

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be  
2 placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to  
3 be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive  
4 record.

5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No: 1403/7/7/21

7  
8  
9  
10 Salisbury Square House  
11 8 Salisbury Square  
12 London EC4Y 8AP

Tuesday 14 December 2021

13  
14  
15 Before:  
16 The Honourable Mr Justice Morris  
17 Dr William Bishop  
18 Ben Tidswell  
19 (Sitting as a Tribunal in England and Wales)

20  
21  
22 **BETWEEN:**

23  
24 Dr. Rachael Kent

**Applicant**

25  
26 v

27  
28 Apple Inc. and Apple Distribution International Ltd

**Defendant**

29  
30  
31 **A P P E A R A N C E S**

32  
33 Ronit Kreisberger QC & Matthew Kennedy (On behalf of Dr. Rachael Kent)  
34 Brian Kennelly QC & Hugo Leith (On behalf of Apple)

35  
36  
37  
38  
39  
40  
41  
42  
43  
44 Digital Transcription by Epiq Europe Ltd  
45 Lower Ground 20 Furnival Street London EC4A 1JS  
46 Tel No: 020 7404 1400 Fax No: 020 7404 1424  
47 Email: [ukclient@epiqglobal.co.uk](mailto:ukclient@epiqglobal.co.uk)  
48  
49

50  
51 **Tuesday, 14th December 2021**

1 (10.30 am)

2 **MR JUSTICE MORRIS:** Good morning, everybody. I am hoping everybody can  
3 hear me. I am seeing nods from counsel. These proceedings are being live  
4 streamed and, of course, many are joining on the Microsoft Teams platform.  
5 I must start, therefore, with the customary warning. These are proceedings in  
6 open court as much as if they were being heard before the Tribunal physically  
7 here in Salisbury Square House. An official recording is being made and  
8 an authorised transcript will be produced, but it is strictly prohibited for anyone  
9 else to make an unauthorised recording, whether audio or visual, of the  
10 proceedings and a breach of that provision is punishable as a contempt of  
11 court.

12 With that introduction I say good morning to everybody and start by thanking the  
13 parties for their skeleton arguments and their endeavours so far to cooperate  
14 in reaching a conclusion on some of the matters.

15 What I would like to do, first of all, is a little bit of housekeeping. In particular we  
16 have very recently received new material and I am wondering if  
17 Ms Kreisberger can take me through the new material that has been provided  
18 this morning. What has happened as far as I am concerned is that my hard  
19 copy bundle for the hearing has been updated by the insertion of a number of  
20 items which I haven't looked at. Somebody has updated the bundle for me.  
21 I gather that the authorities bundle has also been updated.

22  
23 **Submissions by MS KREISBERGER**

24 **MS KREISBERGER:** Thank you, sir. Yes, I can do my best to do that. The new  
25 material has been subsumed into my bundles. So I will check with those  
26 instructing me that I haven't missed anything. Sir, I should say if there is any

1 delay in seeking instruction, I had hoped to be in the same location as my  
2 legal team, but we have had a positive COVID test in the household, so I am  
3 at home. So I apologise if there's any delay.

4 **MR JUSTICE MORRIS:** That's all right. Okay.

5 **MS KREISBERGER:** Sir, the first document to note is what should be new tab 5.1 in  
6 the CMC bundle.

7 **MR JUSTICE MORRIS:** Yes.

8 **MS KREISBERGER:** That is a draft confidentiality ring order. That has now been  
9 agreed between the parties.

10 **MR JUSTICE MORRIS:** Okay. Good. Thank you.

11 **MS KREISBERGER:** Moving forward in the bundle, the next category of new  
12 documents is the recent flurry of correspondence that's keeping us all on our  
13 toes. That, sir, is at tab 27, 27.1 through to 27.3.

14 **MR JUSTICE MORRIS:** Yes. Okay. So that's further inter partes correspondence.

15 **MS KREISBERGER:** That's inter partes correspondence. I hope, sir, we will sweep  
16 up the points that have been ventilated in correspondence. You will be  
17 pleased to hear that the parties are doing their best to reach agreement on as  
18 many of the issues as possible. It might be just helpful to flag 27.4 while we  
19 are there. That's a letter to the Tribunal from the parties.

20 **MR JUSTICE MORRIS:** Which I have seen. We will come to that shortly. That's  
21 the proposed timetable, basically.

22 **MS KREISBERGER:** Yes.

23 **MR JUSTICE MORRIS:** The other correspondence I have not seen. I am assuming  
24 you are not going to take me to it because it will all come out in the wash as  
25 we go through.

26 **MS KREISBERGER:** Sir, I think, unless anyone prods me, that is the extent of

1 additions to the CMC bundle.

2 **MR JUSTICE MORRIS:** Okay. There is a 27.5 as well.

3 **MS KREISBERGER:** 27.5, if I just pull that one up.

4 **MR JUSTICE MORRIS:** This is about Vannin Capital.

5 **MS KREISBERGER:** That's the correspondence. We will pick that up. There are  
6 some additions to the authorities bundle. I have kept them in a separate  
7 bundle, because they are voluminous. These are from Mr Kennelly.

8 **MR JUSTICE MORRIS:** Fine. Okay.

9 **MS KREISBERGER:** There are three additional authorities from the CAT.

10 **MR JUSTICE MORRIS:** We have them in soft. At the moment we don't have them  
11 in hard. At the moment I believe somebody here is very busily printing them  
12 off. It would have been helpful for them to have been provided in hard copy  
13 by whoever is responsible for their addition. I will leave it at that. It would  
14 have helped us if we had had it this morning in hard copy. We may or may  
15 not get to them. We will have to see.

16 **MS KREISBERGER:** Understood.

17 **MR JUSTICE MORRIS:** With that in mind, what I propose to do is this. I propose to  
18 have a quick run through of the agenda, with the aim of identifying effectively  
19 what is agreed and dealing with those agreed non-controversial matters, and  
20 then, to the extent that there are disputed issues, identifying them as we run  
21 through and then hearing the arguments at the end, to the extent we are  
22 going to have substantial argument.

23 So if we go through the agenda starting with item 1, the forum, that's  
24 non-controversial. I think I can deal with that now. We will make the order  
25 that England and Wales will be the forum.

26 Confidentiality, item two, my understanding is first of all there was the issue of the

1 ring and its terms. It sounds to me as though that is largely agreed. You may  
2 need to introduce it to us, but that's not going to take very long.

3 I am also assuming that there remain outstanding issues on the redactions issue in  
4 relation to the funding arrangements. That's under item 2.

5 I don't know whether there have been any developments since the skeleton, but am  
6 I right that there's going to be argument about that?

7 **MS KREISBERGER:** I think that's the main topic for today, sir. That's right.

8 **MR KENNELLY:** That's correct.

9 **MR JUSTICE MORRIS:** Thank you. Item three, evidence. I am not sure there is  
10 anything there that's going to be controversial. The only issue is whether the  
11 issue concerning Vannin and Project Greve has been resolved. I think in  
12 some places that was under item 3 and in others it was elsewhere. Perhaps  
13 you can tell me where we are on that issue.

14 **MS KREISBERGER:** Yes. Sir, I think Mr Kennelly was pre-empting that I was going  
15 to say I am in Mr Kennelly's hands on that. I think we are waiting for  
16 a response from him as to whether that's now agreed.

17 **MR KENNELLY:** Sir, it is not agreed. We still need information about Vannin and  
18 Project Greve. Sometimes the correspondence comes under confidentiality  
19 but it is properly addressed as evidence relating to funding.

20 **MR JUSTICE MORRIS:** So that's a point we are going to have some arguments  
21 about.

22 **MR KENNELLY:** Yes.

23 **MR JUSTICE MORRIS:** Then heading 4, further information disclosure, there is the  
24 amendment to the claim form. I think there will be an order on that. There  
25 may be an issue as to the timing of that. That may be covered by your  
26 timetable, the actual date of service of the amended claim form. It is a very

1 technical sort of point.

2 There was a suggestion actually in Ms Kreisberger's skeleton that Apple were  
3 seeking information in relation to the conditional fee arrangements, but that  
4 didn't appear in Apple's skeleton. I don't know whether that's still a live issue.  
5 Ms Kreisberger, go ahead.

6 **MS KREISBERGER:** Sir, if I can be helpful, we had also understood that to be the  
7 position. As you say, it wasn't covered in the skeleton, but it has  
8 subsequently been raised in correspondence, correspondence of 11th  
9 December. So I am ready to address you on that, sir, if that's Apple's  
10 position.

11 **MR KENNELLY:** Sir, yes, there is a very narrow point on the question of conditional  
12 contingent fee arrangements. It is very closely linked to the point we make  
13 about the ATE premium. I will have to make submissions about that.

14 **MR JUSTICE MORRIS:** Okay. So it is sort of linked in with the redactions. It is not  
15 a redaction strictly.

16 **MR KENNELLY:** Exactly. It is so closely linked to the redactions issue, I will  
17 address it at the same time.

18 **MR JUSTICE MORRIS:** All right. Then we have future conduct of proceedings,  
19 which I think we can run through in a moment. That's really the timetable.  
20 That's paragraph 8, isn't it. Paragraph 9, further CMC, which I think we will  
21 wrap up with paragraph 8.

22 I don't know whether there is any other business right at the end. There was some  
23 discussion of the relationship between this case and the Google case. I am  
24 not sure that's a live issue.

25 **MR KENNELLY:** No.

26 **MS KREISBERGER:** Not on our side, sir. I think that is being fixed separately.

1 **MR KENNELLY:** Not a live issue from my perspective either.

2 **MR JUSTICE MORRIS:** That's very helpful.

3 If we go back to the beginning, we know that effectively we have argument on  
4 redaction, perhaps including the conditional fee arrangement issue and we  
5 have some argument on the Vannin issue. What I would propose is that we  
6 actually run through any other aspects we need to deal with before, which  
7 I imagine, just going back to the beginning, I have dealt with forum. Is it worth  
8 spending a moment or two on the confidentiality ring, -- obviously it is  
9 agreed -- whether either party has anything to say about it by way of  
10 explanation? I suppose we ought to look at it and perhaps when we rise at  
11 some point we will look at it formally before approving it, but I think, unless  
12 you have any observations, perhaps we need to look at that ourselves just to  
13 approve it.

14 **MS KREISBERGER:** Sir, I think that would be the best approach if you are happy  
15 with that, sir. I am in your hands.

16 **MR JUSTICE MORRIS:** Fine. I am happy with that, unless either of my Tribunal  
17 members has any specific question on the ring at the moment. No? Okay.

18 Evidence. The only point on evidence is that Apple has indicated a desire to file  
19 responsive economic evidence. That's not opposed. So that will be factored  
20 into the timetable. In relation to further information, disclosure and claim form  
21 amendment, I don't know whether -- just remind me. The timetable you  
22 suggested is at 21.4, is it?

23 **MS KREISBERGER:** 27.4.

24 **MR JUSTICE MORRIS:** Yes, I have got it. There is no provision there for the actual  
25 formal date of service for the amended claim form. I think one party said 17th  
26 and one party said 21st. I don't think it matters. Do we have a view on that.

1 **MS KREISBERGER:** We had suggested 17th and we are happy to do that.

2 **MR JUSTICE MORRIS:** Right. There will be permission to amend the claim form  
3 and it is to be served by 17th December.

4 Then we really I think are on to the timetable. Perhaps we can just run through the  
5 timetable and perhaps Hausfeld's letter at 27.4. As you may or may not be  
6 aware, the Tribunal can sit on 3rd to 6th May. I don't know whether you have  
7 been informed of that. We have made enquiries at our end for the hearing of  
8 the CPO. We are content with those dates. I think the rest of it is all agreed.  
9 We will make orders down the line.

10 Effectively, we have publicising the application and the hearing, 24th December.  
11 I will come back to that in a moment.

12 Apple's CPO response and strike-out application, combined with expert evidence by  
13 12th January.

14 4th February is the date for third parties to put submissions or object to the  
15 application. Then 2nd March is Dr Kent's reply to the CPO response and  
16 presumably liberty to file responsive economic evidence at that stage.

17 Then, over the page, we have directions which I think seem fine to us for the  
18 preparation for the final hearing.

19 As far as the time estimate for the final hearing is concerned, we are going to say  
20 three days, and there will be one day as well effectively in reserve within that  
21 bracket. I am going to myself identify hopefully the Friday before -- the  
22 Monday is the Bank Holiday -- the Friday before as a reading day for the  
23 Tribunal, certainly for me. So the only real issue there -- I will come back to it  
24 in a moment -- is this question of a pre-hearing review. I will come back to  
25 that, if I may.

26 Can I raise one issue about the publicising of the application, and that links into the



1 exclusion from the class of certain persons, in particular us. We note that in  
2 the claim form, quite properly, the definition of iOS device user has a number  
3 of exclusions, which includes both you and us and members of the staff here.  
4 It may be that some reference to that is made in the publicity, that in general  
5 there is an exclusion.

6 One point that we do raise is this. The definition at the moment does not exclude, as  
7 far as we can see, family members of, for example, the Tribunal members'  
8 family members. We are wondering whether provision should be made to  
9 widen the definition of the excluded class so that people's wives, husbands,  
10 children, et cetera, all of whom would otherwise be within the class, or who  
11 may probably be within the class, certainly wives, should also be excluded.  
12 Perhaps you could look at that.

13 **MS KREISBERGER:** I am grateful, sir. If I may take that one away and perhaps  
14 come back to you.

15 **MR JUSTICE MORRIS:** Yes. So the only other issue I think on timetable is whether  
16 there's a need for a pre-hearing review. Perhaps, Ms Kreisberger, you can  
17 put forward -- explain whether you think we do need one and, if so, when.  
18 The slight problem is there is a vacation immediately before. We could put  
19 a date in but maybe things -- what do you envisage will be or might be  
20 required by such a pre-hearing review?

21 **MS KREISBERGER:** It was really out of an abundance of caution to have scope for  
22 it in the timetable if necessary, but, being candid, we don't have any particular  
23 issues for a PHR in mind at this stage. We are obviously not very far into this  
24 process, having not seen the other side's response, but speaking from my  
25 experience, it has not proven to be necessary in other cases.

26 **MR JUSTICE MORRIS:** Yes.

1 **MS KREISBERGER:** For a three day certification hearing, one would hope it  
2 wouldn't be necessary. I do just wonder whether it is worth having the time in  
3 the diary, just taking a cautious view.

4 **MR JUSTICE MORRIS:** Okay. Mr Kennelly, do you have a view on that?

5 **MR KENNELLY:** Sir, from our perspective, we don't see the need for one. That has  
6 also been my experience in dealing with other collective proceedings cases.  
7 I see what Ms Kreisberger says about an abundance of caution, but it is not  
8 worth ruining anyone's vacation.

9 **MR JUSTICE MORRIS:** You won't be ruining mine I can tell you.

10 **MR KENNELLY:** In an emergency, if it is not listed, in an emergency, if something  
11 does come up, we can liaise with the Tribunal and the other side, and that  
12 may be the better course.

13 **MR JUSTICE MORRIS:** I think that's right. I think the fact of the vacation -- as  
14 I understand it, my term does not start until the 26th, which I think is probably  
15 the Tuesday of that week before. To squeeze that in as well as a reading  
16 day, unless my fellow Tribunal members have any different view or anybody  
17 here has a different view, I think we won't put one in, but I will say quite clearly  
18 that if there are issues that need to be resolved beforehand, then raise them  
19 with us and we can either arrange a hearing at short notice or deal with it on  
20 paper. There may be issues once the evidence is filed that people start  
21 objecting to things going into bundles. Who knows? Or there may be delay.  
22 People might fall behind in the timetable. Certainly if that's the case, we  
23 would want to know, because I would like to have a clean start on the  
24 Tuesday, but I think, given the sort of window that might be possible for such  
25 a hearing, I am not sure it is going to work very well. So I think we will not  
26 make provision for a pre-hearing review, with liberty to apply I suppose.

1 **MS KREISBERGER:** We are content with that, sir, and grateful for that indication.

2 I think we are all agreed it would be unfortunate.

3 **MR JUSTICE MORRIS:** Yes. Okay. I think, subject to somebody telling me  
4 otherwise, that that covers all the non-controversial issues and we are now on  
5 to the issue of funding arrangements and redactions. I think we are very  
6 interested to hear arguments on this.

7 Can I start with making the following observations only? We as a Tribunal would be  
8 interested to hear submissions on the correct approach to this issue and what  
9 comes first, relevance or confidentiality. The items that have been redacted,  
10 as far as we can see, are the limit on the funding costs up to certification,  
11 funding above budget, funders' return, appendix 1, monitoring cost,  
12 appendix 3, priorities, and ATE premium. Broadly, those are the topics we  
13 have identified.

14 What is the approach that the Tribunal should take where a document has been  
15 submitted, a single document or two single documents, have been submitted  
16 by a claimant, who then seeks redaction? Is the first question that has to be  
17 considered is the material redacted relevant or is the first question is it  
18 confidential? I use the word "confidential" to cover the three heads that you  
19 have identified, although we will come in a moment to whether those are three  
20 different heads, but commercial confidentiality, strategic sensitivity, and legal  
21 privilege you open as principles, but at the moment we are slightly struggling  
22 with who has to establish what here.

23 I don't know whether that's helpful or not. This is not material withheld because they  
24 are separate documents. We have the documents submitted and the  
25 redactions have been made on confidentiality grounds. It may be,  
26 Ms Kreisberger, you say the information is not relevant at all.

1 Anyway, with that introduction, perhaps we can open the points up to argument. By  
2 all means, Ms Kreisberger, open it as fully as you wish.

3 **MS KREISBERGER:** I am very grateful for that. That's very helpful, sir. If I could  
4 start by just updating the Tribunal on where we are in terms of areas of  
5 dispute.

6 **MR JUSTICE MORRIS:** Yes.

7 **MS KREISBERGER:** Setting aside the Project Greve issue, which I think we are  
8 going to be in a position of having to hear what Apple has to say on that, and  
9 then whether that can be taken forward today or not. But on redactions there  
10 is now agreement on the priorities deed.

11 **MR JUSTICE MORRIS:** That's appendix 3, is it?

12 **MS KREISBERGER:** Appendix 3. The funders' returns, which is clause 9.2 of the  
13 LFA.

14 **MR JUSTICE MORRIS:** Yes.

15 **MS KREISBERGER:** The actions cost cap.

16 **MR JUSTICE MORRIS:** The cost cap?

17 **MS KREISBERGER:** The PCR actions cost cap. That's agreed.

18 **MR JUSTICE MORRIS:** Which is the cap up to certification?

19 **MS KREISBERGER:** Yes. I will just check the relevant provision.

20 **MR JUSTICE MORRIS:** It is the end of 2.1 I think.

21 **MS KREISBERGER:** I think that's right, sir.

22 **MR JUSTICE MORRIS:** Can I just turn the agreement up?

23 **MS KREISBERGER:** 1.2.

24 **MR JUSTICE MORRIS:** I meant 1.2. It is right at the end of 1.2. As I understand it,  
25 it is not the overall cap. It is the cap up to certification.

26 **MS KREISBERGER:** Correct.

1 **MR JUSTICE MORRIS:** So there's agreement on that. Yes. Carry on.

2 **MS KREISBERGER:** Finally, bank account details.

3 **MR JUSTICE MORRIS:** Okay.

4 **MS KREISBERGER:** Now, the items which Apple still seeks disclosure of, but which  
5 are resisted by Dr Kent, are as follows. They are the insurance premia.

6 **MR JUSTICE MORRIS:** Yes.

7 **MS KREISBERGER:** If it is helpful for your note, sir, they are in the ATE policy,  
8 which is behind tab 8 of the CMC bundle.

9 **MR JUSTICE MORRIS:** Yes.

10 **MS KREISBERGER:** Schedule 1.

11 **MR JUSTICE MORRIS:** Give me the page? Page 126.

12 **MS KREISBERGER:** Yes, page 126.

13 **MR JUSTICE MORRIS:** It is at the bottom. It is a deposit premium.

14 **MS KREISBERGER:** That's the one.

15 **MR JUSTICE MORRIS:** Over the page.

16 **MS KREISBERGER:** You see it over the page. Also pages 134, 135 and 136.

17 **MR JUSTICE MORRIS:** Yes.

18 **MS KREISBERGER:** And 137.

19 **MR JUSTICE MORRIS:** Yes. I have marked them before I think. That's the same  
20 thing but broken down by reference to each insurer, each line.

21 **MS KREISBERGER:** Yes, yes.

22 **MR JUSTICE MORRIS:** So insurance premia.

23 **MS KREISBERGER:** That's the first category. The second category is the solicitors'  
24 excess provision. There we move to tab 7, one tab earlier, and it is clause 7.6  
25 which is on page 88 of the bundle. I will come back to the substance of the  
26 redactions, to the extent that I need to.

1 Then there is the issue of conditional and the contingent fee arrangements for the  
2 legal team, which Mr Kennelly adverted to.

3 Finally, with apologies for jumping around, back to tab 7, at the very back you will  
4 see page 110. The appendices have been redacted, and Apple seeks  
5 appendix 1.

6 **MR JUSTICE MORRIS:** Actual versus costs ...

7 **MS KREISBERGER:** The live budget, although they have helpfully confirmed in  
8 correspondence they don't seek the live version. They seek only the version  
9 which was appended to the litigation funding agreement. So they are not  
10 seeking the actuals. Dr Kent is able --

11 **MR JUSTICE MORRIS:** Just give me a moment. Only the version appended to the  
12 LFA which at the time presumably didn't have much actual spend in it anyway.  
13 I don't know.

14 **MS KREISBERGER:** Correct. So they are not seeking the actuals, but there is  
15 sensitivity around the budgeted amounts as well, and I will take you through  
16 that, sir, and explain where the sensitivity lies.

17 **MR JUSTICE MORRIS:** Okay. That's very helpful. So we have identified the four  
18 categories. I don't know where you are going next, but at some point perhaps  
19 you would like to indicate in relation to the four categories where there has  
20 been recent agreement, what that agreement is, in other words whether they  
21 are disclosed, not disclosed, in the ring, not in the ring, that sort of thing. You  
22 can either do that now or whenever you are ready. I don't want to take you  
23 out of your order.

24 **MS KREISBERGER:** Thank you, sir. If I take it as I go through, I hope it will be  
25 clear. I was proposing to deal with those categories of documents in that  
26 order. So the insurance premia, the excess provision, conditional/contingent

1 fee arrangements and the appendix to the LFA.

2 **MR JUSTICE MORRIS:** Yes. Okay.

3 **MS KREISBERGER:** Sir, I have well in mind your opening observations. What  
4 I would like to suggest -- of course, the key objective is to find a way through  
5 in relation to these papers. I appreciate this is an issue that comes up time  
6 and again in these cases, but in terms of the question of does one look at  
7 relevance or confidentiality first, if it is helpful to make clear that Dr Kent's  
8 starting point, as the proposed representative, is that, of course, as much as  
9 possible should be in the public domain. The caveat to that is the one that  
10 you have already cited, which is that, of course, she should not be compelled  
11 to disclose information which is strategically sensitive, commercially sensitive  
12 or privileged, and those three categories incidentally are noted on the very  
13 face of the first CMC order in Gutmann. That's the approach.

14 So whilst I can address you, sir, on relevance in the course of my submissions, my  
15 focus is on whether these redactions are correctly withheld, because  
16 otherwise one would be straying into these areas, which is inappropriate.

17 **MR JUSTICE MORRIS:** All right.

18 **MS KREISBERGER:** Of course, sir, I am very happy to answer questions on  
19 relevance as we go through.

20 **MR JUSTICE MORRIS:** Yes, I understand that, but, in fact in your skeleton I think,  
21 in certain categories -- it may not be the categories that are now remaining  
22 disputed -- there is a suggestion you say that they are not relevant. I do  
23 wonder, and I understand your client's starting point is that everything should  
24 be in the public domain, but we are in a process of working towards the main  
25 hearing, and the issue we have to decide in relation to funding, it is largely,  
26 not wholly, based on whether it is appropriate to authorise the representative.

1 I have that in my mind as to how this information may or may not assist in that  
2 regard.

3 You may say "Actually, I am not going to argue that because here is the funding, and  
4 we think everything should be made open, regardless of that narrow analysis".  
5 But it is plain from the skeletons that this issue of relevance has been raised.  
6 Anyway, I will let you make your submission. That's why we have been  
7 thinking in that way. Also, because it seems to us, and I am personally  
8 probably not as on top of all the cases as you are, but in a number of cases  
9 some of this information has been disclosed but without there having been  
10 argument, or it has not been seriously contested, and so the case law at the  
11 moment is not necessarily decisive. Anyway.

12 **MS KREISBERGER:** I understand the point and have it well in mind, but I think if it  
13 is helpful my submission is really based on a minimalist, not a maximalist  
14 approach. So we are really asking that the Tribunal keep out that which must  
15 not be compelled, generally without getting into questions of relevance.  
16 Relevance is a secondary consideration in the context of a CPO, which might  
17 help explain why the information is not necessary. But really the first question  
18 is can it be compelled?

19 My submission is that is the pragmatic way forward here, given the nature of the  
20 information that Apple is asking for, which can be shown quite clearly to be  
21 confidential in the broad sense.

22 **MR JUSTICE MORRIS:** Okay.

23 **MS KREISBERGER:** You mentioned the authorities and indicated that perhaps you  
24 are not as on top of them. I would like to take you through them, if I may.

25 **MR JUSTICE MORRIS:** You may.

26 **MS KREISBERGER:** I am grateful for that. Just really to show, and I am proposing



1 to take the insurance premia first, the basic proposition, my fundamental  
2 submission is that they shouldn't be disclosed because giving them to Apple  
3 would give Apple a tactical advantage, and that is not new thinking. That  
4 principle is established in the High Court authorities and you are quite right to  
5 say there is some uncertainty around the edges, but that basic proposition is  
6 correct, and it has already been applied in the CPO context and I am thinking  
7 of the Gutmann case.

8 **MR JUSTICE MORRIS:** Yes, I have seen that. I am not as uneducated as I might  
9 have indicated. I am not fully educated. Okay.

10 **MS KREISBERGER:** I am not surprised by that.

11 **MR JUSTICE MORRIS:** Carry on. You take us where you want to take us to. I am  
12 going to take up my authorities bundle. Yes.

13 **MS KREISBERGER:** Sir, if I could ask you to turn up tab 1 in the authorities bundle.

14 **MR JUSTICE MORRIS:** Yes.

15 **MS KREISBERGER:** This is the Arroyo judgment. This was a judgment of the  
16 Senior Master in the QBD. It was given in the context of group litigation  
17 concerning a pipeline. It is a very different set of facts, but the application  
18 here was for disclosure of the whole ATE policy.

19 **MR JUSTICE MORRIS:** Yes.

20 **MS KREISBERGER:** The result in that case was that the entire policy was withheld.  
21 I am not relying on that more expansive approach, obviously, as you have the  
22 ATE policy. We only seek to redact the premia.

23 **MR JUSTICE MORRIS:** Yes.

24 **MS KREISBERGER:** If I could ask you to turn to page 14, paragraph 48, you see at  
25 the beginning of that paragraph this is setting out the claimant's principal  
26 submission that the amount of the premium and the success fee --

1 **MR JUSTICE MORRIS:** When it comes to authorities, I either like them to be read  
2 out, the bit you are relying on, or at least taken to.

3 **MS KREISBERGER:** Sir. If I could take you to -- I am going to count lines.

4 **MR JUSTICE MORRIS:** I have it, about halfway down.

5 **MS KREISBERGER:** That's right. Really just to save time.

6 **MR JUSTICE MORRIS:** "The amount of the success fee ..."

7 **MS KREISBERGER:** The previous sentence:  
8 "An opposing party would derive obvious tactical advantage from the inspection of  
9 a CFA" and I will be coming back to that, "or ATE policy. The amount of the  
10 success fee or premium would reflect the contracting party's assessment of  
11 the merits of the case."

12 **MR JUSTICE MORRIS:** Right.

13 **MS KREISBERGER:** Then, if we move forward to paragraph 49, you see that the  
14 Senior Master accepts that submission, which he says -- let me read out the  
15 full sentence.

16 **MR JUSTICE MORRIS:** Yes.

17 **MS KREISBERGER:** "In my judgment, those supporting submissions of  
18 Mr Leighton's in respect of this, or any other piece of litigation carried on by  
19 a claimant with the aid of the CFA and ATE are almost so obvious as not to  
20 need to be stated, and they are relevant factors to be taken into account."  
21 Then he goes on. If we could move halfway down the paragraph, can you see there:  
22 "The very fact".

23 **MR JUSTICE MORRIS:** Yes, I have it. Thank you.

24 **MS KREISBERGER:** "The very fact that the terms of the insurance were negotiated  
25 suggests that the policy terms took into account specific litigation risk factors  
26 and the views and tactics of the claimant's lawyers."

1 He goes on to say:

2 "I have no doubt that if you compare and contrast the terms, you would be able to  
3 work out chances of success and/or tactics."

4 So he accepts the submission.

5 **MR JUSTICE MORRIS:** Of course that was (a) in the context of a CFA and (b)  
6 argument was about the disclosure of the whole of the ATE, and here we  
7 have the ATE fully disclosed, apart from the premium and, of course, the  
8 existence of ATE insurance is central to one of the questions that this Tribunal  
9 has to ask in the very specific circumstances of collective proceedings. It is  
10 a very different context. Nobody would seek to argue, in the context of these  
11 proceedings, that the ATE could not be disclosed for that reason.

12 **MS KREISBERGER:** Correct, and I don't rely on it for that point. I simply rely on it  
13 as to whether there are sensitivities. As I say, we are not taking that  
14 maximalist approach.

15 To answer that question precisely, sir, if you could move forward to tab 3, this is  
16 Mr Justice Popplewell's judgment in Excalibur, tab 3, page 50. Here it is right  
17 to say that at paragraph 24, which is on page 55, he also expressed some  
18 concerns about Arroyo. He said, in the last sentence, it didn't seem to weigh  
19 very heavily in exercising his discretion on whether to disclose the relevant  
20 documents, but the key --

21 **MR JUSTICE MORRIS:** In this case this was an application for disclosure of what?

22 **MS KREISBERGER:** The starting point was the --

23 **MR JUSTICE MORRIS:** The ATE?

24 **MS KREISBERGER:** It was the ATE. They began by asking for the full ATE.

25 **MR JUSTICE MORRIS:** Yes.

26 **MS KREISBERGER:** What I want to show you, sir, is what was agreed at

1 paragraph 25.

2 **MR JUSTICE MORRIS:** Okay. Thank you.

3 **MS KREISBERGER:** So what happened is that the claimants indicated -- and this is  
4 the fourth sentence.

5 **MR JUSTICE MORRIS:** I am with it. Thank you.

6 **MS KREISBERGER:** "They would be prepared for the order to reflect an entitlement  
7 on the part of Excalibur to withhold or redact material to the extent that it  
8 would otherwise disclose (1) the amount of success fee or premium being  
9 charged to reflect the contracting party's assessment of the merits of the  
10 case."

11 They go on and they also talk about termination.

12 **MR JUSTICE MORRIS:** Yes.

13 **MS KREISBERGER:** At 26, Mr Justice Popplewell said:

14 "Those proposals seem to me to meet the legitimate concern."

15 So that's really what we are relying on. This, in my submission, is a more moderated  
16 and sensible approach.

17 **MR JUSTICE MORRIS:** And you say it also identifies the underlying rationale?

18 **MS KREISBERGER:** It does.

19 **MR JUSTICE MORRIS:** I at some stage, obviously with authorities, would want  
20 some further -- what should I say -- identification of how the premium in  
21 a case such as the present would or might reflect the PCR's assessment of  
22 the merits of the case. I mean, I know it has been said that it has been  
23 assumed that it does, and I know you will take me to the cases in a moment  
24 where the premia have been redacted, but since Mr Kennelly himself is  
25 obviously contesting that issue, it might be helpful just for a moment for us to  
26 understand precisely how in a case such as this the premium would

1 necessarily reflect the underlying merits. I mean, I obviously can see the  
2 force that you are not going to disclose legal advice saying you have got  
3 a 30% chance of winning. That I think I can understand. But it might be  
4 helpful. Anyway, that's helpful. Thank you. That's Excalibur.

5 **MS KREISBERGER:** Thank you, sir. The last authority outside of the Tribunal that  
6 I wanted to cite was RBS Rights Issue litigation.

7 **MR JUSTICE MORRIS:** Next tab?

8 **MS KREISBERGER:** That's the next tab. I am not sure we need to turn up the  
9 judgment, although I can take you to it, sir. The relevant paragraph is 109,  
10 but let me just explain that the issue there which Mr Justice Hildyard was  
11 addressing was whether the High Court had jurisdiction to order disclosure of  
12 the ATE policy as a matter of procedure. That was opposed. That is not in  
13 issue here. We are not taking a jurisdictional point. The judge found that he  
14 did have jurisdiction, but in that case he declined to make the order for  
15 disclosure of the ATE policy.

16 **MR JUSTICE MORRIS:** The policy as a whole?

17 **MS KREISBERGER:** As a whole. He didn't offer it up. I think the most helpful  
18 comment on this which I wanted to take you to, sir, is Hollander on  
19 Documentary Evidence. We can go back to the judgment if helpful.

20 **MR JUSTICE MORRIS:** That's at the back.

21 **MS KREISBERGER:** That's at tab B10, the penultimate page, 335. What the  
22 editors say is this. It is at paragraph 26-07, halfway down the page.

23 **MR JUSTICE MORRIS:** Yes.

24 **MS KREISBERGER:** They say:

25 "It is obvious that there are real problems in giving disclosure of an ATE policy. It  
26 gives the other party a tactical advantage to know the terms of funding,

1 exactly how the mechanics of the settlement would work, who has to be  
2 consulted, who has to approve and how the matter is to be sorted out in case  
3 of dispute. It may make clear the limitations on funding, the exclusions, and  
4 indicate the pressures that can tactically be brought on the insured party. The  
5 terms may well also give some indication of or opportunity to infer the nature  
6 of the legal advice received. It is therefore likely that parties will seek  
7 disclosure of ATE policies for tactical reasons, under the guise of needing the  
8 information for management purposes. Hildyard J was fully alive to these  
9 concerns when he dealt with the application in RBS. Having considered that  
10 he had jurisdiction, he declined to make such an order. He was concerned  
11 that to some extent the application was in contrived clothing, that it anticipated  
12 a potential defence to a security for costs application that might never be  
13 brought, and might occasion distracting satellite litigation."

14 They quote there paragraph 109. Sir, could I just suggest you read that to yourself,  
15 just so you have the full picture.

16 **MR JUSTICE MORRIS:** I will. Let me read it now. Thank you. Thank you.

17 **MS KREISBERGER:** As you will see there, they concluded:

18 "Much is to be said for this cautious approach."

19 **MR JUSTICE MORRIS:** There is also a passage about conditional fee  
20 arrangements.

21 **MS KREISBERGER:** I am grateful for that.

22 **MR JUSTICE MORRIS:** If the terms were relevant, I notice. I notice in a passage --  
23 just let me digest that again. The reference in the second half to group  
24 litigation and to ensure that claimants have transparency. Anyway, I have  
25 read all that. Thank you.

26 **MS KREISBERGER:** Sir, then just to finish off this part of my submissions, if I could

1 ask you to go back to tab 6.

2 **MR JUSTICE MORRIS:** Yes.

3 **MS KREISBERGER:** You will see that is the transcript of the first case management  
4 conference in the Gutmann case, the trains case. If I could ask you to turn up  
5 page 147.

6 **MR JUSTICE MORRIS:** Yes.

7 **MS KREISBERGER:** You see line 19?

8 **MR JUSTICE MORRIS:** Yes.

9 **MS KREISBERGER:** This is the President:  
10 "The other thing that has been I think redacted is the ATE insurance policy, which is  
11 at tab 2."

12 **MR JUSTICE MORRIS:** The next sentence or paragraph, something went wrong  
13 with the transcript I think:  
14 "Given the circumstances of this case where your client is protected as to adverse  
15 costs", do you think? Mr Kennelly is saying yes.

16 **MR KENNELLY:** That's what I inferred.

17 **MR JUSTICE MORRIS:** "We don't see any reason why it needs to be made  
18 confidential."  
19 That's the policy as a whole?

20 **MS KREISBERGER:** Correct.

21 **MR JUSTICE MORRIS:** Carry on.

22 **MS KREISBERGER:** Mr Moser then updated the Tribunal to say:  
23 "Matters have moved on and we propose now that the ATE insurance policy also be  
24 made public".  
25 Which is where we are.

26 **MR JUSTICE MORRIS:** Yes.

1 **MS KREISBERGER:** "... subject to the premium remaining redacted."

2 The President said:

3 "That seems reasonable. The premiums are redacted anyway and the premiums  
4 obviously are confidential and will betray an assessment of risk."

5 So that was the approach in Gutmann.

6 **MR JUSTICE MORRIS:** Yes.

7 **MS KREISBERGER:** I should just come back to the Hildyard judgment -- more  
8 efficient to do that now -- just on the question of privilege. So for the same  
9 reason, betraying an assessment of risk, insurance premia are treated as  
10 privileged. The relevant passage, so we are moving back to tab 4,  
11 bundle page 79, at the bottom of that page, paragraph 112. The judge said:

12 "In my view, it is unlikely that privilege attaches to an ATE policy, whether it is  
13 litigation or advice privilege, except to the extent that parts of a policy, such as  
14 possibly the amount of premium", and they refer back to the Barr case, which  
15 is in the bundle, but I don't think I need to show it to you, "may attract legal  
16 advice privilege and require redaction on the basis that the relevant part might  
17 allow the reader to work out what legal advice has been given."

18 So for the same reasons really the starting point is that the premiums attract  
19 privilege.

20 **MR JUSTICE MORRIS:** Yes. Okay.

21 **MS KREISBERGER:** That is what I was going to say on that topic in terms of the  
22 principles. We are in no different position here, sir. They have the ATE  
23 policy, but the position is disclosing the premium does give rise to this risk of  
24 betraying an assessment of merits, and so the premia are properly withheld.

25 As a subsidiary point, one does not see the relevance of it.

26 Now, sir, I am going to take you to the litigation budget but I am going to do that in



1 the context of the CFA arrangements, and I think that will also be helpful on  
2 this topic. That will assist on relevance.

3 **MR JUSTICE MORRIS:** Okay. One of the passages you just referred to in one of  
4 the cases was saying something along the lines that if the ATE policy was  
5 disclosed generally or the premia, the other side would be able to make  
6 comparisons with standard forms, and therefore perhaps make  
7 an assessment. I am going to press you a little bit about this betraying the  
8 assessment of the merits or, as it is put in RBS:

9 "How would this allow the reader to work out the legal advice that had been given."

10 I don't know. In the context of this sort of litigation, how would that arise?

11 Presumably somebody on your side would say: "Oh, that's a very, very large  
12 premium. Therefore, they must think the risk of an adverse costs order is very  
13 high". Perhaps you can walk me through how that assessment -- how it would  
14 betray an assessment of the risks?

15 **MS KREISBERGER:** Sir, I am just going to take instructions on that point, if I may.

16 **MR JUSTICE MORRIS:** Please do. You can come back to it.

17 **MS KREISBERGER:** I am grateful.

18 **MR JUSTICE MORRIS:** Mr Tidswell, did you wish to add something?

19 **MR TIDSWELL:** If I may. Ms Kreisberger, if I ask you again on the same point, is  
20 there a separate point, apart from the legal advice privilege that the Chairman  
21 has just been referring to, which I think you have couched as a strategic point,  
22 and what is that founded on? Is that based on us having a discretion not to  
23 permit disclosure of things as a matter of general discretion, or is that actually  
24 based on a provision as to entitlement to redact and withhold?

25 **MS KREISBERGER:** It is a question for your judgment as to whether this material is  
26 confidential. I am not running a jurisdiction argument, as one saw in some of

1 the cases, because clearly we are in a position where we have disclosed the  
2 documents, but the principle is that confidential material cannot be compelled.  
3 So provided you are with me, sir, that this material is strategically sensitive  
4 and/or privileged, its disclosure cannot be compelled by the Tribunal.

5 **MR JUSTICE MORRIS:** Is that right? What, under schedule 4, or whatever the  
6 schedule of the Act is?

7 **MS KREISBERGER:** Schedule 4 --

8 **MR JUSTICE MORRIS:** Your basis for saying "cannot be compelled", is that right as  
9 a matter of law, or is there a balancing exercise and confidentiality rings come  
10 in? Anyway, I don't know.

11 **MS KREISBERGER:** If it is properly privileged.

12 **MR TIDSWELL:** I agree privilege. That is the point of my question really. I can see  
13 absolutely if you are making an argument about privilege, which I think is  
14 certainly referred to by Mr Justice Hildyard, and he expressed a little bit of  
15 scepticism about it, but one can see the argument. I think it goes to the  
16 Chairman's question about how you might reverse engineer the question  
17 about the merits. I am asking you what other basis there might be and, if so,  
18 what the foundation for that is. As I understand confidentiality, it would not be  
19 a bar to disclosure per se. What it might do is give rise to a consideration  
20 about how the material is dealt with, and obviously confidentiality rings is one  
21 way of dealing with that, but it is not in itself a reason to refuse disclosure.

22 So when you talk about the strategic aspects of this, I was not sure whether you  
23 were putting it into that basket to say that there was a discretion as to how it  
24 was dealt with or whether again, as the Chairman suggests, you were putting  
25 it back into schedule 4 as a legitimate business interest that might be affected.

26 **MR JUSTICE MORRIS:** Just picking up on that, we have the privilege issue and

1 plainly the legal advice that a party receives about the merits is privileged, and  
2 it would therefore follow that if the disclosure of the premium could be seen to,  
3 as it says, allow the reader to work out the legal advice or even gives some  
4 idea, some flavour of the legal advice, you are in the territory of privilege. You  
5 have identified a category first of all of commercial confidentiality, which, as  
6 I understand it, is really to do with damaging the business interests of either  
7 the funder or even the solicitors vis-a-vis competitors, but then there's this  
8 middle category of strategic sensitivity, which I think is in principle a very  
9 relevant consideration and is not necessarily confined to legal advice, but  
10 tactical advantage: "We know they are going to run out of money tomorrow",  
11 et cetera, et cetera.

12 I think we would be interested to know, in analytical terms, where that category of  
13 strategic sensitivity comes.

14 **MS KREISBERGER:** I understand the issue. So the --

15 **MR JUSTICE MORRIS:** Do come back to us if you wish to.

16 **MS KREISBERGER:** I may take you up on that, but perhaps I could give you my  
17 initial reaction, which is that it is ultimately a matter in your discretion. As  
18 I said, I am not running a jurisdiction argument.

19 In terms of the correct analytical approach, we are still within the territory of Rule 101  
20 of the CAT rules, which relates to requests for confidential treatment. That's  
21 the broad category one is operating in and that's what we are doing. Rule 101  
22 does refer to schedule 4, which brings in commercial sensitivity. I will just let  
23 you pick that up.

24 **MR JUSTICE MORRIS:** I think it is in your skeleton, isn't it?

25 **MS KREISBERGER:** It is. If I can take you to that. So this is page 6 of the bundle.

26 **MR JUSTICE MORRIS:** Is schedule 4 set out anywhere precisely?

1 **MS KREISBERGER:** Not in my skeleton.

2 **MR JUSTICE MORRIS:** We can find it anyway.

3 **MS KREISBERGER:** Probably the best place is 7.33 to 7.42 of the Guide, which  
4 sets it out. The way I have set it out in the skeleton is that confidential  
5 treatment is the broad category. This is the process, the procedural request.

6 **MR JUSTICE MORRIS:** Yes.

7 **MS KREISBERGER:** Within that, one has commercially sensitive information.

8 **MR JUSTICE MORRIS:** Yes.

9 **MS KREISBERGER:** And strategically sensitive information.

10 **MR JUSTICE MORRIS:** Yes.

11 **MS KREISBERGER:** I don't want to be misconstrued. As you helpfully indicated,  
12 privilege is a different category, but to the extent that material is strategically  
13 sensitive, then the Tribunal has a discretion not to order its disclosure. So it is  
14 not a hard-edged rule. That's why the skeleton does also refer to relevance,  
15 because at that stage you have to take a view based on the nature of the  
16 information, the strategic sensitivity and the question: "Well, does the  
17 defendant really need this? Does it need to go into the public domain?"  
18 I think one needs to take a pragmatic balancing approach.

19 **MR JUSTICE MORRIS:** Okay. I am just going to -- I was going to -- yes. Go  
20 ahead.

21 **MS KREISBERGER:** I am sure this goes without saying, but just so my submission  
22 is clear, we have seen and you will have a look at the confidentiality ring order  
23 in draft. Whilst that might assist on matters of commercial sensitivity, it, of  
24 course, does not assist on questions of strategic sensitivity.

25 **MR JUSTICE MORRIS:** Okay. Yes. That was going to be one of my questions at  
26 the outset, but that's helpful.

1 **MS KREISBERGER:** I am just going to take instructions to check.

2 **MR JUSTICE MORRIS:** I was just looking at your skeleton in relation to the  
3 principles on strategic sensitivity and seeing whether the authorities seem to  
4 establish that that is something different from privilege, and I think those  
5 passages do suggest that, because they refer to tactical advantage.

6 **MS KREISBERGER:** They do, that's correct, although what one sees is that the  
7 same material often ticks both boxes, because they are intimately linked, but  
8 there's a distinction between the tactical advantage, which the other side gets,  
9 and the broader principle that material which betrays legal advice shouldn't be  
10 disclosed.

11 **MR JUSTICE MORRIS:** Yes. Okay. All right.

12 **MS KREISBERGER:** For instance, I took you, sir, to paragraph 23 of Excalibur.

13 **MR JUSTICE MORRIS:** I have just been reading it. That's fine. All right. Well, we  
14 are bombarding you with questions, so I will let you get back to where you are  
15 going.

16 **MS KREISBERGER:** It is very helpful.

17 **MR JUSTICE MORRIS:** That deals with premia I think.

18 **MS KREISBERGER:** I just want to make sure that I have fully addressed your  
19 question, which is what is it about the premia that raises the sensitivity. I am  
20 not sure I can say this is specific to this case, but the problem with seeing the  
21 premia is that they can be compared to premia on other cases and so they  
22 can betray an assessment of risks. It is the point you made, sir, if it is very  
23 large, that might reveal something. As I said, I am going to come back to  
24 relevance to the extent that I can.

25 Sir, I think you also have the point that we discussed that strategic sensitivity is  
26 a matter of discretion but privilege is not. That's the hard-edged rule. You

1 have paragraph 23 of Excalibur to assist you on that.

2 Unless the Tribunal --

3 **MR JUSTICE MORRIS:** I have not read 23. Let me see it.

4 **MS KREISBERGER:** That's on page --

5 **MR JUSTICE MORRIS:** I am just marking it. That's all. Okay.

6 **MS KREISBERGER:** Unless the Tribunal has any other questions on premia I was  
7 going to move on to clause 7.6 of the LFA. So that is at tab 7.

8 **MR JUSTICE MORRIS:** Just so I am clear, your case obviously on the premia is  
9 that it can't go into the ring. It has to be fully redacted.

10 **MS KREISBERGER:** Because it is strategically sensitive and privileged. So it  
11 wouldn't address the concern.

12 **MR JUSTICE MORRIS:** Okay. Can I put the authorities bundle away for the  
13 moment?

14 **MS KREISBERGER:** You can.

15 **MR JUSTICE MORRIS:** Are you going to take me to 7.6?

16 **MS KREISBERGER:** 7.6, which is tab 7, page 88. Sir, if I could perhaps just give  
17 you a minute to read that back to yourself, the unredacted part.

18 **MR JUSTICE MORRIS:** Okay. I have read that.

19 **MS KREISBERGER:** You will see this provision is addressing a scenario where  
20 solicitors' fees exceed budgeted amounts. Once that excess reaches  
21 a certain threshold, funding notices can be presented to the funder; in other  
22 words, to seek further funding.

23 If it is helpful, and I found it helpful, the definition of funding notices --

24 **MR JUSTICE MORRIS:** Yes, it is clause --

25 **MS KREISBERGER:** -- on page 81, 1.26.

26 **MR JUSTICE MORRIS:** As I understand it, a funding notice is a sort of invoice,

1 "please pay at certain junctures", by reference to presumably the stages in the  
2 litigation. I have not digested it fully.

3 **MS KREISBERGER:** Correct. It's a request for funds.

4 **MR JUSTICE MORRIS:** It is a request for funds, but it must presumably be on  
5 a staged basis, must it not, by reference to the budget?

6 **MS KREISBERGER:** I will check whether that's accurate. Here one is, of course,  
7 dealing with the scenario where the budget has been exceeded.

8 **MR JUSTICE MORRIS:** Yes. I have looked at the budget, but the budget will have  
9 a budget for solicitors' fees for a particular stage. If the fees for that stage are  
10 exceeded, then you cannot ask for payment, unless the excess is above  
11 a certain amount, or until. Anyway, yes, carry on.

12 **MS KREISBERGER:** That is right. That is the point. So the redactions, coming  
13 back to 7.6, relate to the level of the excess threshold, and I can say the  
14 mechanics of calculating the threshold and what happens next. The same  
15 point applies once again. The level at which that threshold is set is  
16 strategically sensitive information and it is privileged information, because it  
17 betrays their assessment of litigation risk. So to the extent it reveals  
18 an assessment of merits, it is privileged and it would also give a tactical  
19 advantage. On relevance, it is a point which only impacts Dr Kent's solicitors.

20 We say if it were known by Apple, it could be used as a pressure point. That's the  
21 tactical sensitivity. This one hits all three boxes of confidentiality, because it is  
22 also commercially sensitive information between competing solicitors' firms.

23 **MR JUSTICE MORRIS:** For my part, I think it would help if you gave me some form  
24 of worked example as to why this would betray an assessment of litigation  
25 risk. It is the point at which the threshold is set? For how long? I am not sure  
26 I fully understand it, to be honest. What I would imagine is you take the

1 budget presumably for a particular item, a particular stage in the proceedings,  
2 and more solicitors' fees than that budget are incurred, and Hausfeld therefore  
3 has to wait either for a period of time or for all time, if it doesn't exceed it by  
4 a lot, before they get reimbursed. Is that correct?

5 **MS KREISBERGER:** That's correct.

6 **MR JUSTICE MORRIS:** I don't know whether you are able to explain in  
7 a hypothetical example by comparing excess A with excess B and why --  
8 I mean, yes.

9 **MS KREISBERGER:** It is a little difficult to do that. There is always difficulty when  
10 I am making submissions on material that is not in front of the Tribunal, but  
11 the particular concern is how high the threshold is. So what amount of cost  
12 will be incurred before a funding notice will be issued reveals something about  
13 the solicitors' appetite for risk. So if that threshold was very low -- one could  
14 put £5,000, for argument's sake.

15 **MR JUSTICE MORRIS:** It doesn't really matter. Any figure, yes.

16 **MS KREISBERGER:** A low figure might tell you -- can I make the proviso that I don't  
17 know where the Tribunal is going to land on this -- I don't know anything about  
18 my solicitors' appetite for risk. This is purely hypothetical.

19 **MR JUSTICE MORRIS:** That is what I am asking. A low threshold --

20 **MS KREISBERGER:** A low threshold might indicate a low appetite for risk,  
21 essentially, and an unwillingness to incur costs without the ability to issue the  
22 funding notice to seek more funding.

23 **MR JUSTICE MORRIS:** Because ultimately their internal assessment of merits is  
24 weak and you are not going to recover it, or you are going to be out of pocket.

25 **MS KREISBERGER:** Yes, it is the latter. It is a willingness to incur cost without a  
26 funder, in the absence of funding provision. The higher it is, the higher the



1 risk for the solicitor.

2 **MR JUSTICE MORRIS:** No, the higher the threshold, the lower --

3 **MS KREISBERGER:** Sorry. The higher the threshold, the lower --

4 **MR JUSTICE MORRIS:** -- or the less perceived risk. The higher the threshold, the

5 less risk perceived by the solicitor.

6 **MS KREISBERGER:** But the real concern -- of course one is operating in

7 hypothetical scenarios here. One wants to take a prudent approach, because

8 the eventualities are potentially very serious if we are right on this point, and

9 the point is this. It would give the opponent the ability to apply a pressure

10 point, in other words, to engage in litigation gaming to drive --

11 **MR JUSTICE MORRIS:** -- drive up costs.

12 **MS KREISBERGER:** Exactly. That might be the overall approach, in any event, but

13 nonetheless far better to keep this threshold out of the hands of the opponent

14 that might --

15 **MR JUSTICE MORRIS:** That's really the strategic point, at its heart, isn't it?

16 **MS KREISBERGER:** Absolutely. That's the strategic point. You have my

17 submission that it is also covered by privilege.

18 **MR JUSTICE MORRIS:** I do.

19 **MS KREISBERGER:** The tactical point is the real and genuine concern here. As

20 I say, the Tribunal has to take a pragmatic approach and ask what in any

21 event is the relevance?

22 I think I will complete the picture when I take you to the budget, sir, which I think will

23 help as well.

24 **MR JUSTICE MORRIS:** Okay. I have that argument now I think.

25 **MS KREISBERGER:** Then I move on to category number 3, which are the CFAs.

26 Sir, you have the point that there was not anything in Apple's skeleton on this.

1 So I am having to rely on what has been said in correspondence. I will  
2 obviously be very interested to hear what Mr Kennelly has to say. I am not  
3 going to ask you to turn up the letter, but to assist, what has been said in  
4 correspondence is that information about these arrangements is needed in  
5 order to calculate the amount of funding actually required for the litigation. So  
6 that's the basis for the request.

7 **MR JUSTICE MORRIS:** Okay.

8 **MS KREISBERGER:** I have two answers. One, that you are by now very familiar  
9 with on the principles, but, secondly, that assertion -- and this is the new  
10 point -- is factually wrong.

11 Just on the first point for your note, I don't think we need to go back to the  
12 authorities, but I have taken you to the passages that say CFA arrangements  
13 can be withheld for the same reason as insurance premiums.

14 **MR JUSTICE MORRIS:** Just remind me of the cases, just for my note. I can't  
15 remember which --

16 **MS KREISBERGER:** For your note, there is Arroyo, tab 1, page 14, paragraph 48.

17 **MR JUSTICE MORRIS:** Okay.

18 **MS KREISBERGER:** The authority I rely on most heavily is Excalibur, tab 3,  
19 page 56, paragraph 25.

20 **MR JUSTICE MORRIS:** Okay.

21 **MS KREISBERGER:** That's where he says parties are entitled.

22 **MR JUSTICE MORRIS:** You don't need to repeat it.

23 **MS KREISBERGER:** You have got that one.

24 **MR JUSTICE MORRIS:** It is just for my note to go back to.

25 **MS KREISBERGER:** There is also paragraph 23 on page 55. You were just looking  
26 at that one. That's the sentence that begins:

1 "If and insofar as ..."  
2 Just like ATE premium, they give an indication of risk assessment, they betray legal  
3 advice, so they are privileged and they give tactical advantage. You have  
4 that, sir.  
5 I think what might be worthwhile to move on to is why Apple's assertion is factually  
6 wrong. Now, this of course goes to relevance. I am going to ask you to turn  
7 up the litigation budget. That's in the CMC bundle. So you can put away the  
8 authorities bundle if you have it open. Tab 9.  
9 **MR JUSTICE MORRIS:** Now, of course I am right in thinking, am I not, that the  
10 conditional fee agreements have not been disclosed at all?  
11 **MS KREISBERGER:** That's correct. They have not been disclosed.  
12 **MR JUSTICE MORRIS:** We are not talking about a part document here, are we?  
13 This is an application for disclosure in a way.  
14 **MS KREISBERGER:** That's right, although this application has not been made.  
15 **MR JUSTICE MORRIS:** Okay. Yes. Strictly, in those circumstances, one might say  
16 that the first question in any event here is relevance. I don't know.  
17 **MS KREISBERGER:** I accept that.  
18 **MR JUSTICE MORRIS:** Yes. You are going to take me to the litigation budget.  
19 **MS KREISBERGER:** I am going to take you to the litigation budget. I just want to  
20 explain, I am juggling the hard copy and a version on the iPad because I am  
21 very short-sighted. I hope you do better than me. I struggle to see  
22 particularly some of the footnotes on the hard copy, but it is at tab --  
23 **MR JUSTICE MORRIS:** Actually, let's see if I can get it up on the bundle as well.  
24 **MS KREISBERGER:** It is easier.  
25 **MR JUSTICE MORRIS:** I actually can just about see it, not that I -- let me just see.  
26 What page is it in the bundle? It is page 138.

1 **MS KREISBERGER:** My bundle page has gone.

2 **MR JUSTICE MORRIS:** 138, I think.

3 **MS KREISBERGER:** Let me check on that.

4 **MR KENNELLY:** It is 138.

5 **MR JUSTICE MORRIS:** No, it is not. Sadly, the bundle is not the same  
6 page number, which is always ...

7 **MS KREISBERGER:** Is this the electronic? If someone could give me --

8 **MR JUSTICE MORRIS:** It is 26 pages on. It is about 150 something. 160 I am  
9 going to guess at.

10 **MS KREISBERGER:** It is behind tab 9 on the electronic bundle.

11 **MR JUSTICE MORRIS:** Oh, I can do it by tab if I can manage that. It turns out to be  
12 at page 165. Can I make it larger? That's my next ... I am not sure it is going  
13 to work larger. Yes. Okay. I have it larger. Yes.

14 **MS KREISBERGER:** Great. So now if I can take you to the bottom right-hand  
15 corner in hard copy as well, if that's easier.

16 **MR JUSTICE MORRIS:** Yes. I am working on the hard copy at the moment.

17 **MS KREISBERGER:** Okay. You will see there the penultimate row in the bottom  
18 right-hand corner says "Total through to trial".

19 **MR JUSTICE MORRIS:** Yes.

20 **MS KREISBERGER:** There you have the sum of 15.3 million.

21 **MR JUSTICE MORRIS:** Yes.

22 **MS KREISBERGER:** Just below that you have "Total funded amount" and that's the  
23 11.29 million figure. Footnote 1 explains what has gone into 11.29, and it is  
24 the final sentence of footnote 1.

25 **MR JUSTICE MORRIS:** Let me just highlight that.

26 **MS KREISBERGER:** That's the one where I move to electronic.

1 **MR JUSTICE MORRIS:** Yes, I have it.

2 **MS KREISBERGER:** It says:

3 "The total funded amount is based on the CFA hourly rates."

4 **MR JUSTICE MORRIS:** Yes.

5 **MS KREISBERGER:** I just want to spend a moment on terminology.

6 **MR JUSTICE MORRIS:** I would quite like -- I did look at that sentence before.

7 I don't know why. I would quite like the whole of that footnote to be explained

8 to me I think.

9 **MS KREISBERGER:** It is perhaps not as self-explanatory. I have also had to spend

10 some time understanding this. So all solicitors and counsel are engaged

11 under partial CFAs.

12 **MR JUSTICE MORRIS:** Yes.

13 **MS KREISBERGER:** But per hour amounts are displayed at the full hourly rates.

14 So that is a reference to the boxes.

15 **MR JUSTICE MORRIS:** Yes. I can see the hourly rates.

16 **MS KREISBERGER:** You can see the hourly rates. Then you can see the values

17 for each event, claim form, first CMC and so on. Those are straightforward

18 multiplication of hours by hourly rate.

19 **MR JUSTICE MORRIS:** The full hourly rate -- okay. You carry on. I would like to

20 know the contrast between the full hourly rate and the CFA hourly rate.

21 **MS KREISBERGER:** Yes. CFA hourly rate is what's known as a discounted base

22 rate.

23 **MR JUSTICE MORRIS:** Right.

24 **MS KREISBERGER:** The way I think of this, to avoid confusion, is that's the pay as

25 you go rate. So there is a discount from the hourly rate that you see in the

26 boxes.

1 **MR JUSTICE MORRIS:** Yes.

2 **MS KREISBERGER:** Which populates the budget, and the discounted rate is what's  
3 incurred as you go through the litigation. No other costs.

4 **MR JUSTICE MORRIS:** Without embarrassing you, taking let's say the most junior  
5 counsel at 225 an hour, then he will be paid 160 an hour or something as the  
6 case goes along and that's the CFA right.

7 **MS KREISBERGER:** Precisely. That's an important point. What footnote 1 is  
8 telling us is that the 11.29 million figure called "total funded amount" is not  
9 capturing the full hourly rates in the boxes. It is capturing the lower amount,  
10 the hypothetical sum that you just put forward for junior counsel. So there is  
11 good reason to refer to that as total funded amount, because that's the  
12 amount that is funded by the funder as one goes through the litigation.

13 **MR JUSTICE MORRIS:** Yes.

14 **MS KREISBERGER:** So when Apple say, "We need to see your CFAs, because we  
15 need to know the amount of funding actually required for the litigation", they  
16 are wrong. They have that number. That's in the litigation budget. The  
17 amount of budget actually required for the litigation is 11.29 million, because it  
18 is only the discounted base rates or CFA rates referred to in this budget,  
19 which are the costs which are payable prior to the conclusion of the litigation.  
20 So that is the figure Apple say they need and they have it.

21 **MR JUSTICE MORRIS:** Yes.

22 **MS KREISBERGER:** The deferred element is only payable in the event of success.  
23 It is not part of the funded costs. The deferred element will be captured by  
24 adverse costs in the event that Dr Kent is successful and makes out her  
25 claim. Those aren't costs paid for by the funder.

26 **MR JUSTICE MORRIS:** By the ATE, is it?

1 **MS KREISBERGER:** They are not part of the funded costs as we go through the  
2 litigation.

3 **MR JUSTICE MORRIS:** No, but you just said they would be captured by the  
4 adverse costs.

5 **MS KREISBERGER:** If Dr Kent wins --

6 **MR JUSTICE MORRIS:** If Dr Kent wins, then those costs --

7 **MS KREISBERGER:** -- adverse costs against Apple. They only kick in in the event  
8 of a win.

9 **MR JUSTICE MORRIS:** I am getting confused.

10 **MS KREISBERGER:** Sorry. It is very confusing. They only arise if Dr Kent is  
11 successful and then they are borne by Apple. They are not costs which arise  
12 if Dr Kent is not successful, the deferred element.

13 **MR JUSTICE MORRIS:** It is not funding required from the funder?

14 **MS KREISBERGER:** No.

15 **MR JUSTICE MORRIS:** Okay.

16 **MS KREISBERGER:** Now, just for completeness, the figure -- I will just bring it up  
17 again -- in the bottom right-hand corner marked "total through to trial".

18 **MR JUSTICE MORRIS:** Yes.

19 **MS KREISBERGER:** That's the 15.3 million figure. That amount is based on the  
20 numbers in the boxes, essentially. So that is not based on discounted rates.  
21 That's based on the ordinary hourly rates that you see captured in a budget.

22 **MR JUSTICE MORRIS:** Yes.

23 **MS KREISBERGER:** Both amounts -- make sure I have got this right -- include the  
24 ATE premia. So Apple --

25 **MR JUSTICE MORRIS:** Where do we get that from? Where in this --

26 **MS KREISBERGER:** It is in the footnote. So if we go back to --

1 **MR JUSTICE MORRIS:** Footnote?

2 **MS KREISBERGER:** -- footnote 5, ATE premia are included in total funded amount.

3 **MR JUSTICE MORRIS:** Can you not therefore -- if you look at the one above it,  
4 "excluded from the total", can you therefore not work out what the premia are  
5 anyway?

6 **MS KREISBERGER:** No.

7 **MR JUSTICE MORRIS:** Because the difference is not all premia. Is that right?

8 **MS KREISBERGER:** I think the difference, as I understand it, is that there are  
9 distribution costs in the total and they are obviously not confirmed at this  
10 stage, because that's only --

11 **MR JUSTICE MORRIS:** Assuming that 16.3 million includes premia, somewhere in  
12 those descriptions in the left-hand side will be -- will it be disbursements?

13 **MS KREISBERGER:** Yes.

14 **MR JUSTICE MORRIS:** It will be within disbursements, will it, the premia?

15 **MS KREISBERGER:** Yes.

16 **MR JUSTICE MORRIS:** But we certainly know now the premia are a maximum of  
17 £11 million at the very most.

18 **MS KREISBERGER:** I am going to check that. I am --

19 **MR JUSTICE MORRIS:** I am playing detective, perhaps trying to be too clever.

20 **MS KREISBERGER:** I am going to check that point in case I have misspoken.

21 **MR JUSTICE MORRIS:** Okay.

22 **MS KREISBERGER:** That's correct. What one does not see is the level of the CFA,  
23 the deferred element.

24 **MR JUSTICE MORRIS:** We are on two different points. I was trying to play  
25 detective.

26 **MS KREISBERGER:** The premia does not sit in the million. You cannot work it out



1 because the premia, if you remember, are in the 11.29 million figure.

2 **MR JUSTICE MORRIS:** I see that, but if you look at footnotes 4 and 5 --

3 **MS KREISBERGER:** Yes.

4 **MR JUSTICE MORRIS:** -- the 16.3 are excluded from the total -- are included in the

5 total of -- okay. That's my mistake.

6 **MS KREISBERGER:** They are excluded from the 16.3.

7 **MR JUSTICE MORRIS:** That's my mistake. The 16.3 excludes the premia.

8 **MS KREISBERGER:** Exactly.

9 **MR JUSTICE MORRIS:** So the premia are not included in any of the -- if you go to

10 the left-hand side -- I set a hare running I think here. If you go to the left-hand

11 side, the premia are not included in any category, but then --

12 **MS KREISBERGER:** Sorry, on the left-hand side?

13 **MR JUSTICE MORRIS:** Right. If you look at the whole figure of 16 million, it is

14 made up of solicitors, counsel, experts, other. That's the total. That's

15 everything. Yes?

16 **MS KREISBERGER:** Yes.

17 **MR JUSTICE MORRIS:** Plus the proposed class representative costs. That all

18 adds up to 16.3 million. Because I had misinterpreted footnote 4, I had

19 thought that somewhere in those categories on the left-hand side were the

20 premia, but that's wrong. But then, when you get to total funded amount,

21 that's the 11 million, the premia are added back in.

22 **MS KREISBERGER:** Correct.

23 **MR JUSTICE MORRIS:** Okay. Therefore, you can't work out --

24 **MS KREISBERGER:** You can't reverse engineer the amount of premia or the

25 contingency element. That's right.

26 Just to finish off, what you don't have in here is the success element. So that goes

1 beyond the deferred. So there are three levels: discounted base rate, full  
2 hourly rate, which includes the deferred element paid in the event of success,  
3 and then there's a success element, and that's paid out of undistributed  
4 damages. So it is not part of the funded costs.

5 That's what I was going to say on the CFA.

6 **MR JUSTICE MORRIS:** Now we are going to the appendix point.

7 **MS KREISBERGER:** That's the one. There is nothing I can really show you on that.

8 It has simply been redacted. Matters have moved on. I don't have Apple's  
9 response to our latest correspondence, because I think that went across this  
10 morning. So quite understandably I will need to hear what Mr Kennelly has to  
11 say to this. But, as I highlighted in opening, and I think I saw Mr Kennelly  
12 nodding, Apple are not asking for the actual costs that subsequently populate  
13 this spreadsheet. So that's agreed between the parties. That's helpful. But  
14 Dr Kent's position is that the Excel spreadsheet, as attached to the LFA at the  
15 time of its conclusion, cannot be disclosed in its full form.

16 So a redacted version can be disclosed, but the amounts which populate that budget  
17 are the discounted base rate amounts, and that's where I find it helpful to think  
18 about the pay as you go point, because that's what that budget is capturing,  
19 costs as the litigation progresses.

20 If Apple were given the unredacted version of those budgeted amounts, they could  
21 then do the maths by looking at the amount I have just shown you in the  
22 litigation budget and could work out the deferred amounts.

23 **MR JUSTICE MORRIS:** Okay. Let me just digest that for a moment. I think what  
24 you are saying let's take, for example -- a good example -- first CMC,  
25 column 3 on the budget we have just been looking at, and we take the amount  
26 for your senior associate at 37,500, which is budgeted. Yes?

1 **MS KREISBERGER:** Yes.

2 **MR JUSTICE MORRIS:** Column 3, line 2, 37,500. You are saying that the  
3 equivalent figure in the appendix 1, assuming it is broken down into similar  
4 stages, will have a budgeted figure which will be less than that, because it will  
5 be the discounted rate, say 30,000, and that will then disclose the deferred  
6 element, which is part of the conditional fee agreement. I mean, effectively, in  
7 a way, it is the same point as the argument on the conditional fee agreement.

8 **MS KREISBERGER:** Correct. That's precisely the point. The reason for not  
9 disclosing the full budget is because it gives an insight into the conditional fee  
10 arrangement -- so it is the same point -- as regards the deferred element.

11 **MR JUSTICE MORRIS:** Fine. So the objection is it will disclose -- okay. That's very  
12 helpful.

13 **MS KREISBERGER:** That's all I was going to say on those points, sir.

14 **MR JUSTICE MORRIS:** I think that is fine. I am wondering -- I think we will turn to  
15 Mr Kennelly. I know there is a separate Vannin point, but we will deal with  
16 that later.

17 Mr Kennelly, I am assuming you will be a while. Are you likely to be longer than  
18 45 minutes? Difficult to tell. I am just wondering whether it would be worth  
19 taking a five or ten minute break.

20 **MR KENNELLY:** I think it is worth taking a break anyway. I will still try to finish  
21 before lunch.

22 **MR JUSTICE MORRIS:** We'll break until 12.30 actually. If we run over a little bit if  
23 you think we're going to finish, but don't feel under time pressure. I am going  
24 to rise from the hearing. Thank you.

25 **(Short break)**

26 **MR JUSTICE MORRIS:** We are back in the hearing. I hope that everybody can

1 hear me. I think Mr Bishop is not yet in. He is in now.

2 Before Mr Kennelly makes his submissions, Ms Kreisberger -- oh, I am sorry. I was  
3 waiting for the live stream. I will start again.

4 I think we are back at the hearing. Thank you.

5 Before Mr Kennelly makes his submissions can I just go back to the beginning of  
6 your submissions, Ms Kreisberger, where you mentioned the fact that the  
7 parties had reached agreement on three or four of the other aspects. Are you  
8 able to tell me -- and perhaps Mr Kennelly can tell me -- the basis upon which  
9 that agreement has been reached; in other words, what is going to happen to  
10 priorities, funders' return, cost cap, bank account details, whether they are  
11 going to be disclosed or not, and whether it is going to the ring.

12 **MS KREISBERGER:** Sir, I will just check but I think all of those items are being  
13 disclosed into the ring. I will just check on funders' return.

14 **MR KENNELLY:** I understand that funders' return is going into the ring.

15 **MS KREISBERGER:** Yes, going into the ring. That's right.

16 **MR JUSTICE MORRIS:** Okay. Mr Kennelly, when you are ready.

17

18 **Submissions by MR KENNELLY**

19 **MR KENNELLY:** Mr Chairman, members of the Tribunal, thank you.

20 Having heard Ms Kreisberger's submissions this morning, Apple is no longer going to  
21 pursue the redaction in relation to the litigation plan budget, the document at  
22 appendix 1, and we are not seeking disclosure at this stage of the conditional  
23 and contingent fee arrangements. It would have been perhaps better -- we  
24 would have saved some time earlier on -- if we had had that explanation  
25 earlier on in correspondence. Having had it from Ms Kreisberger today, we  
26 are not going to pursue those this afternoon.

1 We do pursue, notwithstanding her explanation, the unredaction of the ATE premium  
2 and the solicitors' excess. I will explain why that is.

3 The simple fact is the way the PCR has put together the budget and redacted it  
4 means it is not possible for the Tribunal to tell from the budget how much  
5 money is actually available for the litigation.

6 **MR JUSTICE MORRIS:** Let me just take this down. Sorry. Can I just clarify?  
7 When you say how much money is available for the litigation, how much  
8 money is available for the claimant's costs?

9 **MR KENNELLY:** From the funder, yes.

10 **MR JUSTICE MORRIS:** Thank you.

11 **MR KENNELLY:** Even though it is just the claimant's costs we are talking about,  
12 that's obviously a very important issue.

13 **MR JUSTICE MORRIS:** Yes, it is one of the key issues that we will have to  
14 determine.

15 **MR KENNELLY:** Indeed. It is a key feature of this statutory scheme, which goes to  
16 explain in part why the older, non-collective proceeding authorities are of  
17 more limited assistance to you, because in this context, in the context of  
18 collective proceedings, it is critical to understand that the litigation is properly  
19 funded and that the PCR will not run out of money halfway through. That's  
20 not just a problem for the class members, although it would be highly  
21 undesirable for them. It would be a major problem for the Tribunal and it is  
22 contrary to public interest.

23 It is also of concern to the respondents, because we would be exposed to a high  
24 level of unrecoverable costs, notwithstanding the ATE insurance, if that were  
25 to happen.

26 It is clear that we cannot tell how much funding is available to the claimants without

1 the ATE premium from the very same litigation budget to trial that you have  
2 been looking at, both on hard copy and on screen. I will go to that now, if  
3 I may.

4 **MR JUSTICE MORRIS:** Okay. This is an important part. You say we can't tell how  
5 much funding is available without knowing the ATE premium.

6 **MR KENNELLY:** Precisely.

7 **MR JUSTICE MORRIS:** Let me go to -- I have got the budget.

8 **MR KENNELLY:** In fact, sir, Mr Chairman, you picked up on this point just before  
9 we took our break. We begin with the total funded amount, that  
10 11 million-odd, at the very far right of the table.

11 **MR JUSTICE MORRIS:** Yes.

12 **MR KENNELLY:** That's the total funded amount. That's what the funders are  
13 providing, the claimants.

14 **MR JUSTICE MORRIS:** Yes.

15 **MR KENNELLY:** But, sir, as you recognised, that figure includes the ATE premia.

16 **MR JUSTICE MORRIS:** Okay. I need to digest this a little bit. Yes. I have got that  
17 much.

18 **MR KENNELLY:** The ATE premia, you get that, sir, from the footnote 5 you were  
19 looking at. Just looking at footnote 5, you see how the ATE premia is broken  
20 down -- this is an important point I will come to -- between deposit and  
21 contingent premia. They are included in the total funded amount. So that  
22 money, that 11 million-odd, has to also cover the payment of this premia. It is  
23 the deposit premium with which I am particularly concerned.

24 **MR JUSTICE MORRIS:** Okay. I have looked at it once. Can you briefly perhaps in  
25 a sentence explain the distinction between the two. The deposit premia is  
26 payable at the outset or something, is it?

1 **MR KENNELLY:** Indeed. The best thing to do to understand that distinction is to go  
2 back to the ATE policy behind tab 8, and page 112 of the CMC bundle.

3 **MR JUSTICE MORRIS:** Yes.

4 **MR KENNELLY:** So it is tab 8.

5 **MR JUSTICE MORRIS:** I have it. I had already marked it actually.

6 **MR KENNELLY:** I am grateful. Contingent premium is the amount specified in the  
7 schedule plus IPT, and that is payable by the insured in the event of  
8 a successful outcome being achieved. That's only payable if there is success.  
9 Then, more importantly for our purposes, the deposit premium is the amount  
10 specified in the schedule that the insured either directly or via their  
11 representative is required to pay to the insurer at the policy commencement  
12 date. That is not contingent on a successful outcome being achieved.

13 We are concerned here with the deposit premium, because the bigger the deposit  
14 premium, the less there is to fight the case.

15 **MR JUSTICE MORRIS:** If the deposit premium is half a million or the deposit  
16 premium is a million, that will reduce the -- you take it away from the 11.2. If it  
17 is a million, then it is 10.2. You say that when it comes to the CPO hearing  
18 we, the Tribunal, probably need to know a figure -- Ms Kreisberger may  
19 disagree -- we need to know, as in most of the other cases, a figure for the  
20 amount that the funder is providing for the costs of the litigation, and in most  
21 cases that figure is specified I think, the cases I have looked at.

22 **MR KENNELLY:** Indeed.

23 **MR JUSTICE MORRIS:** Obviously, if the premium is £30,000, it is not going to  
24 make much difference, and I would say what's the difference between  
25 11.29 million and 11.26 million. But if the premium is £5 million or even  
26 £2 million, you would say that that would make a difference in our

1 assessment.

2 **MR KENNELLY:** That's my submission.

3 **MR JUSTICE MORRIS:** Okay. Carry on.

4 **MR KENNELLY:** We make a similar point in relation to the solicitors' excess. It is  
5 the other side of the same coin. I am not going to take you back --

6 **MR JUSTICE MORRIS:** Sorry. I am just digesting for a moment. I am sorry about  
7 this. Let me just think. I am just looking at the budget again. You are  
8 highlighting the fact that the premia are included in the bottom line. I am  
9 assuming that you say the fact that they are excluded from the total is  
10 irrelevant for this purpose?

11 **MR KENNELLY:** Yes.

12 **MR JUSTICE MORRIS:** All right. You are going to the solicitors' point, excess.

13 **MR KENNELLY:** Indeed, solicitors' excess. I am not going to take you back to the  
14 agreement. You have seen clause 7.6 and the fact that it is redacted, but my  
15 basic point is that that excess is also relevant to determining how much  
16 money is actually required to run the litigation, because, as I read it, if the  
17 excess is right, if the solicitors are prepared to agree to a large excess, that's  
18 less out of the funding pot. Ms Kreisberger shakes her head.

19 **MR JUSTICE MORRIS:** One minute. I need to understand this point. I don't find  
20 the excess point at the moment -- if the excess is high, the less -- say that  
21 again?

22 **MR KENNELLY:** The less is needed from the funding pot. It may be that the  
23 language we are using is confusing but we are describing the same thing,  
24 because on the solicitors' excess, Ms Kreisberger accepted that the amount of  
25 the excess could show the solicitors' appetite for risk, the amount they were  
26 prepared to take on, how much exposure they were prepared to take. But



1 even on that basis, it is material to the demand on the funder, because if the  
2 solicitors have a low appetite and they are prepared to take very little  
3 exposure themselves, it is all on the funder. There is more on the funder and  
4 less on the solicitor.

5 **MR JUSTICE MORRIS:** Hold on a minute. So the lower the excess, the more  
6 frequently or the more that the solicitor can go to the funder and say "fund us".

7 **MR KENNELLY:** Indeed.

8 **MR JUSTICE MORRIS:** Now, of course, the excess isn't a full excess, in the sense  
9 that anything over the budgeted amount is at the solicitors' risk altogether. It  
10 is either for a limited period of time or it is forever, if it never gets above the  
11 amount, because once you have reached it, you can go back and claim it.  
12 I am assuming -- let's just say at the stage of the CMC the excess is £50,000.  
13 Then, if the solicitors incur only £40,000 for the CMC, over and above the  
14 budgeted amount, then that is at their risk for all time, presumably.

15 **MR KENNELLY:** That's the problem. We don't know. That is the very point.

16 **MR JUSTICE MORRIS:** It appears to work that way, because they can claim once  
17 the excess -- let's say it is 50,000, the figure. I don't know whether it works on  
18 a stage by stage basis, but assuming it does -- maybe it doesn't. Maybe it is  
19 an overall figure. Maybe it runs across the whole case. In other words, if it is  
20 across the whole case, then eventually, once it gets above that excess, then  
21 the funder will have to pay it. Ms Kreisberger is shaking her head. I don't  
22 know. It is a slightly odd provision, because if it is a 50,000 excess for the  
23 CMC stage, the solicitors run up 40,000 excess only, then that is wholly at  
24 their risk, and they have to pay it, and they never get it back. If they run up  
25 50,000, if they add another 10,000 to that budget, then they get it all from the  
26 funder. It's a bit odd.

1 **MR KENNELLY:** Sir, if that's how it works, and Ms Kreisberger will explain in reply  
2 how it works. But however it works, it is material to how much money and at  
3 what stage the funder is called upon to provide funding. It goes to the amount  
4 that the funder is expected to deploy, the amount that's needed and the  
5 manner in which it is needed in the course of the proceedings, at the very  
6 least.

7 **MR JUSTICE MORRIS:** But this is an excess over the budgeted cost. If the  
8 budgeted cost is the 11 -- the funded amount, should I say, the 11.29 million.  
9 But that's not the same as the budgeted cost, though, is it?

10 **MR KENNELLY:** I read it the same way you did. If the excess is high and they for  
11 several things, like short CMCs and so forth, don't come near it, then the  
12 solicitors will absorb that cost and the funding won't be needed. The funding  
13 will be called upon for the big ticket items. That's relevant to working out  
14 whether there is enough funding for the claimants to fight the case.

15 Pausing there, the solicitors' excess point is less clear than the ATE premium case.  
16 I don't want the two issues to be taken as equally important. The ATE  
17 premium is plainly important because that's normally a significant sum of  
18 money. The solicitors' excess, there may be an explanation, but we haven't  
19 had it.

20 **MR JUSTICE MORRIS:** Okay. I have to say at the moment I am both struggling  
21 with how it works, as maybe you are, and I am also slightly struggling with  
22 why it puts the Tribunal in difficulty in assessing whether there are sufficient  
23 funds. In every case you will have a budget and you will have a total figure.  
24 The funder is providing £10 million by reference to a budget, and in every  
25 case there is a risk that that budget will overrun. Anyway, carry on. As I say,  
26 at the moment I am struggling a bit with the excess point, perhaps both ways.

1 **MR KENNELLY:** Indeed, sir. On the excess what's really required I think is  
2 an explanation, because we are in the dark as to how it operates in this case.  
3 We think, based on what Ms Kreisberger said in opening, it is, even on her  
4 explanation, relevant to the need for funding and how the funding will be  
5 required and how much will be needed.

6 Those are the two requests. You have heard Ms Kreisberger's concern and the  
7 PCR's concern that giving us this information will somehow give away or  
8 disclose their view of their prospects of success.

9 Three points to make about that concern. The first is a factual point. You saw,  
10 members of the Tribunal, that the ATE premia have two parts, the deposit part  
11 and the contingent or uplift part. We only want the deposit part, which in my  
12 respectful submission is very unlikely to give anything away, because the  
13 contingent part is by definition applicable if they win. That uplift part is the bit  
14 that's liable to tell you something about their views of prospects of success.

15 To understand how much money they actually had to fight the case, we only need to  
16 see the deposit part, the deposit premium, because that's what comes out of  
17 the pot during the proceedings.

18 **MR JUSTICE MORRIS:** Yes.

19 **MR KENNELLY:** We say that's very unlikely to tell us anything about the internal  
20 view of the merits on the PCR side.

21 **MR JUSTICE MORRIS:** Okay.

22 **MR KENNELLY:** I said I had three points. The second point is that this Tribunal  
23 recognises because of the nature of the statutory scheme that the ATE  
24 premium may well need to be known by the Tribunal and by the respondent.  
25 Sir, you mentioned the case of the Tribunal. You may have had the O'Higgins  
26 case in mind. It is to that I now ask you to turn.

1 **MR JUSTICE MORRIS:** Okay. Can I get the authorities bundle? Are you taking me  
2 to the bit of O'Higgins -- actually I have hard copies now anyway so that's all  
3 right.

4 **MR KENNELLY:** I am and I apologise for not providing hard copies to you.

5 **MR JUSTICE MORRIS:** You want me to go to the new material?

6 **MR KENNELLY:** No. If you go first to the old one. I am going to start at 2019. It is  
7 the authorities bundle, tab 7, page 191.

8 **MR JUSTICE MORRIS:** This was a transcript. Okay.

9 **MR KENNELLY:** Yes. I take you to 191 just to show you that they are discussing  
10 the ATE issue.

11 **MR JUSTICE MORRIS:** Yes.

12 **MR KENNELLY:** The Chairman says:

13 "There is nothing else that you feel ought to go into the ring."

14 Then this. The President says:

15 "So ordered, then; subject to this point that I think Mr Justice Roth, then President,  
16 has made in the context of the Trucks litigation, which is that the funding  
17 arrangements have, as it were, a wider interest to the members of the putative  
18 class going forward. If one is considering whether to opt in or out of a given  
19 scheme, one wants to know how it's being funded. I am entirely happy to put  
20 it into the ring at the moment, both funding documents and the ATE insurance  
21 documents, but I want to put down my own marker. I don't consider that to be  
22 a permanent regime. At some point I am going to be quite keen and will raise  
23 of my own motion, the movement of these materials out of the ring and into  
24 the public domain. That may be subject to more specific redactions. For  
25 instance, one might say that in the ATE insurance documents the premiums  
26 ought, whatever the status of the other party document, to be kept

1 confidential, because that shows a certain insight into the risk that is being  
2 attributed to the success or failure of the litigation, and I can see a good  
3 reason for keeping that under wraps, but generally speaking I would want to  
4 see these documents migrate into the public domain."

5 Pausing there, the concern that the Tribunal had in 2019, in O'Higgins, was whether  
6 the confidential material was going into the public domain or not. This was  
7 not a debate between having the ATE premium in a confidentiality ring. The  
8 question was whether things are going to be in the public domain.

9 **MR JUSTICE MORRIS:** Right. So in that case at that time the premiums were  
10 going to go into the ring?

11 **MR KENNELLY:** Yes.

12 **MR JUSTICE MORRIS:** Premia?

13 **MR KENNELLY:** Yes, indeed.

14 **MR JUSTICE MORRIS:** One minute.

15 **MR KENNELLY:** Sorry.

16 **MR JUSTICE MORRIS:** Although the logic of that -- the reason that he gives insight  
17 into the risk being attributed to success or failure, doesn't really follow, doesn't  
18 really justify it going into the ring, does it, because he accepts or seems to  
19 accept the risk which Ms Kreisberger refers to, that insight is surely valuable  
20 to those within the ring as well as outside the ring. I am not sure the logic  
21 there quite adds up. Anyway, carry on.

22 **MR KENNELLY:** Sir, I make a virtue of the fact that the Chairman referenced that,  
23 because that's part of the balancing exercise. If you put privilege to one side,  
24 and I will come back to privilege, it was a question of confidentiality and one  
25 balances the potential that there might be an insight into risk being attributed,  
26 and we will come back to whether that's demonstrated or not, the importance

1 of having the information in order to be able to establish that the claim is  
2 properly funded. That is a balancing exercise that needs to be struck. The  
3 degree of insight that's shown will depend on every individual case and the  
4 factors in every individual case.

5 **MR JUSTICE MORRIS:** All right.

6 **MR KENNELLY:** So he had that point in his mind, but what did the Tribunal do?  
7 We see that when we come to 2021.

8 **MR JUSTICE MORRIS:** Now I have to look at the other tabs, presumably?

9 **MR KENNELLY:** Yes, please. That's in what is now tab 9.3. You will recall in  
10 O'Higgins there was a carriage dispute, two different candidate PCRs, and  
11 there still is. That explains some of the submissions I am about to take you  
12 to.

13 In tab 9.3 if you go, please, to page 153, top right-hand corner. This is the  
14 submission of Mr Patel, who is one of the counsel for the O'Higgins PCR.

15 On 153, he makes the point on which I rely, where he says, line 8 down, he says:  
16 "It is a non-controversial proposition. Having more funding available to bring to this  
17 litigation is better for the class. If funding becomes tight ..."

18 **MR JUSTICE MORRIS:** I have not quite got it.

19 **MR KENNELLY:** Line 8, sir.

20 **MR JUSTICE MORRIS:** "Other things being equal, having more funding".

21 **MR KENNELLY:** Yes, indeed.

22 "Having more funding available to bring to this litigation is better for the class. If  
23 funding becomes tight, on the other hand, the defendants can put pressure on  
24 the class representatives to settle. That will be bad news for the class. Work  
25 streams could be compromised. Points could be overlooked. Facts may not  
26 be fully investigated, documents not fully analysed. So the class's interests

1 we say are unambiguously served by having more funding available."  
2 That goes to the point we discussed earlier about how critical it is that we know how  
3 much funding they actually have to run this case.  
4 Then, if you go, please, to page 155, top right-hand corner.  
5 **MR JUSTICE MORRIS:** Yes.  
6 **MR KENNELLY:** The very bottom of that page, line 22. He is making the point that  
7 superficially the amount of funding available to the O'Higgins PCR and the  
8 Evans PCR -- it is 29 million or 22 million. Then, over the page, line 6 --  
9 **MR JUSTICE MORRIS:** This is all submission, is it?  
10 **MR KENNELLY:** All submission, sir, yes.  
11 **MR JUSTICE MORRIS:** Yes.  
12 **MR KENNELLY:** The next question is how much of this funding is available to fight  
13 the rest of the claim. He says:  
14 "It is a simple calculation, involving taking the amounts spent off the amount that you  
15 see in the table, but it is not a useful metric, because it does not tell you the  
16 amount left in respect of the conduct of the litigation. In particular, it does not  
17 tell you the amount that will disappear out of the pot automatically if the CPO  
18 is granted to one of the parties, and what I am talking about there is the ATE  
19 deposit premiums."  
20 He is making the point that I have made to you a moment ago.  
21 **MR JUSTICE MORRIS:** Yes.  
22 **MR KENNELLY:** At 157, next page --  
23 **MR JUSTICE MORRIS:** Just give me a moment. Yes.  
24 **MR KENNELLY:** From line 7 down he compares the Evans and O'Higgins PCR's  
25 funded costs. You see at line 16 a reference to the ATE column. Each party  
26 has an ATE column. He refers to the deposit premium for the Evans PCR.

1 **MR JUSTICE MORRIS:** Yes.

2 **MR KENNELLY:** And he refers to the premiums for the O'Higgins PCR.

3 **MR JUSTICE MORRIS:** Those having been presumably voluntarily disclosed.

4 **MR KENNELLY:** Yes. Yes, indeed.

5 **MR JUSTICE MORRIS:** They were in the ring, weren't they?

6 **MR KENNELLY:** Sorry, disclosed into the ring. Of course, sir, for our purposes, just  
7 to be absolutely clear, all we want is disclosure into the ring. But here the  
8 parties recognised at the very least they would have to disclose the material  
9 into the ring, and that means the Tribunal could see it, but, in fact, because of  
10 the importance of the issue to the public interest and the need for  
11 transparency, the parties disclosed the figures publicly and the debate was  
12 had in public.

13 **MR JUSTICE MORRIS:** Okay. So that was an explanation of it, but there wasn't  
14 any sort of ruling on it, but it was accepted, was it, that the deposit premiums  
15 were relevant to be disclosed in order to work out the funding available?

16 **MR KENNELLY:** Accepted between the parties. The Tribunal has not yet made  
17 a decision.

18 **MR JUSTICE MORRIS:** All right, sorry. So this is argument, is it?

19 **MR KENNELLY:** All argument. I was simply showing what happened in the  
20 O'Higgins case.

21 **MR JUSTICE MORRIS:** This is in the actual CPO hearing?

22 **MR KENNELLY:** At the CPO hearing. The premia were disclosed not just into the  
23 ring but publicly, because and one can see why, from the debate the PCRs  
24 were having, it was critical to understand how much money was in fact  
25 available to fight the case, which is the very question that this Tribunal needs  
26 to determine at the CPO hearing.



1 **MR JUSTICE MORRIS:** Okay.

2 **MR KENNELLY:** The fact that in theory the premium might reveal an element of risk  
3 isn't sufficient.

4 **MR JUSTICE MORRIS:** Okay. But I am right in thinking by this stage nobody was  
5 saying the premia shouldn't be disclosed?

6 **MR KENNELLY:** No.

7 **MR JUSTICE MORRIS:** It wasn't contested.

8 **MR KENNELLY:** It wasn't contested.

9 **MR JUSTICE MORRIS:** You are obviously much more on top of the case. Was it,  
10 in fact, in the interests of one or the other of the proposed PCRs -- it was in  
11 their interests to show they had more available, was it, so they would want to  
12 disclose it?

13 **MR KENNELLY:** Certainly Mr Patel believed it was in his interests to say that.  
14 That's a fair inference, sir.

15 **MR JUSTICE MORRIS:** Okay. Yes. Thank you.

16 **MR KENNELLY:** Of course, if the concern is that somehow telling us this will reveal  
17 something on their side, we have said in correspondence if they told us the  
18 total amount of funding actually available, that would be sufficient. We don't  
19 need a breakdown or any more detailed insight. We just need to know the  
20 total amount of funding actually available.

21 **MR JUSTICE MORRIS:** Okay, but if they gave that figure, they would say -- would  
22 that necessarily reveal the premia, presumably?

23 **MR KENNELLY:** It would certainly go some way to --

24 **MR JUSTICE MORRIS:** Yes.

25 **MR KENNELLY:** My third of three points on this issue, and that's the cases to which  
26 my learned friend referred that are not collective proceedings cases. We say

1 they are of really limited utility, for the reasons I gave in opening. But even  
2 those cases I am afraid don't support the PCR to the extent that they have  
3 claimed in their skeleton.

4 Could I take you first, please, to the Excalibur judgment.

5 **MR JUSTICE MORRIS:** Yes, please do.

6 **MR KENNELLY:** In the authorities bundle.

7 **MR JUSTICE MORRIS:** I have to say I am interested to hear what you say about  
8 the cases themselves, but we are well on to the point that we are in a very  
9 special regime here, and whereas the authorities seem to suggest that it is  
10 doubtful whether ATE policies should be disclosed at all, we are in a different  
11 place, because the question before this Tribunal is very different. We have  
12 a very special job that we have to do, but anyway, yes. Excalibur is at tab --

13 **MR KENNELLY:** Excalibur is at tab 3. I am grateful for that indication and I will go  
14 a bit more quickly through these than I might have done.

15 **MR JUSTICE MORRIS:** I am not sure. I would like to know why you say they don't  
16 go as far as perhaps Ms Kreisberger has suggested.

17 **MR KENNELLY:** So page 54, bottom right-hand corner in Excalibur. This is  
18 a judgment of, as Ms Kreisberger said, Mr Justice Popplewell, as he then  
19 was, in 2012. He refers there in paragraph 19 to that very same decision of  
20 the Senior Master Whittaker in Arroyo that Ms Kreisberger took you to. He  
21 says this:

22 "I was referred to the decision of Senior Master Whittaker in Arroyo. I have not  
23 derived a great deal of assistance from that. What he had to say in that case  
24 about privilege attaching to ATE policies was obiter, because he did not  
25 regard them as relevant and was largely premised on the fact that they would  
26 attach legal advice privilege. In so far as he regarded them as going any

1 further and attracting litigation privilege, it is a decision which can be  
2 supported, if at all, only on the particular facts of that case."

3 **MR JUSTICE MORRIS:** Yes.

4 **MR KENNELLY:** Over the page, Mr Justice Popplewell continues.

5 **MR JUSTICE MORRIS:** Go on.

6 **MR KENNELLY:** Paragraph 23. This is an important point, because Ms Kreisberger  
7 was saying: "Well, it is either privileged or it is strategically important". One  
8 has to be very careful in asserting privilege. If these documents are  
9 privileged, they attract very strong protection. The Tribunal has no discretion  
10 to put them in the ring if they are privileged. Therefore, the confines of  
11 privilege are narrowly drawn, particularly legal advice privilege.

12 In paragraph 23, Mr Justice Popplewell is dealing with the submission that if a party  
13 could not appoint a solicitor to discuss the case without risk of having to  
14 disclose its funding arrangement -- this is a different issue, but it is the point of  
15 principle I am making, that would inhibit free access to justice.

16 "In my submission, this is not so. If and insofar as the disclosure of the funding  
17 arrangements would or might give the other side an indication of the advice  
18 which was being sought or the advice which was being given, it would be  
19 covered by legal advice privilege. There is no need for litigation privilege to  
20 be extended more widely to cover such a case."

21 **MR JUSTICE MORRIS:** Okay.

22 **MR KENNELLY:** Then 24, he said:

23 "As Senior Master Whittaker said in Arroyo, if the opposite party knew a party's  
24 funding arrangements, it might give them a tactical advantage in relation to  
25 various aspects of the conduct of the litigation. One of the difficulties with this  
26 submission in the current case which did not arise in Arroyo is that without

1 knowing what the terms of the funding arrangements are it is difficult to judge  
2 the extent to which knowledge of those arrangements by the defendants  
3 might give rise to the opportunity to deploy them for unfair tactical advantage.  
4 In those circumstances, these considerations do not seem to me to weigh  
5 very heavily, as a matter of discretion, against an order for disclosure of the  
6 documents which I have held to be unprivileged."

7 **MR JUSTICE MORRIS:** So this is on the issue of strategic advantage or tactical  
8 advantage which is a different category. It is not privilege.

9 **MR KENNELLY:** Yes.

10 **MR JUSTICE MORRIS:** And here the judge is saying that in the balancing exercise  
11 between disclosure of relevant and privileged documents and tactical  
12 advantage he didn't think tactical advantage weighed very heavily.

13 **MR KENNELLY:** Indeed. One can see why the learned judge was sceptical. It is  
14 one thing to assert it, as the PCR does, but it just does not follow that having  
15 that bare figure tells you very much at all about the internal view of the merits  
16 of the case.

17 There is no evidence before you at all on this point. So the points that  
18 Ms Kreisberger made are really just assertion on her part. It boiled down to  
19 the fact that having the number would give you some insight into the risk or  
20 the extent to which the ATE provider regarded the case as likely to succeed or  
21 not.

22 **MR JUSTICE MORRIS:** Yes.

23 **MR KENNELLY:** It could be compared, she said, to premia in other cases.

24 I make two points about that. First, this is going into the ring. There is no question  
25 of the wider market comparing the ATE premium in this case to the premium  
26 offered in other cases.

1 **MR JUSTICE MORRIS:** Save to the extent that it is believed that those within the  
2 ring, who presumably are the defendants' legal advisers, will have themselves  
3 knowledge of the sorts of premia that are or are not charged in either cases  
4 generally or in collective proceedings more specifically.

5 **MR KENNELLY:** Well, our knowledge of what's offered of the premia in collective  
6 proceedings more generally comes from the various documents that I am  
7 showing the Tribunal. We have no particular insight into the ATE premia that  
8 have not yet been disclosed in the few cases before the Tribunal where the  
9 issue has arisen.

10 Secondly, and more importantly, sir, even if one can compare the premia in this case  
11 to the premia, for example, in O'Higgins, what does it actually tell you about  
12 the internal view of the merits on Dr Kent's side.

13 The level of the premium will depend on a huge number of variables, which are  
14 different from case to case, which don't depend necessarily on the merits of  
15 the particular case. It will depend on the state of the litigation funding market,  
16 the ease with which the funders can raise funds, the extent to which capital  
17 can be better deployed elsewhere.

18 There are a huge number of variables, economic variables that will affect the level of  
19 the premium that have nothing to do with the particular merits assessment  
20 that has been given in the case in question, which is why throughout the case  
21 law, even in the non-collective proceedings cases, one sees the judge again  
22 and again expressing scepticism about whether one can tell anything from  
23 an ATE premium really.

24 **MR JUSTICE MORRIS:** Okay. That was your third point. You were not going to  
25 take us to any of the other cases, were you?

26 **MR KENNELLY:** I was, but I am conscious of the time.

1 **MR JUSTICE MORRIS:** I am conscious of the time too.

2 **MR KENNELLY:** I don't want to overstay my welcome on this side of the luncheon  
3 adjournment. If you want to stop now, sir, I am happy to stop.

4 **MR JUSTICE MORRIS:** You are obviously going to be a little while. Ms Kreisberger  
5 will obviously want to reply. We have the Vannin issue. I don't know how  
6 long that's going to take us. I don't know whether you can reduce it even  
7 further.

8 **MR KENNELLY:** I can help you. On this point I have one minute on solicitors'  
9 excess and a very short point on RBS Rights. Then I will have made my  
10 submissions on the points raised by Ms Kreisberger. On Vannin I will need  
11 about ten minutes.

12 **MR JUSTICE MORRIS:** Right. Ms Kreisberger, we are going to break for lunch.  
13 I am not going to carry on sitting for another half an hour. I think it is probably  
14 worth, if you are going to be two or three minutes finishing the redaction issue,  
15 I think it is worth finishing that and then we will break, subject to everybody  
16 else in the room here being happy with that. I don't want to deprive people of  
17 their lunch. Yes. Okay. Yes. Carry on.

18 **MR KENNELLY:** I am grateful. So before I go back to the cases, I have given you  
19 my submission as to why the ATE premium itself may not necessarily -- is  
20 unlikely to tell us anything, especially not the deposit premium, as I said, but  
21 there is no evidence, nothing specific to this case, which Ms Kreisberger has  
22 offered to suggest why the deposit premium will tell you or me anything about  
23 their internal view of the merits.

24 That is the same for the solicitors' excess, because she says that if the excess is  
25 low, it shows a low appetite for risk; if it is high, a high appetite for risk on the  
26 part of her and counsel -- solicitors' excess, so just solicitors, but again

1 Hausfeld's appetite for risk in this particular case will be informed by a large  
2 number of factors other than their ultimate view of the prospects of success.  
3 Like any business, they will make decisions for good commercial reasons and  
4 their appetite for risk may be informed by factors going to their -- I speculate,  
5 but a whole range of factors, internal commercial factors to do with their  
6 business, their own access to funding and so forth, that are quite separate  
7 from the question of their internal view of the merits. I am afraid that point  
8 does not really go very far from Dr Kent's perspective.

9 In response to a similar question from the Tribunal, Ms Kreisberger said it could be  
10 a pressure point. It could encourage the respondents to game the system  
11 and try and drive up costs, but this process is closely supervised by the  
12 Tribunal.

13 The ability for a defendant to play tactical games on the basis of its knowledge of the  
14 level of the solicitors' excess is very limited. That kind of behaviour is  
15 carefully policed by the Tribunal and has been in these cases so far. So it's  
16 just unrealistic to suggest that knowing the solicitors' excess will tell us  
17 anything about their internal view of the merits, still less give us an ability to  
18 game the Tribunal.

19 That's the point on the facts. Very quickly on the case law, RBS Rights,  
20 Ms Kreisberger said this was an authority to show that the premium is  
21 privileged. Of course, it didn't go that far. If you go to RBS Rights behind  
22 tab 4, first of all, paragraph 109, this was the passage that you saw in  
23 Hollander on page 79.

24 **MR JUSTICE MORRIS:** Yes.

25 **MR KENNELLY:** I rely on this passage. It goes to again distinguish these cases  
26 from the case at hand. Mr Justice Hildyard said at 109 that generally an ATE

1 policy will not be relevant, but he says:

2 "There may be exceptions. For example, where the ATE policy has been deployed  
3 in the course of the proceedings, whereby to influence or impact on  
4 a decision."

5 That's plainly the case here. It is central to the request for certification:

6 "And it is especially likely" --

7 **MR JUSTICE MORRIS:** To show ability to pay adverse costs?

8 **MR KENNELLY:** Yes.

9 **MR JUSTICE MORRIS:** Yes.

10 **MR KENNELLY:** Then:

11 "It is especially likely, as it seems to me, in the context of group litigation, where the  
12 considerable benefit to claimants of several liability has been obtained. More  
13 generally, I would add, to my mind, the court will in such a context tend to be  
14 more amenable to such disclosure as the price of other benefits, and to  
15 ensure that the claimants themselves have transparency."

16 That's in the context of group litigation in the Chancery Division. That's a fortiori in  
17 the case of collective proceedings.

18 **MR JUSTICE MORRIS:** Yes. Okay.

19 **MR KENNELLY:** Sorry, sir. I cut across you.

20 **MR JUSTICE MORRIS:** No, you didn't. It is fine. I was just going to praise myself  
21 for having remarked in passing when we looked at it first time that there was  
22 a read across from group litigation. That was all.

23 **MR KENNELLY:** You took my punchline.

24 **MR JUSTICE MORRIS:** I declined to do so.

25 **MR KENNELLY:** Paragraph 111, he doesn't agree with the Senior Master in Arroyo  
26 that the ATE policy is privileged. That's the second rejection of that point. He



1 says, at 112:

2 "It is unlikely that privilege attaches to an ATE policy, as such, on either ground,  
3 litigation or advice, except to the extent as conceded by leading counsel that  
4 parts of the policy, such as possibly the amount of premium may attract legal  
5 advice privilege and require redaction."

6 So it is not, as Ms Kreisberger said, the rule that the premium attracts privilege. It is  
7 possible and it will depend on the extent to which she can persuade you that  
8 the simple fact of the premium will disclose the legal advice given. We say  
9 they have not come close to showing that in this case for the purpose of  
10 privilege.

11 Sir, I am grateful for the extra time. Those are my submissions on that point.

12 **MR JUSTICE MORRIS:** Okay. Thank you very much. I think we will have a full  
13 hour. We will resume at 2.20 and we will see where we get to. Unless there  
14 are any other matters I am going to rise from the hearing. Thank you very  
15 much.

16 **(1.22 pm)**

17 **(Lunch break)**

18 **(2.20 pm)**

19 **MR JUSTICE MORRIS:** Yes. Good afternoon. Ms Kreisberger, when you are  
20 ready.

21 **MR KENNELLY:** If I may, in fairness to Ms Kreisberger, it may be better for me to  
22 go first because we are the ones who raise --

23 **MR JUSTICE MORRIS:** You want to deal with the Vannin point.

24 **MR KENNELLY:** It is probably better for me to go first and her to reply.

25 **MR JUSTICE MORRIS:** That's my mistake for getting the batting order not quite  
26 right. Yes, go ahead.

1 **MR KENNELLY:** It is a short point. Does the Tribunal have the collective  
2 proceedings application with its accompanying evidence? That's not in one of  
3 the hearing bundles.

4 **MR JUSTICE MORRIS:** No. I have the claim form. I don't have the evidence to  
5 hand in hard copy. I suspect that if somebody directs me, we probably have it  
6 in soft copy somewhere.

7 **MR KENNELLY:** I was going to show you Dr Kent's witness statement. It is a very  
8 short point. I will tell you what it says in a sentence, just for your reference,  
9 and then you can check it later or Ms Kreisberger can correct me.

10 **MR JUSTICE MORRIS:** Give me a minute. I don't know -- no, I don't think I have it  
11 to hand. Go ahead.

12 **MR KENNELLY:** It is a short sentence. I will read it out. Then you will have it in the  
13 transcript anyway. It is paragraph 42 of her first witness statement. Under  
14 the heading "Ability to fund the case", she says:

15 "With regard to the financing of the proposed proceedings, I have entered into  
16 a litigation funding agreement with Vannin."

17 There's a cross-reference to the LFA that we will come back to, which you do have.

18 **MR JUSTICE MORRIS:** Yes.

19 **MR KENNELLY:** Then this:

20 "Vannin has funded litigation in the UK since 2010 and is a member of the  
21 Association of Litigation Funders of England and Wales."

22 That is it on the assets or liquidity of Vannin. Nothing about how many other cases  
23 they have ever funded or whether they have ever paid out on anything. We  
24 simply don't know.

25 Then we look to the LFA, which is annexed to that witness statement or exhibited to  
26 it. That you do have. Please go to it at tab 7 of the CMC bundle, page 78.

1 **MR JUSTICE MORRIS:** Yes.

2 **MR KENNELLY:** Just at the very top of the heading, one sees the actual contractual  
3 counterparty, and it mentions a company not referenced in Dr Kent's  
4 statement or an entity, Project Greve, because the agreement is between  
5 Dr Kent and Vannin Capital PCC, for and on behalf of Project Greve PC,  
6 which gives an address in Jersey.

7 **MR JUSTICE MORRIS:** Yes.

8 **MR KENNELLY:** Nothing obviously here -- one would not expect it -- to accompany  
9 it on the assets or liquidity of any of these entities.

10 We wrote to the PCR. I can show you their response. 12th November letter from  
11 them, tab 21 in your CMC bundle, page 161.

12 **MR JUSTICE MORRIS:** I am going there. Yes.

13 **MR KENNELLY:** I ask you to turn to the indented A, about two thirds of the way  
14 down the page, beginning:

15 "On the ownership, assets and liquidity of Project Greve."

16 We wrote to them and said: "Tell us about the ownership, assets and liquidity  
17 position of Project Greve", which appears in the agreement, and we see what  
18 they say.

19 "On the ownership, assets and liquidity of Project Greve PC and its relationship to  
20 Vannin Capital PCC, Vannin Capital PCC, the company registered in Jersey,  
21 is a protected cell company."

22 That's a creature of Jersey law.

23 "Project Greve PC is a protected cell of Vannin Capital PCC. Project Greve PC is  
24 not a company or legal entity distinct from Vannin Capital. References to  
25 Project Greve PC simply identifies the cell of Vannin Capital PCC, which is  
26 the subject of the transaction with the PCR for the purposes of these

1 proceedings."

2 Pausing there, that appears -- Ms Kreisberger can explain -- to refer to the fact that it  
3 is the assets of Project Greve that are in play and they are insulated or distinct  
4 from those of Vannin Capital.

5 **MR JUSTICE MORRIS:** Just a minute. Those are odd words, subject to the  
6 transaction. They are not the subject. They are party to the transaction.  
7 I don't know what "subject to the transaction" means anyway.

8 **MR KENNELLY:** It is certainly not clear. Then the legal entity involved is Vannin  
9 Capital PCC acting in respect of Project Greve PC. Who is backing this?  
10 I mean are Vannin Capital's assets backing this or not? Is there recourse in  
11 respect of the assets of Vannin Capital?

12 **MR JUSTICE MORRIS:** Vannin Capital is the member.

13 **MR KENNELLY:** We know nothing about Project Greve. So we write again and we  
14 got a response.

15 **MR JUSTICE MORRIS:** Just a minute.

16 **MR KENNELLY:** Sorry.

17 **MR JUSTICE MORRIS:** I note the words there "acting in respect of Project Greve",  
18 whereas the agreement says "acting on behalf of".

19 **MR KENNELLY:** Indeed, sir. We are really concerned about this. We know nothing  
20 about Vannin Capital and we know less about Project Greve.

21 **MR JUSTICE MORRIS:** You wrote to them.

22 **MR KENNELLY:** We wrote to them. I will take you to their response. That's at  
23 tab 27.5 in your CMC bundle.

24 **MR JUSTICE MORRIS:** Got it.

25 **MR KENNELLY:** Page 180.8.

26 **MR JUSTICE MORRIS:** Okay.

1 **MR KENNELLY:** Still nothing on the assets and liquidity of whichever entity is  
2 acting --

3 **MR JUSTICE MORRIS:** Can I just read that? When it says "assets available",  
4 assets of Project Greve?

5 **MR KENNELLY:** Indeed.

6 **MR JUSTICE MORRIS:** Okay.

7 **MR KENNELLY:** So it gives us very little consolation that the LFA can be enforced  
8 by the PCR against Vannin, if, in fact, it is only the assets of Project Greve  
9 that are available to meet the costs of these proceedings.

10 **MR JUSTICE MORRIS:** All right. So what is it that you are asking for?

11 **MR KENNELLY:** We are asking the PCR to tell us what assets are available on the  
12 part of Project Greve to meet the costs of the proposed App Store  
13 proceedings.

14 **MR JUSTICE MORRIS:** Right.

15 **MR KENNELLY:** If indeed, which is not clear, it is only the assets of Project Greve  
16 which are available to meet the costs of what they call the proposed App  
17 Store proceedings.

18 **MR JUSTICE MORRIS:** This more widely goes to the issue of whether or not the  
19 funder has got the funds to fund the costs.

20 **MR KENNELLY:** Yes.

21 **MR JUSTICE MORRIS:** Which is presumably a concern for us more than for you, in  
22 a way.

23 **MR KENNELLY:** It is, but it is also a concern for us for the reason I gave at the  
24 beginning, which is that if this case runs out of money, we will also suffer, in  
25 the sense that there will be irrecoverable costs that won't be covered. Even  
26 though they have ATE, we will not get full recovery. Money will be wasted,

1 even by us.

2 **MR JUSTICE MORRIS:** But that will always be the case.

3 **MR KENNELLY:** Indeed. It is principally a concern for the Tribunal. You are right,  
4 sir.

5 **MR JUSTICE MORRIS:** All right. Okay. This is all on the understanding that even  
6 though Project Greve doesn't have legal personality, the notion of --  
7 Ms Kreisberger can explain -- the notion of a cell within a protected cell  
8 company is if a company contracts only in respect of one of its cells, only the  
9 assets of that cell are involved.

10 **MR KENNELLY:** That's exactly how we read this correspondence from Hausfeld.

11 **MR JUSTICE MORRIS:** Not that I am personally aware of the workings of  
12 a protected cell company, but I am sure others are.

13 **MR KENNELLY:** That exchange reveals the problem. We are not Jersey lawyers.  
14 This is not in the jurisdiction. Sir, you asked us to have to hand today the  
15 Merricks judgment of August this year, the judgment on the application for the  
16 CPO.

17 **MR JUSTICE MORRIS:** Yes. Go on. Give me the reference.

18 **MR KENNELLY:** It is not in the --

19 **MR JUSTICE MORRIS:** I have the judgment here.

20 **MR KENNELLY:** I am sorry. The paragraph I wish to take the Tribunal to is  
21 paragraph 29, because a similar problem arose there, because the funder  
22 was a Jersey company and therefore outside the jurisdiction. You see that  
23 from paragraph 29.

24 **MR JUSTICE MORRIS:** Yes, I have it.

25 **MR KENNELLY:** Mastercard had no right to enforce the LFA. Any rights it might  
26 otherwise have had under the Contracts Rights to Third Parties Act had been

1 expressly excluded.

2 They are also expressly excluded from the LFA in this case:

3 "It could apply for a third party costs order but Innsworth Capital is a Jersey  
4 company", as is the funder here and therefore outside the jurisdiction.

5 "Therefore, Mastercard sought an undertaking from Innsworth Capital to the Tribunal  
6 that it would discharge the liability for costs awarded against Mr Merricks."

7 **MR JUSTICE MORRIS:** Right. That's a slightly different point, isn't it? I don't know.

8 **MR KENNELLY:** That goes to ATE. The point is they were exposed and the  
9 Tribunal in that case said that the position of Mastercard was understandable,  
10 and ultimately the PCR in that case agreed to give the relevant undertakings.

11 **MR JUSTICE MORRIS:** Right. Okay.

12 **MR KENNELLY:** It draws attention to the fact that when you are dealing with  
13 an off-shore or a company outside the jurisdiction there is an added area of  
14 concern, an added degree of concern based with the lack of information we  
15 see.

16 **MR JUSTICE MORRIS:** So what you are asking for is some form of order requiring  
17 the PCR to give information as to the assets available to Project Greve.

18 **MR KENNELLY:** Yes.

19 **MR JUSTICE MORRIS:** Okay. Does that conclude your submissions?

20 **MR KENNELLY:** That concludes my submissions. Yes.

21 **MR JUSTICE MORRIS:** Thank you. Ms Kreisberger, when you are ready.

22

23 **Reply by MS KREISBERGER**

24 **MS KREISBERGER:** Thank you, sir. I will come back to the issue of Vannin at the  
25 end. Now there are only two categories of information left which is redacted  
26 and which is resisted by Apple. That's the ATE premia and the solicitors'

1 excess provision.

2 **MR JUSTICE MORRIS:** Yes.

3 **MS KREISBERGER:** In reply, I will address you on these points. I am going to take  
4 relevance first, coming back to your opening observations. So on ATE premia  
5 I will reply on relevance and then sensitivity.

6 **MR JUSTICE MORRIS:** Yes.

7 **MS KREISBERGER:** On the solicitors' excess provision, I will say a word on the  
8 mechanics, given there was some debate about that, and then relevance and  
9 then sensitivity.

10 **MR JUSTICE MORRIS:** Yes.

11 **MS KREISBERGER:** I may trespass on your time with a couple of comments on the  
12 authorities, but you will appreciate that's of subsidiary importance once you  
13 have my submissions. Finally, I will deal with the Vannin point.

14 On ATE premia and their relevance in these proceedings, Mr Kennelly said they are  
15 relevant because Apple is entitled to know how much funding is there left from  
16 the 11.29 million figure once you have taken out the ATE deposit. My  
17 submission in response is that figure is not a relevant question in these  
18 proceedings. I will explain why.

19 It is probably worth having in front of you, sir, the litigation budget. Tab 8. I will just  
20 get that up. You will recall the amount which was labelled "total through to  
21 trial" in the totals, and that's the 15.3 million figure.

22 **MR JUSTICE MORRIS:** Yes.

23 **MS KREISBERGER:** That is Dr Kent's estimated costs through to trial, excluding  
24 premia, so excluding the deposit, on the basis of full hourly rates.

25 **MR JUSTICE MORRIS:** Yes. Just pausing there, it is the total amount, including  
26 lawyers' deferred amounts, and therefore assumes success.



1 **MS KREISBERGER:** Correct.

2 **MR JUSTICE MORRIS:** Yes. Okay.

3 **MS KREISBERGER:** But that is the actual estimate, or rather the estimate of actual  
4 costs, the best estimate of actual costs through to trial without premia.  
5 Premia aren't in that.

6 **MR JUSTICE MORRIS:** Yes.

7 **MS KREISBERGER:** So the overriding question for the Tribunal is: is that number  
8 sufficient to get the case through to trial, because that number is not muddied  
9 by insurance premia. That's the costs.

10 **MR JUSTICE MORRIS:** One minute. Yes.

11 **MS KREISBERGER:** So that's the relevant figure. Is this a sufficient estimate of  
12 costs for this kind of case?

13 Now, in that sense --

14 **MR JUSTICE MORRIS:** That's the figure.

15 **MS KREISBERGER:** Yes, that's the figure that takes you through to the end. The  
16 deferred element is only triggered if there is success, but that's the full figure  
17 in the case of success. To that extent, the 11.29 million figure, whilst it is  
18 extremely interesting for the funder, because that's the pay as you go figure --  
19 that's what the funder incurs month to month or event to event -- it is not very  
20 interesting for the Tribunal or for Apple, and the reason is this. The  
21 11.29 million figure, as I explained, is based on the discounted rate, ie minus  
22 the deferred element.

23 **MR JUSTICE MORRIS:** Yes.

24 **MS KREISBERGER:** What that figure tells you, it doesn't give you the figure, but  
25 that element of it, anything above the 11.29 million is at risk for the legal team,  
26 the solicitors and the counsel team.

1 **MR JUSTICE MORRIS:** One minute. Yes.

2 **MS KREISBERGER:** So it is interesting for the legal team, including me, because  
3 that's the amount at risk, but 11.29 million doesn't tell the Tribunal what the  
4 overall costs will be. The 11.29 million is what's protected by the funder, and  
5 what's not protected is at risk for the legal team. That is not Apple's concern.  
6 So in paying 11.29 million, the funder is paying the part that's not at risk and  
7 the legal team bear the rest.

8 You can see what the overall effect --

9 **MR JUSTICE MORRIS:** One minute, please. One minute. The funder is paying the  
10 part that is not at risk.

11 **MS KREISBERGER:** Not at risk.

12 **MR JUSTICE MORRIS:** And the rest.

13 **MS KREISBERGER:** The rest is borne by the legal team. You see that overall  
14 amount, that's the 15.3 million, and that doesn't incorporate the premia.

15 Before I move on from relevance -- I will then move on to sensitivity, because it is  
16 a very important point -- but just on relevance, Mr Kennelly took you to FX,  
17 and you quite rightly observed that in that case the premia were offered up  
18 voluntarily. That's because there was a carriage dispute in that case. I am  
19 going to tell you why it is not being offered up here.

20 I just want to address another point Mr Kennelly made before I move on to  
21 sensitivity. He said that the premia are relevant to Dr Kent's ability to pay  
22 adverse costs, he said, "and that's why we need to see them". That's just  
23 a mistake, because the premia are irrelevant. The only aspect which is  
24 relevant to the ability to pay adverse costs, Dr Kent's ability to pay adverse  
25 cost, is the cover, the extent of the cover.

26 **MR JUSTICE MORRIS:** Yes. So his case is based on two aspects. One is are we

1 satisfied that the PCR's costs will be covered. Right? Two is are we satisfied  
2 or will we be satisfied at the CPO hearing as to whether, in the case of the  
3 claim failing, whether the defendants' costs will be covered. Although he  
4 made the point about unrecovered, in relation to the latter, that's met by the  
5 ATE insurers.

6 **MS KREISBERGER:** That's right.

7 **MR JUSTICE MORRIS:** If and insofar as there's a gap between what's covered by  
8 the policy and unrecovered costs, then that is always the case.

9 **MS KREISBERGER:** Yes.

10 **MR JUSTICE MORRIS:** Regardless of whether the claim fails on the merits at the  
11 end of the day or fails because the claimant has run out of money.

12 **MS KREISBERGER:** Yes.

13 **MR JUSTICE MORRIS:** Okay.

14 **MS KREISBERGER:** The cover is in place. That is page 127.

15 **MR JUSTICE MORRIS:** Of.

16 **MS KREISBERGER:** Of the bundle. That's in tab 8.

17 **MR JUSTICE MORRIS:** Authorities bundle?

18 **MS KREISBERGER:** No, sorry. This is the ATE cover.

19 **MR JUSTICE MORRIS:** Okay. Sorry.

20 **MS KREISBERGER:** So it is the CMC bundle, the ATE policy, page 127. You can  
21 see there --

22 **MR JUSTICE MORRIS:** I have not quite got there yet. Yes?

23 **MS KREISBERGER:** Page 127, that sets out the extent of the cover.

24 **MR JUSTICE MORRIS:** What are you pointing to in particular. Sorry.

25 **MS KREISBERGER:** So the box -- if you have page 127 in front of you.

26 **MR JUSTICE MORRIS:** Sorry. 10 million.

1 **MS KREISBERGER:** Yes. So stage 1 is certification. Stage 2 is post certification.  
2 You have the 10 million figure. So that's what's relevant to cover Apple's  
3 costs in the event of an unsuccessful claim.

4 **MR JUSTICE MORRIS:** Yes. Okay. All right. So that deals with that point.

5 **MS KREISBERGER:** So that's that point. Sensitivity --

6 **MR JUSTICE MORRIS:** Were you going to go back to O'Higgins now?

7 **MS KREISBERGER:** No, I made the point there. It is just (inaudible). It was  
8 a carriage dispute.

9 **MR JUSTICE MORRIS:** And they were positively advancing it.

10 **MS KREISBERGER:** Exactly. Exactly.

11 **MR JUSTICE MORRIS:** Okay.

12 **MS KREISBERGER:** So, as I say, here we don't accept that the premia are relevant  
13 to Mr Kennelly's clients, because he has the 15.3 million, which is based on  
14 full hourly rates, and he has the 11.29 million. He does not need to see the  
15 premia.

16 There is a real issue, which I say should weigh heavily in the balance when you  
17 approach this, as a matter of discretion, and in relation importantly to privilege  
18 and that's this. The real sensitivity --

19 **MR JUSTICE MORRIS:** You are now dealing with sensitivity?

20 **MS KREISBERGER:** I am on sensitivity. Now, sir, you have my submissions on  
21 why the premia themselves are sensitive and the authorities on that, but  
22 I want to make a distinct point -- it is an important point -- which is this. If we  
23 give them the premia amounts, the deposit, they can work out the deferred  
24 element.

25 **MR JUSTICE MORRIS:** Yes.

26 **MS KREISBERGER:** Now, they have conceded that the CFA -- they are not

1 bringing that application for disclosure of the CFA. So they accept the  
2 sensitivity is there. But this would be to give them the CFAs via the back  
3 door, at least as far as the deferred element is concerned which, as you know,  
4 is only paid in the event of success.

5 **MR JUSTICE MORRIS:** Yes, because -- I understand the point. Because if, for  
6 example, on those figures the premia was let's say £290,031. Okay?

7 **MS KREISBERGER:** Yes.

8 **MR JUSTICE MORRIS:** The balance of the total funded amount would be  
9 11 million, and therefore you could work out that the deferred element was  
10 4.302 million.

11 **MS KREISBERGER:** Exactly.

12 **MR JUSTICE MORRIS:** Yes.

13 **MS KREISBERGER:** I have written it out as a sum. So if we call it 4 million, which  
14 is the difference between 15.3 and 11.3, 4 million equals deferred element  
15 minus the premium. So 4 million equals X minus Y. X is the deferred  
16 element. Y is the premium. If you know Y, you can obviously work out X.

17 **MR JUSTICE MORRIS:** Yes.

18 **MS KREISBERGER:** By adding Y to 4 million, adding the premium to 4 million.

19 **MR JUSTICE MORRIS:** You will be pleased to know over the luncheon  
20 adjournment I was also dealing in equations and Xs. I had not got an X and  
21 a Y but I was looking at that, yes. I understand the point you are making.

22 **MS KREISBERGER:** I am grateful. So it is simple maths. I don't know how simple,  
23 but it is maths. So this is really the issue here. It is the deferred element via  
24 the back door.

25 Now, that's my principal submission on sensitivity.

26 **MR JUSTICE MORRIS:** Okay.

1 **MS KREISBERGER:** I just want to address a subsidiary point which Mr Kennelly  
2 raised. He said, in any event, disclosing the deposit premium does not  
3 disclose risk in any case, because there are all these other factors. My  
4 submission, without getting into the evidence, is that's not the case, for this  
5 simple reason, matter of principle. The deposit --

6 **MR JUSTICE MORRIS:** The deposit premium.

7 **MS KREISBERGER:** The deposit premium is the only money which the insurer  
8 receives if they lose. They just get the deposit. The contingency is, in the  
9 event of success, that's a reward for the risk. If a deposit premium -- well, put  
10 it this way round. If an ATE insurer considers the risk to be very high, they  
11 could ask for a very large upfront deposit.

12 **MR JUSTICE MORRIS:** Yes.

13 **MS KREISBERGER:** That is why the deposit premium is informative, contrary to  
14 Mr Kennelly's submission on that.

15 **MR JUSTICE MORRIS:** Okay.

16 **MS KREISBERGER:** That was all I was going to say on ATE premium. Solicitors'  
17 excess provision.

18 **MR JUSTICE MORRIS:** Yes.

19 **MS KREISBERGER:** It might just be useful to have clause 7.6 there, just for  
20 reference. On the mechanics of how this works, which, sir, you have raised,  
21 I hope it is helpful to explain that it is a phased approach which applies, as  
22 you speculated. So it is not just something that kicks in at the end of the day.  
23 It operates on a cumulative basis. So if at the end of the first CMC there is  
24 an excess, that goes towards --

25 **MR JUSTICE MORRIS:** Sorry. Just pausing there for a moment, the first CMC is  
26 not the first stage, is it? I think there are other stages before?

1 **MS KREISBERGER:** Yes, sorry. Purely for --

2 **MR JUSTICE MORRIS:** We have the pre-action claim form for CMC according to  
3 the litigation budget. If at the end of the first CMC there's an excess, that is  
4 a cumulative excess at that time covering all three stages. Is that right?

5 **MS KREISBERGER:** Yes, correct. I can't tell you without getting into specific  
6 mechanics how those stages work. I am not suggesting it is precisely on the  
7 basis of the litigation budget that you have seen.

8 **MR JUSTICE MORRIS:** Okay, but let's say you get to the end of stage three, and  
9 the total budget for stage three was 200,000. Okay? The solicitors can put in  
10 litigation funding notices up to that 200,000. Okay? But if by the end of that  
11 stage the fees are 230,000 and the excess is, in fact, more than that, the  
12 solicitors can't bill for it effectively at that point.

13 **MS KREISBERGER:** Correct.

14 **MR JUSTICE MORRIS:** Okay.

15 **MS KREISBERGER:** Correct.

16 **MR JUSTICE MORRIS:** But if at the next stage let's say they become 50,000 over  
17 budget, and that's above the limit, they can bill for it and they can bill  
18 retrospectively for the full excess.

19 **MS KREISBERGER:** Yes, it accumulates. So you can hit the excess based on  
20 incremental. I am going to be told if that is not right, but I think it is.

21 **MR JUSTICE MORRIS:** Okay. So to some extent --

22 **MS KREISBERGER:** They can claim the costs above the threshold or rather they  
23 can present funding notices in respect of amounts above the threshold.

24 **MR JUSTICE MORRIS:** Ah, hold on a minute.

25 **MS KREISBERGER:** But they work up to the threshold. That can apply  
26 cumulatively.

1 **MR JUSTICE MORRIS:** This is where I am still not clear. You may or may not be  
2 able to answer the question. Let's say the threshold is 50,000 excess. Let's  
3 say after the first CMC the total bill is 30,000 over. You get to the next stage  
4 and by that time you are 55,000 over.

5 **MS KREISBERGER:** Yes.

6 **MR JUSTICE MORRIS:** My question is at that point can the solicitors bill for the full  
7 55,000?

8 **MS KREISBERGER:** No.

9 **MR JUSTICE MORRIS:** Only the 5,000. The excess is always non-funded?

10 **MS KREISBERGER:** Agreed.

11 **MR JUSTICE MORRIS:** It is like a proper insurance excess in a way.

12 **MS KREISBERGER:** I am just going to take instructions because I know it is  
13 important to get this right.

14 **MR JUSTICE MORRIS:** So that excess, the gap between the budgeted amount and  
15 the trigger level is never recovered?

16 **MS KREISBERGER:** Correct. Well, it is not funded.

17 **MR JUSTICE MORRIS:** I meant recovered but the solicitors don't get paid --

18 **MS KREISBERGER:** From the funder. My understanding is that can come out of  
19 undistributed damages, in the event of success at the end of the day, but this  
20 is the funding agreement.

21 **MR JUSTICE MORRIS:** Okay. So it is like an excess in an insurance policy where  
22 the insured carries the risk of the first slice of the claim. Yes.

23 **MS KREISBERGER:** I think that -- I am just going to check --

24 **MR JUSTICE MORRIS:** When I make a claim on my motor insurance and I have  
25 a 200-pound excess, I have to pay the first £200 regardless. I am just talking  
26 about funding.



1 **MS KREISBERGER:** Just on funding, absolutely. So to the extent that's helpful,  
2 I think that's all I can say. Where does that get us?

3 **MR JUSTICE MORRIS:** Where does that leave the argument?

4 **MS KREISBERGER:** It takes us back to the £15.3 million figure, because, as I said  
5 earlier, that is the cost estimate.

6 **MR JUSTICE MORRIS:** Yes.

7 **MS KREISBERGER:** So any questions of adequacy go to that 15.3 million figure.

8 **MR JUSTICE MORRIS:** Yes.

9 **MS KREISBERGER:** This excess which exists above the funded amount is simply  
10 an additional contingency for the lawyers to draw down more funding. But  
11 Dr Kent is not asking the Tribunal to take that contingency into account.  
12 Dr Kent does not rely on it to make good her proposition that this claim is  
13 adequately funded.

14 **MR JUSTICE MORRIS:** Because the lawyers take the risk.

15 **MS KREISBERGER:** The lawyers take the risk and it is a contingency. It is not  
16 an element of funding on which Dr Kent relies. Sir, I am just going to check  
17 one point so I don't misspeak.

18 **MR JUSTICE MORRIS:** Okay.

19 **MS KREISBERGER:** Yes, I am right. I just wanted to double check that this is  
20 correct. This excess provision floats above that 15.3 million figure, and you  
21 have that figure.

22 **MR JUSTICE MORRIS:** You mean cumulatively, effectively.

23 **MS KREISBERGER:** Cumulatively.

24 **MR JUSTICE MORRIS:** I think you are directing me to the question of "relevance".

25 **MS KREISBERGER:** This is all on relevance.

26 **MR JUSTICE MORRIS:** You are effectively saying we should not be concerned

1 about this because it is at the lawyers' risk.

2 **MS KREISBERGER:** It is at the lawyers' risk and it goes beyond the cost estimate  
3 on which Dr Kent relies, which is 15.3 million. So it doesn't add to the picture.

4 **MR JUSTICE MORRIS:** Because the solicitors and counsel incur greater costs, so  
5 be it on their head.

6 **MS KREISBERGER:** Correct.

7 **MR JUSTICE MORRIS:** Nobody else is going to pay for it.

8 **MS KREISBERGER:** No.

9 **MR JUSTICE MORRIS:** Okay.

10 **MS KREISBERGER:** As you said, sir, that's relevant, but sensitivity is also  
11 important here. I did address you on this, sir, but I just want to be clear. The  
12 sensitive question that this answers is how much time are the lawyers  
13 prepared to put at risk. So it does directly go to the question of appetite of risk  
14 and assessment of merits.

15 **MR JUSTICE MORRIS:** Just reading this back in my own mind, this slice of excess  
16 is basically unrecoverable from the lawyers' point of view, and if the slice is  
17 very thin, it shows that they are not prepared to put much at risk. Just give  
18 me a minute.

19 **MS KREISBERGER:** Yes.

20 **MR JUSTICE MORRIS:** If the slice is thick -- I am not sure my analogy is  
21 particularly good -- then prepared to put time at risk because they think the  
22 merits are good, say.

23 **MS KREISBERGER:** Yes.

24 **MR JUSTICE MORRIS:** Ultimately, it is recoverable, is it?

25 **MS KREISBERGER:** From undistributed damages in the event of success;  
26 otherwise not.

1 **MR JUSTICE MORRIS:** Well, that's the point.

2 **MS KREISBERGER:** You have it exactly. It tells you a lot about -- appetite for risk  
3 tells you about merits assessment.

4 Just to answer a point that Mr Kennelly addressed you on, he said: "Well, don't worry  
5 about gaming. The Tribunal has controls". Well, we are not so sanguine on  
6 my side. If your opponent knows how much risk the legal team has taken on,  
7 that could be used to their advantage. Knowledge of that exposure could lead  
8 to a driving up of costs as a litigation tactic.

9 **MR JUSTICE MORRIS:** Has that -- maybe it has or it hasn't -- has that concern  
10 been aired by the Tribunal or parties in any of the other cases, the driving up  
11 the costs point, and litigation tactic. I seem to recall it may have been.

12 **MS KREISBERGER:** I will just check that. Shall I come back to you on that?

13 **MR JUSTICE MORRIS:** Come back on that. Has the Tribunal made any  
14 observations and recognised that as a realistic risk or has it said the  
15 opposite? Don't worry. We are robust. We can control it.

16 **MS KREISBERGER:** No, I do think it has come up. I do think it has come up but  
17 I am afraid I don't know it off the top of my head.

18 **MR JUSTICE MORRIS:** Okay.

19 **MS KREISBERGER:** I am just going to check one factual point, sir, before I move  
20 on. Sorry, sir. The excess doesn't need to wait for undistributed damages. It  
21 would be carried by the defendant via an adverse costs order in the event of  
22 success.

23 **MR JUSTICE MORRIS:** Ah, okay.

24 **MS KREISBERGER:** It is like the deferred element.

25 **MR JUSTICE MORRIS:** So it is not undistributed damages. It would be --

26 **MS KREISBERGER:** It is part of the usual costs.

1 **MR JUSTICE MORRIS:** Yes, okay. Either way those that have been carrying the  
2 risk will get it in the event of success.

3 **MS KREISBERGER:** Correct.

4 **MR JUSTICE MORRIS:** If they have got a sure fire winner, then they will have a big  
5 slice; if they have a big slice of excess, it is an indication that they think they  
6 have got a sure fire winner.

7 **MS KREISBERGER:** It can be.

8 **MR JUSTICE MORRIS:** I am putting it in an overblown way.

9 **MS KREISBERGER:** It can be.

10 **MR TIDSWELL:** Sir, could I just ask a question. If you are in a world where you  
11 have gone up and hit the excess, and then funding is available again, am  
12 I correct in thinking that would then become additional costs under the  
13 agreement, because that's costs over and above the budget, and so,  
14 therefore, would be adding to the cake of funding?

15 **MS KREISBERGER:** That's right. So that would come within the definition -- so  
16 that's at page 79 in the bundle. You see there additional action costs are  
17 defined:  
18 "Any action costs over and above the litigation plan budget or any saved costs limit."  
19 So the pie then grows if additional funding is released. Exactly.

20 **MR TIDSWELL:** Thank you.

21 **MR JUSTICE MORRIS:** Yes, Ms Kreisberger.

22 **MS KREISBERGER:** To sum up on 7.6, we say it is not relevant and it is sensitive,  
23 and, given, as you said, the appetite for risk indicates a view on the merits, if it  
24 is privileged, it shouldn't be disclosed in any event. That goes beyond a mere  
25 discretion.

26 **MR JUSTICE MORRIS:** Okay.

1 **MS KREISBERGER:** Sir, I am going to, if I may, just address you extremely briefly  
2 on Excalibur and RBS, because I don't want the position on those authorities  
3 to be misrepresented.

4 **MR JUSTICE MORRIS:** Okay. Can I get my authorities bundle out?

5 **MS KREISBERGER:** I am grateful.

6 **MR JUSTICE MORRIS:** It is around tab 4 or 5. 3.

7 **MS KREISBERGER:** Excalibur is tab 3. Going back to paragraph 24, which  
8 Mr Kennelly took you to, and he emphasised the last sentence where the  
9 judge said that:

10 "These considerations don't seem to me to weigh very heavily as a matter of my  
11 discretion."

12 But the issue here was different, so I just want to make sure you have the  
13 significance of this paragraph.

14 **MR JUSTICE MORRIS:** The issue in Excalibur was different?

15 **MS KREISBERGER:** In Excalibur. So what he says -- Mr Picken for the claimants  
16 made submissions based on Arroyo, and he raised concerns that if his  
17 opponent knew what the funding arrangements were, it might give them a  
18 tactical advantage. Then what Mr Justice Popplewell said is:

19 "One of the difficulties with this submission in the current case", so on the facts of  
20 Excalibur, "which did not arise in Arroyo is that without knowing what the  
21 terms of the funding arrangements are, it is difficult to know how they might be  
22 deployed for unfair tactical advantage."

23 So when the judge was giving his judgment, he didn't have any funding documents.  
24 You asked me what documents were being withheld. We don't know. It is not  
25 set out. But it looks like it was CFA and ATE. They are referred to simply as  
26 "the funding documents". So he didn't have the documents and he said "Well,

1 the claimants have gone too far, because I can't tell if there is tactical  
2 advantage here or not".

3 He rejected what I described at the outset as the maximalist approach, if you can't  
4 have anything, but what he did think was appropriate was the compromise  
5 position, which was to withhold both the amount of the success fee -- that's  
6 essentially now agreed in this case -- and the premium. He said those are  
7 legitimate concerns. So paragraph 24 is the overreach paragraph, and then  
8 25 and 26 he says "but this does address the concern, and there is  
9 a concern". I just wanted to make sure that was clear.

10 **MR JUSTICE MORRIS:** Okay. Thank you.

11 **MS KREISBERGER:** I also wanted to make sure you just had for your note, very  
12 briefly, paragraph 112 in RBS. That's the one on privilege. What Mr Justice  
13 Hildyard here does is essentially accept that premia can attract legal advice  
14 privilege. So Arroyo was to that extent correct. We are not making --

15 **MR JUSTICE MORRIS:** Where is that?

16 **MS KREISBERGER:** That's 112.

17 **MR JUSTICE MORRIS:** Just let me read it again.

18 **MS KREISBERGER:** Yes.

19 **MR JUSTICE MORRIS:** Well, he says: "Except to the extent ..." I don't think the  
20 concession point helps Mr Kennelly, because he seems to accept that  
21 concession. If you take the brackets away, ignore the brackets:

22 "Except to the extent that parts of a policy such as possibly the amount of premium,  
23 may attract legal advice privilege."

24 So I think the bottom line is he considers that in principle it might do.

25 **MS KREISBERGER:** I agree. I am not pushing it any further than that. But it goes  
26 to the point that there is a debate in these cases about litigation privilege, and

1 we are not relying on that. He says "It might attract legal advice privilege", to  
2 the extent that it allows the reader to work out what legal advice has been  
3 given. So he accepts that if it allows the reader to do so, then it may be  
4 privileged. All I am saying is I have addressed you on why we say it is of  
5 interest. It does allow an insight into the merits assessment, and if that's right,  
6 his reasoning seems to accept that legal advice privilege would therefore  
7 attach. I am not pushing it any further than that.

8 **MR JUSTICE MORRIS:** Okay.

9 **MS KREISBERGER:** As you know, and you have my submission, it was applied in  
10 Gutmann, in the context of collective proceedings.

11 **MR JUSTICE MORRIS:** When you say applied in Gutmann, what was applied in  
12 Gutmann.

13 **MS KREISBERGER:** In Gutmann the ex-president accepted that the premia should  
14 be redacted. I showed you --

15 **MR JUSTICE MORRIS:** Yes, line 30 and 31, but I don't think he expressly said that  
16 it is a matter of privilege.

17 **MS KREISBERGER:** No, no.

18 **MR JUSTICE MORRIS:** He didn't really express the basis. He just thought it might  
19 run a risk of something or other, the right wording, but whether --

20 **MS KREISBERGER:** It would betray an assessment of risk. That's at page 147.

21 **MR JUSTICE MORRIS:** Anyway, his basic position was he thought it could and was  
22 properly withheld. I am not sure whether he did it under the heading of  
23 privilege, though I think it must be, because it is not really --

24 **MS KREISBERGER:** I think it is privilege and strategic sensitivity. It is worth noting,  
25 though I don't think it is in the bundle, but I don't think it is very controversial, if  
26 I just draw to your attention the order which is on the website.

1 **MR JUSTICE MORRIS:** In?

2 **MS KREISBERGER:** The order in Gutmann that was drawn up after that CMC that

3 you have the transcript for. The order says this:

4 "Upon a confidentiality ring having been established ..."

5 I don't think this is in the bundle.

6 **MR JUSTICE MORRIS:** Okay.

7 **MS KREISBERGER:** It refers to the applicant having provided to the Tribunal the

8 litigation funding agreement, the adverse cost deed of indemnity and the after

9 the event insurance policy, in unredacted form, save for information over

10 which privilege, strategic sensitivity or commercial sensitivity is asserted. So

11 that's on the face of the order, so all three categories.

12 **MR JUSTICE MORRIS:** Right. Can somebody send me that order, please?

13 **MS KREISBERGER:** Yes.

14 **MR JUSTICE MORRIS:** So he doesn't spell out which it is, but that's fine.

15 **MS KREISBERGER:** He doesn't.

16 **MR JUSTICE MORRIS:** All right.

17 **MS KREISBERGER:** That just leaves Vannin. Before I move on to Vannin,

18 because that takes us to the end of the redactions head, it might just be

19 useful, and I think I need to correct something I said to you earlier in my

20 earlier submission, to give you the shopping list on where the parties have

21 reached on each of the categories of redaction.

22 I am going back to the points that were dealt with before the hearing, just so the list

23 is complete and may be useful for the order.

24 The PCR action cost cap, and I have page --

25 **MR JUSTICE MORRIS:** It is 1.2.

26 **MS KREISBERGER:** That's it, page 79. That one has been redacted. That's not



1 disclosed into the ring.

2 **MR JUSTICE MORRIS:** That's agreed to be redacted.

3 **MS KREISBERGER:** Agreed to be redacted.

4 **MR JUSTICE MORRIS:** Okay.

5 **MS KREISBERGER:** Bank account details redacted.

6 **MR JUSTICE MORRIS:** Right.

7 **MS KREISBERGER:** Priorities deed withheld.

8 **MR JUSTICE MORRIS:** Appendix 3.

9 **MS KREISBERGER:** Essentially. Appendix 3 and you see in the bundle it simply  
10 says "1 to 3 have been agreed to be withheld by agreement."

11 **MR JUSTICE MORRIS:** Agreed to be redacted effectively, because we are all in  
12 one document, aren't we?

13 **MS KREISBERGER:** Yes, yes.

14 **MR JUSTICE MORRIS:** Right. Okay.

15 **MS KREISBERGER:** It is page 110, but it is not terribly -- not informative.

16 **MR JUSTICE MORRIS:** No.

17 **MS KREISBERGER:** Funders' return, I have addressed you on. That's 9.2 of the  
18 LFA. That's going into the ring by agreement.

19 **MR JUSTICE MORRIS:** So it is not going to be redacted?

20 **MS KREISBERGER:** It is not going to be redacted but it is disclosed confidentially.

21 **MR JUSTICE MORRIS:** To some extent you have ceded ground on that one.

22 **MS KREISBERGER:** Absolutely right.

23 **MR JUSTICE MORRIS:** Was that it?

24 **MS KREISBERGER:** Just for completeness, as you know, Mr Kennelly does not  
25 now seek appendix 1 to the LFA, which is the spreadsheet to the budget.

26 **MR JUSTICE MORRIS:** Now to be redacted.

1 **MS KREISBERGER:** Now to be redacted, and there is no application for disclosure  
2 of the CFAs.

3 **MR JUSTICE MORRIS:** Yes.

4 **MS KREISBERGER:** I think that's the full list. I hope.

5 **MR JUSTICE MORRIS:** Thank you. You are going to now deal with Vannin.

6 **MS KREISBERGER:** Vannin. On Vannin, there's not an awful lot I can say for  
7 today's purposes. I now have Mr Kennelly's question, which is what assets  
8 are available to meet the costs of the proceedings. Mr Kennelly has taken  
9 you to the latest letter from Hausfeld, which sets out the position correctly,  
10 and that's 27.

11 **MR JUSTICE MORRIS:** 27.5.

12 **MS KREISBERGER:** Which is that the contractual counterparty is Vannin Capital  
13 PCC.

14 **MR JUSTICE MORRIS:** One minute. Yes.

15 **MS KREISBERGER:** The cell is -- reference Project Greve identifies the relevant  
16 cell and the assets available to meet the proceedings are the assets of Project  
17 Greve. Mr Kennelly took you to that. That correctly states the position.

18 As to the question of what assets are available to meet the costs order, we are  
19 content to adduce evidence -- I obviously can't do that today on my feet -- but  
20 Dr Kent can bring forward evidence from the funder.

21 **MR JUSTICE MORRIS:** When you say "from the funder", from who? Project  
22 Greve? They don't have a legal personality.

23 **MS KREISBERGER:** They don't have a legal personality, so it is Vannin.

24 **MR JUSTICE MORRIS:** It is from Vannin to explain the assets of Project Greve. Is  
25 that right?

26 **MS KREISBERGER:** Yes.

1 **MR JUSTICE MORRIS:** Or what other assets?

2 **MS KREISBERGER:** If we say the relevant assets. Now, the assets of Project  
3 Greve --

4 **MR JUSTICE MORRIS:** Right.

5 **MS KREISBERGER:** There is a question about timing and how we do this. I would  
6 suggest, and I will be told by those behind me if this is incorrect, that this  
7 could be done with the reply, because it is really an issue for the certification  
8 hearing, because it goes to suitability.

9 **MR JUSTICE MORRIS:** Right.

10 **MS KREISBERGER:** But, sir, I am --

11 **MR JUSTICE MORRIS:** Would it not be -- I am thinking aloud -- better -- I mean, if  
12 it's a relatively short point and it is a matter of supplementing Ms Kent's  
13 witness statement, isn't it, would it not be better if that was done sooner than  
14 the reply. Mr Kennelly, not surprisingly, is nodding.

15 **MS KREISBERGER:** Sir, I am just taking instructions.

16 **MR JUSTICE MORRIS:** What is the timetable? Where is the timetable? It is at 27.

17 **MS KREISBERGER:** 27.4, I think. I just have it here. 27.4.  
18 Now we are due to receive Apple's response by 12th January.

19 **MR JUSTICE MORRIS:** On 12th January.

20 **MS KREISBERGER:** So there is no prospect I think of this being done in time for  
21 that to be taken account of in the response, given where we are.

22 **MR JUSTICE MORRIS:** Really?

23 **MS KREISBERGER:** We have a week I think, perhaps not even a week to people  
24 disappearing off on their Christmas holidays.

25 **MR JUSTICE MORRIS:** Hang on. It is 14th December now. There is a month to  
26 12th January. I know that, unlike when I was young, people no longer seem

1 to work between Christmas and New Year. I have memories, of course, of  
2 being in chambers on 27th December, and I should say that quite a lot of my  
3 brethren in my current job work on those days. I understand there is now  
4 a reasonably long gap, but there is a week until Christmas and there is time  
5 after Christmas. I do wonder whether it could be done before 12th January  
6 even if it was only done by 5th, 6th or 7th January. It would still give the  
7 opportunity to Apple to see it before they put their response in.

8 **MS KREISBERGER:** Well, I am told that the legal team are going on holiday and  
9 the funder by the end of this week, so before Christmas is not an option. You  
10 may recall this indulgence was extended by Dr Kent to Apple, because  
11 Dr Kent has been agitating for Apple's response rather sooner, but it has been  
12 conceded that Apple can have until the other side of the Christmas holidays  
13 for their response. So it can't be done I am told with the best will in the world  
14 before Christmas.

15 **MR JUSTICE MORRIS:** That I may be able to accept.

16 **MS KREISBERGER:** I am just exploring with my team whether it can be done  
17 before 12th January, but the difficulty is whether it can be done soon enough  
18 for it to make a material difference.

19 **MR JUSTICE MORRIS:** Okay. Mr Kennelly, can I hear you on this? Maybe it  
20 doesn't have to be done by 12th January but let me hear you, Mr Kennelly.

21 **MR KENNELLY:** Sir, you are absolutely right. This is the very thing that we will be  
22 responding on in our CPO response. So this is why we have been agitating  
23 for this information because we want to make submissions about it in our  
24 response. The timetable works so that we make a full response on the 12th.  
25 Now, if we don't get it by then, what we will have to do is put in  
26 a supplementary response on that issue.

1 **MR JUSTICE MORRIS:** Yes.

2 **MR KENNELLY:** That may be what we have to do, but the PCR will still have to do  
3 their reply.

4 **MR JUSTICE MORRIS:** By 2nd March.

5 **MR KENNELLY:** Then they may be squeezed by the response that we give them  
6 on this issue.

7 **MR JUSTICE MORRIS:** Well, there is quite a lot of time.

8 **MR KENNELLY:** Sir, may I finish. The other point I was going to make, really they  
9 should be able to do this early in the New Year, before the 12th. If, as they  
10 tell us, Vannin is a highly experienced funder, then they should be able to  
11 generate this information extremely quickly. The assets are on a balance  
12 sheet. It is something they can produce in a matter of moments really. If this  
13 is their only job, then I can't see --

14 **MS KREISBERGER:** Would it help if I came in there and I am told it can be done by  
15 7th January.

16 **MR JUSTICE MORRIS:** Fine. Yes, it would help. Mr Kennelly.

17 **MR KENNELLY:** Yes.

18 **MR JUSTICE MORRIS:** I mean, if you need more time to respond to it, and you get  
19 it on 7th January, and you say: "Well, we haven't got time because our main  
20 response is well-drafted, well-advanced", I would have no difficulty in then you  
21 writing to the Tribunal and saying "We have not responded on this, and we will  
22 need another week for it or another two weeks". There is still a gap of six  
23 weeks between 12th January and the reply. So I don't think --

24 **MR KENNELLY:** I am content with that, sir.

25 **MR JUSTICE MORRIS:** Let's say 7th January. I am grateful to both parties for  
26 reaching a sensible conclusion on that. So that addresses that I think and

1 that can be recorded in the order.

2 Ms Kreisberger, did you have anything else you wish to add?

3 **MS KREISBERGER:** Nothing further.

4 **MR KENNELLY:** May I come back very quickly, because there was something --

5 **MR JUSTICE MORRIS:** You may.

6 **MR KENNELLY:** Thank you, sir. On the point of the ATE premium, and to reassure  
7 you that my submissions did not go to anything relevant, did not go to the  
8 amount of money available to fund the claim, I was surprised to hear that  
9 irrelevance was being taken, because it was not my concern that there was  
10 insufficient funds to do with an adverse costs order. I was dealing only with  
11 the money available for the claimants to fund their own action, in  
12 circumstances where they lose.

13 Ms Kreisberger's whole answer to me and her submission to you is: "Don't worry.  
14 The 15 million is there. That money, that full amount is available if they win".  
15 That's why the 11.2 million is important. That's the amount available,  
16 committed whether they win or lose. That is the basic amount, and the  
17 premium comes out of that. That's why it is still important to focus on the  
18 premium.

19 **MR JUSTICE MORRIS:** Okay. Let me just digest that for a second. I am not going  
20 to -- you are now concerned with whether the Tribunal can be satisfied that --  
21 I am just making a note.

22 **MR KENNELLY:** Whether they can be -- I am sorry, sir. I interrupted you.

23 **MR JUSTICE MORRIS:** Satisfied that the claimant will have funds to pay own costs,  
24 in the event that they lose, in the event the claimant loses.

25 **MR KENNELLY:** To take the matter to trial.

26 **MR JUSTICE MORRIS:** Right. Okay.

1 **MS KREISBERGER:** Can I respond to that, sir?

2 **MR JUSTICE MORRIS:** You can. That was your only point, Mr Kennelly, was it?

3 **MR KENNELLY:** Yes.

4 **MS KREISBERGER:** I am somewhat baffled by that, because, as I explained, in  
5 that case the legal team are at risk. The risk is on the legal team if they lose.  
6 So they simply don't get the deferred element. That only applies in the event  
7 of success. So essentially the legal team have given up a portion of the  
8 15.3 million because they only get the funded amount.

9 **MR JUSTICE MORRIS:** Okay.

10 **MS KREISBERGER:** That's a concern.

11 **MR JUSTICE MORRIS:** I am not going to have the to and fro. I have got the point.  
12 I think I am going to have to sit down with my Xs and Ys to see how it comes  
13 out in the equation, but I think I have the point. I am going to look at the  
14 figures on the hypothesis that I have got the point, on the hypothesis that the  
15 claimant doesn't win. I will look at the figures and assess Mr Kennelly's  
16 argument on that basis.

17 **MS KREISBERGER:** Just so it is clear, it is the question of the legal team being at  
18 risk.

19 **MR JUSTICE MORRIS:** No, I understand that.

20 **MR KENNELLY:** And how safe it is, how assured are you if the legal team has  
21 some massive exposure, compared to a fully funded cover.

22 **MR JUSTICE MORRIS:** Okay. It is not an exposure in the sense that these are  
23 fees that they won't recover. It is just fees they have agreed not to charge.

24 **MS KREISBERGER:** Indeed.

25 **MR KENNELLY:** Indeed, it is the proportion. You are asking us how secure is the  
26 litigation plan, how much of the legal expenses will be covered by funding

1 and, you know, to what extent are the lawyers taking on a risk that may strike  
2 the Tribunal as disproportionate. That's a material matter for your  
3 consideration.

4 **MR JUSTICE MORRIS:** Okay. Thank you all very much. Given the hour, we will  
5 rise for a few moments just to consider how we are going to deal with this and  
6 we will probably come back to you at 3.45. Thank you very much.

7 **MR KENNELLY:** I am grateful.

8 **(Short break)**

9  
10 **DIRECTIONS**

11 **MR JUSTICE MORRIS:** We are ready to resume. Ms Kreisberger, Mr Kennelly, let  
12 me tell you how I would like to proceed. We would like you to produce  
13 an agreed order with all the directions that we have dealt with, including the  
14 last point about the Vannin further witness statement, save for the issue of  
15 redaction, and we are going to reserve our decision on that.

16 I would hope that that doesn't make the order difficult with the directions, and I would  
17 hope that either the fact that it is reserved can be recorded or there will be  
18 a subsequent order. Obviously, at the moment they are redacted, but I am  
19 sure that one way or another that can be catered for and that the reserved  
20 decision on the redactions does not hold up the rest of the order, because we  
21 want to get the directions in place.

22 Yes, Mr Kennelly.

23 **MR KENNELLY:** Simply to say, sir, from my perspective, that seems perfectly  
24 possible. Then we will liaise with the PCR to do that.

25 **MR JUSTICE MORRIS:** Ms Kreisberger?

26 **MS KREISBERGER:** Sir, I am grateful. That presents no problem.



1 **MR JUSTICE MORRIS:** One other thing I suppose that occurs to me is costs are  
2 going to be costs in the case in any event, are they?

3 **MR KENNELLY:** Yes.

4 **MR JUSTICE MORRIS:** There is going to be no argument about the costs of  
5 redactions. We will all be here anyway.

6 **MR KENNELLY:** Indeed, yes.

7 **MR JUSTICE MORRIS:** Is there any other matter that we need to discuss before we  
8 conclude for the day?

9 **MS KREISBERGER:** Sir, I will just check.

10 **MR KENNELLY:** While my learned friend is checking, from my perspective there is  
11 nothing further, but I will be told by the team if I have missed something.  
12 Nothing further from our side, sir.

13 **MR JUSTICE MORRIS:** Thank you.

14 **MS KREISBERGER:** Sir, I just really want to check the understanding that I don't  
15 think the order needs to provide for the redactions that have been dealt with  
16 by consent, but it could do that.

17 **MR JUSTICE MORRIS:** That's a good point. I am not sure it does need an order,  
18 does it, if you have agreed the position, Mr Kennelly?

19 **MR KENNELLY:** No, it doesn't. In the past we have had not had to get orders for  
20 agreed positions.

21 **MR JUSTICE MORRIS:** No, and if there is any dispute, we have the transcript. If  
22 there is any dispute, you can bring it back before the Tribunal. I think it gets  
23 overcomplicated.

24 **MS KREISBERGER:** We are content with that. I just wanted to check.

25 **MR JUSTICE MORRIS:** There was no formal application in a way for disclosure or  
26 redaction. All right. That's very good. Thank you very much.

1 Unless there is anything else, which I don't think there is, I shall bring today's case  
2 management conference to a conclusion. Can I thank everybody for their  
3 assistance, including all those names I can see but people I cannot see and  
4 let's hope that one day we can do it in a court room, but I suspect that's going  
5 to be a while from now.

6 May I wish everybody a good holiday season.

7 **MS KREISBERGER:** And to you, sir.

8 **MR KENNELLY:** And to you.

9 **MR JUSTICE MORRIS:** Thank you very much. Bye-bye.

10 **MS KREISBERGER:** Thank you. Bye-bye.

11 **(3.48 pm)**

12 **(Hearing concluded)**

13

14

15

16

17

18

19

20

### Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?