



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1408/7/7/21

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

(together “**Google**”)

ORDER

UPON the Class Representative’s application of 21 December 2023 to vary paragraph 8.6 of the Order of the Chair drawn on 15 September 2023 (“**Directions Order**”) (the “**Application**”)

AND UPON the Defendants’ response to the Application dated 22 December 2023

AND UPON the Class Representative’s submissions in reply dated 3 January 2024

IT IS ORDERED THAT:

Disclosure

1. Paragraph 8.6 of the Directions Order shall be varied as follows:

Google shall provide “Stage 2 Disclosure” in accordance with the following steps:

(a) *the Class Representative shall submit to Google any supplementary disclosure requests following the provision of Stage 1 Disclosure by reference to the issues in the Play Store Proceedings by **4pm on 2 February 2024**;*

[...]

(c) *Google shall provide the disclosure requested pursuant to the above and / or as ordered at the Fourth CMC by **4pm on 15 April 2024**.*

Factual Evidence

2. Paragraph 8 of the Tribunal’s Order of 16 December 2022 (the “**December Order**”) (as amended) is varied such that the parties shall serve signed statements of witnesses of fact, and hearsay notices where required by **4pm on 17 May 2024**.
3. Paragraph 9 of the December Order is varied such that the parties shall serve signed reply statements of witnesses of fact, and hearsay notices where required by **4pm on 7 June 2024**.

Other

4. The parties shall seek to agree any further amendments to the timetable that may be required in relation to expert evidence, and in the absence of agreement, the matter will be considered at the Case Management Conference listed on 1 March 2024 (“**CMC**”).
5. Costs reserved to the CMC.
6. There be liberty to apply.

REASONS

1. By an order dated 15 September 2023 (the “**Directions Order**”), the Tribunal gave directions for disclosure to be provided by the Defendants. Pursuant to that Order, the Defendants have provided what is generally referred to in these proceedings as “Stage 1 Disclosure”. The latest tranche of Stage 1 Disclosure was provided on 30 November

2023. I am informed that the disclosure provided by the Defendants to date amounts to over 2 million documents.

2. Paragraph 8.6 of the Directions Order envisaged that the Class Representative (“CR”) would submit any supplemental disclosure requests following the provision of the Stage 1 disclosure by 5 January 2024 (paragraph 8.6(a)); that there would then be a CMC to adjudicate any outstanding issues relating to disclosure, and that the Defendants would have until 15 March 2024 to provide such supplemental disclosure as may be agreed or ordered (paragraph 8.6(c)).
3. The CR now seeks an extension of time for formulating supplemental requests for disclosure by four weeks, until 2 February 2024, and proposes that supplemental disclosure be provided by 15 April 2024. A CMC has been fixed for 1 March 2024 at which outstanding issues relating to disclosure will be considered. The Defendants do not agree to the CR’s request. They propose an extension of two weeks, with consequential two week extensions to the dates for the production of supplemental disclosure and service of factual evidence.
4. The CR states that she has made good progress in her review of the Stage 1 disclosure, and is using technology assisted review to prioritise documents with the highest predicted degree of relevance. However, the sheer volume of documents (some of which are over 1,000 pages long) has impacted the speed of the review. The CR has increased the number of reviewers assigned to the matter, but it is still taking longer than was originally anticipated. The holiday season was also, at the time that the application was made, anticipated to have an impact on the rate of review and availability of the CR’s experts and wider legal team. The CR confirms that requests for supplemental disclosure will be made on a rolling basis notwithstanding the requested extension. The CR maintains that there will be no material impact on the timetable to trial, and that there would be no prejudice to Google.
5. The Defendants’ objection is essentially two-fold: first, it is said that the requested amendments would prejudice the timetable to trial and would prejudice the Defendants. This is because the requested extension would have a knock-on effect on the dates for provision of disclosure, and provision of factual evidence (a factor that will primarily affect the Defendants given that the CR is not expected to be in a position to serve much

by way of factual evidence). Secondly, the Defendants complain that the CR has not provided a proper reason or justification for any extension of time and (it follows) that the explanations offered by the CR are insufficient. The Defendants rely upon various authorities to the effect that it is incumbent on the CR to provide a proper explanation for the failure to comply with the Directions Order including full and detailed evidence as to the steps taken to meet the deadline, what remains to be done, and the difficulties encountered (*Crypto Open Patent Alliance v Craig Steven Wright and others* [2023] EWHC 3287 (Ch) at [114]; *Municipio de Mariana & Others v BHP Group (UK) Ltd and another* [2023] EWHC 2126 (TCC) at [52]-[53]; *Jalla v Shell International Trading and Shipping Co Ltd* [2021] EWCA Civ 1559 at [33]; *The Witz Company and another v Edmund Truell* [2023] EWHC 2116 (Comm) at [11]). The Defendants maintain that the CR has not provided this.

6. As regards the Defendants' request for an extension of time for factual evidence, which is currently required to be served on 26 April 2024, the CR suggests that there is no need for an extension. The supplemental disclosure will have been dealt with by 15 April 2024. The CR maintains that the process of disclosure need not impact the timetable for the provision of witness statements at all because it is the Defendants who are providing the documents, and they will know what the documents contain. The CR also says that if an extension of time is granted for witness statements, then that will reduce the time available for the experts to consider the factual evidence before the date the CR is required to file her expert reports: currently 21 June 2024.
7. I note that despite the supposed insufficiency of the explanation provided by the CR, the Defendants do not object to an extension of two weeks. The dispute between the parties, therefore, is simply whether the extension of time should be two weeks or four weeks and whether dates for factual evidence should be similarly extended. This application comes before me in circumstances where this trial is not set down for trial until 6 October 2025; where the knock on effects on other dates in the trial timetable are, on any analysis – at least on the basis of the information provided to me – minimal; and where, importantly, it is not suggested that there will be any impact on the trial date.
8. Taking first the Defendants' objection based on insufficient reasons being given, I note the cases referred to by the Defendants, but each turned on its own very particular facts. I am satisfied that the reasons given by the CR for the extension sought are satisfactory

in the circumstances of this case. The CR may have received the bulk of the Stage 1 disclosure in the three week period between 25 August 2023 and 13 September 2023, but that amounted to over 2 million documents. The extension sought is not a long one. Further, the CR has said that supplemental disclosure requests will be made on a rolling basis in the meantime, and I take it, therefore that the extension sought is a longstop date. Any prejudice to the Defendants can be addressed by factoring in similar extensions to the date for the provision of disclosure, and factual evidence. I also note that if a four week extension is granted, the parties will still be in a position to identify and address any disclosure issues that are in dispute between them in good time before the CMC on 1 March 2024.

9. I do not accept the suggestion by the CR that the date for factual evidence should not be extended. The CR relies upon the original date for filing of witness statements, which was 15 December 2023, and suggests that the Defendants evidence ought to “already be at a very advanced stage of preparation”. That is simply unrealistic, not least because the parties themselves agreed an extension to 26 April 2024. Whilst the Defendants will be aware by 26 April 2024 of the documents of which disclosure has been provided (potentially by additional custodians), I accept that the Defendants should have a reasonable opportunity, having provided the supplemental disclosure, to consider the factual evidence on which they wish to rely. In my view, a reasonable opportunity is longer than 11 days, in particular in circumstances where, on any analysis, the trial timetable can accommodate it.
10. I am not asked to go further and extend the relevant dates for expert evidence. In that regard, I note that in this case the process is sequential and the CR is to provide expert evidence first: by 21 June 2024. The CR suggested that this deadline would not be impacted by her own proposed extension relating to supplemental disclosure, and that her experts have already commenced work on the basis of the documents disclosed to date. The CR’s experts will have such further disclosure as may be provided almost two months prior to the date for service of her expert report. On the timetable that I have ordered, the CR’s experts will also have had the Defendants’ factual evidence for over a month by the date currently fixed for the provision of their reports. Before the next CMC the parties must consider and seek to agree whether the dates for expert evidence

can stay as they are or need to be amended, and if so, what those dates should be. If agreement cannot be reached this will be considered at the next CMC on 1 March 2024.

11. These sort of issues – both as regards the extension sought by the CR and the knock-on consequences for other dates in the timetable - ought to have been capable of agreement between the parties and an agreed position put to the Tribunal. For that reason, I am not inclined simply to order costs in the case. If either side wishes to seek their costs I will hear any application at the CMC. In the absence of any application, the order will be “no order as to costs”.

Bridget Lucas KC
Chair of the Competition Appeal Tribunal

Made: 18 January 2024
Drawn: 18 January 2024