Neutral Citation Number: [2015] EWHC 3705 (Ch)

Case No: HC-2012-000023

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building
Royal Courts of Justice
London, EC4A 1NL

Date: 17/12/2015

Before :

MR JUSTICE ROTH.

- -

Between :

INFEDERATION LIMITED	**Claimant**
- and -	
(1) GOOGLE, INC	
(2) GOOGLE IRELAND LIMITED	
(3) GOOGLE UK LIMITED	**Defendants**

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MS. HELEN DAVIES QC and **MR. DAVID BAILEY** (instructed by **Hausfeld & Co LLP**) for the **Claimant**
MR. JON TURNER QC and **MR. ROBERT O'DONOGHUE** (instructed by **Bristows LLP**) for the **Defendants**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ROTH.

Mr Justice Roth :

Introduction

1. In these proceedings, the claimant ("Foundem") alleges that the defendants ("Google") have abused a dominant position contrary to article 102 of the Treaty on the Functioning of the European Union and the Chapter II Prohibition in section 18 of the Competition Act 1998. At the same time, the European Commission ("the Commission") has opened proceedings investigating a potential infringement of article 102 against the first defendant (which for convenience I shall also refer to as "Google"). It is common ground that there is substantial overlap between the present proceedings and the Commission proceedings. Foundem has applied pursuant to CPR rule 31.22(1)(b) for permission to use documents disclosed by Google in these proceedings so that it may send the Commission a detailed analysis which it has prepared of those documents.

2. This application was to be heard along with a significant number of other matters at a CMC held on 10 December. Since the parties were able to resolve all the other matters in a manner approved by the Court, they sensibly agreed that this outstanding application should be determined on the basis of their written evidence and Counsel's skeleton arguments without further oral submissions.

Background

3. These proceedings were commenced on 22 June 2012. At that time, the Commission was investigating the possibility that certain practices of Google infringed article 102, following complaints from a number of companies including Foundem. However, no formal proceedings by the Commission against Google had yet been initiated.

4. On 26 July 2013, I made the first of two orders for disclosure. Among the documents which Google was ordered to disclose were the pre-existing documents which it had supplied to the Commission in connection with the Commission's ongoing investigation.

5. Because of the possible overlap between the allegations made in the present proceeding and the matters being considered by the Commission, and in view of the restrictions placed on national courts in such circumstances by article 16 of Council Regulation 1/2003, with the consent of both sides I addressed a request to the Commission for information as to the potential scope of any contemplated decision. Following the helpful response from the Commission and further submissions by both sides, I decided on 1 April 2015 that this matter could not proceed to trial, as originally listed, in February 2016. At that stage, it was unclear whether the Commission would resolve its investigation by accepting commitments from Google under article 9 of Regulation 1/2003 or proceed to issue a statement of objections ("SO") initiating formal proceedings. In order to keep a trial period in reserve, dependent on the progress of the Commission investigation, the trial date was re-fixed for July 2016. See my judgment at [2015] EWHC 1824 (Ch).

6. Subsequently, on 15 April 2015, the Commission issued an SO addressed to Google. On 27 August 2015, Google responded to the SO. In the light of these developments, the parties agreed that the trial could not proceed in July 2016 and that date has

accordingly been vacated, with a further CMC listed instead to take stock of the position in the light of an anticipated decision by the Commission.

7. Following the order of 26 July 2013, Google disclosed 678 documents, almost all of which were derived from the pool of documents that had been provided by them to the Commission. Having reviewed the documents, Foundem prepared an initial and detailed analysis of their contents ("the Analysis"). On 2 April 2014, Foundem provided a copy of the Analysis to Google.

8. Foundem has had a number of discussions with the Commission case team. It told them about the Analysis and that it believed that the Analysis would assist the case team in understanding certain key documents. It is therefore hardly surprising that the Commission case team expressed interest in seeing the Analysis. That was confirmed on 16 October 2015 in an email from the Head of the relevant unit at DG Competition. On 7 December 2015, he wrote a further email reiterating the Commission's interest in seeing the Analysis and asking for an update on the matter.

9. Google has confirmed to Foundem that all but a very small number of the documents referred to in the Analysis are already before the Commission: the exceptions relate to some Foundem-specific documents. However, when asked to consent, Google objected to Foundem disclosing the Analysis to the Commission.

10. Foundem has therefore applied to the court for permission to send the Analysis to the Commission. For the purpose of its application, it has agreed to redact any reference in the Analysis to documents that had not already been supplied by Google to the Commission. Accordingly, this application does not involve the supply of any documents received on disclosure to the Commission but of an analysis and commentary on the documents which the Commission already has in possession.

The Law

11. CPR rule 31.22 provides:

> "(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where-
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> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
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> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree."

12. This provision effectively codifies what has sometimes been referred to as the "collateral purpose rule" that previously applied at common law.[1] CPR 31.22 constitutes a complete code: see *SmithKline Beecham PLC v Generics (UK) Ltd*

[1] Save for sub-paragraph (a) which follows RSC Ord 24, r. 14A, inserted to reverse the decision of the House of Lords in *Home Office v Harman* [1983] AC 280.

[2003] EWCA Civ 1109, [2004] 1 WLR 1479, at [29]. As stated above, Foundem makes its application pursuant to rule 31.22(1)(b).

13. The rationale of the collateral purpose rule has been recently considered by the Court of Appeal in *Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA Civ 1409. Giving the judgment of the court, Jackson LJ stated at [56]:

> "First, a party receiving documents on discovery impliedly undertakes not to use them for a collateral purpose. Secondly, the obligation to give discovery is an invasion of the litigant's right to privacy and confidentiality. This is justified only because there is a public interest in ensuring that all relevant evidence is provided to the court in the current litigation. Therefore the use of those documents should be confined to litigation. Thirdly the rule against using disclosed documents for a collateral purpose will promote compliance with the disclosure obligation."

14. Following a survey of the leading authorities, Jackson LJ set out, at [66], the general principles which emerged, of which the following are relevant to the present application:

> "(i) The collateral purpose rule now contained in CPR 31.22 exists for sound and long established policy reasons. The court will only grant permission under 31.22(1)(b) if there are special circumstances which constitute a cogent reason for permitting collateral use.
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> …
>
> (iii) There is a strong public interest in facilitating the just resolution of civil litigation. Whether that public interest warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case. Those circumstances require careful examination. There are decisions going both ways in the authorities cited above."

15. In *Apple Corps Ltd v Apple Computer Inc* [1992] 1 CMLR 969, a pre-CPR case, the court determined an application by the plaintiffs for permission to disclose to the Commission documents which had been disclosed to them on discovery in the English proceedings. As in the present case, there were parallel proceedings considering a potential infringement of competition law being conducted by the Commission. Ferris J considered the general principles governing the exercise of the court's power to release a party from its obligation under the collateral purpose rule and the requirement that there should be "cogent and persuasive" reasons for doing so. He stated, at [110]:

> "… there is the most unusual feature of this case that the very same issue, namely whether the 1981 agreement infringes Article [101], is being considered concurrently by two tribunals, namely this court and the Commission. Clearly both

> tribunals have to apply the same criteria. In so far as facts have to be decided in order to reach a conclusion on the issue, both tribunals need to decide the same facts. For the purpose of any such decision the same evidential material ought, one would have thought, to be available to both tribunals. As the tribunals are completely independent of each other, there cannot be certainty that they will necessarily reach the same conclusion of fact on the same evidence or give the same weight to every individual piece of evidence. But it appears to me to be highly desirable, to put it no higher, that each tribunal should have the opportunity of evaluating the same evidence unless it can be seen that the particular material which is relied upon is devoid of relevant evidential value so far as the issue is concerned."

16. Ferris J proceeded to state that the release of the plaintiffs from the obligation under the collateral purpose rule would not occasion any injustice to the defendants. He observed, at [112]:

> "Clearly the defendants cannot validly complain about use of the documents in the way proposed on the ground that the relevant documents may assist the plaintiffs to succeed in their contentions. The defendants, of course, do not put their [objection][2] in this way."

The real objection amounting to prejudice raised by the defendants was that if the documents were disclosed to the Commission, an oral hearing which the Commission had fixed for 16 April (i.e. some three weeks later) would have to be postponed. Ferris J rejected that ground along with the other alleged prejudice put forward by the defendants as insubstantial, and held that the considerations which I have quoted above constituted cogent and persuasive reasons for permitting the disclosure sought.

17. I have no doubt that the reasoning of Ferris J remains applicable under the CPR. Indeed, in *Synstar Computer Services (UK) Ltd v ICL (Sorbus) Ltd* [2002] ICR 112 (a post-CPR case), Lightman J summarised the approach to be adopted in cases where questions of the application of EU competition law arise in parallel proceedings before domestic courts and the Commission. He said, at [14]:

> "(c) to better enable the regulatory body and the court to reach the same conclusions, it is important that the evidential material which is before the court is available before the regulatory body. Accordingly (and most particularly in a case where the procedural rules of the regulatory body and the court regarding disclosure are different) the court will release cross-undertakings given by parties on disclosure to enable this object to be achieved: see *Apple Corps v Apple Computers.*"

The Present Case

[2] The reported text reads "obligation" but that seems to be a typographical error.

18. As I have already observed, significant issues raised in the proceedings before this Court are also raised in the proceedings before the Commission, but there are other allegations of abuse of dominance in these proceedings that are not being considered by the Commission. The documents subject to the Analysis (after the agreed redactions) are clearly relevant to the Commission proceedings since they are documents which Google has provided to the Commission as part of its investigation. Moreover, any decision as regards the application of article 102 which the Commission may adopt in its proceedings will be binding on this Court pursuant to Article 16 of Regulation 1/2003. That provision gives effect to the policy encapsulated in recital (22) of the Regulation:

> "In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided."

If Foundem were to make submissions on the meaning of certain Google documents in the present proceedings, it would therefore be unfortunate if the Commission had been unable to consider such submissions in arriving at its decision. To adopt the language of Ferris J in the *Apple* case, it seems to me highly desirable that the Commission, in considering the same evidence as this Court, should not be deprived of the opportunity of evaluating that evidence in the light of at least the same arguments.

19. Google has pointed out that, by contrast with the *Apple* and *Synstar* cases, here what is sought is not permission to disclose documents to the Commission obtained by disclosure but a commentary on documents which the Commission already has. However, far from giving rise to a greater obstacle to the grant of permission under the collateral purpose rule, in my view this is, on the contrary, a lesser objection. Having regard to the rationale of the rule as summarised in *Tchenguiz,* such disclosure does not involve any further invasion of Google's right to privacy and confidentiality. Nor would a refusal to grant permission here help to promote compliance with the disclosure obligation: no additional documents would be disclosed to the Commission if this application is granted.

20. The objections raised by Google as set out in its evidence and Counsel's skeleton argument are, first, that allowing Foundem to use the documents disclosed in the English proceedings for the purpose of the Commission proceedings would place it in a different position to the other complainants in the Commission investigation since in general complainants have only limited access to the file in those proceedings; and secondly, that if the Analysis is provided to the Commission then Google will be compelled to provide its own detailed response, giving rise to a potentially escalating debate at substantial cost.

21. As regards the first point, the reality is that Foundem is indeed in a different position from other complainants as it has started and pursued proceedings before a national court. The result is that Foundem has had an opportunity to see the documents which other complainants in the European forum have not seen. But there is no suggestion that Foundem commenced these domestic proceedings for an improper purpose, or purely to gain some advantage with respect to the Commission's investigations. In my view, the fact that other complainants may not have seen these documents does

not in any way lessen the important public policy that the proceedings before the national court should be consistent with the proceedings before the Commission. Such consistency means that the Commission should not be prevented from hearing arguments based on consideration of the same evidence.

22. As regards the second point, I appreciate that if Foundem is permitted to send the Analysis to the Commission, Google will wish to prepare and submit a response. However, I cannot see that this involves any prejudice to Google. There is no suggestion that the Commission would not accept and consider such a response. On the issue of costs, I doubt whether that would ever be a consideration of much weight in a matter of this kind. But in any event, given the scale of the Commission's investigation and how much is at stake for Google, I have no doubt that the cost of preparing such a response and any consequent communication would be a metaphorical drop in the ocean of the total expenditure likely to be incurred by Google in the Commission proceedings.

23. Therefore, as in the *Apple* case, I find that the objections raised against permitting disclosure are insubstantial. In my judgment, there are cogent reasons for allowing such disclosure and I grant permission accordingly.