



Neutral citation [2023] CAT 72

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1408/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

16 November 2023

Before:

BRIDGET LUCAS KC
(Chair)

TIM FRAZER
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN

ELIZABETH HELEN COLL

Class Representative

- v -

(1) ALPHABET INC.
(2) GOOGLE LLC
(3) GOOGLE IRELAND LIMITED
(4) GOOGLE COMMERCE LIMITED
(5) GOOGLE PAYMENT LIMITED

Defendants

Heard on 10 November 2023

RULING (DISCLOSURE)

APPEARANCES

Tristan Jones and Mr Matthew Kennedy (instructed by Hausfeld and Co. LLP) appeared on behalf of the Class Representative.

Owain Draper (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. This Ruling concerns issues of disclosure that arose in the course of the third case management conference (the “Third CMC”) in these proceedings which took place on 10 November 2023.
2. In very brief summary, these are collective proceedings brought pursuant to section 47B of the Competition Act 1998 (the “Act”). The Class Representative (“CR”) alleges that the Defendants (together, “Google”) have contravened Article 102 of the Treaty on the Functioning of the European Union and section 18 of the Act by imposing a network of contractual and technical restrictions that eliminate all meaningful competition to Google’s Play Store on Google Android devices. This, it is said, enabled Google to collect an excessive and unfair commission on Android App purchases. It is alleged that the alleged infringements have caused loss and damage to consumers. The CR’s claims are denied by Google. In particular, Google denies that it charged excessive and unfair services fees to App developers, denies that any proportion of any excess allegedly charged was ultimately passed on to the consumers that make up the class, and maintains that in any event the pleaded quantum is grossly inflated.
3. For completeness, at the Third CMC we were also required to consider the formulation of issues for expert evidence. As to that, we were helpfully provided with a table which set out the relevant issues and recorded whether they were agreed or not agreed. By the time of the hearing a broad measure of agreement has been reached on a number of the issues for the experts. Where they were either not agreed at all, or alternative wording was proposed, the parties’ respective contentions were briefly summarised in additional columns, and we heard oral submissions relating to them. We have provided to the parties a further version of the list of issues for expert evidence recording our decision, and providing brief reasons in a further column we have added. We therefore do not refer further to expert evidence in this Ruling.

B. DISCLOSURE

4. The CR initially made four applications for disclosure. At the Third CMC we were only required to determine two. The two applications were brought by the CR. The CR sought orders that:

- (1) Further information to be provided by Google in relation to what is known as “Repository 2”; and
- (2) Google provide certain financial information.

(1) Application relating to Repository 2

5. The term “Repository 2” was used in Google’s Disclosure Report. By way of explanation, Repository 1 relates to documents produced by Google in ongoing proceedings brought against them in the US (approximately 2 million documents). Broadly speaking, those documents cover the period up to 14 August 2020. Repository 2, again broadly speaking, is intended to cover electronic documents created since 14 August 2020. Google disclosed approximately 33,000 Repository 2 documents on 27 October 2023.

6. The directions relating to Repository 2 disclosure were considered at the second CMC which took place on 21 June 2023 and are recorded in the order ultimately made on 15 September 2023 (the “CMC2 Order”). Paragraph 8 of the CMC2 Order envisaged that Google would start by applying certain search terms to 13 custodians, and would disclose responsive relevant, non-privileged documents. The timetable then provided for the CR and Google to seek to agree any supplemental custodial collections and supplemental search terms and for any points of disagreement to be resolved at this Third CMC. The search terms would then be applied with responsive documents being disclosed on 30 November 2023. Whilst it was therefore expected that the CR would have formulated proposed additional searches at least by the time of this Third CMC that is not what has happened.

7. The CR maintains that she has faced difficulties in ascertaining whether or not further searches are required. She submits that there is an information asymmetry between the parties which means that it is difficult, unless Google proactively cooperates, for the CR to identify relevant custodians or search terms. Those difficulties and concerns were outlined in the CR's application letter dated 23 October 2023 (the "CR Application Letter"). It is apparent that there has been extensive correspondence between the parties on this issue although Mr Jones, Counsel for the CR, rightly referred us only to selected passages sufficient to make his points.
8. The CR wants Google to confirm in relation to 17 categories of documents the CR has identified as relevant to certain issues in the case, specifically: (1) which custodians are likely to hold those documents; and (2) which of the search strings Google has used were likely to locate those documents. The categories of documents sought were identified in "Annex A" to the CR's letter to Google dated 29 September 2023. Many of the categories of documents were drafted by reference to defined terms including a broad definition of "Management Documents". Annex A then contained a further two columns: one requiring Google to identify the custodians, and the other sought the specific search strings that would identify the documents.
9. In essence, what the CR seeks is confirmation that Google (1) considers the issues and types of documents identified by the CR as "relevant" to the issues in this case; (2) has identified the custodians likely to have them, and (3) has given thought to the search strings that will identify them.
10. In addition, at paragraph 10 of the CR Application Letter, the CR identified concerns that had already been identified in relation to Repository 2. These were (1) that none of Google's 13 custodians appear to have held positions which relate to the financial performance of the Play Store (although Google has since agreed to add a further custodian, Mr Cramer, the Finance Director, Platforms and Ecosystems, of Google Play); (2) that the 13 custodians were insufficiently senior; and (3) that certain "project names" which the CR considered to be potentially relevant were not reflected in the search terms applied by Google.

11. The CR suggests that the order is required (1) to enable the CR to conduct her review of the Repository 2 documents; and (2) to assist the CR in identifying any categories of documents that have been missed and which should form part of the CR's request for further searches.
12. Google maintains that it should not be required to complete the CR's Annex A. First, Google submits that the real substance of the CR's request is that Google should shoulder the burden of inspecting its disclosure to identify for the CR how to locate categories of what the CR asserts are critical documents to her, enabling the CR to locate material more easily, at less cost and in less time. Secondly, Google considers Annex A to be wholly unsuited to the purpose of seeking information about Google's disclosure, not least because the CR's defined terms and categories are too broad. Thirdly, it is suggested that there will be an overlap in the dates relating to Repository 1, although this point did not feature much in the submissions at the hearing.
13. Mr Draper, for Google, told us that Google considered that the disclosure already given would meet many, if not all, of the CR's categories. He submitted that the CR ought to review the approximately 33,000 documents before asking for further information from Google, and that the CR has access to sophisticated technology to facilitate that task. Mr Draper also pointed out that disclosure had not been directed to take place by reference to the categories now identified by the CR, and that the task that Google would have to undertake was nowhere near as straightforward as the CR suggests.
14. We consider that there is an information asymmetry, and that the CR needs to understand more about the approach Google has taken when identifying the documents falling within its Repository 2 disclosure. That information will enable the CR to consider and formulate any further searches that may be required, as envisaged in the CMC2 Order. It is, therefore, reasonable and proportionate to require Google to provide further information as to the exercise that has been undertaken. That said, we do not consider that it is incumbent on Google to assist the CR's *review* of the disclosure by being required to run its search terms against the custodians it has identified.

15. At the Third CMC we therefore ordered that:
- (1) A suitably senior employee or officer of Google (we would need to be guided by Google as to who that should be) should provide a witness statement signed by a statement of truth which:
 - (i) confirms that Google has considered and is satisfied that they have identified the custodians most likely to have documents falling with the categories identified in Annex A (and what that means is dealt with in (2) below), and that they have applied appropriate search terms to those custodians' documents which are likely to identify the documents falling within those categories;
 - (ii) addresses and answers the issues raised by the CR in paragraph 10 of the CR Application Letter.
 - (2) The CR will revisit and amend Annex A to the 29 September 2023 letter, and in particular the broad definitions used. The CR will provide a further copy which is more specific and focused in its requests, and addresses the concerns canvassed by the Tribunal. If the parties are unable to agree the form of Annex A then the parties may refer the matter to the Chair.
 - (3) Nothing in our order was intended to prevent Google from taking the position that it does not consider the category of documents identified by the CR to be relevant to any issue in the case.
16. Google is therefore required to provide certain information relating to the basis upon which custodians have been selected or omitted, and to answer specific queries relating to, for example, the project names which may not have been searched for, but Google is not required to complete the "Search String" column of Annex A. We consider that this strikes the right balance between ensuring that the CR has the information she needs relating to the approach taken by Google to the disclosure exercise so that she can consider what further searches

may be required, and not requiring Google, in effect, to conduct part of the review exercise for the CR. It ought also to flush out whether there are fundamental fault-lines between the parties as to whether or not certain issues or categories of documents are irrelevant to these proceedings.

(2) Application for Financial Information.

17. The second application related to the CR's request for disclosure by Google of certain financial data and other information requested by the CR's forensic accountancy expert, Mr Dudney of AlixPartners. The data and information is said to be required for him to conduct his analysis of whether Google's prices were unfairly excessive. The basis for this application was set out in a second letter dated 23 October 2023. This application relates to "Repository 11" in Google's disclosure report which was described as being "*UK Google play transaction data*" stored "*Electronically on the Defendants' systems*".
18. The CR complains that she has been attempting to engage Google on this issue for some time, to no avail. For the purposes of this application, Mr Dudney has explained in two witness statements the information that is required, why he requires it, and why he believes Google is likely to have the data and documents sought. Broadly speaking, what is sought is the data, itself and documents or information needed to understand that data and interpret it.
19. The CR submits that at its most basic, an assessment of abusive prices requires detailed financial information in order to analyse the costs and revenues properly attributable to the service in issue. That does not mean necessarily taking at face value the approach that Google's management has adopted in relation to revenue recognition or attribution of costs. That must be right. It is an exercise that also requires financial information to be provided at a level of granularity.
20. The CR referred us to a letter of 19 June 2023 in which Google explained that: "*Repository 11 is a database of financial information which can be interrogated and from which certain reports can be produced. Google is content to generate and disclose profit and loss statements (P&Ls) for i) the Google Play business,*

and ii) the Android business on a quarterly basis, covering the period January 2008 – 31 May 2023. Such P&Ls will be produced in the same format as they were presented to management in the ordinary course of business.” The only financial information Google has disclosed to date in relation to Repository 11 is quarterly P&L accounts in the high-level form provided to management.

21. Google maintained that the CR’s request is premature, and that the CR, and its expert, ought to (1) review the 2 million Repository 1 documents which are likely to contain financial documents relevant to the issues Mr Dudney will be considering; and (2) await disclosure that is to be provided by Mr Cramer. Google also argued that Mr Dudney’s requests proceed on mistaken assumptions as to how Google maintains its accounting records, and the documents that have been generated in the course of that process. Google says that the CR’s requests will require the generation of new documents through running reports on its accounting systems, rather than disclosing existing documents, and it is the latter with which the disclosure exercise is concerned.
22. That said, Google does accept that more detailed financial information is required and had, by the Third CMC made the following proposal:
 - “a. Google will provide by 30 November 2023 custodial disclosure from Mr Cramer.
 - b. Google will by 8 December 2023 provide a witness statement outlining its approach to accounting in respect of Google Play and Google Play’s billing system at the relevant times. This will address the matters raised by the CR in the reply, and will provide the experts with a common starting point.
 - c. It is proposed that the accounting expert instructed by Google then meet with Mr Dudney to discuss what further documents and information may be required in light of (1) Repository 11, (2) the completed custodial disclosure and (3) the witness statement referred to above. Appropriately precise requests can likely be made on an agreed basis.”
23. The CR considered this proposal to be inadequate for the following reasons: (1) because she has already attempted to extract information from Google about its financial data to no avail, and we are at the stage now where Google must tell the CR what they have, and provide what has been requested by Mr Dudney; (2) the proposal will not work if it depends on the experts first getting to grips with the 2 million Repository 1 documents; (3) Mr Dudney already knows what

he considers to be required and has set this out in his witness statements; and (4) there is time pressure to move this issue on because the forensic accounting exercise needs to be done before the competition economics experts complete their own expert reports.

24. We accept that the CR has previously made a number of attempts to extract the data and information sought, but the fact is that Google does now propose to engage with the process. We agree with the CR that this exercise does not need to, and should not, wait until the 2 million or so Repository 1 documents have been reviewed. In that regard, we refer to the Tribunal's decision in *Boyle v Govia Thameslink Railway Limited* [2023] CAT 63 at [9(7)]: it is generally data and information that the experts will need, not documents. We also note that, if the expert led process is to be effective, it must be envisaged that they will, by the time they meet, have available to them more information and data at a more granular level than has currently been provided. In the course of submissions Mr Draper accepted that there were levels of detail underpinning the P&L reports provided to management, and informed us that these could be provided at least down to the level of general ledger entries.

25. With that in mind, at the Third CMC we made an order that:
 - (1) Google shall provide a witness statement within two weeks of the Third CMC explaining their accounting policy and practice, and provide a response to the points made by Mr Dudney in the Annexures to his first witness statements.

 - (2) Google will also, within one week of the Third CMC, provide the financial data underpinning the P&L Accounts provided down to the level of "general ledger entries". Google has permission to apply for a further week to do this, should it prove necessary.

 - (3) The forensic accounting experts shall meet within two weeks after the witness statement (and, it follows, the financial data) has been provided and seek to agree the data and information that is required from Google

for the purposes of their forensic accounting reports, and the form in which it should be provided.

26. This Ruling is unanimous.

Bridget Lucas KC
Chair

Tim Frazer

Professor Michael Waterson

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

Date: 16 November 2023