IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

BETWEEN:

DR RACHAEL KENT

Class Representative

- v -

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

Defendants

REASONED ORDER

UPON the Defendants' application by letter to the Tribunal dated 16 September 2024 to adduce further evidence in the form of the enclosed witness statement of Mr Trystan Kosmynka dated 15 September 2024 (the "**Application**")

AND UPON the Class Representative's response to the Application dated 19 September 2024

AND UPON reading the further letter from the Defendants' solicitors dated 23 September 2024

IT IS ORDERED THAT:

1. The Defendants shall have permission to adduce as evidence of fact the witness statement of Mr Kosmynka dated 15 September 2024.

2. The Class Representative shall make any requests for disclosure arising from the statement of Mr Kosmynka by no later than 4pm on 30 September 2024.

3. The Defendants shall provide disclosure of any documents sought or provide reasons

for not providing any such disclosure by 4pm on 7 October 2024.

4. The Class Representative has permission, if so advised, to serve a further expert report from Dr Lee in response to Mr Kosmynka's statement, such expert report to be filed and served by 4pm on 18 October 2024.

5. No order as to costs.

6. There be liberty to apply.

REASONS

1. The Defendants ("Apple") seek permission to adduce a witness statement from Trystan Kosmynka dated 15 September 2024. Mr Kosmynka is Senior Director of Apple's App Review, which reviews apps submitted to Apple's App Store in order to assess (in his words) "whether they are safe, reliable and protective of users' privacy and security". The date for exchange of witness statements was 26 January 2024 and Apple acknowledge that they now need to apply for permission, under rule 55(2) of the Competition Appeal Tribunal Rules 2015, to adduce the evidence in the witness statement. They rely on the test set out in *Denton v TH White* [2014] EWCA Civ 906 ("*Denton*"), which I have recently applied in these proceedings in permitting the Class Representative to adduce a late witness statement. Apple says the *Denton* test is satisfied, as:

    (a) Mr Kosmynka's evidence is responsive to factual assertions contained in an expert report from Dr Wenke Lee served by the Class Representative and dated 14 May 2024. This report is said to contain criticisms of the App Review which had not previously been particularised, with the Class Representative's prior position simply being to put Apple to proof on issues relating to the integrity of apps sold through the App Store.

    (b) The Class Representative has recently (12 August 2024) amended her claim to include allegations concerning the EU Digital Markets Act (the "DMA"), which only came into effect in March 2024. The material now covered by Mr Kosmynka in his statement about the consequences of the DMA on the App Review could not have been the subject of a witness statement served in January

2024.

2. The Class Representative opposes the introduction of Mr Kosmynka's statement on various grounds, including:

   (a) Apple was on notice that it was being put to proof on its case on objective justification, on which Apple bears the burden of proof. It served witness statements on 26 January 2024 dealing with the App Review and the evidence in Mr Kosmynka's statement could have been served then.

   (b) Dr Lee has simply addressed the expert issues agreed between the parties and cannot be criticised for that.

   (c) Parts of Mr Kosmynka's statement are inadmissible, and his statement does not comply with the Tribunal's requirements. Mr Kosmynka's evidence in relation to the DMA goes beyond the scope of the amended pleading.

   (d) It is apparent from Mr Kosmynka's statement that there are relevant documents which need to be disclosed but which Apple has previously refused to provide.

3. I am satisfied that the *Denton* test is met in relation to this issue. While it is a substantial statement provided at a late stage, and therefore on the face of things a serious and significant failing, there are good reasons why the evidence could not have been provided in January 2024, which call into question whether it is fair to say there has been a failure at all. Sometimes the sequence of events in litigation is unpredictable and cannot be anticipated as one might like. I should add that I do not consider the Class Representative or Dr Lee to have conducted themselves in any improper way. However, the position is that there are matters of fact which have emerged as being important only recently (through the amended pleading and Dr Lee's report) and which should properly be the subject of factual evidence adduced by Apple, if they so wish. The issues involved are clearly going to need to be decided by the Tribunal at trial and indeed are likely to arise in the cross examination of Apple's other factual witnesses (if Mr Kosmynka is not present) and Dr Lee. It is therefore sensible for the evidence to be presented by way of a statement from Mr Kosmynka. The Class Representative does not suggest that she is unable to deal with the statement in her preparation for trial,

which is scheduled to commence in early January 2025.

4. It is not necessary at this stage to get into the questions of the procedural adequacy of the statement or the relevance or admissibility of any part of it. Those matters are to remain open for further discussion at trial, should the Class Representative wish to pursue them.

5. It is however appropriate for the Class Representative to have the opportunity to pursue further disclosure and to put in responsive evidence from Dr Lee, if so advised, to which Apple does not resist.

Ben Tidswell
Chair of the Competition Appeal Tribunal

Made: 24 September 2024
Drawn: 24 September 2024