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5 **IN THE COMPETITION**

Case No.: 1408/7/7/21

6 **APPEAL**

7 **TRIBUNAL**

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

12 Monday 18<sup>th</sup> July 2022

13  
14 Before:  
15 Bridget Lucas QC  
16 Tim Frazer  
17 Professor Michael Waterson  
18 (Sitting as a Tribunal in England and Wales)

19  
20  
21 **BETWEEN:**

22 Elizabeth Helen Coll

23  
24  
25 **Proposed Class Representative**

26 v

27 Alphabet Inc. and Others

28  
29  
30 **Proposed Defendants**

31  
32  
33  
34 **A P P E A R A N C E S**

35  
36 Tristan Jones, George McDonald & Michael Armitage  
37 (On behalf of Elizabeth Helen Coll)

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**Monday, 18 July 2022**

**(10.30 am)**

**Proceedings**

**THE CHAIR:** Mr Jones.

**MR JONES:** Madam, good morning. I appear with Mr McDonald and Mr Armitage. I was proposing to kick off with a few housekeeping points if that would be convenient.

**THE CHAIR:** Yes.

**MR JONES:** The first of which may make me sound a bit prima donna-ish, but I have just noticed that I am not on the screen up there, so if anyone is watching remotely at the moment they don't have a good view. I thought I would just mention that at the outset in case anyone wants to fiddle with the camera at this point.

**THE CHAIR:** Mr Jones, that puts me in mind that I should have introduced Mr Frazer, who is obviously attending remotely for various issues today.

**MR FRAZER:** Good morning.

**MR JONES:** I am grateful.

The first point is simply to note that there is some confidential material and there is a confidentiality ring in place as you know. The confidential material is highlighted in yellow. It seems to me very unlikely we will need to go to any of it, but I thought I should just mention that at the outset. It has been highlighted in the bundles.

**THE CHAIR:** Yes, thank you.

**MR JONES:** The other housekeeping issue was simply to walk you through some of the documents in the bundle which have been updated to make sure you know what

1 they are and what we have in the bundle.

2 **THE CHAIR:** Yes.

3 **MR JONES:** It is not really to go through the substantive contents -- unless that  
4 would be helpful at this point -- but just to show you three documents in particular.

5 The first is the draft CPO order, which is at tab 3.

6 **THE CHAIR:** Yes.

7 **MR JONES:** This should have been updated very recently. So you should have one  
8 which shows some track changes in red, including at the top of the page, for  
9 example, the case number.

10 So that's page C/3, in the electronic bundle, page 3.

11 **THE CHAIR:** Yes, I have it.

12 **MR JONES:** What this is, just to be clear, is the most up-to-date version of the order  
13 which we ask you to make. The track changes, just for clarity, are changes as  
14 between the version which was initially submitted with the application and this one.  
15 Some of these which now show as track changes might be familiar to you anyway,  
16 because the version which was in here prior to this already had some of these, but in  
17 any event this is now a comprehensive one.

18 These, as I understand it, are all agreed save for the last one on costs which I will  
19 come to in a moment. But you will see if you turn the page that essentially what we  
20 have done is added in some dates and made some very small tweaks to the class  
21 definition.

22 You will see at paragraph 7 that the domicile date has not been filled in. That's  
23 because we consider that that should be the date on which you make any order,  
24 which may or may not be today.

25 8 and 9 similarly, those dates, which are opt-out dates for UK domiciled persons and  
26 opt-in dates for other persons, also have not been completed. Again that's because

1 we suggest they should be nine weeks from the date on which you make the order.  
2 The directions at 11 to 14, have been added in. They are directions for an Amended  
3 Collective Proceedings Claim Form which I will come to in a moment, a Defence,  
4 potentially any Reply, and then a Case Management Conference. That is all agreed.  
5 **THE CHAIR:** Yes.  
6 **MR JONES:** Costs at 15. I maybe should come back to that rather than jumping the  
7 gun on it, but just to note that that provision is not agreed. You may have seen the  
8 letter from Google this morning complaining about that having been added at the last  
9 minute so I will come back to that one. That has not been agreed.  
10 **THE CHAIR:** Yes.  
11 **MR JONES:** That's the first document I just wanted to show you. The second one is  
12 if you go back in this order to paragraph 10 --  
13 **THE CHAIR:** Yes.  
14 **MR JONES:** -- you will see that contains a reference to the draft Rule 81 notice --  
15 **THE CHAIR:** Yes.  
16 **MR JONES:** -- which needs to be appended to the order. And it says that the notice  
17 will be in Annex A.  
18 Now that notice is in fact -- a draft of that -- in tab 30, but that's also been updated.  
19 So I just wanted to show you that. Tab 30, if you have hard copies, is in the second  
20 volume.  
21 Again, what you should have -- this is on page 1164 -- is a notice which again is in  
22 track changes. The first place to see that again is the case number at the top.  
23 I hope you have one which shows the case number in red.  
24 **THE CHAIR:** Yes.  
25 **MR JONES:** Again, Madam, I was not going to go through this in any detail.  
26 If you turn the pages, you will see there are some updates. They are agreed or very

1 minor. I don't think there is anything which is disagreed. This was sent to Google on  
2 Friday with some additional, I am told, extremely minor changes and they have not  
3 come back and complained about any of those additional extremely minor ones, so  
4 I think the position is this is essentially agreed.

5 Madam, that is the document which we propose be annexed as Annex A.  
6 I understand that when previous CPOs have been made, the process that has been  
7 followed is that the Tribunal's Registry has adopted a process of looking through this  
8 notice and possibly making amendments to it -- there are some dates and so on  
9 which need to be filled in anyway --

10 **THE CHAIR:** Yes.

11 **MR JONES:** -- and then liaising with the parties. So we anticipate that that might  
12 happen before the order is finalised, but this is where we reached in advance of  
13 today.

14 **THE CHAIR:** Yes.

15 **MR JONES:** The third document, if I just show you again back in the order, so at  
16 page 8, there is a reference there to my client having permission to file and serve an  
17 Amended Collective Proceedings Claim Form, and the proposal there is that that  
18 would be annexed. It may be inconvenient to annex it, but that is the proposal in the  
19 order.

20 **THE CHAIR:** Yes.

21 **MR JONES:** It says that is Annex B, which is the version now in tab 4 of your  
22 bundle, which again is in track changes. The changes here have been agreed and  
23 they are extremely minor changes to the class definition.

24 Some slightly different definitions are used in the Claim Form than in the CPO order  
25 itself, but the changes are essentially the same changes as have been made in the  
26 CPO order.

1 **THE CHAIR:** Thank you.

2 **MR JONES:** So, Madam, that's what I wanted to say on housekeeping matters. As  
3 I say, it is a small point but I will come back to the costs point later on if that is  
4 convenient.

5 **THE CHAIR:** Yes.

6 **MR JONES:** Beyond that, Madam, I am in the Tribunal's hands. I don't want to  
7 launch into, as it were, an application when you have seen the skeleton argument.

8 **THE CHAIR:** Yes.

9 **MR JONES:** And you may not want that. If you do want it, of course, that's the way  
10 I will proceed. Otherwise I am in your hands as to whether there are particular points  
11 to address and when to call Mr Holt to answer your questions.

12 **THE CHAIR:** Yes, thank you.

13 **PROFESSOR WATERSON:** Can I just raise a point in the document about  
14 European customers who made payments, et cetera, the second of the three  
15 documents you took us to?

16 **MR JONES:** Yes, that's in tab 30.

17 **PROFESSOR WATERSON:** I noticed under "*General Information*", point 3 -- this is  
18 on page 1165 -- you have changed "*its dominant position*" to "*a powerful position*".  
19 Is there a reason for making that change?

20 **MR JONES:** Well, Sir, I would have to take instructions to confirm what I am about  
21 to say, but I am pretty certain I know the answer. It will be to make it common  
22 language and accessible to the individuals reading it.

23 So as a matter of law, of course, it must be abuse of a dominant position, and we  
24 can't succeed unless that is satisfied, but "*dominant position*" is not ordinary  
25 parlance.

26 Let me turn around. I should have turned around before answering, but let me take

1 | some quick instructions.

2 | Yes. So I am glad to say that I was right, but there is an additional point which was  
3 | that the Tribunal in Apple changed it for that very reason in the Apple notice that was  
4 | made.

5 | **PROFESSOR WATERSON:** Thank you.

6 | **THE CHAIR:** Thank you.

7 | Yes, Mr Jones, we found your skeleton argument very helpful indeed. It addressed  
8 | a number of points that we might otherwise have wanted to hear from you on.

9 | Obviously there are two principal issues: the authorisation issue and the eligibility  
10 | issue. We think it would be helpful on the authorisation issue if you could take us to  
11 | the points arising from Google's letter. They don't appear today and they no longer  
12 | oppose, but on the other hand there have been specific matters drawn to our  
13 | attention which I accept you have addressed in your skeleton argument but we think  
14 | it would be helpful for you to take us through those. So that's paragraphs 28 to 30 of  
15 | your skeleton argument.

16 | Then on eligibility, obviously, the Tribunal does have some questions for Mr Holt, so  
17 | I suggest that when we have dealt with the authorisation issues arising from  
18 | Google's letter we then call Mr Holt.

19 | **MR JONES:** I am very grateful.

20 | To start on that letter, could I just make sure that we are looking at the same one? It  
21 | is in the correspondence bundle at tab 55.4, which is page 175.

22 | **THE CHAIR:** Yes.

23 | **MR JONES:** It is over the page, on 176 --

24 | **THE CHAIR:** Yes.

25 | **MR JONES:** -- where Google set out certain concerns that they had, and there are  
26 | five broad concerns listed there. They all relate in some way to funding.

1 You will see, Madam, that they are highlighted in yellow. Can I proceed in this way:  
2 I can answer them at a high level in a non-confidential way, but then if the Tribunal  
3 wants me to give them more detail, I will have to go into a private session to do that,  
4 because this has been marked as confidential.

5 **THE CHAIR:** Yes.

6 **MR JONES:** You will know the context here is that the Funder, Vannin Capital  
7 PCC -- and this is specified in Mr Fegan's Witness Statement -- is a very large  
8 organisation and it is part of a huge investment group. It is also, you will have  
9 noticed, a member of the Association of Litigation Funders.

10 Can I just show you in practical terms what that means? It is in Mr Fegan's  
11 statement, which is tab 21 of the bundle, at page 754.

12 **THE CHAIR:** Yes.

13 **MR JONES:** Down at the bottom of that is an extract from the ALF Code, which  
14 provides that ALF members will:

15 *"Maintain at all times access to adequate financial resources to meet the obligations*  
16 *of the Funder, its Funder Subsidiaries and Associated Entities to fund all the*  
17 *disputes that they have agreed to fund."*

18 And then there are some more details about that general obligation.

19 **THE CHAIR:** Yes.

20 **MR JONES:** So they have entered into a Code which requires them to maintain  
21 adequate resources, and of course that's important because at least the first four  
22 points in Google's letter are about that. They are about whether or not the Funder  
23 has got arrangements which will enable it to satisfy its obligations to my client.

24 Now, I start with that, because we say that isn't only, as it were, the start point, but  
25 just as a matter of principle it is really the end point of those four. I will go into them  
26 in more detail, but the reason I say it is the start point and the end point is because



1 of what this Tribunal said in the *Trucks* case which I should show you.

2 It is in the authorities bundle at tab 9.1, I think it has been called. This was the 2019

3 *Trucks* decision which looked at funding.

4 You will see -- I just invite you to read paragraph 54 -- that an argument was being

5 made there about the evidence of the Funder's ability to meet its obligations.

6 I will just pause to invite you, members of the Tribunal, to read that paragraph 54 to

7 yourselves because you will see how the Tribunal dealt with that.

8 **THE CHAIR:** Can you give me the reference?

9 **MR JONES:** It starts on page A, which is authorities, 199.23. It is paragraph 54.

10 **THE CHAIR:** Page 199.

11 **MR JONES:** Point 23.

12 **THE CHAIR:** I am struggling to find this. I don't know if anyone else has found it.

13 Mr Frazer, have you located it in our bundle?

14 **MR JONES:** We certainly have one copy. This was added late, but I know other

15 updates made their way through. Perhaps this one didn't. I am sorry about that.

16 Madam, can I hand up one copy? It may be, then, that I could read out that

17 paragraph, if that is convenient?

18 **THE CHAIR:** I think for Mr Frazer's benefit you should.

19 **MR JONES:** Yes.

20 **THE CHAIR:** If you just bear with us. I think they are going to try to send a copy

21 over by email.

22 **MR JONES:** Yes.

23 **MR FRAZER:** I have it by email. Thank you.

24 **THE CHAIR:** Thank you.

25 **MR JONES:** I am very grateful. It was paragraph 54 that I was inviting the Tribunal

26 to read.

1 You will see particularly at the end of that paragraph it says:

2 *"Of course, this is a voluntary code and not a binding obligation, but we think it is*  
3 *wholly unrealistic to suppose that a leading litigation funder that is commercially*  
4 *active in this field would not honour these commitments to the Association of which it*  
5 *is a founder member, ..."*

6 So that is a slight difference.

7 *"... and thus place at risk the whole regime of self-regulation."*

8 The point we then return to, in paragraph 65 on internal page 29, where again it is  
9 said in the second half of that paragraph:

10 *"The basis of the ALF Code is to provide a satisfactory means of self-regulation of*  
11 *the litigation funding industry for the protection of those in receipt of [third party*  
12 *litigation funding], and the terms of the ALF Code, on its initial introduction, received*  
13 *the endorsement of Lord Justice Jackson ..."*

14 So we have here a situation where a funder, a reputable funder with very significant  
15 resources in its corporate group, has signed the ALF Code, which makes it clear that  
16 it will be obliged, under the Code, to satisfy its obligations. The first answer to  
17 Google's four points is that that is sufficient.

18 Of course, in the extremely unlikely event that the Funder were to default on its  
19 obligations under the litigation funding agreement, then two things would happen --  
20 and I make the point that that would be extremely unlikely. But firstly Ms Coll would  
21 be able to seek funding from elsewhere, and secondly, even in the absolute  
22 worst-case scenario, if no funding could be found and the claim had to be withdrawn,  
23 Google's costs would still be governed by the ATE. That's not contingent on finding  
24 further funding.

25 So that's the broad context. Google's criticisms, the first four of which go to the  
26 Facility Agreement, which I have to come to in private session, are about internal

1 | arrangements within essentially the corporate group and the wider entity, Fortress,  
2 | and looking at how they have arranged their internal financing.

3 | And what we say simply is that the Tribunal should not go that far. There is no  
4 | reason to burrow into any of that. Their internal arrangements are doubtless  
5 | structured for a variety of commercial reasons which, to be frank, are outside my  
6 | client's knowledge. We are not party to those agreements, and it is not appropriate  
7 | to go into them.

8 | Now, that said, I will go into them, Madam, because they have been raised and you  
9 | have asked me to, but I will unfortunately have to do that in a short private session, if  
10 | I may.

11 | **THE CHAIR:** Yes.

12 | **MR JONES:** I should, in that session, pick up on the fifth point they mentioned in  
13 | their letter, which is a slightly different point, but I will also do that in private.

14 | **THE CHAIR:** Yes. I will just ask my colleagues if there is anything they think they  
15 | need to ask whilst we are still in a public session and before we go into a private  
16 | session on what's been said so far.

17 | **PROFESSOR WATERSON:** My points relate to the private elements.

18 | **THE CHAIR:** So shall we go to private session?

19 | **(10.52 am)**

20 |

21 | **(Hearing in private session)**

22 | **(11.42 pm)**

23 |

24 | **(Hearing resumes in public)**

25 | **THE CHAIR:** Mr Jones, I don't know if you have anything else you would like to  
26 | address us on on the authorisation condition?

1 **MR JONES:** No.

2 **THE CHAIR:** Thank you. We will move on to the section of your skeleton argument  
3 that deals with the eligibility condition.

4 In that regard, I wonder if the best thing would be to call Mr Holt to start with, then  
5 you can make such submissions as you wish to make on the information that he  
6 provides.

7 **MR JONES:** I would be very grateful for that.

8 Could I just mention that we have not arranged, I have just realised, for Mr Holt to  
9 have a copy of his report before him -- although Mr McDonald tells me that his is  
10 tabbed up but there are no markings on it.

11 Mr Armitage tells me his is not even tabbed up. So perhaps I can put that bundle to  
12 Mr Holt.

13 **THE CHAIR:** Yes, certainly.

14 **MR JONES:** Mr Holt, please make your way up to the witness stand.

15 **MR DEREK HOLT (affirmed)**

16 **THE CHAIR:** Thank you.

17 Mr Holt, do make yourself comfortable.

18 **A.** Thank you.

19 **THE CHAIR:** The Tribunal wrote an outline of some issues that we might like to  
20 raise with you. You have seen a copy of that?

21 **A.** I have, yes.

22 **THE CHAIR:** Would it help if you had a copy of that letter?

23 **A.** Sure, that would be helpful.

24 **THE CHAIR:** If anyone has a clean copy of that.

25 **A.** Thank you. **(Handed).**

26 **THE CHAIR:** Thank you. It is Professor Waterson who is going to ask you

1 questions.

2 **PROFESSOR WATERSON:** Thank you.

3 Good morning, Mr Holt.

4 **A.** Good morning.

5 **PROFESSOR WATERSON:** My questions really focus not on the merits of the  
6 case, which are not something for the present, but really on the accuracy of the  
7 damage estimates.

8 **A.** Yes.

9 **PROFESSOR WATERSON:** My first question relates to the tablet version -- the  
10 Android tablet market. So if we look in the core bundle at page 311. There is a table  
11 there you will see.

12 **THE CHAIR:** Do you have it?

13 **A.** Are you referring to my first report?

14 **PROFESSOR WATERSON:** Yes.

15 **A.** Page 311.

16 **THE CHAIR:** Page 311 in the core bundle, right-hand numbering.

17 **A.** Thank you. Yes, I am there now.

18 **PROFESSOR WATERSON:** Okay.

19 We see somewhat of a contrast between the UK Android share of smartphones and  
20 the UK Android share of tablets. We see the Android share of tablets is growing but,  
21 at least in the early years that you talk about, it is really quite small -- 21 per cent,  
22 24 per cent et cetera. It grows to 39 per cent. So the question that I have on this is  
23 whether you view Android as being dominant in the area of tablets or not?

24 **A.** Okay. Firstly, shall I just clarify, just in case it is not entirely clear, that these UK  
25 Android shares relate to the proportion of tablets which are Android tablets as  
26 a function of all tablets -- that already may have been clear -- as opposed to, for

1 instance, the share of Android tablets that might be the ones with Google Play  
2 pre-installed.

3 **PROFESSOR WATERSON:** Yes.

4 **A.** So the next question, then, I think, is, what is the implication of that set of  
5 proportions?

6 The brief answer to that question is that it does not have an impact on my market  
7 definition. It does have an impact on my estimate of damages.

8 **PROFESSOR WATERSON:** Exactly.

9 **A.** Yes. So in relation to market definition, I think, as is already clear from the way --  
10 I think you understand what these market shares indicate -- the balance of the other  
11 tablets sold and used in the UK will be primarily iOS tablets, so iPads.

12 So then the question about the implications for market definition in my analysis then  
13 rest on what is the role of those iOS tablets in the context of the market definition  
14 exercise I have carried out. And there is no impact on my market definition analysis,  
15 because I have looked at essentially three different layers of the market. I focused  
16 on the licensable mobile operating system market, the app distribution for Android  
17 market and payment progressing for Android devices.

18 In each of those cases I have looked at direct substitutability, so in other words, from  
19 that set of focal products that I have just outlined, what are the other potential  
20 products that might constrain a hypothetical monopolist from raising prices by  
21 a small but significant amount?

22 In sections 4 and 5 of my first report, I identify that there are no other sort of direct  
23 constraints on the hypothetical monopolist relative to those focal markets that I have  
24 described.

25 I have also considered whether iOS, as an operating system -- or indeed the iOS  
26 app store, as an alternative method of app distribution outside of Android -- affects

1 my market definition. And for the reasons I have set out, I think primarily in  
2 section 5, which refers back to the European Commission's decision on *Google*  
3 *Android*, I found that that is not the case.

4 **PROFESSOR WATERSON:** Yes. I think I follow that explanation.

5 So then -- again I am always looking at the core bundle pagination -- at page 184 in  
6 the core bundle -- this is at the bottom of paragraph 1.8.8 of your report -- the  
7 proposed class size is assumed to comprise 100 per cent of GMS smartphone users  
8 and, in addition, 25 per cent of GMS tablet users.

9 **A.** Yes.

10 **PROFESSOR WATERSON:** Then on page 309, at paragraph 10.3.2(c):

11 *"I also need to make an assumption regarding the extent of overlap between Android*  
12 *smartphone and tablet users ... "*

13 Skimming over the next sentence or so:

14 *"I assume that the total number of GMS Device users is equal to the total number of*  
15 *Android smartphone users, plus 25 [per cent] of tablet users."*

16 That 25 per cent is never really explained?

17 **A.** Yes. So I think I should clarify that I intended to identify 25 per cent of the  
18 Android tablet users as opposed to all tablet users.

19 **PROFESSOR WATERSON:** Yes.

20 **A.** The reason why I added only 25 per cent rather than all of the Android tablet  
21 users is to account for overlap, so people who have both an Android smartphone  
22 and an Android tablet, which would then, of course, mean that they are the same  
23 individual. So I didn't wish to risk overcounting the number of devices from the  
24 perspective of the size of the class.

25 **PROFESSOR WATERSON:** Yes. But this is very much an estimate?

26 **A.** It is. It is.

1 **PROFESSOR WATERSON:** Your own personal estimate?

2 **A.** That's right. That's not based on any specific knowledge that 25 per cent is an  
3 accurate amount of the incremental number of people who have an Android as  
4 a result of this --

5 **PROFESSOR WATERSON:** That then obviously leads to the question about how  
6 you might subsequently update this proportion.

7 **A.** Yes. Well, this is obviously a preliminary report and is carried out on the basis of  
8 information I had available to me at the time. I would expect that the disclosure  
9 would be a key source to assist me in this regard. So for example, I would expect  
10 that disclosure would indicate the number of individual GMS user accounts, and that  
11 would already account for this overlap issue between Android smartphones and  
12 Android tablets.

13 **PROFESSOR WATERSON:** Yes, I see.

14 **A.** Yes.

15 **PROFESSOR WATERSON:** But just to clarify, this 25 per cent does not come from  
16 anywhere specific?

17 **A.** It does not. I wanted to be relatively conservative in terms of the likely impact on  
18 the size of the class, yes.

19 **PROFESSOR WATERSON:** Thank you.

20 So I think that completes the questions that I wanted to raise on tablets, unless --

21 **THE CHAIR:** I have no further questions.

22 Mr Frazer?

23 **THE CHAIR:** I think Mr Frazer said no.

24 **A.** There was one other brief comment that I might add, which is that in my report  
25 I did refer to the issue of how should you think about tablets and smartphones, which  
26 I think is one of the points that your questions are pointing to.



1 I noted that the European Commission, in thinking about licensable mobile operating  
2 systems, did not see any need to distinguish between those operating systems in  
3 respect of smartphones and tablets, but treated them as a common market for  
4 licensable mobile operating systems. And I have essentially adopted that same  
5 approach at this stage.

6 **PROFESSOR WATERSON:** Thank you.

7 So then to turn to the second point that was notified: the volume effect.

8 As you will have seen in the letter, you suggested that:

9 *"The extent of the volume effect at the aggregate level will depend on the extent of*  
10 *the inflated Commission; the extent to which this would have led to increased prices*  
11 *for Relevant Purchases; as well as price sensitivity of demand for Relevant*  
12 *Purchases.*

13 *"At this stage of proceedings I have not been instructed to devise a methodology to*  
14 *estimate the volume effect."*

15 So the obvious question arises from that: how will the volume effect affect any  
16 proposed aggregate damages assessment?

17 **A.** Yes. Before I answer that question, I think it might be helpful to ensure that we  
18 are talking about the volume effect from the same common understanding.

19 I am obviously aware that in many competition litigation matters volume effects take  
20 on a particular significance, particularly where there is a claimant that has essentially  
21 suffered an overcharge from, for example, a cartel, and then there may be a case for  
22 mitigation. In other words, has the claimant passed on part of the overcharge to its  
23 customers?

24 Then in that scenario, if it has passed on part of the overcharge, then it may have  
25 suffered a loss in the form of a volume effect. And that volume effect is effectively  
26 a loss of profit associated with the margin it would have had on the sales that it

1 | would have made, but did not, as a result of having essentially raised prices in partial  
2 | mitigation of the initial overcharge.

3 | So that's essentially sort of a common understanding of the volume effect in this  
4 | context.

5 | **PROFESSOR WATERSON:** Yes.

6 | **A.** I should point out that my reference to a volume effect is somewhat distinct from  
7 | that.

8 | In the context here, what I am speaking about is essentially the foregone purchases  
9 | that the members of the class would have made. And otherwise it is probably a sort  
10 | of common phenomenon to the volume effect I just described, but it is from the  
11 | purchasing perspective rather than the sales perspective.

12 | What that means is, the loss is essentially a loss of consumer surplus or amenity  
13 | value, as opposed to a loss of profit on sales.

14 | I just thought it might be helpful to clarify that terminology.

15 | **PROFESSOR WATERSON:** That is very useful, thank you.

16 | So what you are saying, then, is that you are not looking at the loss in consumer  
17 | surplus due to foregone sales?

18 | **A.** What I am saying is I have not been instructed to devise a methodology for that  
19 | at this stage.

20 | **PROFESSOR WATERSON:** Yes.

21 | **A.** But if helpful I can offer some initial reflections on that point. If helpful.

22 | **PROFESSOR WATERSON:** Thank you. No, I was puzzled as to why you were not  
23 | asked to look at this. But you probably can't answer that.

24 | **A.** No, I can't. I can offer a view on what the potential magnitude of these might be  
25 | and how you might go about looking at it, but that would be my perspective on it.

26 | **PROFESSOR WATERSON:** Okay. Thank you.

1 In a related point, on page 277, when you are introducing your methodology, the  
2 estimation of overcharge, at paragraph 8.1.2, you talk about incidence and obviously  
3 you discuss that later on in section 9.

4 **A.** Yes.

5 **PROFESSOR WATERSON:** So then maybe it would be useful if you explained to  
6 the court what you mean by "*incidence*" in this context.

7 **A.** Yes. Okay, incidence in this context is a term that is in one sense similar to  
8 pass-on. Essentially, the incidence is effectively the proportion of any overcharge or  
9 increase in the actual commission compared to the counterfactual that would have  
10 fed through into increased prices for the Relevant Purchases.

11 So in other words, how much of any harm would have been affecting the consumers  
12 who purchase these Relevant Purchases.

13 **PROFESSOR WATERSON:** Yes. Then if we turn to page 283. You have a figure  
14 on that page, figure 9.1 --

15 **A.** Yes.

16 **PROFESSOR WATERSON:** -- which shows that, amongst other things, the nature  
17 of the demand curve is going to influence how much is the consumer burden versus  
18 how much is the supplier burden.

19 **A.** Yes, yes. This is an illustration as opposed to a specific contextual --

20 **PROFESSOR WATERSON:** Yes. So it also influences the quantity that is  
21 purchased. That is in your diagram. In other words, in some sense a volume effect.

22 **A.** Yes, that's right. Exactly. The demand curve would give you a sense of what is  
23 the price sensitivity to a change in price.

24 **PROFESSOR WATERSON:** Yes.

25 **A.** That's right.

26 **PROFESSOR WATERSON:** So incidence and the volume effect will then be

1 related, would they not? In other words, if you drew the demand curve more steeply  
2 the consumer burden would be greater and the supplier burden would remain  
3 the same, if you pivoted the demand curve, as it were, around the price of 1.50 and  
4 quantity of 10.

5 **A.** I think that's the case. Obviously you would be holding other factors constant in  
6 making that assessment.

7 **PROFESSOR WATERSON:** Yes.

8 **A.** Yes.

9 **PROFESSOR WATERSON:** So doesn't that show that incidence and volume effect  
10 are related?

11 **A.** I think it would be fair to say that they are related. Indeed, for the volume effect,  
12 in terms of how you might look at that, a key starting point is indeed the size of the  
13 differential and the prices that might have occurred as a result of the alleged  
14 infringement.

15 So they are, in a sense, closely related concepts in that regard.

16 **PROFESSOR WATERSON:** Right, yes.

17 So I was puzzled as to -- that increased my puzzlement, as it were, as to why you  
18 are not looking at the volume effect.

19 **A.** Yes. Well, I think I am not able to respond in terms of the rationale behind the  
20 instructions not to address it. But all I can add is that I would agree that a starting  
21 point for any volume effect analysis would be the core methodology, to think about  
22 the size of the overcharge and the impact on Relevant Purchase prices.

23 There would, however, be some further steps that would need to be examined. One  
24 of those would be the evidence in relation to the price sensitivity point, which you  
25 are, I think, alluding to here.

26 You would also need to form a view as to how to treat -- how to measure effectively

1 the opportunity loss for the purchases that were not actually carried out. And again,  
2 there would need to be some further evidence to identify what that would look like.

3 There are bounds, I think, that I can comment on already at this stage that would  
4 apply in that regard. Obviously if you have not made that purchase in the actual  
5 world, then your valuation of that particular good or service is generally not going to  
6 be any greater than what the actual price of it was --

7 **PROFESSOR WATERSON:** No.

8 **A.** -- because you would have obviously made the purchase in that situation.

9 **PROFESSOR WATERSON:** Yes.

10 **A.** And similarly, it is bounded on the lower side because, based on whatever the  
11 subsequent methodology would identify in terms of the level of the overcharge and  
12 the impact on the relevant purchases, again any valuation below that level would not  
13 be relevant because no purchases -- or at least those purchases by those  
14 consumers -- would not have been made, even in the counterfactual with a lower  
15 price.

16 So there are some bounds that one can put on this issue about how to understand  
17 the surplus aspect.

18 **PROFESSOR WATERSON:** I see, yes. Okay.

19 Then if we move on, I wanted to raise a point in -- point 2 in your second report. This  
20 is essentially a response, as I understand it, to Mr Noble's report.

21 **A.** That's right.

22 **PROFESSOR WATERSON:** So then if we turn to that response at page 342 of the  
23 combined tabulation, where you are talking about top-down versus bottom-up. And  
24 in paragraph 2.1.7, a few key segments -- I won't read out the name of the  
25 segments -- account for a large proportion of Relevant Purchases.

26 So that likely means that some people don't make purchases in this particular area --

1 I happen to be included amongst them -- and other people do.

2 **A.** Yes.

3 **PROFESSOR WATERSON:** So do you envisage that this would influence the way  
4 in which damages would be distributed, or is this not a matter for you?

5 **A.** I have not focused on the way in which damages would be distributed. The  
6 methodology I have devised is to estimate the aggregate damages.

7 Having said that, I can offer some comment on the implication of this factual point  
8 around a proportion of the relevant spend that is accounted for by certain categories  
9 on the aggregate damages methodology, if that would be helpful. But I have not  
10 looked at the issue of distribution.

11 **PROFESSOR WATERSON:** So that is a matter for others, is it?

12 **A.** It is either a matter for others or, if I am asked to consider that from an economic  
13 perspective in due course, then obviously I would be happy to do so. But yes.

14 **PROFESSOR WATERSON:** Another point in relation to this -- and again this is in  
15 your response. It is page 344 in the tabulation. In 2.1.13:

16 *"Fourthly, I agree with Mr Noble in principle that if overcharge and incidence are*  
17 *correlated, then this could imply that the aggregate damages could be either greater*  
18 *or lower than would be obtained by a top-down-down estimate ..."*

19 Surely they are likely to be correlated, given the discussion earlier of your figure 9.1,  
20 that overcharge and incidence will be linked. Is that not the case?

21 **A.** Again, I think there is quite a wide range of factors one would need to take into  
22 account in looking at the incidence issues. That figure, I think, was sort of a high-  
23 level summary, but there would be a range of other factors that would need to be  
24 taken into account.

25 So I don't think it is necessarily the case that it would always be the case that you  
26 would have a higher overcharge for a given category compared to the rate

1 of incidence.

2 One of the reasons for that is it is not even clear to me that there would be much  
3 variation in the rate of overcharge in the context of this matter, given the way in  
4 which competition in app distribution has operated.

5 So whereas in the actual world you see some variation in the level of Commission  
6 that is applied under certain circumstances, those are relatively modest, but in the  
7 sense that only a relatively small percentage of the Relevant Purchases appear to  
8 have a different level of Commission, if you look at the total value of the Relevant  
9 Purchases. And that's a point that of course I am not able to comment on in full  
10 detail because I don't have the disclosure which identifies each of the Relevant  
11 Purchases and what Commission was applied.

12 But when the Competition and Markets Authority looked at similar issues it found that  
13 the Effective Commission was fairly close to the standard 30 per cent, which  
14 indicates to me that, yes, there are some variations, a small number of variations,  
15 but they apply to a relatively modest set of circumstances.

16 And that approach or that charging structure is fairly common, as I understand it, in  
17 a number of other contexts.

18 So it is not clear to me that you would necessarily have wide variation in the levels of  
19 counterfactual Commission according to each of these segments such as the  
20 different types of apps that would apply.

21 Having said that, in response to Mr Noble's evidence that looked at what are the  
22 proportions of relevant spend across certain dimensions, I did refer back to my initial  
23 report, and repeated in my reply report, that it would indeed make sense to be aware  
24 of those patterns of the relevant spend and to focus the evidence in a proportionate  
25 way, to ensure that, you know, the most important categories are directly accounted  
26 for when thinking about overcharge, and indeed incidence.

1 **PROFESSOR WATERSON:** Then just over the page in 2.1.17 -- so this is on  
2 page 345 -- you say at the end of that paragraph:

3 "*my methodology is designed to estimate aggregate damages, rather than individual*  
4 *damages.*"

5 Of course I accept that.

6 **A.** Yes.

7 **PROFESSOR WATERSON:** But are these points that we have been discussing  
8 going to influence aggregate damages as well as individual damages?

9 **A.** They could do. In other words, in order to identify the aggregate damages you  
10 need to have a view on the counterfactual Commission rate and the counterfactual --  
11 or the level of incidence that would apply.

12 I think, looking at some of the key segments by category of app spending, for  
13 instance, would be relevant, and you could apply the aggregate methodology in  
14 a somewhat granular way to account for those key segments.

15 So for example, you would form a view on overcharge and incidence to the extent  
16 that there is any good reason to suppose that they would vary compared to the  
17 overall perspective. You could apply that combination of overcharge and incidence  
18 for a particular segment that was of particular importance, you know, from the  
19 distribution of spending.

20 So if there was some correlation, then that fact would be accounted for in that  
21 methodology. So whether it would be higher or lower, I don't think one can say at  
22 this stage, but it would be accounted for in the aggregate damages estimate.

23 **PROFESSOR WATERSON:** Thank you.

24 I think that is all I wanted to ask under that point. So let's turn to the final point, the  
25 role of business users.

26 Again, this has been raised with you. If we turn to page 350, paragraph 2.5, this is



1 your response to Mr Noble's point about business users. If you look down the  
2 subparagraphs, 2.5.1 and 2.5.2, I don't see this has gone really any further than  
3 saying that there are business users and I don't know much about them.

4 **A.** Yes. I think that is a fair comment. I accept that these two paragraphs do not  
5 give extensive detail on the issue of how business users would be identified.

6 I think I can offer some further reflections. There may be two context points to add.

7 It is not clear to me -- well, firstly, actually, this comment stems from a debate about  
8 whether business user information might be something that can be identified from  
9 the disclosed data. And I suggested, albeit I don't have the information, that it may  
10 be possible to identify, from the user IDs for the data that Google may have, which of  
11 these are business users, either from the knowledge as to the user ID contact  
12 information or possibly from the nature of the credit card, possibly being  
13 a commercial credit card in some cases.

14 I don't have an answer to that. So I think that is something I would like to look at, at  
15 the point where, if disclosure is made, I could look at it. So that's, I think, just an  
16 issue about the information that might be in disclosure.

17 On the assumption that that would not be sufficient, for example, to allow you to  
18 derive an estimate of which ones are the business users, I could offer an alternative  
19 approach to that.

20 Again, before suggesting how that might work, I think there is an overall significance  
21 to your materiality question to be thought about here, for some of the same reasons  
22 about concentration of the structure of Relevant Purchases in terms of certain types  
23 of apps and so forth.

24 I am not sure if I am permitted to say what those categories are, given the  
25 confidentiality point. But I think it is pretty clear that several of the categories of  
26 apps, including one which is particularly heavily driving the overall level of Relevant

1 Purchases, would seem to be ones that essentially consumers would be carrying out  
2 and not businesses.

3 So when you add all of the categories that seem to be essentially consumer-focused,  
4 you get to what I expect would be a very high proportion of the Relevant Purchases.

5 The second point on the business context that is worth being aware of -- and this is  
6 partly anecdotally from my own experience -- when a business is using apps, or  
7 wishes their employees to use apps, then that business can, through a separate  
8 enterprise programme, essentially distribute those apps to its employees.

9 For example, I have, on my work-issued smartphone, a number of apps that my firm  
10 has downloaded directly, for things like time and expense management and other  
11 sorts of productivity things. My understanding -- and obviously I am happy to be  
12 corrected if this is inaccurate -- is that that distribution method does not apply, in the  
13 Apple context, through the App Store and similarly in the Google context through the  
14 Play Store, but it is a separate arrangement between those companies and Apple  
15 and Google respectively.

16 This debate around the business user segment of paying for Relevant Purchases is  
17 a narrower phenomenon, whereby the businesses have not used these separate  
18 distribution methods, these enterprise programmes, but are using, in this case, the  
19 Play Store.

20 That is not to say that there are no such Relevant Purchases that business users are  
21 paying for but just that there is a separate category that businesses would be largely  
22 engaging in but which would be out of scope.

23 **PROFESSOR WATERSON:** Okay. So it seems to me that what you are suggesting  
24 is that there are two types of business users: the first type, which you have just been  
25 talking about, is where the business essentially makes a bargain with the Play Store  
26 or with the appropriate Apple organisation about a range of apps, and I think what

1 | you are saying, and what it is, is that we are not considering those at all.

2 | **A.** Yes, well, my estimate of Relevant Purchases, which would obviously in due  
3 | course be made much more precise by the disclosed data, in my view would not  
4 | include the category of business downloads of apps for their users for that purpose  
5 | that have been taking place outside of the Play Store.

6 | **PROFESSOR WATERSON:** Then there is a second type, if you like, where -- I am  
7 | thinking about businesses which operate on what you might call a looser basis, like,  
8 | for example, Just Eat or, you know, Uber, those sorts of businesses, where they  
9 | would -- I don't know whether they have their own arrangements or whether -- which  
10 | I suggest is more likely -- whether it is up to their workers --

11 | **A.** Yes.

12 | **PROFESSOR WATERSON:** -- that they download various apps to facilitate the  
13 | operation.

14 | **A.** Yes. I think you have raised an interesting point, which is that we need to  
15 | distinguish between spending that happens for example on Uber Eats, which is  
16 | obviously an app that consumers can download -- I guess businesses could  
17 | potentially download on their behalf. And obviously Uber is a company which  
18 | essentially makes some money by operating a service which is to join up hungry  
19 | individuals with restaurants who are able to fulfil that desire.

20 | My understanding is that those sorts of purchases, i.e., a food delivery, are not in  
21 | scope. Those would not be accounted for within the estimated Relevant Purchases  
22 | and the Commission would not apply to those transactions.

23 | Just again, to distinguish between what we mean by a business in the context of this  
24 | particular debate, it is not that businesses may develop innovative apps and sell  
25 | goods or services to consumers. That's not really what we are talking about here.

26 | We are talking about businesses who, in the ongoing course of their everyday

1 business, have, as an input cost, some expenditure that goes via the Google Play  
2 Store, because they, for a number of reasons, may want their employees to have  
3 access to some apps, and they have paid for it.

4 So again, just as a clarification of scope, that's what we have in mind here. Yes.

5 **PROFESSOR WATERSON:** Yes. Thank you.

6 **A.** Okay.

7 **PROFESSOR WATERSON:** I think that covers the issues that I wanted to raise,  
8 unless my colleagues on the bench have any other issues?

9 **THE CHAIR:** Mr Frazer.

10 **MR FRAZER:** For the purposes of this stage, I think that has answered all my  
11 questions. I thought that was very helpful.

12 **THE CHAIR:** Yes.

13 Thank you very much. I have no further questions either, Mr Holt. But Mr Jones  
14 may.

15 **Questions by MR JONES**

16 **MR JONES:** I am grateful.

17 Just a few clarification questions if I may. Mr Holt, may I take you back to page 309,  
18 please, in your report.

19 You remember that you were asked about the 25 per cent figure at 10.3.2(c) at the  
20 top of that page. That was your estimate of the overlap, essentially, between  
21 smartphone users and tablet users.

22 My question really was this, just for clarity: does that 25 per cent figure impact on the  
23 aggregate damages assessment or just on the purpose and distribution estimate that  
24 you have come up with here?

25 **A.** It is just the per-person estimate, and the estimate of the class size, which  
26 obviously is the denominator for that calculation.

1 The aggregate damages calculation is on the basis of an assumed spend per device.  
2 And because the assumed spend per device is not -- it essentially applies to all  
3 devices as an overall average -- there would be no reason to reduce the spend on  
4 tablet device for that reason.

5 **Q.** Thank you.

6 My second question was about the volume effect that you were talking about. When  
7 you answered questions on that you said, I think, to Professor Waterson that it would  
8 be possible to come up with bounds, as I think you put it, on the consumer surplus,  
9 and you had a discussion about what the upper limit and lower limits might be  
10 because of different types of consumers.

11 My question is, is it possible -- and it may not be -- but is it possible just to give in  
12 broad-brush terms an idea of what those bounds would mean as a percentage,  
13 compared to the overcharge that you are looking at on the Commission.

14 **A.** Yes, I could give some high level and preliminary remarks on that, which would  
15 give, I think, a good sense of the order of magnitude but obviously would need to be  
16 subject to some further refinement in due course.

17 I think the likely scale of aggregate damages would increase by a few percentage  
18 points if one were to take into account the volume effect compared to not taking into  
19 account the volume effect. What I mean by that is, if the overall aggregate damages  
20 associated with just the Commission effect on actual Relevant Purchases was, for  
21 the sake of argument, 100, then I think we would be looking at, you know, 102, 105,  
22 108, that sort of range, when taking into account the volume effect.

23 I can explain a little bit more as to why, if that would be helpful.

24 **Q.** For my part, I don't have a further question on that, but if the Tribunal would find  
25 it helpful -- of course I don't want to cut you off.

26 **MR FRAZER:** Yes.

1 **A.** Okay. So as I mentioned earlier, the core methodology that relates to the  
2 Commission effect on the actual purchases would be the starting point again for the  
3 volume effect.

4 The next two aspects that one would need to take into account are the price  
5 sensitivity point and then the effect of loss associated with a given change in  
6 volumes arising from the volume effect.

7 So again, just to try to make this tractable and purely for illustrative purposes, if you  
8 were to say, as an example, that the core effect on actual purchases was driven by,  
9 let's say, a 10 per cent increase in the price of those Relevant Purchases -- which is  
10 itself arguably a combination of the so-called overcharge and the so-called  
11 incidence, but together let's just say 10 per cent for the sake of argument. So then  
12 those two other components would work as follows:

13 The first would be, if prices had been essentially 10 per cent lower, how much more  
14 volume might you expect. And if the price sensitivity is in the order of, you know,  
15 something like 0.7, which is a value that I refer to in my first report from a very initial  
16 look at consumer demand in the context of the app markets, then that would drive  
17 a 7 per cent increase in volumes.

18 **MR FRAZER:** Yes.

19 **A.** So the next question then is, if you have a 7 per cent increase in volumes, again  
20 for illustrative purposes, what is the impact of that?

21 And that is where my bounding question comes in. The per-unit of volume impact of  
22 that is less than it is for the core overcharge. So for instance, if the price was  
23 actually 10 but it should have been 9, for the sake of argument, then of course  
24 everyone who made a relevant purchase would have lost that difference of 1.

25 But for these additional volumes, that's not the case. The loss would be somewhat  
26 less than that, because not everyone would have had a valuation of the full 10. They

1 might have had 9.5, in which case their loss would not be 1 but only 50 cents, for  
2 example.

3 So taking that into account in the simplest way you might divide the volume increase  
4 of 7 per cent by two, to take an average across that range – exactly, so maybe  
5 3 per cent, for example.

6 **PROFESSOR WATERSON:** Yes. Thank you. That is helpful.

7 **MR JONES:** My final question is about the significance of business use. And you  
8 made some points about the likely materiality of this and you referred to different  
9 segments. I think you were worried about confidentiality.

10 But can I just show you page 194, just to remind you of the graph that you have  
11 here, or the chart you have here, which isn't confidential. I know you were  
12 concerned about confidentiality, but this one is not confidential so I just wanted to  
13 draw this to your attention and ask if you have any further comments on this?

14 **A.** Yes. I was concerned, because on a previous document I saw a confidential  
15 mark on a word that is indicated here.

16 So what this graph on page 194 is showing is the distribution of Google Play Store  
17 spending by category of app. So there are many categories of apps: games, social  
18 media-type apps, productivity apps and so on.

19 And what this graph is showing is that I think it is fair to say that the vast majority of  
20 spending is in the games segment. I think this aggregates together some different  
21 particular types of games, but if you take all those games together they account for  
22 something like 90 per cent or so of the relevant spending.

23 Then you have some other ones which might arguably be again mostly focused on  
24 consumers, such as dating apps, which might fall within lifestyle, as an example.

25 So my point about materiality was essentially rooted in evidence of this nature, which  
26 is that app segments that would appear to be primarily consumer-focused account

1 for a large proportion of the total.

2 **MR JONES:** Thank you. I don't have any further questions.

3 **THE CHAIR:** Thank you.

4 Thank you very much, Mr Holt. That was very helpful. And thank you for coming  
5 along to provide your information today.

6 **A.** Thank you.

7 **THE CHAIR:** Thank you.

8 **(The witness was released)**

9 **MR JONES:** Would it be convenient for me to address you on a few points which  
10 arise out of Mr Holt's evidence?

11 **THE CHAIR:** Yes.

12 **MR JONES:** I will do it briefly. There are a few points I just wanted to pick up.  
13 The first one is the volume effect.

14 **THE CHAIR:** Yes.

15 **MR JONES:** Professor Waterson very fairly said that he was puzzled as to why  
16 Mr Holt had not been asked to address this.

17 **THE CHAIR:** Yes.

18 **MR JONES:** The answer to that is that they are not in the claim. I should show you  
19 that. It is at page 78 of the core bundle, where we have set out what damages  
20 are sought.

21 You will see, for example, at paragraph 174, that the loss and damage is described  
22 as the difference between the Commission paid and the Commission that basically  
23 should have been paid but for the abuses.

24 **THE CHAIR:** Yes.

25 **MR JONES:** That is a fairly standard way of putting these claims. There are  
26 potential other heads of loss that could have been included. One of them, actually,



1 was the innovation losses, which Ms Coll says in her witness statement on that one  
2 she wants to keep plain and simple and has not included.

3 **THE CHAIR:** Yes.

4 **MR JONES:** Volume effects have not been addressed expressly anywhere apart  
5 from that sentence that you picked up on in Mr Holt's report. I didn't want to interrupt  
6 earlier to say that, because I know he has raised it as an issue and it is important to  
7 hear what it is. But that was the reason I asked at the end how significant it would  
8 be, because I didn't want you to think we were leaving a potential value on the table.  
9 It is not in the pleaded case, just to be clear.

10 The second point I wanted to come back to is the question about tablets --

11 **THE CHAIR:** Yes.

12 **MR JONES:** -- and related points about market definition.

13 I will be brief on this, because I think you all have the points. But just to be  
14 absolutely clear, the broad picture is that the phone and tablet markets are divided  
15 between Apple devices and Android devices. There are some others, but very  
16 broadly that's the position.

17 Apple and Android, we say -- and regulators around the world are coming to this  
18 conclusion as well -- are essentially dominant in markets in their own spheres. They  
19 have what Apple calls the walled garden, their own ecosystems, and we have  
20 identified what we say are markets within those ecosystems.

21 That is why the percentage of tablets that are Apple versus Android versus  
22 potentially some others -- or one could say the same for mobile phones -- doesn't  
23 affect, as Mr Holt said, his market definition, because his markets are not markets  
24 that include Apple devices. The licensable operating system market, for example, is  
25 not a market that Apple is in, and it is the same for the other markets that have been  
26 identified.

1 So I just wanted to make sure I covered that point.

2 The third point I wanted to come back to was a question Professor Waterson raised  
3 about distribution. You asked Mr Holt about the intentions on distribution, and he, as  
4 he said, has not addressed that.

5 Could I just be clear that the broad intention at this stage is for distribution to be as  
6 individualised as possible.

7 I will show you that in a couple of places if I may. It is in the Litigation Plan at  
8 page 554, at paragraph 55, where it is said at the end:

9 *"It is currently envisaged that claims made by Proposed Class Members would be*  
10 *capable of being validated and distributed on the basis of the loss suffered by the*  
11 *individual Proposed Class Member."*

12 Then that is picked up in the Notice and Administration Plan. If we can turn to  
13 page 588 -- there is a discussion, actually, before 588, but I will just go to 588 first.  
14 There is a discussion about claim validation and how people might put in their claims  
15 at the end.

16 If you look at paragraph 12.11:

17 *"At this stage, it is noted that Proposed Class Members are likely to have digital*  
18 *records of their purchases in the Google Play Store, which we anticipate will*  
19 *significantly facilitate the process of validating claims in due course. It is currently*  
20 *envisaged that claims made by Proposed Class Members would be capable of being*  
21 *validated and distributed on the basis of the loss suffered by individual Proposed*  
22 *Class Members."*

23 There was a question on your sheet about this. Maybe I should just segue into that  
24 now, just to address one issue that you raised there.

25 Just to put this in context, if you go back in this plan to paragraph 12.1, you will see  
26 a quotation from *Merricks*, essentially saying that the distribution may be best

1 decided at the end of the action.

2 That's the reason why this part of the plan has been expressed in somewhat  
3 tentative terms, because it can all be reviewed later on, and should all be reviewed  
4 later on.

5 But the question which may have been underlying one of the points in the Tribunal's  
6 letter is, well, what about this group of people who are going to have very small  
7 claims?

8 **THE CHAIR:** Exactly.

9 **MR JONES:** And we absolutely expect that there will be a group of people who  
10 basically were buying gaming apps, who are going to have reasonably large claims,  
11 and then a long tail of people with smaller claims. We don't have the precise  
12 numbers, but that is, to be clear, what we anticipate.

13 Now, that has been at the moment addressed in this way:

14 If you look in the plan at paragraph 12.10, so page 587, firstly you will see there is  
15 a possibility of certification under oath. Then under 12.10.2:

16 *"... we anticipate that proof of purchase information will be readily available to*  
17 *Proposed Class Members, ... [t]herefore, it may be reasonable to require such*  
18 *documentation to support Proposed Class Members' claims. One option may be*  
19 *only to require such purchase documentation when a claim is for an amount over*  
20 *a pre-set threshold."*

21 Then they go on to say:

22 *"Another scenario in which purchase documentation may be used is in the case of*  
23 *claim audits."*

24 And later on they come back to this point about a specified designated threshold  
25 value.

26 So that is one possible way of dealing with small claim values: that you make it

1 easier for people to come forward so that they don't have to get documentation.  
2 Could I just emphasise, though, that that is not the only way of doing it. I fully accept  
3 that all methods of distribution have their pros and cons. And there is a downside to  
4 this, which is that there is going to be a large number of people with really small  
5 claims. So for example, another way of dealing with this, which could be looked at at  
6 the end, would be to say that individuals who purchased below a certain amount --  
7 let's say £100, although I am just giving these figures for completely illustrative  
8 purposes -- but individuals below a certain amount, one could say they won't have  
9 individualised damages assessments. They, instead, would all get £10 or whatever  
10 it would work out at.  
11 It would be absolutely within the Tribunal's gift to make an order like that at the end  
12 for distribution, if at that stage the Tribunal was worried about the idea -- and one  
13 can understand why you might be worried about the idea -- of people coming forward  
14 for 80p or something. But this kind of question is going to be much easier to assess  
15 at the end when you know much more about who these people are in the class and  
16 how much damage they have all suffered.  
17 That was on distribution. My last point, following what Mr Holt said, is just to pick up  
18 on what I think were essentially the key criticisms that have been made by Google in  
19 their Response, which were about potential differences in overcharge and possibly in  
20 incidence between different consumer groups and different types of apps.  
21 As Mr Holt explained, his methodology, although it has been called top-down, is  
22 absolutely flexible enough to take account of that. He can look at overcharge if it  
23 does differ between sectors; he can look at gaming app providers and make a  
24 particular assessment of incidence for that category of apps if that is appropriate;  
25 and given that there is an intention to have an individualised approach to distribution,  
26 those could also be taken into account if necessary at that stage.

1 That's what I wanted to say arising out of the questions for Mr Holt. More generally,  
2 again, I am in your hands if there are questions on other topics.

3 **THE CHAIR:** Yes, thank you.

4 I have one comment arising from your skeleton argument.

5 Sorry, can I just ask whether the Panel members have any questions arising from  
6 those submissions?

7 **Questions by THE PANEL**

8 **PROFESSOR WATERSON:** Yes. Could I just raise the point you just made actually  
9 about distribution? This comes under paragraph 12.10.1, certification under oath.

10 Does that mean that in order to make a claim, someone would have to -- how would  
11 they make an oath?

12 **A.** I would have to take instructions on what was intended by that, because to be  
13 frank I had the same question when I read it myself.

14 Given this is for small claim values, it can't mean an oath as we would understand it  
15 in legal terms. But Epiq are a very experienced claims administrator. Of course,  
16 most of their work has been done in the United States and so it may be they have  
17 a different understanding of that word than as it struck you, Sir.

18 **PROFESSOR WATERSON:** It just strikes me that to pay a solicitor £50 to claim  
19 £10 --

20 **MR JONES:** It is a fair statement. I can say that absolutely is not the intention.

21 **PROFESSOR WATERSON:** Thank you.

22 **MR JONES:** I am being whispered instructions. Can I just check because it seems  
23 that someone does have the answers.

24 I am told it is just a standard form that someone signs, and I am sure could be  
25 signed electronically. The distinguishing feature is, I am told, that it just says on it:  
26 I confirm on pain of perjury that this is an accurate claim that I am making. It doesn't

1 need to be witnessed as oaths under law normally would by a solicitor, or barrister,  
2 I discovered recently.

3 **THE CHAIR:** Yes.

4 **PROFESSOR WATERSON:** Thank you.

5 **THE CHAIR:** Mr Frazer, did you have any questions arising out of those  
6 submissions?

7 **MR FRAZER:** No further questions from me, thank you.

8 **THE CHAIR:** Thank you.

9 So the one point I was going to raise with you was about the consultative group,  
10 which I think is referred to in footnote 8 of your skeleton.

11 I appreciate that in the *Kent* application, there was a suggestion that the proposed  
12 class representative go back and consult with the consultative group. At your  
13 footnote 8 -- page 8 of your skeleton -- you suggest that that's been done, but we  
14 don't know what the answer was.

15 Now it may be that you don't feel you can tell us, but you canvassed the consultative  
16 group's views but then we don't find out what they were.

17 **MR JONES:** Well, they were content. I can tell you that.

18 They were content with what they had seen and been told and discussed. Beyond  
19 that, I don't have any details but I can certainly ask for more details, but they were  
20 content with the arrangements as they had seen them and discussed them.

21 **THE CHAIR:** Thank you. It may be worth confirming that to the Tribunal.

22 **MR JONES:** Yes. In a letter?

23 **THE CHAIR:** Yes.

24 **MR JONES:** Yes, Madam, yes.

25 **THE CHAIR:** Thank you.

26 I am not sure if the Panel members have any further issues to raise with you in

1 relation to the application. Professor Waterson?

2 **PROFESSOR WATERSON:** No thank you.

3 **THE CHAIR:** Do you have anything, Mr Frazer?

4 **MR FRAZER:** No, thank you.

5 **THE CHAIR:** I am going to suggest that we rise for ten minutes and then come back  
6 and let you know where our thinking is.

7 **MR JONES:** I am grateful, thank you.

8 **(12.52 pm)**

9 **(A short break)**

10 **(1.05 pm)**

11

12 **Ruling**

13 **THE CHAIR:** Mr Jones, thank you very much for your very helpful submissions, and  
14 Mr Holt in particular for attending today and answering Professor Waterson's  
15 questions. It has been very informative.

16 We will grant the application and certify these proceedings as collective proceedings,  
17 and Ms Coll to act as the class representative.

18 We will give a detailed judgment, with reasons to follow. We have, I think, set you  
19 two items of homework, which is confirmation as to the view of the consultative  
20 group, and the amendment to the availability date of the funding.

21 We would be very grateful if you could confirm those to the Tribunal as soon as  
22 possible.

23 So I think that we should now turn to consider the terms of the order.

24 **MR JONES:** Yes.

25 Madam, can I clarify, just on the second piece of homework, amendment to the date.

26 I think what you asked me was, what date were they going to change it to? But we

1 were not sure if you would want confirmation that that has been done, because that  
2 would take a bit longer. I don't know how long it will take them to make the change  
3 as opposed to just informing the Tribunal what the intention is. So we want to make  
4 sure we have answered your question correctly.

5 **THE CHAIR:** I had understood from your submission that they were going to do it  
6 shortly after this hearing, and they were on it.

7 **MR JONES:** I think that is the position. So if the Tribunal wants an update that that  
8 has been done, then that's what we will do.

9 **THE CHAIR:** I think that is what we would like. Thank you.

10 **MR JONES:** I am grateful.

11 On the order, then --

12 **THE CHAIR:** Yes.

13 **MR JONES:** -- I think that is, as you have seen, almost entirely uncontroversial.  
14 You will be familiar with the order, that it has the section on authorisation and then  
15 the section on class definition, which has been tweaked slightly.

16 The domicile date, I mentioned earlier, and the dates in paragraphs 8 and 9 will need  
17 to be filled in from the date that you make the order formally.

18 I went through the publication point and the document --

19 **THE CHAIR:** Can I just stop you there.

20 On paragraphs 8 and 9, we were slightly wondering what the thinking was behind  
21 nine weeks. I think that's what you indicated that period would be.

22 **MR JONES:** Yes. My understanding is that that's the period which has been  
23 ordered in other cases. So it has been taken from that. But it needs to be long  
24 enough to be able to publicise it and give people an opportunity --

25 **THE CHAIR:** Yes.

26 **MR JONES:** -- to come back. So either whether they want to opt-out or whether



1 they want to opt-in.

2 So I think that's the essential starting point. We need long enough to publicise it,  
3 give people a chance to come forward. It is going to be before any CMC, on the  
4 other hand, so it has to be done at some point before there. I am not sure that there  
5 is any magic in nine weeks, except that I think that is what has been thought  
6 practical in other contexts.

7 **THE CHAIR:** Yes, I think it has varied in other cases. We were inclined to be more  
8 generous. We were looking for twelve weeks or three months, whichever works  
9 better.

10 **MR JONES:** I am being told that that is fine, Madam. Yes, that sounds very  
11 sensible.

12 **THE CHAIR:** Thank you. So that will be for both paragraphs 8 and 9.

13 **MR JONES:** 8 and 9. And whether it is 12 weeks or three months doesn't matter. It  
14 will be for the Tribunal to fill in the dates anyway when the order comes down.

15 **THE CHAIR:** Yes.

16 **MR JONES:** Absolutely. And then paragraph 10 is the one which I mentioned which  
17 we looked at earlier, which is the publicity and the notice which comes with that.

18 As I said, I think my understanding is that the Tribunal has tended to go through a bit  
19 of a process of having the Registry look at the notice and maybe make any  
20 suggestions. So anticipating that that might happen before it is finalised. But again  
21 we are in your hands on that.

22 **THE CHAIR:** Yes. I am sure we will go through that process. The Registry will do  
23 that. I am rather pleased to see that you picked up one of the points I had noticed.  
24 Just to prove that I had done my homework, I noticed the CPO notice did not reflect  
25 the fact that claimants could opt-in or opt-out, whichever, by email, but that has been  
26 corrected.

1 **MR JONES:** Yes.

2 **THE CHAIR:** But we will go through the process.

3 **MR JONES:** The directions from paragraphs 11 to 14, as I said, are agreed. That's  
4 amending the Collective Proceedings Claim Form and then having a Defence and  
5 a Reply.

6 **THE CHAIR:** Then there is the vexed issue of costs.

7 **MR JONES:** It may not be vexed. It is quite a short point really.  
8 We had put in costs reserved. The position is that Ms Coll is going to want to ask for  
9 some of her costs. Costs resulting out of the fact that Google objected and work in  
10 light of that, and then pulled out at the last minute.  
11 I am clearly not going to make that application today because Google are not  
12 represented by counsel today to respond to it. I have not given them notice of it. So  
13 we could just say costs be reserved. The reason we have tweaked it is that I know  
14 in other contexts it has been said it is better not to just leave costs reserved --

15 **THE CHAIR:** Is that what you really mean?

16 **MR JONES:** It is better to sort it out quite quickly so that the Tribunal who has dealt  
17 with the CPO application can make a decision on costs in reasonably short order.

18 **THE CHAIR:** Yes.

19 **MR JONES:** If I can put it this way: even if they were reserved, it would be sensible  
20 for my client to make the costs application within the next four weeks or so, because  
21 otherwise that has become stale in your recollection. It just doesn't make sense to  
22 leave it hanging. That is the context.  
23 So with that in mind, it occurred to us we could do what is often done in these orders  
24 which is just put in place a machinery for the costs application to be made within 28  
25 days, defence to come back in 14, class representative to respond within seven.  
26 That just gives it a defined time limit.

1 Google have said -- I don't know if you have seen their letter -- it is inappropriate to  
2 suggest a change to the order at this last stage, et cetera, et cetera.

3 Madam, you see it has just been done because it struck us as sensible, but in fact  
4 not a huge amount turns on it because this really is what should be done in any  
5 event, whether you say costs reserved or put in the place the machinery. It seems to  
6 us the machinery is more sensible.

7 **THE CHAIR:** Yes. I think what I am inclined to do is say that we should receive  
8 submissions as to the appropriate cost order from your client. Within 28 days  
9 sounds fine. Then the defendants to file submissions as to the appropriate cost  
10 order to be made within 14 days after that. So slightly tweak the wording. But  
11 I envisage a similar time-frame to what you have in your order.

12 We will reflect that in the draft that you will receive.

13 **MR JONES:** I am very grateful. I should just say part of the reason for 28 days is  
14 because it does build in a bit of time for the parties to liaise and see if we don't need  
15 to trouble the Tribunal with it.

16 **THE CHAIR:** Yes.

17 **MR JONES:** And at the other end, there is liberty to apply if Google needs liberty to  
18 apply.

19 **THE CHAIR:** Yes. So the draft you will receive will probably include something to  
20 that effect, if the parties are unable to agree.

21 **MR JONES:** I am very grateful, Madam. That's all I have to say on that.

22 **THE CHAIR:** I think we have covered everything. The Panel members are nodding.  
23 Thank you very much. It has been very helpful to hear from you today. As I say, you  
24 will hear from the Registry, hopefully in not too long, with detailed reasons for our  
25 decision today and a formal order.

26 **MR JONES:** I am very grateful.

1 **THE CHAIR:** Thank you.

2 **(1.13 pm)**

3 **(The hearing concluded. Judgment to be given at a future date)**

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