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 Class Representative's application to the Tribunal dated 30 October 2024 for *inter alia* the admission of Mr James Walker and Mr Kevin Jenkins into the Outer Confidentiality Ring established pursuant to the Re-Amended Confidentiality Ring Order drawn on 23 October 2024 (the "Re-Amended CRO")

AND UPON the Class Representative's Renewed Application (the "Renewed Application") to the Tribunal dated 18 December 2024 requesting that an Order be drawn in this form

AND UPON reading the letter from the Defendants' solicitors to the Tribunal dated 20 December 2024

AND HAVING REGARD TO the Tribunal's powers under the Competition Appeal Tribunal Rules 2015

IT IS ORDERED THAT:

1. Upon provision by the Class Representative of Part D undertakings signed by each of Mr Walker and Mr Jenkins and an updated Part A (as referred to in the Re-Amended CRO) to the Defendants, each of Mr Walker and Mr Jenkins:

    1.1. shall be admitted as Outer Confidentiality Ring Members; and

    1.2. shall undertake to the Tribunal not to provide any form of advisory or consultative services to app developers or in relation to app development for a period of 5 years from the final conclusion of the App Store Proceedings.

2. Each of Mr Walker and Mr Jenkins shall access documents containing Outer Confidentiality Ring Information only:

    2.1. via a secure platform, access to which is via log-in credentials provided to Mr Walker and Mr Jenkins for their own use only (such access will be on a read-only basis with no possibility for Mr Walker or Mr Jenkins to download and/or print documents);

    2.2. via hearing bundles during hearings before the Tribunal for use during the hearing only; and/or

    2.3. in person under the supervision of a solicitor or counsel who is a member of the Outer Confidentiality Ring on a read-only basis with no possibility for Mr Walker or Mr Jenkins to copy and/or reproduce documents.

3. The costs shall be costs in the case.

4. There be liberty to apply.

REASONS

1. The Class Representative seeks to add members of her Consultative Group to the Outer Confidentiality Ring. This application was made, and opposed by the Defendants, at the Pre-Trial Review ("PTR") in these proceedings, on 15 November 2024. At that

time, the Tribunal indicated that it was minded to grant the order, subject to the provision of a further undertaking (that is, additional to the existing undertakings in the Re-Amended CRO) from Mr Walker and Mr Jenkins. The purpose of that further undertaking was to address concerns expressed by the Defendants that Mr Walker and Mr Jenkins might inadvertently use confidential information in the course of ongoing advisory work for entities which are developing or have developed iOS apps.

2. The Defendants continue to object to the revised undertaking (reproduced above at 1.2 of the Order) on the basis that Mr Walker and Mr Jenkins remain free, under the revised undertaking, to provide advisory or consultative services to organisations developing or operating iOS apps. The Defendants say the distinction between advising on app development and advising entities which have iOS apps is artificial and allows for the possibility of inadvertent use of confidential information. They rely on the example of a previous advisory role held by Mr Jenkins to demonstrate the artificiality of the distinction.

3. At the PTR , the Tribunal invited the parties to comment on the decision of the Court of Appeal in *One Plus Technology (Shenzen) Co. Ltd and ors v Mitsubishi Electric Corporation and another* [2020] EWCA Civ 1562 ("*One Plus*"). In paragraph 39 of his judgment, Floyd LJ summarised the key points arising from the relevant authorities:

> "39. Drawing all this together, I would identify the following non-exhaustive list of points of importance from the authorities:
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> i) In managing the disclosure of highly confidential information in intellectual property litigation, the court must balance the interests of the receiving party in having the fullest possible access to relevant documents against the interests of the disclosing party, or third parties, in the preservation of their confidential commercial and technical information: *Warner Lambert* at page 356; *Roussel* at page 49.
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> ii) An arrangement under which an officer or employee of the receiving party gains no access at all to documents of importance at trial will be exceptionally rare, if indeed it can happen at all: *Warner Lambert* at page 360: *Al Rawi* at [64]
>
> iii) There is no universal form of order suitable for use in every case, or even at every stage of the same case: *Warner Lambert* at page 358; *Al-Rawi* at [64]; *IPCom 1* at [31(ii)].
>
> iv) The court must be alert to the fact that restricting disclosure to external eyes only at any stage is exceptional: *Roussel* at [49]; *Infederation* at [42].
>
> v) If an external eyes only tier is created for initial disclosure, the court should remember that the *onus* remains on the disclosing party throughout to justify that designation for the documents so designated: *TQ Delta* at [21] and [23];
>
> vi) Different types of information may require different degrees of protection, according to their value and potential for misuse. The protection to be afforded to a

secret process may be greater than the protection to be afforded to commercial licences where the potential for misuse is less obvious: compare *Warner Lambert* and *IPCom 1*; see *IPCom 2* at [47].

vii) Difficulties of policing misuse are also relevant: *Warner Lambert* at 360; *Roussel* at pages 51-2.

viii) The extent to which a party may be expected to contribute to the case based on a document is relevant: *Warner Lambert* at page 360.

ix) The role which the documents will play in the action is also a material consideration: Roussel at page 49; *IPCom 1* at [31(ii)];

x) The structure and organisation of the receiving party is a factor which feeds into the way the confidential information has to be handled: *IPCom 1* at [33]."

4. While *One Plus* was an intellectual property case, I consider that these points are of general application. In particular, it is necessary, in considering the Class Representative's Renewed Application, to balance the risk of misuse of confidential information provided by the Defendants by way of disclosure (which all parties accept is a question of inadvertent misuse) with the ability of the Class Representative to prosecute her case at trial by way of appropriate access to those documents.

5. In relation to the latter, the Class Representative has properly and sensibly included in her Consultative Group individuals with relevant industry experience who can advise her on the technical and commercial complexities which these proceedings inevitably throw up. The Tribunal considers support of that sort to be important, recognising that the Class Representative will necessarily have limitations on her experience and may need to rely on others who can give her suitable advice.

6. We were particularly interested in submissions from the parties at the PTR about sub-paragraph 39(ii) of *One Plus*, which highlights the importance of an officer or employee of a party having proper access to documents at trial, and the weight this consideration will have as against considerations of commercial confidentiality.

7. In this regard, it is reasonable to see the members of the Consultative Group as part of the Class Representative's litigation team and a valuable and important resource for the conduct of the litigation and the trial in particular. In the context of the present balancing exercise, I do not see a substantial difference between the Consultative Group members and an officer or employee of a party. I therefore attach considerable weight to the importance of the members of the Consultative Group having proper access to the key documents at trial.

8. In relation to the risk of misuse, it seems to me that the undertakings offered deal substantially with the concerns advanced by the Defendants. The limitation on advising on app development is clear and there are also mechanisms included in the proposed order which mean that Mr Walker and Mr Jenkins will not be able to retain documents or copies of them. While it is of course possible that there might be some inadvertent misuse through the means suggested by the Defendants (because of some ambiguity in the distinction between advising app developers and advising entities with iOS apps), that is in my judgment a relatively low level of risk, given the clear undertakings offered and the mechanisms to control access.

9. I therefore conclude that the proposed order and undertakings represent a proper balance between the competing interests of the parties.

Ben Tidswell	Made: 02 January 2025
Chair of the Competition Appeal Tribunal	Drawn: 02 January 2025