Neutral citation [2024] CAT 40

IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13 June 2024

Before:

BEN TIDSWELL
(Chair)

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 COMPEITITION AND MARKETS AUTHORITY

Intervener

RULING (RELIEF FROM SANCTIONS)

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1. The Class Representative (the "CR") seeks relief from the sanction set out in Rule 55(2) of the Tribunal's Rules, in order to submit the witness statement of Christian Owens, dated 13 May 2024, in circumstances where the date for the filing and service of factual witness statements was set by the Tribunal as 26 January 2024. The CR's reasons for the late submission of the statement are, in summary, that:

   (1) Mr Owens gave evidence on 11 April 2024 in proceedings in an Australian court against Apple entities.

   (2) The CR became aware of that evidence shortly thereafter and identified that similar evidence might be useful in these proceedings.

   (3) The CR therefore arranged to take a witness statement from Mr Owens, which she says was done with expedition.

   (4) The statement was provided to the Defendant and the Tribunal at the same time as service of expert reports, shortly after it was signed by Mr Owens.

2. The Defendants submit that the Tribunal should require the CR to provide more information, including about the way in which she first became aware of Mr Owen's evidence, the process by which the statement was taken and the timing of that, the way in which the CR's experts appear to have had access to the statement before it was provided to the Defendants. The Defendants maintain that it would be common practice and procedurally proper to require the CR to provide a witness statement in support of her application, given it is acknowledged as a significant breach of the Tribunal's directions and that there are matters which remain unexplained by the CR in correspondence on the matter. The Defendants point to the approach taken in *Merricks v Mastercard* [2023] CAT 39 ("*Merricks*") by way of example of the proper approach.

3. Rule 55(2) provides as follows:

> "Unless the Tribunal otherwise directs, no witness of fact or expert witness may be heard unless the relevant witness statement or expert report has been

submitted in advance of the hearing and in accordance with any directions of the Tribunal under paragraph (1)."

4. It is now the practice of the Tribunal to approach the question of relief under Rule 55(2) broadly in accordance with the test set out in *Denton v TH White Ltd* [2014] EWCA Civ 906 ("*Denton*"), to be considered against the background of the Tribunal's duty to deal with matters justly and proportionately in accordance with Rule 4. See for example the decision in *Merricks* cited above and *Kerilee Investments Limited v International Tin Association Limited* [2024] CAT 36. That test requires consideration of:

   (1) Whether the breach is a serious or significant one.

   (2) Why the default occurred.

   (3) All the circumstances of the case so as to enable the Tribunal to deal justly with the application.

5. The failure to provide witness statements in accordance with the timetable directed by the Tribunal is, on any view, a serious matter. Compliance with timetables is an important foundation of efficient case management, and witness statements are a central part of the trial process. However, in this case the statement is short (nine pages long) and was provided three and a half months late and nearly eight months before the trial date. There is ample time for the Defendants to deal with the issues raised by the statement and there is no indication it will disrupt preparation for trial. It is, in my view, not of material significance and at the lower end of seriousness for the type of breach in question. That is sufficient to dispose of the application in favour of the CR, but I will in any event go on to consider the other limbs of the *Denton* test.

6. I am satisfied with the explanations given by the CR in her solicitors' letters of 14 and 22 May 2024. I take the reasons and background given there at face value and I see no likely benefit in requiring the CR to incur cost in preparing formal evidence by way of a witness statement. I do not accept the submission by the Defendants that I should require a witness statement from the CR as a matter of

common practice and propriety. The appropriate course in each case will depend on its particular circumstances.

7. It may well be the case that the CR should have realised at an earlier juncture that Mr Owens was going to give evidence in the Australian proceedings which might be of assistance in these proceedings. I also agree with the Defendants that it is unfortunate that Mr Owens' statement was made available to the CR's experts prior to it being served (so that the Defendants' experts had no knowledge of it) and before there was any permission to deploy the statement. However, the explanation given by the CR is plausible and reasonably reflects a developing situation which gives justification for the late provision of the statement. I note in this regard the asymmetry that applies in these collective proceedings, where the information (and therefore evidence) available to a class representative is generally considerably less that that available to a defendant.

8. Turning to the circumstances more generally and the just and proportionate outcome, the Defendants have acknowledged that they are able to provide reply factual evidence and any consequential expert observations, if so advised, by 2 August 2024 as suggested by the CR (which is the existing date for service of reply expert evidence), and that there is no apparent prejudice to the timetable to trial if the evidence is allowed in. These factors strongly point to allowing the evidence into the proceedings. Taking into account the degree of seriousness and significance, and the explanation given by the CR, I therefore conclude that, in the circumstances, it is just and proportionate to allow the CR to proceed to adduce evidence from Mr Owens, in the form of his statement and at trial if required. The Defendants shall have permission to file and serve reply factual evidence and any consequential expert observations, if so advised, by 4pm on 2 August 2024. Should the Defendants encounter any difficulty in meeting this deadline they have liberty to apply.

Ben Tidswell
Chair

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

Date: 13 June 2024