 10 September 2021 in *Epic Games, Inc. v Apple Inc.*, Case 4:20-cv-05640-YGR, filed on 13 August 2020.

materially different in his expertise from that of the two competition economists that Apple already has permission to provide evidence from.

32. We were also concerned that adding another expert to the case, with no doubt a corresponding expert for the Class Representative, would materially expand the scope of expert evidence and in particular the practicalities of arranging a "hot tub" for the economists. There is a serious risk that the "hot tub" process could become fragmented and elongated, affecting the overall timetable.

33. While we are mindful of the importance of this case to Apple, in terms of the size of the monetary claim and the nature of the issues in dispute, we consider that provision for two competition economists is already generous and sufficient. It is a matter for Apple whether they use Professor Hitt as one of those two experts, but we are not prepared to give permission for Professor Hitt as well as the existing two competition economists.

(4) Intellectual Property Expert

34. Apple seeks permission to provide evidence from an expert in intellectual property. Apple specifies three areas which they say need to be addressed by this evidence:

(1) The valuation of the intellectual property which Apple makes available to developers. This is relevant to the unfair pricing claim, and Apple's defence that the value to developers of access to the iOS and associated tools must be taken into account in assessing the fairness or otherwise of the commission charged to developers.

(2) The assessment of comparators (that is, other similar situations where platforms and developers interact), which is also relevant to the unfair pricing claim. Apple say that it is necessary to understand the value of any intellectual property passing from the platform to developers in these comparator situations in order to understand if they are truly comparable.

(3) The significance of the potential enforcement of Apple's intellectual property rights in the counterfactual analysis in which certain contractual restrictions might not apply.

35. The Class Representative resists this application on the basis that there is no properly pleaded issue in Apple's Defence which justifies the expert permission and also that Apple has not identified the type of expert they wish to call.

36. Ms Kreisberger spent some time taking us through the Defence, in an attempt to make the first of these points good. We consider it plain that Apple intends to argue the points set out above and that there is sufficient material in the Defence to satisfy us that there are issues relating to intellectual property that might justify the provision of expert evidence. We refer to the following passages in the Defence by way of example:

(1) Concerning the value of the iOS system and tools to developers:

> "15. The DPLA is a portfolio licensing agreement that offers a limited license to develop iOS Apps "*using the Apple Software*" and distribute them, if accepted by Apple, "*via the App Store*" to iOS users. Apple thereby grants developers access to (amongst other things):
>
> (a) The iOS operating system. Without the licences granted by Apple, including under the DPLA, developers would have no ability to create and distribute apps for use in that operating system.
>
> (b) Apple's proprietary Software Development Kits ("SDKs"). These packages of software development tools enable developers to create apps for use in Apple's operating systems. They include pre-made code libraries, frameworks, debuggers and other building blocks that developers can use to turn their ideas into apps. They save developers significant time in designing codes to achieve their desired results, particularly for common or complex functions. Apple's provision of these tools further reduces developers' need to debug and test those elements of their apps. Apple currently makes over 60 SDK packages available to developers and 150,000 iOS Application Programming Interfaces ("APIs"). These include:
>
> i. Metal, Apple's proprietary graphics framework that reduces strain on device CPUs (central processing units). This allows devices to render higher quality images and create more immersive visual app experiences.
>
> ii HomeKit, for creating apps that interact with smart home and Internet of Things devices.

iii The Taptic API, for building haptic vibration into app functions. This allows developers to incorporate tactile feedback that can enhance or replace audiovisual experiences.

iv CloudKit, which provides developers with a storage option for their app's data, including up to 1 petabyte of free storage on iCloud.

v ARKit, for incorporating augmented reality into apps.

vi CoreML, for integrating pre-trained machine learning model types into apps.

(c) Apple's programming language, Swift. Swift's innovative, concise syntax makes Swift-based apps easier to develop and faster.

(d) Apple's TestFlight and Sandbox Environment systems, which allow developers to run small-scale and/or isolated tests before releasing apps to the general public, improving security and stability while reducing scaling problems.

…"

And

"133. In summary, however, Apple denies that any Commission it has charged is excessive or unfair. In particular, the CR's case fails to account for demand-side factors when assessing the value of the product that Apple invented. Consequently, it does not measure the real economic value that developers and consumers derive from the App Store and the wider iOS ecosystem:

…

(b) Apple's Commission is not a mere fee for the distribution of software or processing of payments. It is not intended to reflect Apple's costs in running the App Store. Instead, the Commission (along with the various other charges that Apple sets) reflects the economic value of the ecosystem that Apple has built and continues to build. The economic value that Apple provides to developers and consumers is substantial, far in excess of cost (and *a fortiori* any particular set of costs), and will be subject of evidence in due course. Paragraphs 13-17, 27-32, 35 and 41-42 above are repeated."[2]

(2) Concerning the assessment of comparators:

"143. As to paragraphs 126 and 127, the CR's analysis of comparator app store commissions is inadequate. It is admitted and averred that none

[2] These cross references to other paragraphs of the Defence include paragraphs in which licences granted by Apple to developers are set out in detail.

> are perfect comparators for Apple, because none provide the unique combination of hardware and software innovations and intellectual property that Apple makes available to developers in exchange for the Commission. However, the fact that several app stores, including those considered by Mr Holt such as Steam, charge or have charged 30% commissions, is strong evidence that Apple's Commissions have not been unfair at any time. The CR's case that any store that charges 30% commissions is exploiting market power is denied. Of the only two arguably significant platforms that the CR relies on that charge a uniformly lower rate, Epic operates its app store at a loss, and Microsoft only recently reduced its headline rate in August 2021 after supporting Epic in its litigation against Apple. Apple will address comparators further in evidence in due course."

(3) Concerning the enforcement of intellectual property rights:

> "101(d) In any event, the App Distribution Restrictions only concern the terms on which Apple permits developers to use intellectual property that belongs to Apple (i.e. the technology that is licensed under the DPLA). The "*actual and potential*" competition that the CR alleges is foreclosed by the App Distribution Restrictions would be competition in breach of Apple's intellectual property rights. Save in limited circumstances that do not apply on the facts alleged by the CR, it is not anticompetitive for a dominant undertaking (let alone a non-dominant undertaking) to impose limits on the use of its intellectual property."

37. We say nothing further at this stage about the extent to which Apple's pleadings may or may not otherwise be adequate. There is sufficient material before us to satisfy us that the points which Apple wishes an intellectual property expert to address are identifiable from the pleadings.

38. We do have some concerns about the issue of the enforcement of intellectual property rights. It is not clear to us what type of expert evidence might be provided on this issue and why it is necessary, given the Tribunal's ability to form a view on the legal questions involved. We are not at this stage willing to grant Apple permission to provide expert evidence on this issue. If Apple wishes to pursue the matter, it should provide a more detailed indication of the subject matter of the expert evidence proposed.

39. We do however grant permission for the provision of expert evidence in relation to the valuation of intellectual property which is provided by Apple to developers and by other platforms to developers in the comparator situations. Valuation of intellectual property seems to us to be a recognised area of expertise and a matter on which the Tribunal will need the assistance of expert

evidence in order to resolve the unfair pricing allegations. That permission applies to Apple and also the Class Representative, should she choose to instruct an expert in this field as well.

(5) IT/Mobile/Internet Security Experts

40. The issue here is whether it is reasonable to expect Apple to be able to locate an expert to cover what is said to be a wide ranging subject. We propose not to decide this point now, but instead to deal with it in the following way.

41. If Apple or the Class Representative consider, having identified potential experts in this area, that it will in fact be necessary to use two experts, then they should:

    (1) List the issues which it is proposed that both experts will cover.

    (2) Provide the names of the proposed experts and their backgrounds.

    (3) Identify precisely which expert will cover which issues.

42. The Tribunal will consider the proposed issues and expert allocation, with the benefit of any observations from the other party, and will rule on the number of experts and allocation of issues between them.

(6) Managing the Expert Process

43. We have given permission for up to 14 experts in these proceedings, with the possibility of further numbers being added to that. As in any large case, the careful management of the expert process will be necessary to ensure that the case can be disposed of efficiently and in accordance with the timetable already set. In particular, we have a target trial date of January 2025, with 8 weeks allocated for that. In order for the case to be ready for trial then and to be tried in that window, considerable discipline will be required.

44. We draw the parties' attention to the comments made in *Royal Mail Group Limited and BT Group PLC v DAF Trucks Limited and Others* [2023] CAT 6

regarding the problems posed by excessive volumes of expert evidence.[3] We expect the parties' proposals to take the findings in that judgment regarding the proper management of the expert evidence process into account. Failure to do so is likely to have cost consequences.

45. We will therefore expect the parties to begin to identify with some particularity the issues they propose to ask their experts to address. These lists of issues should be shared and discussed between the parties (if necessary, including direct interaction between the experts themselves) in order to ensure that everyone is on the same page. The Tribunal should then be updated on those developments and a further CMC may be necessary if there are disputes or concerns to resolve.

46. The parties should therefore provide the Tribunal with a proposed draft order for the management of expert evidence, which will incorporate the necessary steps to get to the point described above.

C. SUMMARY OF DECISIONS ON EXPERT EVIDENCE

47. The parties have permission to provide expert evidence from the following experts:

(1) Two experts each in competition economics.

(2) One expert each in accounting.

(3) One expert each in IT/mobile/internet security, with liberty to apply for a second expert if so advised.

(4) One expert each in respect of the app industry.

(5) One expert each in respect of the payments systems industry.

(6) One expert each in relation to intellectual property valuation.

[3] See, for example, paragraph 231. See also the comments made in paragraph 265 of [2022] CAT 25.

48. The parties are to provide a draft order to the Tribunal by 5pm on 27 April 2023, setting out their proposals (and any disagreement in relation to those) for the management of expert evidence in these proceedings.

49. This Ruling is unanimous in all respects.

Ben Tidswell
Chair

William Bishop

Tim Frazer

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

Date: 5 April 2023