Neutral citation [2024] CAT 25

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1408/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

16 April 2024

Before:

BRIDGET LUCAS KC
(Chair)
TIM FRAZER
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

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

Heard remotely on 1 March 2024

RULING (KNOWN ADVERSE DOCUMENTS APPLICATION)

APPEARANCES

Tristan Jones and Mr Matthew Kennedy (instructed by Hausfeld and Co. LLP) appeared on behalf of the Class Representative.

Josh Holmes, KC, and Thomas Sebastian (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. This Ruling concerns an application made by the Class Representative ("CR") dated 15 February 2024, and considered at the fourth case management conference on 1 March 2024 ("the Fourth CMC"), for an order that the Defendants (collectively referred to as "Google") provide disclosure of "known adverse documents" ("a KAD Order"). The Fourth CMC was listed primarily to deal with matters arising in the course of disclosure. Disclosure in these proceedings ("the UK Proceedings") is to be provided in two stages, and by reference principally to various *"repositories"*, as explained in more detail below. By the time of, and during the course of, the Fourth CMC the parties managed to resolve most of their differences on the subject of disclosure, and Google is to provide further disclosure in response to various requests made by the CR. However, the CR submits that there are *"gaps"* in Google's disclosure which have been identified essentially by chance, and that a KAD Order is appropriate so as to ensure that disclosure is provided of all documents adverse to Google's case in the UK Proceedings.

B. BACKGROUND

2. By way of background, at the case management conference on 10 November 2023 ("the Third CMC"), the CR indicated an intention to make an application for *"ongoing disclosure"* whereby Google would have been ordered to disclose any *"relevant"* documents that were provided or shown to Google's solicitors in the UK Proceedings and which did not otherwise fall within a category of documents that Google has been ordered to disclose. After a discussion with the Tribunal as to the form of the relief that was being proposed, the CR indicated that the application would not be pursued on that occasion, and further consideration would be given as to the form of relief that might be sought.

3. The application is now renewed, and the order sought is in a slightly different form. The order now sought is as follows:

> "The Defendants shall provide disclosure and inspection of Known Adverse Documents. For the purposes of this paragraph, Known Adverse Documents

> shall have the meaning set out in §2 of Practice Direction 57AD to the Civil Procedure Rules.
>
> Disclosure and inspection of documents pursuant to paragraph 1 above shall be given within 10 workings day [sic] of the date on which the Defendants (or any of them) become(s) aware of the document in question. In the case of any Known Adverse Documents of which the Defendants (or any of them) became aware prior to the Fourth CMC, disclosure and inspection shall be provided by 15 March 2024."

4. The rationale for the CR's application is summarised in the CR's skeleton argument for the Fourth CMC in the following terms:

> "In a nutshell, the CR is concerned that the orders made by the Tribunal to date will not result in the disclosure of all of the most relevant documents to the CR. In that regard, one point bears emphasis: the CR makes no criticism of Google. The CR's concerns are a product of the fact that disclosure has been provided in these proceedings principally by reference to pre-existing repositories of documents gathered for different proceedings."

5. The latter is a reference to the fact that the parties agreed a two-stage disclosure process which is reflected in an order dated 15 September 2023 ("the Directions Order") made following the second case management conference. In short, it is Google that will have the vast bulk of documentation relevant to these proceedings. In broad terms, Stage 1 Disclosure was to be provided by Google by reference to certain relevant *"Repositories"* as identified in Google's Disclosure Report and by reference to certain custodians and the application of certain search terms (including supplemental custodians and search terms requested by the CR). The Third CMC was fixed in order to address any issues arising in relation to the Stage 1 process, including any additional custodians and search terms to be applied. Stage 2 Disclosure requires Google to conduct further searches by reference to any supplementary disclosure requests submitted by the CR following the provision by Google of its Stage 1 Disclosure.

6. In summary, Stage 1 Disclosure has been provided by Google in these proceedings as follows:

   (1) Google has provided disclosure of documents from *"Repository 1"* by reference to 44 custodians. Repository 1 is a repository of documents gathered for production to the plaintiffs in the US Proceedings. The

custodians from whom disclosure has been given from Repository 1 were originally identified for the purposes of the US Proceedings, and no further relevance review of documents in Repository 1 has been carried out by reference to the UK Proceedings. Approximately 2m documents have been disclosed to the CR from Repository 1.

(2) Google has provided disclosure of certain custodial documents from *"Repository 2"* by reference to 14 custodians. Repository 2 is comprised of documents gathered for the purposes of the UK Proceedings. The 14 custodians are a sub-set of the 44 custodians in respect of whom Repository 1 disclosure has been given. Search terms were applied to the documents gathered, and the documents were reviewed for relevance to the UK Proceedings.

(3) Google has provided disclosure of relevant, non-privileged documents from *"Repository 4"*. Repository 4 is comprised of *"Google documents produced in Case AT.40099, Google Android."*

(4) Google has provided disclosure of relevant documents from Repositories 3, and 5–7. Repository 3 comprises *"Relevant submissions made by Google to the UK Competition and Markets Authority in relation to its Mobile Ecosystems Market Study"*. Repository 5 to 7 comprise *"Pre-existing Google documents produced in EC investigation concerning Google Play commenced in May 2022"*, *"Pre-existing Google documents produced in CMA investigation commenced on 10 June 2022"*, and *"The Google Play Store Terms of Service"* respectively.

(5) Google has provided disclosure of relevant documents from Repositories 8 to 11, which comprises *"Payment Processor Contracts / Merchant Services Agreements"*, *"Contracts and agreements with OEMs, developers and other third parties"*, *"UK Google Play transaction data"*, and *"UK Play financial data"*, respectively.

(6) Google has also disclosed in Stage 1 certain other additional documents and data on an ad hoc basis, in response to requests made by the CR.

7. Repository 12 is described in the following terms: *"Once the number of experts, fields of expertise and list of issues for the experts have been identified and agreed, the parties will liaise to discuss any additional repositories of data required."* Repository 12, perhaps unsurprisingly given its conditional scope, did not formally form part of either Stage 1 or Stage 2 and was not referred to in the Directions Order. The list of issues for experts was finalised at the Third CMC. By letter dated 2 February 2024, the CR then requested updated versions of all relevant datasets disclosed to date in the UK Proceedings. Google responded by letter dated 13 February 2024 identifying (by reference to Repository 10) the UK Google Play Transaction Data that had been provided, confirming that it would be updated, and stated that Google anticipated disclosing various additional and expanded datasets, whether by way of Stage 2 Disclosure, or under Repository 12. The *"Stage 2"* disclosure process is ongoing.

8. The CR maintains that, as the disclosure process has progressed, a number of *"gaps"* have been identified. However, because the process has its origins in the provision of documents for the purposes of other proceedings, it is not necessarily the case that these *"gaps"* can be addressed by means of specific requests for disclosure at Stage 2. The CR submits that the *"gaps"* have come to light, essentially by chance, and that the concern is that there may be categories of potentially relevant documents that the CR will simply be unaware of, and therefore not know to seek by way of supplemental request. In other words, there may be (as far as the CR is concerned) *"unknown unknown"* categories of documents relevant to, and potentially adverse to, Google's case in these UK Proceedings.

9. Google's position is essentially threefold: First, a KAD Order would not achieve anything useful in the circumstances of this case. That is because it is very unlikely to unearth additional documents and data required to resolve the case fairly. Secondly, the Tribunal can have confidence that those documents and data have been, and will be, captured by the existing disclosure exercise which

has been substantial. The CR's allegations that gaps have been found in the existing regime are not well-founded. Thirdly, this is not a simple and costless addition to the existing disclosure regime. It would involve a burdensome and challenging further process of enquiry, covering a large and indeterminate number of people, notwithstanding the fact that it does not entail a primary obligation to search for documents. Given the lack of benefit or need for it, the exercise is disproportionate.

C. THE LAW

10. In relevant part, §2.7 of Practice Direction 57AD – Disclosure in the Business and Property Courts ("PD57AD") reads as follows:

> "[…]
>
> 2.2 For the purpose of disclosure, the term "document" includes any record of any description containing information. The term is further defined below.
>
> […]
>
> 2.5 A "document" may take any form including but not limited to paper or electronic; it may be held by computer or on portable devices such as memory sticks or mobile phones or within databases; it includes e-mail and other electronic communications such as text messages, webmail, social media and voicemail, audio or visual recordings.
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> 2.6 In addition to information that is readily accessible from computer systems and other electronic devices and media, the term "document" extends to information that is stored on servers and back-up systems and electronic information that has been 'deleted'. It also extends to metadata, and other embedded data which is not typically visible on screen or a printout.
>
> 2.7 Disclosure extends to "adverse" documents. A document is "adverse" if it or any information it contains contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute, whether or not that issue is one of the agreed Issues for Disclosure.
>
> 2.8 "Known adverse documents" are documents (other than privileged documents) that a party is actually aware (without undertaking any further search for documents than it has already undertaken or caused to be undertaken) both (a) are or were previously within its control and (b) are adverse.
>
> 2.9 For this purpose a company or organisation is "aware" if any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the case, or for the conduct of the proceedings, is aware. For this purpose it is also necessary to take reasonable steps to check the position with any person who has had such

> accountability or responsibility but who has since left the company or organisation."

11. The CR proposes that the words *"whether or not that issue is one of the agreed Issues for Disclosure"* are omitted from §2.7 because there are no *"agreed Issues for Disclosure"* in this case.

12. Paragraph 3.1(2) makes clear that the duty to disclose known adverse documents, unless they are privileged, exists regardless of whether or not any order for Extended Disclosure pursuant to paragraph 8, is made. Paragraph 3.3 provides that the duty is a continuing one.

13. Mr Kennedy, representing the CR on this application, referred us to the commentary in the White Book relating to PD57AD which reflects the fact that the disclosure scheme is intended to reflect a new, proportionate and targeted approach to disclosure.

14. Mr Holmes KC, representing Google, drew our attention to *Castle Water Limited v Thames Water Utilities Limited* [2020] EWHC 1374 (TCC). The dispute between the parties arose out of the sale by the defendant to the claimant of its non-household and sewerage retail business. Disclosure in that case was being undertaken by reference to a List of Issues for Disclosure prepared under PD51U (being the pilot scheme introduced prior to the introduction PD57AD). Mr Justice Stuart-Smith referred to various aspects of the pilot scheme, and at [8] considered the concept of *"adverse"* and *"known adverse"* documents:

> "8. The one area where there is as yet an absence of authoritative clarification and which may not be common ground is that of "adverse" and "known adverse" documents. A party is under an obligation once proceedings are commenced against it to disclose known adverse documents, regardless of any order for disclosure made, unless they are privileged: paragraph 3.1(2). This is described in the Practice Direction as a continuing obligation. The obligation arises under Models A and B, and is expressly mentioned as applying to known adverse documents "arising from a search directed by the Court" under Models C, D and E.
>
> 9. Paragraphs 2.7, 2.8 and 2.9 of the Practice Direction lay down that "a document is "adverse" if it or any information it contains contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute". "Known adverse documents" are documents that a party is "actually aware (without undertaking any further

> search for documents than it has already undertaken or caused to be undertaken) both (a) are or were previously within its control and (b) are adverse." For this purpose "a company or organisation is "aware" if any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the case, or for the conduct of the proceedings, is aware."
>
> 10. The question then arises what the obligation of a party may be to discover whether it has any "known adverse" documents that must be disclosed. Paragraph 2.9 states that "for this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation." This provision, taken in conjunction with the fact that there needs to be a degree of assurance that adverse documents will not simply be ignored or buried, leads to the conclusion that a party is obliged to take reasonable steps to check whether it has any known adverse documents. The Practice Direction gives no guidance on what has to be done to amount to "reasonable steps to check" and the specific steps to be taken will be fact and context sensitive. However, it may be asserted with some confidence that, in a case of any complexity at all or an organisation of any size, reasonable steps to check whether a company or organisation has "known adverse documents" will require more than a generalised question that fails to identify the issues to which the question and any adverse documents may relate. Similarly, it will not be sufficient simply to ask questions of the leaders or controlling mind of an organisation, unless the issue in question is irrelevant to others."

15. PD57AD applies to disclosure in the Business and Property Courts (PD57AD, paragraph 1.1). It does not apply to competition claims in the High Court. Nor does PD57AD apply to disclosure in the Tribunal. Disclosure in the Tribunal is dealt with in Rules 60 to 65. In particular, for present purposes, Rule 60(2)(b) provides that, unless the Tribunal otherwise thinks fit, the Tribunal shall decide at a case management conference *"having regard to the governing principles and the need to limit disclosure to that which is necessary to deal with the case justly, what orders to make in relation to disclosure"*. The governing principles require the Tribunal to seek to ensure that each case is dealt with justly and at proportionate cost. That includes ensuring that the parties on an equal footing; dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party; and ensuring that it is dealt with expeditiously and fairly. Rule 60(3) provides that the Tribunal may at any point give directions as to how disclosure is to be given, and in particular: *"(a) what searches are to be undertaken, of where, for what, in respect of which time periods and by whom and the extent of any search for electronically stored documents"*. Rule 60(6)

provides that any duty of disclosure continues until the proceedings are concluded.

16. The Tribunal's Guide to Proceedings provides that: *"Disclosure in proceedings before the Tribunal is not automatic and proceeds on the order or direction of the Tribunal"* (paragraph 5.86). This is an area in which the Tribunal will expect the parties to pay close attention to the requirement of co-operation in Rule 4(7), and to the need to devise a sensible and practical approach to the conduct of the proceedings. The purpose of disclosure is to obtain documentary material that assists in determination of the issues raised by the statements of case, and it is *"not to be used as a weapon in a war of attrition"*. (paragraph 5.87).

17. We accept that, in principle, it is within the Tribunal's jurisdiction to make an order that requires a party to disclose *"known adverse documents"*. However, it is clear that, unlike the regime provided for under PD57AD, such disclosure is not a requirement in all cases. The question for the Tribunal remains whether or not it is appropriate to make such an order in the circumstances of each case, and in particular, whether it is necessary in order to deal with the case justly and at proportionate cost in accordance with Rule 4.

18. In the course of the Fourth CMC, the CR referred us to an order made by Mr Justice Roth on 16 May 2023 in *Infederation v Google LLC and others* ("the Foundem Order"). The order was lengthy and detailed, and addressed various case management matters including amendment, and the provision of further information and disclosure by both the claimant and defendants. In particular, paragraphs 19 to 21 dealt with *"other disclosure"* to be provided by the defendants in two tranches. In relation to either tranche, to the extent that a search was involved and had been confined to the documents of certain individuals, the defendants were to explain their roles and responsibilities and the basis upon which they were selected. Paragraph 20 set out the disclosure to be provided in the first tranche. Paragraph 21 set out in sub-paragraphs (a) to (k) the disclosure to be provided in the second tranche. Sub-paragraphs 21(a) and (b) related to a proprietary tool referred to by the defendants as *"Penaltyserver"*. Paragraph 21(a) required disclosure of certain Penaltyserver files for the period 1 January 2009 to 30 April 2011. Paragraph 21(b) required

the defendants to search for and disclose: *"Any known adverse documents relating to whether the search rankings of Foundem and/ or any of the third parties listed in Annex B, were adversely affected by any adjustment algorithm or manual demotion or blacklisting"* between the same dates. Of the *"other disclosure"* to be provided, therefore, only paragraph 21(b) referred to a search being required for *"known adverse documents"*.

19. After the hearing, Google wrote to the Tribunal by letter dated 5 March 2024, and made the following submissions in relation to the Foundem Order: (1) the KAD order made in the case was limited to a single standalone issue relating to a factual question on the operation of an algorithm (not in connection with Google's disclosure more generally); (2) no disclosure had previously been ordered in connection with that issue. Google offered KAD based disclosure in place of any other disclosure order on the specific issue; (3) Google offered (and the Court ordered) KAD disclosure on the basis that it was a more manageable alternative to making search-based disclosure, which was unlikely to yield relevant material and would therefore be disproportionate; and (4) the KAD obligation was kept within limited and proportionate bounds, such that investigations were ordered to be made of only 12 named individuals specifically identified as relevant to the issue, and covered only a defined period of time. This, Google says, is not comparable to the wide-ranging obligation that the CR seeks to impose in these proceedings.

20. We agree. The order made in that case is of no assistance to us in determining whether an order in the (different) terms sought by the CR should be made in this case. Whether a wide-ranging obligation, in the terms sought by the CR, is appropriate in the circumstances of this case is the matter to which we will now turn.

D. THE CR'S APPLICATION

21. The CR relies on four matters in relation to which *"gaps"* have been identified in Google's disclosure, in support of the submission that a KAD Order is necessary and appropriate in this case. Google, on the other hand maintains that, properly analysed, the four issues do not demonstrate any gaps in Google's

disclosure. On the contrary, they demonstrate that the disclosure process is working well.

22. The four matters are:

(1) Documents said to have been *"missing"* from Repository 1 disclosure;

(2) The *"late"* identification by Google of two new custodians;

(3) The disclosure in relation to expert evidence on behavioural issues; and

(4) The identification from documents in the disclosure already provided by the CR of new *"project names"*.

(1) Repository 1

23. The CR refers to a concern as to whether or not Google's disclosure in relation to Repository 1 was adequate. As we have outlined above, the disclosure that Google offered to provide in relation to Repository 1 was disclosure by reference to the discovery provided in the US Proceedings. In total, around 2 million documents have been disclosed in the UK Proceedings in relation to Repository 1.

24. We were referred by Google to a letter to the CR dated 3 May 2023. Annex 3 to that letter summarised the approach to discovery adopted in the US Proceedings. In particular, Google referred to (1) there having been twelve rounds of requests for production in the US, involving over 300 requests; (2) the negotiations relating to the identification of central repositories, relevant custodians, date ranges and search strings; (3) the identification of 44 custodians, and application of 93 complex search strings across those custodians and in relation to various applicable date ranges between 1 January 2007 and 9 May 2022; and (4) the application of additional search strings. Approximately 48.1m documents were collected from the 44 custodians. Applying the search terms reduced this to 6.2m unique documents which were then manually reviewed by 400 reviewers

for relevance, confidentiality and privilege. A total of 3m documents were then produced in the US Proceedings.

25. Google's discovery in the US Proceedings included documents that related to other proceedings involving different parties, and which were not collected for the purposes of the claims brought in the US Proceedings. These are referred to as the *"State AG Materials"*, and *"the Callsome Materials"*. Google explained to the CR that it would not produce those documents because they were not relevant to the claims brought in the UK Proceedings.

26. The CR accepted Google's proposal to produce disclosure by reference to the documents produced for the US Proceedings, i.e. Repository 1: we are told by the CR that this was in order to avoid arguments as to of whether or not disclosure was under-inclusive. At the Third CMC, the CR, in addition, sought disclosure of the expert reports in the US Proceedings. The CR submits that one of the reasons it pressed for the expert reports was to assist its review of the 2 million or so Repository 1 documents, and the ability to identify immediately relevant documents. Initially, it was only Google's expert reports that were provided, although redacted versions of the plaintiff expert reports in the US Proceedings have also now been disclosed.

27. The CR says that, on review, it was apparent that various documents referred to in those expert reports were missing. On 12 January 2024, the CR wrote to Google saying that 200 documents referred to in the expert reports could not be found. On 24 January 2024, Google responded providing references in the existing Repository 1 disclosure for some, but not all, of the documents identified by the CR. The CR then wrote on 30 January 2024 asking for an explanation as to why the missing documents had not been disclosed, enclosing a list of 700 documents referred to in Google's expert reports that the CR had not been able to identify in disclosure. Google responded on 15 February 2024 noting that Google had explained, and the CR had accepted, that Repository 1 disclosure would not consist of the entirety of the US Production, but confirmed that it would search for and provide the specific documents identified by the CR.

28. The CR wrote again to Google on 19 February 2024, stating that the only agreed exclusions from the US Proceedings disclosure were the Callsome and State AG materials, and raising further queries as to why the document population had decreased from 3 million produced in the US Proceedings to 2.2 million in the UK Proceedings (the figure is in fact nearer 2 million).

29. Google responded on 29 February 2024 (the day before the Fourth CMC) and sought to explain the steps in the disclosure process that had been applied in relation to Repository 1. In particular, Google explained that the State AG Materials and Callsome Materials totalled approximately 800,000 documents; that the US production included documents form the EC Android Proceedings, which had been disclosed separately in the UK proceedings (under Repository 4); and that the balance of the US production contained *"non-custodial"* discovery specific to the US Proceedings including agreements, data and publicly available documents. Mr Holmes explained that non-custodial disclosure from Repositories 3 to 12 was prepared on a bespoke basis for the purposes of the UK Proceedings.

30. Google expressed its willingness to disclose the non-custodial disclosure from the US Production (said to total around 160,000 documents) without further review by Google in order to allay the CR's concerns. Google also informed the CR that it had ascertained that the documents yet to be disclosed from the expert reports totalled 264 unique documents after de-duplication (not 700), and consisted of contracts, datasets, and publicly available information. Google suggested that the non-custodial documents such as contracts and datasets which were relevant to the UK Proceedings are the subject of Repositories 8 to 11.

31. From the CR's perspective, Google's explanation raised more questions than it answered. The CR's concerns were set out in the CR's letter in response, also dated 29 February 2024. The CR highlighted that there was an *"unexplained and arbitrary distinction between custodial and non-custodial documents"*, and an *"extreme information asymmetry"*, and complained that Google's responses were *"opaque"*. The CR sought urgent information in relation to what Google referred to as *"non-custodial"* documents, and further information relating to

the 264 unique documents. In the course of submissions at the Fourth CMC, Mr Holmes sought to answer these questions and to explain and clarify aspects of Google's approach to disclosure. Google has agreed to provide a written response to the queries raised in the CR's letter of 29 February 2024. The CR reserves her position in relation to the further non-custodial disclosure until there has been an opportunity to consider Google's explanation and response, and the implications of receiving disclosure of a further 160,000 documents.

32. Specifically, as regards the *"missing"* documents referred to in the expert reports, the CR submits that the fact that these have come to light does not mean that the disclosure process is working. This is because: (1) the process by which these documents were identified was not as a result of reviewing Repository 1 documents, but instead as a result of the review of the expert reports, disclosure of which was provided separately to Repository 1 and in response to the CR's request; and (2) whilst certain plaintiff expert reports in the US Proceedings have been identified by the CR, they are heavily redacted. This is said to give rise to a concern because the US plaintiffs' expert reports are those most likely to refer to documentation and information adverse to Google, and potentially useful to the CR's case in the UK Proceedings.

33. In any event, the CR submits that the fact that there now appears to be a clearer understanding of how Google approached Repository 1 disclosure does not remove the need for a KAD Order. The CR accepts that the documents which still appear to be *"missing"* may be included in the non-custodial documentation that Google has agreed to disclose. However, there is a more general concern: that, as a result of the process adopted to disclosure in this case and, in particular, the fact that disclosure has been given by reference to documents collected for the purposes of other proceedings in other jurisdictions, there is a risk that *"gaps"* will arise. In other words, just as some documents relevant to the US Proceedings may not be relevant to the UK Proceedings, documents relevant to the UK Proceedings may not have been identified as relevant to the US Proceedings, and therefore will not come to light from Repository 1 or be disclosed in relation to the other Repositories either. The provision of the 160,000 non-custodial documents disclosed in the US Proceedings will not necessarily *"plug"* gaps in the disclosure of adverse documents specifically

relevant to the UK Proceedings. The CR suggests that a KAD Order would sweep up such *"unknown unknown"* documents.

34. Google submits that, on the contrary, the identification of the *"missing"* documents is an example of the disclosure process working. In relation to the general concern about the process adopted in this case, Google submits that, whilst the documents were identified for the purposes of other proceedings (and in particular, the US Proceedings), the UK Proceedings were inspired by, and reflect the issues that arise in those other proceedings. The documents were therefore collected with the relevant issues that arise in these proceedings very much in mind. In relation to the further documents the CR suggests are missing by reference to the expert reports, these have either already been disclosed by Google or, as regards the 264 documents yet to be disclosed, Google will search for and provide them. The CR had expressly agreed (at least at this stage) not to seek the expert reports submitted by the Plaintiffs in the US Proceedings (due to issues relating to third party confidentiality). Whilst there were documents referred to in the expert reports that were not disclosed from the US production, a number of these were agreements and data specific to the US Proceedings. As to that, the analogous relevant documents to the UK Proceedings have been disclosed in the various categories of non-custodial disclosure provided by reference to other repositories.

(2) New Custodians

35. This issue arises from a concern on the part of the CR as to whether or not the relevant custodians had been identified by Google, and the possibility that Google might seek, at a relatively late stage, to adduce factual evidence from persons not previously identified as a custodian of documents, and that evidence would be given by reference to documents that had not previously been disclosed. The CR asked Google to identify potential *"non-custodian"* factual witnesses. In response, Google identified two: Mr Rawles and Mr Byers. Google also stated that it had collected their custodian materials, and would provide disclosure, subject to the application of key search terms and a privilege and relevance review. 1,180 or so documents have been disclosed as a result of

this exercise, some of which have not previously been disclosed by Google in response to searches of other disclosure repositories.

36. Neither Mr Rawles nor Mr Byers were identified by the CR as a result of a review of documents disclosed in Stage 1. The CR suggests that this is odd: if they are identified as being best placed to give evidence of fact at trial, it might be thought that they would also be those most likely to hold relevant documents. There is a further point: the CR suggests that because the disclosure relating to Mr Rawles and Mr Byers has been provided voluntarily there is currently no continuing obligation on Google to provide any potentially adverse document that might subsequently come to light from that source. Again, it is suggested, this presents a risk of non-disclosure of adverse documents that currently fall outside the disclosure order scheme.

37. Google submits that the 44 original custodians, and the 14 the subject of Repository 2 disclosure are the persons who were identified as those *"most likely to possess relevant documents"*, as previously explained. The reason why Mr Rawles and Mr Byers were not included as custodians is because they are not those *"most likely"* to possess relevant documents (which is the basis upon which the custodians were selected). Other custodians are *"those most likely"* to have the documents. They have been identified instead because they are considered to be likely to have evidence to give on certain factual matters that arise. It is anticipated that their evidence will be on particular issues such as apps and gaming, and a description of how those industries operate rather than, for example, matters relating to Google specifically. The reason for providing disclosure now in relation to their custodial documents is one of fairness to the CR.

(3) Behavioural Issues

38. There are four issues that relate to consumer behaviour in relation to the sideloading, installation and use of Apps which are to be the subject to expert evidence. The Tribunal noted at the Third CMC that any such evidence must be underpinned by reference to objective data. In the course of the Third CMC, Google's Counsel, Mr Draper said that *"just to give some comfort perhaps to*

my learned friend and those behind him, Google does anticipate disclosing a lot of data that goes to those issues". In a letter dated 16 November 2023, the CR expressed concern that this was *"the first time"* that it had been indicated that Google held this data, and noted that it had not yet been disclosed. It was said that this failure to disclose was exactly the sort of issue that had prompted the application made at the Third CMC for *"ongoing disclosure"*.

39. On 23 November 2023, Google responded identifying relevant data that had already been provided. Google referred to its disclosure report which recorded that it anticipated that there may be disclosure of further repositories of data once the expert issues had been finalised, and that it anticipated further data sets may be required. Google confirmed that, now that the areas for expert evidence had been set by the Tribunal, it would provide a further update. Google provided an update on 26 January 2024, identifying relevant datasets already disclosed; confirming its intention to provide further data relevant to certain issues; confirming that expanded versions of datasets already provided would be disclosed where available; and explaining categories of data it was unlikely to have in its possession.

40. We note that there is an element of inconsistency in the CR's submissions on this point. On the one hand, it was submitted that such data is relevant to issues on the pleadings, and as such disclosure should have been forthcoming before Mr Draper adverted to it at the Third CMC, and (therefore) before the issues for experts had been finalised. However, on the other it was submitted that the CR does not suggest that there is an existing obligation to disclose documents that has not been complied with. Rather, the problem is said to be that there is data which is relevant and ought to be disclosed that does not fall within the scope of the existing Directions Order (which does not refer to Repository 12). The existence of this data is said only to have come to light because of Mr Draper's comment made at the Third CMC. The CR makes the further point that any disclosure that is provided would be voluntary on Google's part, and therefore not subject to any ongoing disclosure obligation.

(4) Project Names

41. In the course of reviewing the Stage 1 Disclosure, the CR has identified various project names that appear to her to relate to matters relevant to these proceedings, but in respect of which no disclosure has been proposed. Google accepts that they are potentially of relevance. However, Google submits that it does not follow that documents relating to these projects are necessarily *"adverse"* to Google. They may relate to the sort of competitive actions you might expect a company subject to significant competitive constraints to undertake. In all events, Google says the projects have now been identified, and disclosure is being given in relation to them. This, Google suggests, is an example of the disclosure process working.

42. The CR submits that a KAD Order is necessary; that it would not be difficult for Google to comply with, and (relatedly) that it is proportionate. The Tribunal addresses these points in turn below.

43. Necessity: The CR submits that the fact that the parties have adopted a bespoke approach to disclosure; that standard disclosure was not ordered, and that PD57AD does not apply such that there is no list of issues for disclosure are factors in its favour. In other words, it is precisely because the disclosure has been conducted in this way that there needs to be a KAD Order to ensure that documents that might otherwise slip through the net are caught. The implication is that documents would have slipped through the net in relation to the four matters relied upon by the CR, had the *"missing documents"* not been identified, essentially by chance. The CR posited the following specific scenario: a witness might refer to a document whilst being proofed that might be adverse to Google but not fall within any of the identified repositories – and therefore fall outside the scope of the order, and any ongoing duty of disclosure. We will return to this scenario below.

44. Google submits that the four issues identified by the CR are in fact examples that demonstrate that the disclosure process is working as it should. As to whether there is any real likelihood of relevant documents slipping through the net, the key issues arising in these proceedings involve objective economic assessments of measures taken by Google. The focus at trial is likely to be on the economic value that Google adds, as well as the economic effects of

Google's measures. The content of these measures is unlikely to be in issue, and the scope for dispute as to primary fact is likely to be limited.

45. The CR says that on the contrary, there are a number of issues that will need to be determined by reference to contemporaneous documents, such as market definition and objective justification. The risk presented by missing documents is therefore a real one.

46. Difficulty: As regards the difficulty in applying the concept of *"adversity"*, the CR submits that it is a different concept to relevance. The CR accepts that if a person was to sit and think about whether a document is or is not adverse, that might present difficulty, but that is not the exercise that is required. To adopt (and adapt) Mr Kennedy's words: *"What's required is that enquiries have to be made of the relevant people and they have to have the relevant issues explained to them, the concept of adversity explained to them and shown to them, and they have to be asked if they know of the existence of any documents within Google's control that meet that definition. So it's not a review exercise that gives rise to acute difficulties … [for example] looking at a complex financial spreadsheet, [where] it's difficult to know whether it's adverse or not."*

47. Mr Kennedy submitted that PD 57AD expressly envisages that the concept of adversity is one that be applied by lay people. There is no requirement that every adverse document must be identified. Mistakes can be made, and the CR accepts that she may not get documents that are adverse because someone does not remember that they exist or that they mistakenly think that they are not adverse.

48. Google submits that the complex issues in this case do not lend themselves to a ready identification of adverse documents. Google maintains that this is not a case that will turn on disputes of primary fact – when and where a meeting took place, with whom, but rather on objective economic appraisal relating to the definition of relevant market, to an assessment of dominance, to competitive effects of terms and contractual arrangements, fairness of pricing (adjudged by reference to the relevant legal principles), and pass-on. Whilst documents and data are obviously relevant to the assessment of such issues, such an exercise of

objective assessment is not well-suited to a KAD regime, and competition claims are specifically excluded from PD57AD.

49. Proportionality: The CR says that the KAD Order is proportionate in the context of these proceedings. It is inevitable that, in a company of Google's size, the number of people to whom the obligation may attach will be greater than in the case of a smaller company, and that the steps that might need to be taken, given the complexity of the issues, are more onerous than in a more straightforward case. However, these proceedings are significant and substantial. The CR also relies on the fact that, given that disclosure has been provided by reference to previously identified repositories, Google's burden has therefore been lighter than it would otherwise have been.

50. Google submits that, at least as originally drafted, the KAD obligation applies to all those with accountability or responsibility within the organisation for the events or circumstances which are the subject of the case. This potentially extends to a large number of people, and to both existing and past employees. A potentially large number of relevant people might need to be questioned, and the questioning would require a process of education for the individuals concerned, in relation to a significant number of complex issues of economic assessment.

51. The CR points out that Google has not identified the number of people likely to be affected: if it was the 46 identified custodians (44 plus Mr Rawles and Mr Byers), then that would not be onerous. The CR would be prepared to consider an order which listed specific individuals who ought to be subject to the obligation. The CR does not accept that the process need be onerous in the sense of a bespoke process being required for each relevant person. Rather, it ought to be an exercise capable of being done by reference to a general description of the issues in the case, with more targeted enquiries being made of each person by reference to their roles and responsibilities.

52. Google's position is that the obligation that the CR seeks to impose is a substantial one, and a complicated one given the complexity of issues in this case. Google accepts that if it were a relatively straightforward task to

undertake, there might be something to be said for it, whether or not it was likely to be of any utility. However, Google submits that the task is far from straightforward. In the absence of any good justification, therefore, it would be disproportionate to require Google to undertake it. Google submits that, if the task is to be done at all, it should be focused on those providing factual evidence for Google. It could be undertaken at the time of proofing, and focused on the issues on which the witness is to provide evidence.

E. ANALYSIS

53. As we have said, PD 57AD does not apply to a competition claim, even where those cases proceed in the High Court. It plainly does not apply in the Tribunal. It seems to us that there are good reasons for this. Competition cases are frequently substantial and complicated. Expert evidence, and in particular from experts in competition economics, is generally front and central. It is important to the resolution of the key issues in dispute in terms of establishing liability and matters of causation and quantum. That is particularly so in collective proceedings where the loss arising from a claim for infringement of the Chapter I or Chapter II prohibition is established, not on an individual basis but on a class-wide basis, and on the basis of a general and class wide theory of harm. It is the experts in competition economics who will need to consider the theory of harm said to arise out of the infringement, how the infringement was causative of loss, and how loss is to be quantified. It is primarily a matter for the competition experts to articulate the methodology by which such matters are to be proved, which may also require industry expert evidence. And the experts will need to consider what evidence, qualitative and quantitative, is likely to be relevant to that methodology.

54. Disclosure in competition case is, therefore, to a significant extent an expert-led process. It is often the provision of data or information that is of importance, rather than original documentation. That is not to say that original documentation, or evidence from those in key positions in the defendant(s) or industry, is entirely irrelevant. Expert evidence must not become elevated so as to become purely theoretical and divorced from the factual reality underpinning the context in which the claims arise. Where it is relevant and available the

qualitative evidence must, of course, be reflected in the methodology put forward. However, disclosure must be proportionate. In particular, in collective proceedings cases, where the defendants are frequently substantial entities (as in this case) and the class members said to be in the millions, disclosure of every potentially relevant document is neither desirable nor realistically possible. For that reason, the parties are expected to cooperate in devising a disclosure process, and in its implementation. It is frequently an iterative exercise, with parties revisiting and honing requests and, if they are reasonable and proportionate, the recipient is expected to cooperate and provide disclosure. In the event of disputes, the Tribunal is available to resolve them.

55. In our view, to impose upon a party a general obligation to disclose known adverse documents, such as that contended for by the CR, is fraught with difficulty. It will at least require Google to check whether it has known adverse documents. That does not amount to a requirement to conduct a search for them, but we agree with Mr Justice Stuart-Smith in *Castle Water Limited v Thames Water Utilities Limited* that, if the obligation is to be meaningful, Google would be required to identify those with accountability or responsibility within the organisation for the events or circumstances which are the subject of the case, and to conduct some form of education exercise for each of those identified about the events and circumstances of the case and the parties' respective contentions. That process would require a degree of distillation of potentially complex issues relevant to the parties' respective contentions on competition economics. That is likely to be a time-consuming and onerous task.

56. Mr Kennedy submitted that the concept of adversity is one that PD57AD assumes can be understood and applied by lay people. That, with respect, simply underlines why we consider the obligation is a difficult one to impose in competition cases. We accept that there will be complex commercial cases that require the involvement of experts, in relation to which PD57AD applies. However, in a case where issues of competition economics are engaged in such a central and fundamental way so as to underpin the case methodology, and evidence is required to inform that analysis, we do not see *"adverse"* to be a straightforward concept that is easy to apply.

57. In this regard, we note that in relation to the behavioural data issue it was submitted by Mr Kennedy that if the data is adverse to Google, Google would have been required to disclose it sooner had a KAD Order been in place, notwithstanding the fact that it did not fall within the scope of the previously identified Repositories 1 to 11. But *"if"* is the operative word. As Mr Kennedy candidly submitted, he cannot say that a KAD Order would necessarily have assisted because it is not obvious whether even the data already disclosed to date is adverse or not. We also note Mr Kennedy's submission that it is only *"known"* adverse documents that would need to be disclosed, and that there would be no breach if the relevant person was unaware that they were adverse. These submissions highlight the problems with the order sought. It is difficult to see how a view could be taken by an individual within Google's organisation, or with responsibility for these proceedings, as to whether data was *"adverse"* absent a view being taken by the relevant expert(s), and even then, views may differ as between the experts for Google and for the CR. This raises serious questions as to the effectiveness of the order sought. As it happens, in the course of submissions, Google confirmed that data and information that is relevant to those issues will be disclosed if requested as part of the expert led process (and available), whether it is adverse to Google or not. This is, of course, in line with what the Tribunal would expect.

58. The CR appeared implicitly to accept that there may be difficulties with the general form of order sought. In the course of his submissions, Mr Kennedy suggested that, were the obligation to be limited to the 46 custodians previously identified (the original 44 plus Mr Rawles and Mr Byers), that would not be onerous. He went on to suggest that the CR would be prepared to consider limiting the obligation to a list of specific, named individuals to be agreed with Google.

59. A more limited form of order might, in an appropriate case, be warranted. However, we would only impose such an order if there were good grounds for doing so. We would expect there to be a degree of clarity as to the issue in relation to which known adverse documents were to be disclosed, the extent of the obligation, and as to whom it was to be applied. We note that that in the Foundem Order the issue to which the KAD obligation applied was clearly

identified, the obligation was stated to be to conduct a search, and the search was limited to those identified by the defendants as appropriate, subject to a requirement to explain the roles and responsibilities of those identified and give reasons for their selection.

60. Turning to the four specific matters identified by the CR. We do not regard any of them taken either individually or collectively, at this stage, to give rise to sufficient concern as to the likelihood of there being *"missing"* documents, or as to the way in which the disclosure process is currently working, as to amount to good grounds for making a KAD Order, even if such an order could be framed on a more limited and proportionate basis. Taking each in turn.

(1) Repository 1: Google has clearly undertaken a substantial disclosure exercise in the US Proceedings. Google sought first to explain to the CR what was proposed by way of disclosure (being proposals broadly acceptable to the CR, albeit subject to the ability to go back and seek further documents as part of the iterative process). Subsequently, Google has sought to explain what has in fact been done. It is clear that there has been a misunderstanding as far as *"non-custodial"* documents is concerned, and it is fair to say that it could perhaps have been explained more clearly at an earlier stage. It is also right to say that it is only as a result of the expert reports having been requested by the CR, and provided by Google, that the CR became aware of this *"non-custodial"* category. Google has agreed to answer the CR's questions as to what these documents are and how they relate to the disclosure that has already been provided. Google has also agreed to search for, and provide the documents identified by the CR as *"missing"* from the expert reports. Google has offered to provide the non-custodial disclosure category. As yet, it remains entirely unclear whether any of these documents can be properly categorised as *"adverse"* to Google on any issue in the UK Proceedings, or relevant and of a different nature to the disclosure already provided so as to give rise to a concern that there may potentially be other caches of documents available on the issues in dispute in the UK Proceedings. If that does transpire to be the case, then of course the

CR can bring the matter to the Tribunal's attention and may renew an application for an appropriately targeted KAD Order. However, we consider it is premature to make such an order now.

(2) New Custodians: Given that Mr Rawles and Mr Byers had been identified as two witnesses best placed to give factual evidence for Google, the fact that they had not also been identified as custodians of documents relevant to this case called for an explanation. However, in light of Mr Holmes' submission as to the areas of evidence likely to be covered; the fact that disclosure has been provided of their documents, and that no *"adverse"* documents have yet been identified by the CR, and their relevance is considered to be of a piece with other disclosure, it is difficult to see what perceived *"gap"* a KAD Order would have addressed.

(3) Behavioural Issues: We have already referred to this issue and to the fact that it is difficult to see how a KAD Order would, in practice, have led to any earlier disclosure on this issue, prior to agreement of the list of issues for experts. In any event, we consider that disclosure in relation to behavioural issues should be led by the competition economics experts. We do not consider it to have been inappropriate for Google to have taken the view that it would consider disclosure of relevant datasets after the list of issues for the experts had been considered by the Tribunal, and after the experts had had an opportunity to consider what data they would require, providing such disclosure as part of Repository 12. Mr Holmes has assured the Tribunal that Google will engage reasonably with requests for data, and we note that certain information as to what data Google does and does not hold has already been provided. Mr Holmes has also confirmed that where various categories of data and information are identified as being relevant and required, they will be provided whether or not it might be considered to be *"adverse"* to Google. If the process proves unproductive from the CR's perspective, it is of course open to the CR to come back to the Tribunal.

But as matters stand, we see no reason to make a KAD Order at this stage.

(4) Project Names: The fact that the CR has been able to identify a few project names or acronyms that were not on a list of projects initially provided by Google does not, to our mind, warrant the imposition of a KAD Order. We note that (1) the CR has been able to identify them; and (2) Google is going to search for them and provide disclosure of relevant documents. If, when the documents are disclosed, they are materially relevant and there are real grounds for concern as to why they were not disclosed sooner, then the CR may revisit this issue. However, in the first instance, we consider this to be an example of the iterative disclosure process working as it should.

61. The CR submits that it is too early to say that a KAD Order would serve no useful purpose because, unless and until the promised disclosure has been provided and the CR has had the opportunity to review the documents to be provided by Google, the CR will not be able to say whether there are any adverse documents within them that would otherwise not have come to light. In other words, it is too early for Mr Holmes to suggest that there would be no utility in the Order. We look at this issue from the other end of the telescope. In light of the ongoing disclosure exercise, and the iterative process that is unfolding, including in relation to any requests made by the experts for data, information or evidence, it is too early to say that a KAD Order is necessary. That is particularly so in relation to the general form of order sought, and where no alternative, more focused, form of order has been proposed.

62. There is a further ground on which the CR suggests that a KAD Order is appropriate. The CR submits that, because disclosure is to be provided by reference to pre-existing repositories of documents, the effectiveness of the duty to provide ongoing disclosure under Rule 60(6) is limited. As we have said, Mr Kennedy posited the example of a witness in the process of being proofed, referring to a document which was adverse to Google's case, but that document did not fall within any of the repositories identified in the Directions Order by reference to which disclosure is to be given. In that situation, it is said, the

ongoing duty of disclosure would not bite because the document would not fall within the existing obligation to provide disclosure. Another example of where the ongoing duty would not apply is where, instead of being provided specifically in relation to a defined Repository, disclosure was provided in response to a specific request made by the CR: the provision of expert reports by Google on a voluntary basis being a case in point. The CR suggests that the only circumstances in which the duty to provide ongoing disclosure would apply is if, for some reason, a document within one of the repositories had been miscategorised as irrelevant. In those limited circumstances, upon its relevance being realised, it would fall under the obligation to disclose relevant documents identified within one of the repositories.

63. Mr Holmes addressed the first example: that of a witness referring to a document in the course of being proofed. As regards the hypothetical scenario relied upon by the CR, Google relies upon paragraph 3.2 of Practice Direction 2/2021: Trial/ Appeal Witness Statements in the Competition Appeal Tribunal. That provides that a witness statement must list the documents to which a witness has referred, or has been referred to. Mr Holmes confirmed that it was Google's view that this extended to documents identified by the witness during the process of being proofed. Further, Google has confirmed that it will make enquiries of the factual witnesses who are proofed to give evidence as to whether they are aware of any adverse documents in relation to the matters covered by their evidence, and that they will disclose any such documents within a reasonable period.

64. As regards the second point, parties to competition cases are expected to cooperate with the Tribunal to give effect to the governing principles, and that includes in relation to disclosure. The scope of disclosure frequently changes as the disclosure exercise progresses. In many instances, whether or not its scope should be refocused or extended is a matter that is, quite rightly, negotiated and agreed as between the parties, without troubling the Tribunal, and without being formally recorded in an order. We would be surprised if parties considered that the duty to provide ongoing disclosure was limited solely to issues or categories of documents specifically, and expressly identified in an order, and did not apply to aspects of disclosure agreed as between the parties themselves.

65. It will obviously turn on the facts of each case, and the terms agreed between the parties as to the scope of the disclosure to be provided in response to a request, including the extent of any search, or the time period involved. We have not heard argument specifically on the point, but it seems to us that there is at least an obligation on a party to provide disclosure (subject, of course, to privilege) if a party becomes aware of documents where, if disclosure were not made, that would render documents disclosed on a voluntary basis misleading.

66. We appreciate that the CR's application was made in order to protect against the possibility that there may be documents that the CR is unaware of and therefore is unable to frame an application for disclosure in relation to, but which go to one of the (many) issues arising in this case. However, it seems to us that this is the CR's claim on behalf of class members. Even accepting that there is information asymmetry in cases such as the present, the CR, in consultation with the experts, ought to be well-placed to identify the issues and the elements of the case that must be established, and the evidence including in terms of disclosure and data, likely to be required to prove it. The CR is able to explore with Google the information and documentation that is likely to be available. The CR is obviously able to apply to the Tribunal should the need arise if responses are unsatisfactory. In particular, the CR may apply if there are issues arising in the UK Proceedings on which disclosure is required that has not yet been provided. This is so, not least because if there are evidential *"gaps"* in the CR's case then it will be necessary for the Tribunal to consider how best to address them.

67. On the basis that Google has confirmed that it will ask its witnesses whether or not they are aware of any known adverse documents, we therefore refuse the CR's application. The CR has permission to reapply should further concerns arise in relation to the possibility of there being *"missing"* documents or *"gaps"*. However, for the reasons we have given, if such an application were to be made, we would expect it to be more focused, and for the CR to consider (including with Google in the first instance) how such gaps or missing documents might proportionately and reasonably be addressed, whether by defining what exactly the issue is in relation to which the concern arises, or those who it is considered should be subject to the obligation, or in some other

way. If such an order is to be meaningful, the parameters of what it is that Google is being asked to do should be clearer than they are now.

68. This Ruling is unanimous.

Bridget Lucas KC
Chair

Tim Frazer

Professor Michael Waterson

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

Date: 16 April 2024