The Battle (royale) Continues Between Epic and Apple

Sarah Gilkes, Partner, and **Ben Cameron,** Senior Associate, Hamilton Locke, comment on the *Epic Games v Apple* stoush.

Epic Games (**Epic**) runs the wildly successful battle royale game *Fortnite* across a variety of platforms, including on Apple's mobile iOS. *Fortnite* on Apple devices was until August last year distributed through the App Store. In exchange, Apple took a 30% commission of all sales through iOS versions of *Fortnite*.

Last year, Epic changed the code of *Fortnite* to allow iOS users to purchase in-game credits directly from Epic thereby bypassing Apple's commission. In response, Apple removed *Fortnite* from the App Store within 24 hours.

The contract between Epic (a North Carolina-based company) and Apple (a California-based company) required all disputes to be resolved under Californian law.

Litigation in America

In August 2020, Epic commenced proceedings against Apple in California after Apple pulled *Fortnite* from the App Store. Apple filed a countersuit alleging breach of contract. The day after commencing its proceedings, and in an apparent attempt to garner public support for its stance, Epic released the video *Nineteen Eighty-Fortnite* spoofing Apple's 1984 advertisement.[1]

Separately, on 16 November 2020, Epic also commenced proceedings in the Australian Federal Court alleging that the conduct of Apple (and its Australian subsidiary, Apple Pty Ltd) amounted to contraventions of the *Competition and Consumer Act* (**CCA**) and Australian Consumer Law (**ACL**), including unconscionable conduct, engaging in conduct which substantially lessens competition and exclusive dealing.

If successful, Epic's Australian claim would permit Australian iOS users to download apps to their iOS devices from locations other than the App Store.

Original decision

Apple sought a stay[2] of the proceedings on the basis the litigation should be carried out in California given the exclusive jurisdiction clause in the contract between Epic and Apple. This stay was granted which Epic appealed.

Appeal

On 9 July 2021, the Federal Court allowed Epic's appeal,[3] finding that the primary judge should not have granted the stay.

This means that Epic's case against Apple and its local subsidiary can proceed in Australia (pending any further appeals). That is, even though the parties had a contractual agreement to deal with disputes in California, the Federal Court held that Epic's claims under the CCA (which were based on a right under Australian legislation, rather than a right under the contract with Apple) could proceed in Australia. This is a reminder to parties negotiating cross-border agreements that while a jurisdiction clause will govern disputes arising out of the contract, it will not necessarily prevent parties from bringing statute-based claims in other jurisdictions.

Legal reasoning

The primary judge's decision was overturned due to three errors, each of which would have been sufficient to vitiate the original decision.

Error 1: Public policy considerations[4]

The primary judge did not make a cumulative assessment of the public policy considerations.

The considerations in favour of the proceedings being moved to California included:

- minimising the possibility of divergent findings;
- holding contractual parties accountable to the terms of the contract; and
- avoiding multiple international cases giving rise to potentially conflicting findings of fact.

On the other hand, in favour of the proceedings staying under the Federal Court's jurisdiction:

- there are public policy considerations arising from the scope and purpose of the CCA and the jurisdiction granted to the Federal Court and the specialist judges there which prevents the risk that Australian law would be misconstrued in foreign courts;
- certain remedies under the platform provisions (ss 83 and 87(1A) of the CCA) are only available in respect of findings made by Australian courts;

---

1 The District Court of the Northern District of California issued a decision on 10 September 2021 in respect of this case which found that that Apple did not have a monopoly in the relevant market of 'mobile game transactions', but that Apple could not prohibit app developers from notifying users of other stores or purchase options. This judgment has been appealed by both Apple and Epic.

2 *Epic Games, Inc v Apple Inc (Stay Application)* [2021] FCA 338.

3 *Epic Games, Inc v Apple Inc* [2021] FCAFC 122 ('*Epic v Apple*').

4 Ibid 51 – 57.

- the ACCC has statutory rights to intervene in Australian proceedings;
- an Australian case will contribute to further Australian jurisprudence; and
- the proceedings will impact Australian consumers.

On the balance, the Court considered that public policy considerations were in favour of the proceedings continuing under the Federal Court's jurisdiction and there were strong reasons to refuse the grant of stay.

Interestingly, the Court did not consider it was sufficient to rely on the ACCC's right to bring such action in Australia free of contractual restraint nor did the risk of fragmentation of litigation raise an issue of public policy.

Error 2: The disadvantage to Epic in proceeding in the US[5]

The primary judge did not give sufficient weight to the disadvantages to Epic if the case proceeded in the US. These included that:

- the CCA has remedies that would not apply under California law; and
- it was expected to be more difficult to obtain an injunction under Californian law.

Error 3: Failure to properly consider the role of the local Apple subsidiary[6]

The primary judge assessed that the Australian subsidiary's role was merely 'ornamental', but this was not correct. The current proceeding involved claims under Australian laws (the CCA and ACL) against an Australian company (Apple Pty Ltd) which was not a party to the exclusive jurisdiction clause in respect of conduct undertaken in Australia affecting Australian consumers (the operation of the App Store).

Together, these points were sufficient for the Court to agree that the proceedings should continue in Australia, although it did make clear that there is no statutory mandate for proceedings such as these to be heard in Australia.

Forum non conveniens

For completeness, the Federal Court also confirmed that Australia was not a clearly inappropriate forum given that the cause of action relates to Australian competition law involving the Australian App Store, Australian users, and developers for that market, as well as an Australian entity.[7]

5 Ibid 58 – 67.
6 Ibid 68 – 79.
7 Ibid 125.

CAMLA ESSAY COMPETITION
2021- 2022

Enter your media law essay for the chance to win great prizes!

1st prize $1000 and more!

Due Friday 21st January, 2022

For all entry details visit www.camla.org.au
Or email contact@camla.org.au