Neutral citation [2023] CAT 47

Case No: 1408/7/7/21

<u>IN THE COMPETITION APPEAL TRIBUNAL</u>

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

<u>12 July 2023</u>

Before:

BRIDGET LUCAS KC
(Chair)
TIM FRAZER
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN

ELIZABETH HELEN COLL

<u>Class Representative</u>

\- v -

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

<u>Defendants</u>

and

THE COMPETITION AND MARKETS AUTHORITY

<u>Intervener</u>

Heard at Salisbury Square House on 21 June 2023

RULING (EXPERT EVIDENCE & DISCLOSURE)

APPEARANCES

Mr Mark Hoskins KC and Ms Jennifer MacLeod (instructed by Hausfeld & Co. LLP) appeared on behalf of the Class Representative.

Mr Josh Holmes KC and Mr Owain Draper (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. This Ruling concerns two issues that arose in the course of a case management conference (**CMC**) which took place on 21 June 2023, namely (1) expert evidence; and (2) disclosure.

2. These are collective proceedings brought pursuant to section 47B of the Competition Act 1998 (**the Act**). In brief summary, the Class Representative (**CR**) alleges that the Defendants (together, **Google**) have contravened Article 102 TFEU 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, enabling Google to collect an excessive and unfair commission on Android App purchases, and that the alleged infringements have caused loss and damage. The claim is summarised in the Claim Form (now amended) which was referred to in the Judgment on certification ([2022] CAT 39) and we do not repeat it here. The CR's claims are denied in their entirety, and in particular, Google denies that it charged excessive and unfair service fees to App developers; or that any proportion of any excess allegedly charged (if that is established) was ultimately passed to the end consumers that make up the Class, and that in any event, the pleaded quantum is grossly inflated, and based on unjustifiable assumptions.

3. The first CMC in these Proceedings was listed for 15 December 2022. That hearing was vacated in light of the parties having agreed directions. The directions agreed by the parties are reflected in the Directions Order dated 16 December 2022, and address issues relating to expert evidence, disclosure and the time estimate for trial. That order also provided for a CMC to be listed at which it was envisaged that the Tribunal would consider any disputes that had arisen relating to disclosure, and the scope of the expert evidence that would be permitted at trial. This Ruling deals with those issues which were addressed at the CMC on 21 June 2023.

B. EXPERT EVIDENCE

4. Paragraph 4 of the Directions Order required the parties to provide notice by 6 March 2023 of (a) the number of expert witnesses they propose to call; (b) those experts' respective fields of expertise; and (c) the issues it is proposed that each of those experts will address. Paragraph 5 provided that the Tribunal would give directions at the next CMC as to the expert evidence which each party would be permitted to adduce at Trial. The Directions Order went on to provide at paragraph 10 for sequential exchange of expert reports.

5. Subject to the Tribunal's approval, the parties are agreed that permission should be given to the parties to adduce expert evidence in the following areas:

   (1) Competition economics;

   (2) Security (in relation to apps and mobile devices);

   (3) Payment systems; and

   (4) Forensic accounting.

6. The dispute between the parties is as to whether or not:

   (1) the CR should have permission to adduce evidence from a second expert in the field of competition economics, and

   (2) permission should be granted for expert evidence in the following additional areas:

      (i) The development, distribution, monetisation and use of apps and/ or digital content for and on devices and/ or platforms (an **App Industry Expert**); and/ or

      (ii) Behavioural science.

(1) Legal Principles

7. The relevant legal principles relating to whether or not to grant permission for expert evidence were usefully summarised in the Tribunal's decision in *Dr. Rachael Kent v Apple Inc. & Another* [2023] CAT 22 in the following terms:

> "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:
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> > "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."
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> 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.
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> 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:
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> > "…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."
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> 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*:
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> > "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).""

8. Our attention was also drawn to the concerns expressed by the Tribunal in *Royal Mail Group Ltd v DAF Trucks Ltd & Ors* [2023] CAT 6 at [8] (and see also [231]):

"8. We do however wish to sound a note of caution in relation to the expert evidence. We received thousands of pages of detailed experts' reports on

> all of the issues before us. There were central, important issues on the Overcharge and Supply Pass On where the size of the reports could be justified. But there were other subsidiary issues, such as Complements and Loss of Volume, where we considered that there was disproportionate time and money spent on complicated analyses that were less justified. Not only does this increase the overall costs of these proceedings but also it is highly burdensome on the Tribunal, and we would urge parties in other similar cases to exercise some restraint and sense of proportion in the preparation of their expert evidence."

9. We were also referred to the Court of Appeal's decision in *Mark McLaren Class Rep. Ltd v MOL (Europe Africa) Ltd & Ors* [2022] EWCA Civ 1701 which emphasised (at [44]) the Tribunal's case management responsibilities in the context of collective proceedings, and the need to ensure that the case proceeds efficiently to trial, and that *"potentially sprawling cases do not absorb an unfair amount of judicial resource"* (at [46]).

10. Despite the terms of paragraph 4 of the Directions Order, whilst the parties have made clear the number of experts they seek permission to rely upon, and broadly what the fields of expertise would be, the issues that it was intended that some of the experts would address was not as clear as it might have been. To some extent that was ameliorated (1) by the CR's proposal (with which we understand Google is in agreement) that the parties exchange *"a list of the issues which they propose each of their experts shall address"* after permission had been granted, and (2) by the fact that in this case the expert reports will be exchanged sequentially.

11. Mr Hoskins for the CR submitted that there is something of a *"chicken and egg"* conundrum in that a party may consider that they have identified an issue on which expert evidence might be likely to assist but, unless and until permission has been granted, that party may be at risk of costs if any are incurred in exploring with a potential expert whether or not that initial view is correct, and in more precisely refining the issues arising in the case on which the potential expert may be able to assist. Whilst that may to some extent be right, that does not affect the fact that it is still incumbent on the party who seeks permission to adduce expert evidence to be in a position to explain to the Tribunal with a degree of specificity the point in issue, and why it is said that the expert evidence is reasonably required to resolve it. It is not enough to say (in effect) that that

party believes that there <u>may</u> be a point on which expert evidence is likely to assist the Tribunal, but that it is not yet clear what that issue is, what will be required or its likely nature and scope - but that it would be helpful to have permission anyway. If it appears that it may be necessary to discuss the matter with a potential expert in order to identify and frame the issue prior to forming a view then that can be factored into a parties' litigation costs and included in the budgets as necessary. But the Tribunal ought not to be asked to grant permission on a speculative basis, and nor can other parties to litigation be expected to identify an expert and obtain expert evidence to address an issue that has not yet been properly articulated.

(2) The Agreed Experts

12. We are in agreement with the parties that expert evidence is appropriate in the following areas:

    (1) Competition economics;

    (2) IT and/ or mobile security;

    (3) Payment systems; and

    (4) Forensic Accounting in order to address the profitability of Google Play Store, and quantum (if required).

13. We will grant permission to each party to adduce evidence from one expert in these fields. We now turn to whether or not the parties should also have permission to adduce evidence from a second expert in the field of competition economics.

(3) Two Competition Economics Experts

14. The CR seeks permission to adduce evidence from two experts in competition economics. There is no dispute that at least one expert in this field is needed , but the CR says that two are required because:

(1) The economics issues are multifarious and complex. The evidence will need to address market definition; dominance; exclusionary abuse in relation to app distribution; exclusionary abuse in relation to payment systems; abuse by excessive pricing; causation; incidence; pass on to class members; and quantum.

(2) The parties should be on a level playing field. Whilst Google has been considering these issues in relation to various court and regulatory proceedings for a number of years, and can be expected to have an intimate knowledge of their business and the expert issues that arise, the CR has not. Granting permission for two expert economists will go some way to addressing this imbalance.

(3) The expert economist already instructed by the CR, Mr Derek Holt, is also instructed in the *Kent v Apple* proceedings, and will be required to comply with directions that have already been made in those proceedings which are listed for trial on 6 January 2025. There is an overlap between the timetable in the *Kent v Apple* proceedings, and this case which exacerbates the difficulties of one expert having to deal with all of the issues in these proceedings.

(4) In the *Kent v Apple* proceedings it was agreed that two competition economics experts were appropriate, and the Tribunal made an order granting permission for two.

(5) It is not intended that there be any duplication between the issues to be addressed by the two experts, and the dividing line as to who will cover what will best be resolved in discussion between both parties' respective experts.

15. Google object to the CR being granted permission for two competition economics experts. This is essentially because:

(1) Multiple experts in the same field are permissible only in exceptional circumstances. We were referred to *JP Morgan Chase Bank v*

Springwell Navigation Corporation [2006] EWHC 2755 at [80] and *ES v Chesterfield and North Derbyshire Royal Hospital NHS Trust* [2003] EWCA Civ 1284 at [27] and [43] in this regard.

(2) There is a risk that multiple experts may cover the same ground, and duplication imports a risk of waste, unnecessary complexity and practical difficulty in the fair and efficient resolution of the expert issues and proceedings as a whole. We were referred to *Kent v Apple* [2023] CAT 22, where permission was refused for a *"digital markets expert"* because of a concern that they would cover the same ground as the competition economists (see [25] to [33]), that this would materially expand the scope of expert evidence, and that it would generate case management difficulties in particular as regards hot-tubbing.

(3) Boundaries between disciplines and issues ought to be clear, so that the extent of agreement and disagreement between the experts can be readily identified and their points of disagreement addressed efficiently at trial. This is undermined if more than one expert covers the same (or overlapping) grounds.

16. We would accept that there is a lot of work for one expert to cover. We are also aware that in the *Kent v Apple* proceedings (which raise similar issues) the parties agreed that two experts were necessary, and the Tribunal made an order to that effect. However, as the argument developed before us, it appears that the main problem is the workload entailed for Mr Holt in dealing with the two sets of proceedings given the overlapping timetables. As Mr Hoskins eloquently put it, having noted the points of overlap: *"Mr Holt is a very experienced and effective economist with a big team, but Superman would struggle to manage that timetable"*. Whilst Mr Hoskins maintained his reliance on the amount of work required, and the need for two experts to ensure a level playing field given Google's "headstart", we were left with the sense that two experts may not necessarily be required if Mr Holt was not also involved in the *Kent v Apple* proceedings.

17. In light of the decision we have reached on the point it may not much matter for present purposes which argument is the principal driver behind the need to apply for two experts.

18. The convenience of an expert who simply has *"a lot of work on"* is not, in our view, a determinative factor when considering whether permission ought to be granted for a second expert, and we doubt whether it is a relevant factor at all. However, the current situation is not that simple. Mr Holt is involved in two sets of proceedings that overlap in terms of issues (albeit that the cases are not the same) and timetable, with these proceedings being listed to be heard after *Kent v Apple* on the basis that the parties considered that the judgment in that case may inform their approach to these proceedings.

19. If it were simply a question of Mr Holt's convenience (and we have explained why it is not), the answer might be for Mr Holt to be replaced in these proceedings and continue with the *Kent v Apple* proceedings. However, in response to that suggestion, Mr Hoskins submitted that Mr Holt provided the expert evidence in relation to the CPO application and is well-acquainted with the issues arising in this case. In this regard, we note that Mr Holt's replacement was not something pressed by Google. Indeed, in support of its submissions in opposition to the application for two experts, Google relied upon the fact that Mr Holt is well-versed in the issues and has already prepared two expert reports running to 105 pages. In our view, if duplication of cost and effort is to be avoided, an order for Mr Holt's replacement is not the best way to achieve it. Once it is accepted that Mr Holt should remain, we accept that there is a lot of work to do, and that the burden on him will be onerous if he was required to undertake all of the expert evidence himself given the ongoing proceedings in *Kent v Apple*.

20. It is also unrealistic for us to ignore the fact that two experts are to give evidence in this field in the *Kent v Apple* proceedings. It is therefore likely that there will be some issues arising in these proceedings on which Mr Holt will not be providing further expert evidence, because they are now to be covered in *Kent v Apple* by a second expert.

21. We are not persuaded by Google's submission that the additional support that Mr Holt will require could be provided by the team of analysts and economists that will inevitably be assisting him in any event, and that an additional expert is not required. Even if the suggestion is that his support could be increased, it still does not address the problem that he would need to be the expert with ultimate responsibility for the preparation of the expert evidence which would be tested with him in cross-examination. Nor are we persuaded by the suggestion that, as a first step, the directions could be revisited to see whether, in practical terms, sequencing and overlap with the directions in *Kent v Apple* could be minimised. The parties in this litigation are not parties to those proceedings, albeit that the CR has instructed the same solicitors and expert: the parties' ability to influence timetabling in that case or the events that might affect it, is necessarily therefore limited.

22. There is an important distinction between what is proposed by the CR, and the situation in the *ES v Chesterfield and North Derbyshire Royal Hospital NHS Trust* case. That was a medical negligence case in which the Master had granted permission for one expert report on each side. However, on the facts of the case, the defendant would, in addition, have the benefit of the evidence which would be given by the experienced obstetric registrar (since appointed a consultant) and a consultant obstetrician against whom the main complaints were directed. As such, there was a potential inequality of arms in that the defendant would be able to assert that the evidence of all three witnesses (one expert, and two factual but expert in the field) was consistent with an appropriate standard of care, whereas the claimant would have only one witness. Permission was therefore granted by the Court of Appeal for the claimant to adduce evidence from a second expert in the same field, and on the same issues. What is envisaged by the CR is not, if properly implemented, the same thing because the CR specifically envisages that the two experts will not be giving evidence on the same issues.

23. We were also referred to the approach taken in *Kent v Apple*, and the fact that the Tribunal declined to grant permission for an expert in the economics of digital markets. However, the point takes matters no further forward. That decision was taken on the basis that there was a considerable, if not complete

overlap with the evidence of the two competition economics experts for which the Tribunal had given permission. Google does not, in this case currently suggest that any other area of expertise for which permission has been sought by the CR overlaps with the evidence to be given on competition economics. Although that is a possibility with regard to behavioural economics (for the reasons explained in paragraph 44 below), it is not a point that arises in light of our decision on that issue (paragraph 45 below).

24. If a sensible division of the issues of competition economics is capable of agreement between the parties so that the risk of duplication is minimised, then it seems to us that the balance lies in favour of permitting two competition economics experts. In that regard, we note that, rather inconsistently with its submissions urging us to refuse permission being granted for two experts, Google does not suggest that if permission is granted it will nevertheless only rely on one. Rather, if we are minded to grant permission, Google submits it should also have permission to have two experts in this field.

25. Is a division of the issues possible? The CR has not yet made any attempt at a division of the competition economics issues, and we agree with the submission made by Google that it would have assisted the Tribunal if that had been done before the CMC. In submissions, the CR indicated that there have been internal discussions as to a workable division of issues, but Mr Hoskins was unwilling to waive privilege. That is an unsatisfactory situation. The Tribunal ought not to be required to take this assertion on trust. However, we are also cognizant of the fact that the division of issues will be a live issue being addressed by at least Mr Holt in the *Kent v Apple* proceedings.

26. Google submitted that the economic analysis is likely to be interconnected across various issues. So, for example, it is suggested that market definition and dominance are unlikely to be capable of separation. Similarly, Google suggests that issues of dominance are unlikely to be capable of separation from the alleged conduct said to amount to infringements, and that quantum depends on the counterfactual which is bound up with the effects analysis. However, the thrust of Google's complaint is that unless and until clarification of the proposal is provided, it is really *"shooting in the dark"*.

27. We consider that the appropriate course is for us to grant permission for each side to adduce two experts in competition economics, and to require the proposed experts to seek to agree an appropriate division of the issues as between the two experts on each side (and we expect the parties to co-operate in that process). That should provide Google with the clarification it requires in order to see whether the approach is feasible. Without being prescriptive, it seems to us that it is likely that the same approach to the dividing lines ought to be adopted by both sides: it would plainly be undesirable for the division of issues as between one party's experts not to reflect the same division as between the two experts instructed by the other. If there were to be any disparity then that would present challenges for any hot-tubbing exercise in due course, and may create the risk of duplication which ought to be avoided. If the parties are unable to agree, or foresee significant case management issues, they should return to the Tribunal and seek further directions (and if necessary, the variation of the order we have made). At least by that time, the battlelines will have been drawn. We should, however, make clear that this is the practical solution to the position that the parties now find themselves in. The fact remains that the CR ought to have been able to explain her proposal and discussed this with Google prior to the CMC, not afterwards, and been in a position to explain the proposal to the Tribunal at the CMC.

(4) App Industry Expert Evidence

28. The CR seeks permission for expert evidence to be adduced from an App Industry Expert. The reason permission is sought is because the CR is not in a position to provide factual evidence on these issues whereas, by contrast, Google is able to provide factual evidence in relation to the App market from its own employees. The CR relies on the fact that permission was sought and granted in *Kent v Apple* for an App Industry expert.

29. Google objects to permission being granted for expert evidence in this field. In summary, Google accepts that the CR is entitled to rely on third-party evidence in relation to several aspects of the app industry. Google's objection is that it is far from clear that the evidence that the CR intends to rely upon will be properly admissible as <u>expert</u> evidence, as opposed to "non-expert trade witness

evidence". The issue is therefore whether or not the proposed evidence is really to be regarded as factual, or meets the test for expert evidence.

30. We accept that this is an important point. Google's principal concern as we understand it, relates to the approach to be taken and the relative weight to be given to evidence adduced by the CR which is accorded the status of expert evidence, as opposed to the evidence adduced by Google which will be regarded as "factual". Mr Holmes raised the possibility that Google would adduce factual evidence, and the CR would not produce any, but instead adduce expert evidence addressing the factual evidence, but on which Google would not have a corresponding expert report and the time for filing factual evidence in reply would have passed. What if the expert evidence asserted a factual proposition with which Google's factual witnesses disagreed?

31. Google relies upon *Barings and Anor v Coopers & Lybrand and Ors* [2001] PNLR 22, in which Evans-Lombe J said (at [54]): *"...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."*

32. Google acknowledges that the Tribunal has already granted permission for expert evidence in this field in *Kent v Apple*, and referred us to the passage cited in that judgment (at [13]) which is set out at paragraph 7 above.

33. Google does not dispute the accuracy of that summary of the position but submits that determining whether evidence from a person amounts to expert evidence turns on an objective assessment of the subject matter of the evidence, and whether it is the product of expertise, as opposed to ordinary evidence of fact. Our attention was drawn to *Fenty v Arcadia Group Brands Ltd* [2013] EWHC 1945 (Ch), a case which was not referred to in the *Kent v Apple* Ruling. In that case, Birss J summarised the case-law and principles including:

(1) Trade witnesses may give evidence of *"the circumstances of the trade"* and *"nature and circumstances of [the] market"*, even including expressions of opinion as to the likely behaviour of market participants, without this amounting to expert evidence under CPR Part 35: see [35] and [39]-[40].

(2) This is so even though such witnesses will explain and rely on their experience in the trade *"in order to justify their evidence and add credibility to it"*: see [35].

(3) Deciding whether evidence given by a trade witness amounts to expert evidence *"cannot be done"* without close examination of the evidence itself in the context of the issues in the proceedings (and in that case, Birss J had the benefit of the statements already being in evidence): see [40] and following.

34. Although that case was not referred to in the Ruling in *Kent v Apple*, the need to examine the evidence was plainly recognised by the Tribunal. At [20] to [22], the Tribunal said:

> "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.
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> 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.
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> 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."

35. We respectfully agree. We accept that Google's concerns raise real practical and substantive issues which must be addressed, but it seems to us that if we are to do so we must see the substance of the evidence that the CR proposes to rely upon. Given that there is no dispute that the CR is plainly entitled to adduce evidence to make good her case, and the principal dispute is as to the status (expert or factual) to be accorded to it, we consider that the appropriate approach is to grant permission for that evidence to be adduced as expert evidence <u>for now</u>.

36. However, to address Google's concern that the evidence to be adduced may in fact prove to be factual (or at least a blend of factual and expert evidence) we will order: (1) the CR's App industry expert evidence shall be served at the same time as the CR's other expert reports are required to be served; (2) Google will have permission to serve factual witness statements in reply together with any expert evidence on which it seeks to rely; (3) the CR shall be entitled to serve expert evidence in reply (including, if so advised, the impact on her previous report of any factual witness statements filed by Google in accordance with (2)); and (4) the issue of how such evidence is to be dealt with at trial (including any dispute as to whether it is factual or expert) will be a specific item on the agenda for the PTR.

37. We have two further points to make. First, in accordance with the expert process agreed between the parties, the CR's expert and solicitors should liaise with representatives of Google (or its proposed expert, if any) and seek to agree the issues which will require expert (as opposed to factual) evidence. Secondly, we have attempted to ensure that the parties, and their respective experts have every opportunity to understand the factual evidence relied upon, and that the experts' respective positions (taking into account the factual evidence) are clear before they meet. We expect the parties and their experts to cooperate in identifying any further points of difference that might arise for example, from the CR's expert evidence in reply (step (3) above), in good time and so that they can be considered at the scheduled meeting of experts and dealt with in the joint

statement without the need for a further round of reports. However, it is open to the parties to apply if further directions are necessary.

(5) Behavioural Science Expert Evidence

38. The CR originally sought permission to adduce behavioural economic evidence on *"to address issues relating to users' choices regarding switching between devices, the use of alternative means of distributing software applications and alternative payment processing/ solutions/ services"* (draft order paragraph 2). In correspondence, the CR indicated that this would be prepared by an expert drawing on *"literature in relation to consumer behaviour"*; *"survey evidence"* and *"experimental evidence"*. Shortly prior to the CMC the CR sought to change this to an expert in *"behavioural science",* on the basis that the description *"behavioural economics"* was too narrow. The CR maintains that an expert in this field is necessary to *"address important issues concerning human behaviour, such as users' choices regarding switching between devices, the use of alternative means of distributing software applications and alternative payment processing solutions/ services."* We were referred by the CR to an article entitled: *"The role of behavioural economics in competition litigation"* by Dame Vivien Rose (17 Competition L.J. 59 (2018)), and it goes without saying that this article is both interesting and illuminating.

39. Google accepts that both behavioural economics and behavioural science are recognised fields of expertise but does not accept that the issues on which such evidence is sought to be adduced have been explained with sufficient specificity. Google also expressed concern as to the risk of overlap and duplication with the competition economist(s).

40. In correspondence, the CR sought to identify the paragraphs of its Amended Claim Form in relation to which it was suggested such evidence might assist the Tribunal. However, on reviewing those paragraphs, and as Mr Hoskins frankly accepted in the course of his submissions, it was not readily apparent as to how that would be the case for some of the passages so identified. Mr Hoskins did then refer to several paragraphs in Google's Defence which refer to the choices that consumers make. However, the issue that then arises is whether that is

properly to be regarded as factual evidence, or whether expert evidence is required. If the latter is required, and competition economics experts will already be considering the extent to which choices were exercised by consumers by reference to data, the question that then arises is whether or not the Tribunal will necessarily be assisted by an explanation of why consumers exercised the choices that they did.

41. We are not satisfied that the issues on which the CR suggests that expert evidence in behavioural science may be necessary or reasonably required in this case have been identified with anywhere near sufficient focus or clarity. The general statements adopted by the CR do not assist in defining what it is that the experts are to be asked to do on the specific facts arising in this case. In the CR's skeleton it was asserted that *"understanding human behaviour, e.g. decision-making inertia, can improve the explanatory power of economics"*, but the CR was unable adequately to explain how it was envisaged that that the behavioural science would inform the expert economic evidence (i.e. how they would "mesh" together). What appeared to be envisaged by the CR is that it would be necessary for the Tribunal to grant permission for a behavioural science expert first (which would enable the behavioural scientist to be formally instructed), and only then would it be possible to identify with any specificity what the issues were, and whether and to what extent such evidence would be necessary or reasonably required to assist the Tribunal in reaching its decision. With respect, that appears to us to put the cart before the horse.

42. We were reinforced in our view having been referred by Google to the order of Mr Justice Waksman dated 15 February 2023 in *Le Patourel v BT Group Plc & anor* (Case No: 1381/7/7/21). That order granted permission to the parties to adduce expert evidence in the field of behavioural economics, but identified clearly a single issue on which it was to be admitted. That issue was the extent to which the members of the relevant class were *"by virtue of their particular characteristics ... in a position to, or likely to make conscious and informed choices about"* two particular matters. Those were whether to remain with BT, and/or whether to engage with opportunities to switch service provider or tariff. The order also made provision for the CR in that case to inform the defendants

as to what the relevant characteristics of the class members were alleged to be (and the materials that would be relied upon), and for the defendants to respond.

43. Whilst the terms of any particular order will no doubt turn on the particular facts of each case, the CR's proposal in this case is simply that permission be granted in the widest possible terms. That is plainly insufficient. It is no answer to suggest, as the CR does, that it has not been possible to identify or consult a potential expert yet, and therefore no further elucidation is possible. The Tribunal cannot grant permission in a vacuum of information, or on a speculative basis - however "interesting" a point might, at first blush, appear to be.

44. There is a further point here, and that is the potential overlap with evidence that may be adduced by the competition economics experts. Mr Hoskins fairly accepted that there are expert economists who write on behavioural economics, and indicated that this was why the CR made the distinction between that expertise and that of a behavioural scientist: the latter is *"a bit broader"*. However, why that distinction is necessary in this case is not entirely clear to us on the submissions we have heard. We are concerned that there may be a potential overlap between the evidence regarding consumer behaviour that the competition expert economists may be in a position to provide (if instructed to do so), and the evidence of the behavioural scientist, if permission was to be granted. If the CR was minded to renew the application we would need to be satisfied that there would be no (or minimal) overlap: and we would need to have an understanding of how the areas of economic and behavioural science expertise, if separate, were intended to complement each other without duplication.

45. We refuse the CR's application in relation to expert evidence in this area. In doing so we do not intend to close down further discussions between the parties so as to identify any issues on which behavioural science (or economics) evidence is required, and indeed would encourage them to co-operate in doing so, whether in parallel with the process agreed between them in relation to experts where permission is granted, or otherwise. Nothing we have said is

intended to shut the CR out from renewing the application at a later date once there has been an opportunity to consider and address our concerns.

(6) Conclusion on Expert Evidence

46. In conclusion, on the question of expert evidence, therefore, permission is granted for each party to adduce expert evidence from:

    (1) Two witnesses with expertise in economics to address market definition, dominance, abuse, the nature and scope of the class, causation and quantum;

    (2) One witness with expertise in IT and/ or mobile security, to address performance, security, and privacy in connection with the distribution and/or use of software applications, mobile devices, platforms, and/or billing systems;

    (3) One witness with expertise in the use and/or integration of payment systems in digital marketplaces, including payment processing services, payment-related services, and/or billing systems, including in connection with applications and/ or digital content for and on devices and/or platforms;

    (4) One witness with expertise in accounting to address the profitability of the Play Store and if required quantum; and

    (5) One witness with expertise in the development, distribution, monetisation and use of apps and/or digital content for and on devices and/ or platforms.

47. We should say that in reaching this decision, we have had regard the need to case manage these proceedings effectively in order to ensure that *"potentially sprawling litigation of this kind"* is run efficiently and does not absorb a disproportionate amount of resource. With that in mind, we asked the parties to produce an outline trial timetable (non-binding at this stage) so that we could

gauge the impact of the expert evidence sought on the time likely to be required for the trial. Having considered the draft timetable we are satisfied that the trial ought to be capable of being completed in the 8 weeks previously estimated, but we will list with one week in reserve which will also provide some flexibility for any 4 day weeks that are appropriate.

C. DISCLOSURE

48. The parties have made some progress on agreeing the overall structure to disclosure. However, three substantive points remained in dispute. In order properly to understand the areas of disagreement, it is necessary briefly to identify the process that has been agreed. The disclosure exercise is necessarily one-sided, in that the CR has no disclosure to provide, having had no involvement with the underlying issues giving rise to these collective proceedings. It is therefore Google which is to provide disclosure.

49. The parties have agreed a two-stage disclosure process. Google has identified eleven existing "repositories" of documentation, and these provide the starting point for the disclosure process. There is a twelfth, but this relates to potential repositories of documents to be requested relating to expert evidence once the issues have been agreed. In summary, in Stage 1, Google will provide disclosure from these repositories; the parties will seek to agree custodians and search terms, the CR will review the disclosure, and submit any supplementary disclosure requests to Google, and a further CMC will then take place to deal with any disclosure disputes. At Stage 2, Google will provide the additional disclosure requested. Stage 1 must be completed in good time for the CR to be able to formulate the requests for Stage 2 disclosure.

50. The principal repository comprises documents produced by Google in proceedings in the US (**US Proceedings** and **US Production**). This covers documents for the period up to 14 August 2020 and amounts to around 3 million documents. It is common ground that, in the interests of proportionality, appropriate search terms should be applied to identify documents most likely to be relevant to these proceedings. Google says that applying its proposed search

terms to thirteen custodians identified by it results in the disclosure of approximately 120,000 documents.

51. As for disclosure from 14 August 2020 onwards (**the Post-US Production**), Google will need to conduct further searches, the parameters of which are presently disputed. Google has proposed thirteen custodians, and an end-date of 31 May 2023 (with further searches to be applied closer to trial). Google says that its approach (applied up to 31 January 2023) results in around 180,000 documents prior to de-duplication.

52. Other principal repositories are: documents produced in the European Commission Case AT.40099 *Google Android* (**Google Android**); Pre-existing documents produced in the European Commission's investigation concerning the Play Store commenced on 31 May 2022 (**EC Investigation**); Submissions made by Google in the CMA's *Mobile Ecosystems Market Study* that closed on 10 June 2022 (**Market Study**); and Pre-existing Google documents produced in the CMA Investigation into Play Store that commenced on 10 June 2022 (**CMA Investigation**). Google proposes:

    (1) A manual review of these repositories, save for the Google Android documents; and

    (2) To apply search terms to the Google Android documents. Google says that there are 90,000 Google Android documents, of which 40,000 were disclosed in the US Proceedings, and that tests capture 6,345 responsive documents.

53. The points of dispute are as follows:

    (1) Whether there should be an individual document review for relevance of the US Production;

    (2) Whether Google's proposed search terms and custodians should be applied to all 90,000 of the Google Android documents, or (as is currently Google's position) only to the 40,000 which were disclosed in

the US Proceedings; and relatedly, whether there should be an individual document review for relevance of the Google Android documents; and

(3) Whether the Market Study documents should be disclosed early.

(1) Individual Document Review: US Production

54. As regards the US Production, whilst the CR is content for these documents to be refined in the first instance by the identification of appropriate custodians and the application of appropriate search terms, in addition the CR proposes an individual document review for relevance. The CR submits that it is appropriate for Google and not the CR to do this because: keyword searches invariably identify a large number of irrelevant documents; the normal procedure is for the disclosing party to review documents for relevance before disclosure; the disclosing party is better placed to assess the relevance of its own documents (i.e. to "sort the wheat from the chaff"); it will be quicker and cheaper for Google to do the exercise; and the CR will have limited time to review the documents disclosed before having to prepare Stage 2 disclosure requests. The CR submitted that a manual review was not necessarily the only way of conducting an individual document review, and that a form of machine-learning to identify relevant documents might be appropriate. In submissions, Mr Hoskins pointed out that a further relevance review would obviously need to be done, and the issue was who was to conduct it. He also referred to the fact that a review of 180,000 documents (being the Post-US Production documents) would need to be done, and therefore we should view with some scepticism the notion that it was somehow disproportionate for Google to be expected to review the 120,000 US Production documents.

55. Google points to the approach that was adopted in *Kent v Apple* [2023] CAT 20, and the fact that the Tribunal declined in that case to order a further document review (see [17] to [19]). The CR considers this to be a *"volte face"* on Google's part, whereas Google suggests that the CR had previously accepted that there would not be a manual review and it is the CR who has changed her position. That dispute need not concern us. Google also submits that the US Production has already been subject to an individual review for relevance in the context of

the US Proceedings, and it would be wasteful and duplicative to require an individual document relevance re-review. Google suggests that the appropriate course is to apply search terms to identified custodians. There is, we are told, a substantial overlap in terms of subject matter between the US Proceedings and these proceedings.

56. We agree with Google, that it is not appropriate for us to order a further manual review, at least not at this stage. The documents in the US Production have already been reviewed for relevance. We note that the CR has accepted that the US Production is an appropriate starting point (in other words, it is likely that the US Production overlaps with and contains documents relevant to these proceedings). The population of documents we are concerned with is, if Google's custodians and search terms are applied, in the region of 120,000. Whilst not small, that is not a vast number for litigation of this kind.

57. Whilst the number of documents involved in *Kent v Apple* was significantly greater, we note and share the scepticism expressed by the Tribunal in *Kent v Apple* at [18] as to whether it is necessary or proportionate for there to be a wholesale *manual* review, as opposed to the application of search technology. The CR does not suggest that it would not be feasible to undertake her own technology-assisted review such as through further targeted searches so as to isolate documents to particular issues, and we note that the CR also does not seemingly envisage necessarily undertaking a manual review of each document produced. We echo the sentiments expressed by the Tribunal in *Kent v Apple* at paragraphs [20] to [25] as to the need for both parties to be proactive, co-operative and constructive.

58. If it should prove to be the case that the CR has insufficient information to be in a position to properly formulate additional search terms so as to be able to conduct her own review of the documents produced as relevant by Google from the US Production, then we expect the parties to co-operate so as to enable the process to be effective. However, if all else fails, the parties are able to return to the Tribunal for directions.

59. We will not, therefore, at this stage order Google to conduct a further individual review of the documents which are identified as relevant in the US Production by the application of search terms.

(2) Google Android Documents

60. A similar point arises in relation to the 90,000 Google Android documents. Google is not proposing an individual review of these documents, 40,000 of which were included in the US Production. Application of Google's proposed search terms to those 40,000 documents yielded 6,345 responsive documents. The CR wants Google to apply the search terms to all 90,000 Google Android Documents, and in addition to then conduct an individual document review for relevance to the documents identified by those searches.

61. The CR maintains that there is more likely to be a *"read across"* between the Google Android documents and these proceedings than from the US Production and these proceedings. The CR also submitted that there cannot be an issue of proportionality because, of the additional 50,000 documents (90,000-40,000), it is unlikely that there would be more than 15,000 or so to individually review (bearing in mind the 6,345 responsive documents out of 40,000).

62. Google maintains that the Google Android Documents have already been subject to an individual relevance review in the context of the US Proceedings. The 40,000 are those relevant to the US Proceedings, which in turn are likely to be relevant to these proceedings (because of the overlap in subject matter). Google submits that the sensible course is to apply the search terms and custodians to the 40,000 in the US Production, and not to include the remaining 50,000.

63. We will order that Google should apply the search terms and custodians to the full 90,000 Google Android documents. It may prove to be the case that all Google Android documents relevant to these proceedings were produced in the US Proceedings, but we are not satisfied that that is necessarily the case, bearing in mind Mr Hoskins' submission that there is more likely to be a read across from the Google Android documents than the US Production. We will not,

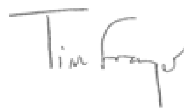
however, require Google to conduct an individual document review for relevance. Google's position is that they have already done this exercise for the purposes of the US Proceedings and the same result would pertain for the current proceedings. From the perspective of both the CR and Google, the number of responsive documents from the application of the search terms is likely to be relatively small. That really cuts both ways. The burden of review is unlikely to be great (in the scheme of this litigation), whoever conducts it. On balance, given Google maintains that they have done this exercise once before, we will not require Google to do it again. The CR will be able to apply such technology-assisted or manual searches for relevance as she considers appropriate to the Google Android population as with the US Production documents. As we have previously indicated, it is open to the parties to apply for further directions if necessary.

(3) Market Study disclosure

64. As regards the Market Study, paragraph 1(b) of the Directions Order required Google to provide inspection of the Market Study documents. Disclosure was provided of 33 documents, 28 of which the CR says were heavily redacted. Google has said that it will conduct a relevance review in due course, and that there was therefore no requirement to explain the redactions at this stage. The CR complains that the early disclosure of this material was to assist the CR in identifying and refining the appropriate approach to disclosure, and that the extent of the redactions mean that the early disclosure is of little or any assistance. The CR seeks an order that Google should conduct a review of the 28 documents for relevance and provide them in short order.

65. Google's position is that the documents were produced in the same form as they had been produced in other related proceedings (known as the Epic UK Proceedings) and that was all they were required to do. Google will be conducting a further review (including of the redactions), and would produce the documents in due course, and in any event by 25 August 2023. Google indicated that the difficulty is that some of the material raised questions of policy and issues which were sensitive, but offered to complete the task within 3 weeks.

66. In the course of the CMC, we ordered that Google must re-review the documents and provide disclosure by 3 July 2022. We did so because there had already been significant delay, and if the provision of early disclosure was to be of any assistance to the CR in identifying search terms, it was defeated if the documentation contained heavy redactions which had not been reviewed, and which may well not be required at all. Mr Holmes suggested that the documents were unlikely to assist in formulating search terms for disclosure. That may be his client's view but the CR is entitled to form her own view. The fact is that the documents were promised, and it is inappropriate for them to be subject to redactions which may not, when reviewed, prove to be necessary or appropriate.



Bridget Lucas KC
Chair

Tim Frazer

Professor Michael Waterson

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

Date: 12 July 2023