IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 12 September – Tuesday 13 September 2022

Before:
Ben Tidswell
William Bishop
Tim Frazer
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr. Rachael Kent
Class Representative

v

Apple Inc. and Apple Distribution International Ltd
Defendants

A P P E A R AN C E S

Michael Armitage and Matthew Kennedy (On behalf of Dr. Rachael Kent)
Brian Kennelly KC and Daniel Piccinin (On behalf of Apple Inc. and Apple Distribution International Ltd)
Nicholas Gibson (on behalf of the Competition and Markets Authority)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Tuesday, 13 September 2022

(10.30 am)

Ruling

THE CHAIR: Yes, good morning everybody. I think we probably need to repeat the warning about the live stream on our website. So I should start with the customary warning. An official recording is being made and an authorised transcript will be produced, but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Having carefully considered the arguments which counsel had very competently made to us yesterday, and after considering the factors set out in a judgment of Mr Justice Hildyard in *Electrical Waste*, we have not been persuaded that the advantages of a preliminary issue outweigh the disadvantages.

We will therefore proceed with a unitary trial and we would like to see the case proceed with all reasonable haste towards that trial and we anticipate receiving a timetable, a proposed timetable for that shortly, from you, from the parties. We will provide our reasons for the decision in due course.

Case Management Conference

THE CHAIR: Would it be helpful to give you some time to talk about timetable and digest that?

MR ARMITAGE: I am grateful for that. I think that would be helpful. We have been thinking overnight about timetables, which required a certain amount of mental

gymnastics, which is no criticism of anyone but we've thought about both possible outcomes. So we have been giving some thought to that and particularly to the Tribunal's observations about the need for speed, as it were, which we of course, entirely agree with. So we do have a proposal ready which I think it would be useful to have some time to discuss with those on the other side of the courtroom, if that would assist.

THE CHAIR: Yes, Mr Kennelly?

MR KENNELLY: Thank you, sir. Obviously, we have also been considering the timetable. Having considered the Class Representative's trial timetable for a unitary trial, we are content with that timetable, with the Class Representative's timetable, if that assists and if there's something else to discuss, we are happy to discuss it, but we have considered it and we've gone through each of the stages, bearing in mind the onerous obligations on Apple in the context of a unitary trial and we believe the Class Representative's timetable is the appropriate one, with a trial beginning October 2024. We don't believe it can be done any quicker than that, in view of the factors which I outlined yesterday in relation to disclosure, witness evidence and expert evidence.

THE CHAIR: Yes, that's very helpful, Mr Kennelly.

MR ARMITAGE: So as I say, having borne carefully in mind the Tribunal's observations, we have been thinking overnight as to whether the seven week trial could be brought on a bit quicker and we do have a proposal which I think would, if accepted by the Tribunal and obviously, subject to anything Mr Kennelly has to say, would, we think, facilitate a trial before the summer in 2024 which will obviously be preferable, if possible. So I don't know if the best thing is for us to -- I have heard Mr Kennelly may not be agreeable to that proposal but I don't know if, nevertheless, it would be worth giving the parties a bit of time for them to actually consider the

concrete proposal because there are some differences between the slightly longer timetable put forward in correspondence. There are also some points about the specifics of what the disclosure process would involve and so on and so forth, so I think, nevertheless, some time, I think, would still be useful.

THE CHAIR: Yes, thank you, Mr Armitage. Mr Kennelly, the goalposts are moving apparently. It might be helpful, I think, for you to have that discussion. I think just to add two things from our perspective, just very much observations on the timetable. One of the things we are keen to do is to make sure this question of disclosure is accelerated and we appreciate there's some history to that and we don't want to get into that, but what we would like is to be clear about the process for disclosure and have that built into the timetable now and if you are going to suggest a departure from the rule 60 approach, then it would be good to understand what that is and have that discussion.

We would also be keen to see some form of disclosure getting underway without necessarily having to await the whole rule 60 process because it seems to us that there may well be some documents that are completely uncontroversial in terms of the need to disclose them. I think you mentioned yesterday this bundle of material in relation to the CMA and the Commission. If there's some way that people could start working on that in advance of any disputes, which there may well be about the wider disclosure, then that would seem to us to be sensible, rather than waiting till the end and nobody looking at documents in the meantime.

So that's one thing to think about. The other thing that did occur to us, and I am conscious of the point you make, Mr Kennelly, about making sure there's proper time for Apple to prepare for this but it did occur to us that the asymmetry of this case may help us a little bit in the timetabling, in that I think it's probably fair to say you are providing most of the documents and Dr Kent's team needs to look at those and will

need to digest them, but we also anticipate and perhaps you'll tell us if this is wrong, most of the witness statement evidence is likely to come in the first instance from your clients, Mr Kennelly. And so just thinking about what time you need to do that independently of the disclosure, on the assumption you are broadly familiar with your own documents, would be a helpful way of looking at how the timetable might be approached.

Those are just observations, we don't want to get in the way of a discussion that you might have between the parties about any finessing of that and certainly, as you know, our inclination is to try and speed things up, if anything. So perhaps we might ask you to have that conversation.

Mr Gibson, did you want to jump in?

MR GIBSON: I wanted to endorse the suggestion of having a brief discussion because I am conscious that the parties will have seen our proposed directions but we haven't had an opportunity to discuss that with them. Overnight, we've also been reflecting on whether it would be prudent to allow for the possibility of a brief reply or at least the possibility of brief reply submissions, so that we don't have to try and insert that into a carefully calibrated timetable at the last minute.

THE CHAIR: Yes, that's very helpful. One of the things it might be useful to do before we send you off to talk about timetable is actually to deal with the other outstanding matters on the agenda because certainly it would be good to make sure that the CMA's position is clear and we all understand what we are doing with that. I don't think there is anything controversial but let's get that out of the way and also, we may as well deal with the composition of the Trial Tribunal while we are here and then we can come back and we just have the timetable to deal with, if that works for the parties.

MR KENNELLY: Thank you, sir. May I ask a preliminary question, so that my

instructing solicitors can immediately engage with the client and with the defendants and begin the process which the Tribunal is outlining.

Can the Tribunal tell us when it can accommodate a seven week trial, working back from the trial itself?

THE CHAIR: In terms of our diaries, if you are asking a question about this panel --

MR KENNELLY: Yes.

THE CHAIR: -- my understanding is there is no particular constraint in 2024 that would cause us a difficulty. I don't think our diaries are that exciting.

In terms of the Tribunal itself, there is, as I am sure you know, a selection of cases involving trucks that's taking up quite a lot of court time over the course of the next two years and I think there is an anticipated trial for 20 weeks at the beginning of 2024, I think I have that right. I don't think we should pay too much regard to that because, obviously, we have another courtroom if we need it and anything could happen in that case.

So I suspect we ought to assume that we will find the space here and I think if we can actually identify a window, then that would be quite helpful in making sure we do get a courtroom, at least have a courtroom available for us.

MR KENNELLY: Thank you, sir. My final observation, if I may call it that, or submissions in relation to these issues, before we move on to the other issues in the agenda and before we break to discuss three points. First of all, if it assists the Tribunal, Apple is minded to file a disclosure report, as the Class Representative requests and that will obviously be extremely useful to the Tribunal and to the parties in understanding the question of repositories and the approach which Apple proposes to disclosure in a unitary trial.

The second point, like the Tribunal, we can see the merit in advancing disclosure, where possible and I refer again to the transaction data which we've been offering to

the Class Representative since February 2022. Again, one can imagine how that can be provided sooner, before one has to engage with the broader and more complex disclosure issues.

But finally, and just as perhaps a note of caution before one can put down final deadlines for disclosure today, because we haven't had sight of the Class Representative's revised proposals for a speedier timetable, speedier than the one they've outlined in their own submissions, we will need to liaise very closely with our clients and with our clients' internal experts as to whether any of these deadlines can be brought forward because since the disclosure, the witness statements and the expert evidence is largely coming from Apple, our ability to accommodate the unitary trial timetable has been carefully examined. It may not be possible in an hour or so to be able to guarantee to the Tribunal that we can do any of this sooner than the deadlines that are in the unitary trial timetable. It's not a question of speaking to one person, this may require more engagement than might ordinarily be the case, where the burden is more evenly spread.

THE CHAIR: Thank you and that's helpful and understood and, of course, we are sensitive to that point and we can deal with that in a number of ways of course. I think if we are able to identify a window that we can work towards, that would be a constructive step forward today.

If some adjustment needs to be made within that for particular reasons, then obviously we can deal with that later but let's try and get to the point where at least we know what we are aiming for and you can always come back and tell us if that needs some further reflection.

MR KENNELLY: Thank you.

THE CHAIR: We might move on then and deal with the CMA's position. Mr Gibson, I am not aware that this is in any way contentious but maybe you are going to tell me

it is. I don't know --

MR GIBSON: I don't believe it is contentious, sir, not least because, as the Tribunal will appreciate, rule 50(2) makes provision for an intervention as of right, written submissions, so we are notifying the Tribunal of our intention to that effect. The point in relation to written submissions really comes down to how we correlate the timing against the backdrop of the rest of the directions and, of course, taking into account the Tribunal's sensible provision for pushing things forward as quickly as possible.

We think it's prudent to put down a marker that we would like to reserve the right to maybe apply in due course, if so advised, to intervene by way of oral submissions where obviously an application would be necessary and we propose to do that at the pre-trial review.

I know that the Class Representative indicated in written submissions that they agree with the directions we had set out. I am not clear on Apple's position but I apprehend we'll be able to discuss those in the short adjournment, once we get to that.

I think that's all I really need to say at this stage.

THE CHAIR: Thank you very much. Mr Kennelly, perhaps it would be helpful -- obviously, there's a question of timing. Is there anything as a matter of principle that Apple objects to in relation to the proposal from the CMA?

MR KENNELLY: No.

THE CHAIR: That's helpful, thank you. Perhaps we can ask that to be incorporated into the discussion about timing and deal with that when we come back.

Mr Armitage, anything you wanted to add to that?

MR ARMITAGE: No, we indicated we were entirely content with that. In fact, we factored it into the proposal we'd been thinking about overnight, so if the CMA are involved in those discussions, that would be agreeable to everybody, I think.

THE CHAIR: Good. Thank you yes.

The next item, composition of the Trial Tribunal. So this is a question about the application of the Practice Direction and our indication to you that we were minded to make a decision about our continuing as the panel which was consistent with the Practice Direction, as opposed to what's said in the Guide and I am sure you are familiar with the slight difference of views that are expressed by those two documents.

So our question, really, was whether either party had any observations about that. My understanding is that, at least in that respect, they don't. But we did get some observations, Mr Kennelly, from you. I really would like to make it clear that the invitation wasn't an invitation to make a submission about the composition of the panel generally, either the trial panel or the settlement panel. Of course, as I am sure you are aware, the composition of panels is a matter for the President and Registrar in each case, and it's not a feature of our system pretty much anywhere in the court system that the parties get to select who tries their cases.

Of course you are very familiar, I know, with the way the Tribunal operates, with the President, supported by a fee paid Chairman and so on. So, having said that, is there anything else you wanted to say about this subject?

MR KENNELLY: In addition to what we say in the skeleton argument, sir?

THE CHAIR: Well, in response to what I've just said, I think.

MR KENNELLY: No, sir. As you anticipate, we understand the system and we understand the rules and how the Tribunal composition is addressed. You have our submission on the position, and we make a separate point about whether one of the Tribunal members should be sitting in this Tribunal as well as in the Tribunal for *Coll v Alphabet Inc.*, the Google proceedings, and we make a point of principle there. It's obviously not our decision at all, and we are quite content for Mr Frazer to

remain, of course, in this case. It's we have a concern about a Tribunal member sitting in both, in circumstances where he would hear submissions in a proceeding which might well have a bearing on issues in our case but where we would not be in a position to address them as they are being made.

That's a point which the president made in the *Sportradar* case. With cases being heard separately, it's often appropriate in those cases to have entirely separate compositions to avoid that pollution occurring. That's the simple point we make there in relation to that overlap.

THE CHAIR: Yes, thank you. I am a little bit perplexed by that because I don't think it is a *Sportradar* situation. These are completely separate cases, aren't they, in that the parties are quite different in the *Coll* case and this case. I appreciate that the subject matter may bear some striking similarity in some respects, but that could be said to be the case in all sorts of litigation which happens in this Tribunal and, indeed, other places.

So I wasn't completely clear why it arose as a matter of principle. I absolutely understand the point that is being made, and Mr Frazer, I think, is grateful to you for making the point and it is one that he recognises, as anyone would in those circumstances. But it wasn't clear to me that there was a point of principle here that needed to be considered for that reason.

MR KENNELLY: The point of principle arises because, although we cannot speak to the particular legal arguments that are being run in the Google case, there's no doubt, even on the basis of what the CMA has told us, that there are significant overlaps on the questions of principle in the Google matter.

We are also concerned about the fact that in that case, *Coll v Alphabet Inc.*, it appears to be the case that they are the same lawyers, the same funders, the same solicitors in that case as in our case, the same experts in fact, I am told, and so it

does appear *prima facie* that there will be a similar approach in that case and similar arguments will be run because of the similarity in the issues, the basic issues in relation to the markets, for example, that are being advanced.

The risk is so significant that we are concerned about that pollution, to use the word the President used in *Sportradar*, which would indicate, as in *Sportradar* -- which I appreciate is a different case -- but the pollution concern we would say is the same and that's why there is potential unfairness in having a Tribunal member sitting in both cases, because it's very possible that submissions will be made in that case which would be of significance to this case and we won't be there to answer them or address them, and that's obviously unfair and that's why we make the point we make.

THE CHAIR: I mean I am not sure it is a point of principle. I think it's a practical point, actually, that clearly any judge sitting in a case that has that characteristic and then sitting in another case that has that relationship, needs to be very careful about the basis on which they make their decision. As I say, I think that happens in any number of cases in our system and it's something that I am sure Mr Frazer has in mind, and indeed, I know it's something that the Registrar and the President of the Tribunal has in mind as well.

So perhaps we can just leave it on that basis that it's a point which we understand. I think it is different from the situation where there is an actual relationship between the two cases in the form of the parties being similar, but the point about the similarity of the subject matter is taken and understood.

MR KENNELLY: Thank you.

THE CHAIR: Thank you. Good. So shall we take a break? How long do you think would be helpful? Mr Armitage, how long would you like?

MR ARMITAGE: Can I suggest half an hour, if that's to the Tribunal's satisfaction.

THE CHAIR: That sounds very sensible. Maybe you could let us know if you think you need longer and we are flexible, but we will aim to be back in here at 11.20, unless we hear otherwise.

MR ARMITAGE: May I just put one other item on the agenda just so that the Tribunal is aware. I will have something to say about the costs of the preliminary issue application points. I suspect it makes sense to deal with that at the end of matters, along with the costs of the CMC generally. But just to flag that I will be making an application for costs of the preliminary issue application.

THE CHAIR: Let's do that. Obviously we'll need to hear from you and Mr Kennelly if that's an issue to be discussed.

Thank you.

(10.50 am)

(A short break)

(12.01 pm)

MR ARMITAGE: The Tribunal, thank you and apologies that my time estimate of half an hour was woefully inadequate.

THE CHAIR: No, you seem to have made some good progress.

MR ARMITAGE: Yes, to be clear, this is not an agreed order in totality, I am afraid. I think as between Mr Kennelly and me, we have reached agreement up to paragraph 9 of the hard copy draft order you now have, subject to a question at paragraph 4 about disclosure, in addition to the transaction data to which Mr Kennelly referred. So we also are going to be asking for disclosure of the regulatory materials but I understand that's now resisted so there may need to be a debate about that.

Thereafter, I'm afraid the agreement ends and I think the bone of contention really, is whether we can have a trial before the summer 2024, as we now think is achievable

on the timetable here set out and Apple, I understand, think that won't be workable for them and therefore, I think the dispute is as between June 2024 or October 2024. So I think that's where the disagreement comes in.

As between us and the CMA, we are entirely in agreement in terms of their intervention. There's one point of dispute, I understand, between the CMA and Apple as to whether the CMA should respond to what we say in response to their written intervention.

THE CHAIR: Good. Okay. That's progress. Perhaps our expectations have been dashed because we thought you may have made more progress. Why don't we deal with it in bits then. Shall we just get the bits up to paragraph 9 that need to be tidied up and see if we can resolve those and maybe we can talk about how the actual trial date gets fixed or at least at this stage, we get a window for it.

MR ARMITAGE: Yes, so I think then, subject to the Tribunal of course, the only point in issue on the first nine paragraphs of this order -- would it be helpful for me to take you through the steps or is the Tribunal happy?

THE CHAIR: I think we've had a chance to have a quick look at it.

MR ARMITAGE: Yes.

THE CHAIR: I don't think there is anything, certainly on this first page that we saw, that caused us any difficulty.

MR ARMITAGE: Yes.

THE CHAIR: Obviously, the point about what can been disclosed now is a point that we raised earlier so I think it would be helpful to go straight to that.

MR ARMITAGE: The transaction data that's agreed, that will be provided by 4 pm on 7 October.

What we seek in addition by way of initial disclosure are the documents provided by Apple to the CMA and to the European Commission in relation to the various

investigations that have been canvassed before you. I understand that that is opposed which we find a rather surprising position, given that in relation to the preliminary issue application, it was positively put forward as a suggestion that that would be done by 7 October. So we say those documents are obviously going to be relevant and informative, provided there is also, as provided for here and as agreed, a proper disclosure process, disclosure reports and so on, resulting in a further CMC early in the New Year where any disputes can be resolved. We certainly do say we want the regulatory materials now.

In relation -- sorry, I should confirm that the request for documents in relation to the CMA will also cover documents provided in relation to the market study which as we see from Mr Gibson's skeleton, also overlaps with the issues in the present case. We say that would be a real advantage to have that by way of early disclosure, consistently with the Tribunal's observations.

But as I say, that's opposed, I understand, in its entirety at this stage. Mr Kennelly's clients are not now prepared to give that disclosure, so probably to be -- over to Mr Kennelly on the reasons for that.

MR KENNELLY: Thank you, sir. So the issue then is whether, in addition to the transaction data, we provide the documents which we offered as part of our package in applying for the preliminary issues split trial.

Just to explain on transaction data because we mention it and one tends to skip over it and there's a sense perhaps that because Dr Kent didn't engage with it since February 2022, it may not be of great utility to her. I will deal with that very briefly so the Tribunal is reassured that matters can be advanced rapidly.

The transaction data is the transaction data used by Professor Hitt. It's the transaction data for every transaction on the App Store in the UK, the UK storefront, between 2008 and 2021. These are millions of data points which will be

indispensable for tracking through consumer behaviour and developer behaviour for the purpose of analysing substitutability.

This is critical data for the questions of market definition and dominance and the Class Representative's team should have been working on it already. They should be working on it now. The concern is to move things along. That is work that ought to have commenced and should commence immediately and it will be of utility to them. And that will be an enormous task for them. I don't seek to minimise the job they have to do but it's an important one and they can begin that as soon as they receive the material, when we give it to them.

THE CHAIR: That's very helpful. Thank you. Just a question about that in terms of how it's made available and you and I are going to -- I am certainly going to betray some ignorance if I start getting too deeply into this but just the format of it and the friendliness of that. Has there been any discussion about what format it comes in and is there any dialogue at all about this?

MR KENNELLY: They just refuse to engage with it. Again, I appreciate the Tribunal does not want to hear that kind of criticism but the fact is we offered it -- that's absolutely a valid question the Tribunal Chairman asked me, it's not a question they've asked and they've not engaged with us at all as to how it could be presented in a friendlier way or how, having reviewed it, they struggled to understand it. Really, the best thing is for them to look at it, engage with it and then revert to us with those kind of queries.

THE CHAIR: Yes, okay.

MR KENNELLY: We urge them to do that. To reassure the Tribunal that things can be advanced in the meantime, the transaction data will be indispensable for that.

On the question of the documents we provided to the CMA and European Commission pursuant to their document requests, it's important to recall that many of

the documents included in those packs are irrelevant. The European Commission in particular, I have already explained to the Tribunal how the investigation's scope is much broader than the claim raised by Dr Kent. Plainly there will be relevant documents involved which is why we are offering them but there will also be significant irrelevant documents in those document packs.

Now we agreed to provide those in order to try and persuade you to grant the preliminary issue and split trial. We were prepared to give irrelevant documents in order to save time because otherwise it would take time to filter them and produce a pack that was relevant. But in circumstances where the preliminary issue is not ordered and the split trial is not ordered, the Tribunal normally would not order parties to disclose irrelevant material. It may not even have the power to order us to disclose irrelevant material. We obviously are obliged to produce relevant material and that's why we are using the rule 60 process under the Tribunal's rules. We will produce a disclosure report. We've agreed the date for that. That's a very important document because it outlines the repositories where the documents are contained, why the documents are relevant and why our document discovery will be sufficiently comprehensive and relevant for the purposes of the proceedings' unitary trial but that's obviously a major job which we will do by the date agreed with Dr Kent.

That's a much more effective and appropriate approach, as opposed to giving the other side irrelevant documents which, really, the Tribunal wouldn't be normally ordering us to do anyway. There's a further point, sir, if I may on this which is that where a party in proceedings seeks disclosure of documents which have been provided to a competition authority, of course your Practice Direction on this issue implements the Damages Directive and there are particular rules that apply to these kinds of applications, where documents are sought from a competition authority file which are held by the undertaking under investigation.

The Damages Directive and the Practice Direction of the Tribunal are very careful to ensure that you don't get broad requests for everything in the file. In fact, the Practice Direction and forgive me for not having a copy before you but it's from paragraphs 4 down to 5.1, footnote 7 in particular. Footnote 7 is the critical footnote and it tells the parties that where a request is made for documents, such as the ones sought now by Dr Kent, they have to specify whether the request, and the Tribunal has to consider (a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held on the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority, and (b), whether the party requesting disclosure is doing so in relation to an action for damages before a national court and that we have that and the need to safeguard the effectiveness of the public enforcement of competition law. But the first point is the critical one, is it a focused request?

THE CHAIR: Can I just be clear about that. Are we talking here about documents which -- if we talk about Apple's own documents that have been supplied to the CMA --

MR KENNELLY: Yes.

THE CHAIR: -- you are saying that applies to that body of documents, as well as things that might have been created for the purposes of the engagement with CMA or, indeed, CMA documents that you might have. Is there any distinction to be drawn?

MR KENNELLY: There is an important distinction between those. Under schedule 8A of the Competition Act, we cannot be ordered, even by the Tribunal, to produce documents that have been created for the purposes of an investigation, where that investigation is ongoing.

THE CHAIR: Yes.

MR KENNELLY: So no one is asking for documents that we have created for the purpose of the investigations. The request, as I understand it, the application, is exclusively in respect of contemporaneous documents which have been provided to the competition authority by Apple, pursuant to document requests from them.

THE CHAIR: And in relation to the Practice Direction, I'm afraid you do have the advantage over me because I can't recall anything about it, other than what you've just told me. So what is the solution -- the Practice Direction then prescribes a way for you to proceed in relation to these documents. What does that actually involve?

MR KENNELLY: It involves Dr Kent making an application to the Tribunal for documents in the Commission file and explaining to –

THE CHAIR: Sorry to interrupt you. But documents in the Commission file. We are not talking about documents in the Commission file, we are talking about your documents.

MR KENNELLY: I am sorry, it's an expression. I mean the documents which we have provided to a competition authority. So, for example, where – because that's how it works. When in civil proceedings, a party says, "We want the pack you gave the CMA or the European Commission", in a damages case, obviously the person providing the documents has a copy of what they provided. So no one is seeking documents directly from the CMA, they are seeking documents which we hold but by reference to the pack that we gave the CMA and the EC. But my core point there is that pack, this is the problem, this is why it doesn't work by way of an application to you, contains irrelevant documents and there are two problems with that.

The first is they have not explained to you why the documents pack they seek from us contains only relevant documents by reference to the issues in the case. They have not done that. Secondly, we can't be required to produce irrelevant documents

to them. We have to filter them which is what we do in our rule 60 process and the disclosure report which is the right way to go.

THE CHAIR: So how are we going to move this forward because there's no question, is there, that Dr Kent is going to make an application for the documents that are relevant, you are going to be forced to make an assessment of relevance and you are going to provide those documents. What we are interested in is that happening as quickly as it needs to, in order to comply with the requirements you are pointing out and is there any question of you being able to do that faster than 17 April which seems to me to be a very long way away in relation to the documents which Dr Kent's team could be looking at now? That's the challenge, Mr Kennelly. I am perfectly happy to accept it's not entirely straightforward but I think we do need you to be telling us how you are going to get round the points that you rightly identify and how you can do so more quickly than that, if that's at all possible.

MR KENNELLY: Two points on that. First of all, for the purpose of our disclosure report which will be in November, we have to identify the repositories of relevant documents and explain what we propose to give to them by way of our disclosure in the case and that will involve us doing that work, working out where the documents are that can be filtered for the purpose of giving adequate disclosure, sufficient disclosure to Dr Kent.

When they get that, they will immediately see what our approach is, if they have concerns about that. It crystallises the problem. They immediately see any inadequacies or problems they identify and they can obviously complain about that at that stage.

We are also agreeing, seeking to agree, the categories of documents and data to be disclosed for the purposes of that CMC. The CMC in January.

So we will not be idle between November and December, we will be discussing with

Dr Kent, based on the disclosure report, what categories and data needs to be disclosed and that will no doubt include their request for those parts of the document provision to the CMA and the Commission which are relevant to the case.

THE CHAIR: Is there any reason why on 19 November, you couldn't supply those documents which you have identified as being relevant from the body we are talking about? In other words, why do we need to wait for Dr Kent to make an application which I am sure she is going to do and us to have a CMC? We know these documents are going to be of interest, let's put it no higher than that. Once you've reached a determination about what you consider not to be relevant which you clearly are entitled to do, why not just then provide those documents to Dr Kent on 19 November?

MR KENNELLY: The difficulty is -- I will make a holding remark to you, sir, and then I will take instructions. My holding remark is this and it may be more than a holding remark. In order to have made the agreement which we've made with Dr Kent, we had to take detailed instructions as to how long it took. Even with all of Apple's resources and the legal teams it has at its disposal, these are the earliest dates we can meet and in order to do the filtering exercise which the Chairman has in mind, it's not straightforward. It does require analysis with the assistance of the legal teams, not just involved in these proceedings but in the proceedings before the Commission.

But let me check --

THE CHAIR: Before you do so, just so I understand the point because I thought you were telling us that you would by the 18th have worked out what was and wasn't relevant. Are you saying that's not the case? And maybe you need to check that but it seems to me that if in your disclosure report you need to have filleted those bundles so that we know what you believe is not relevant -- and there may be

a dispute about that but at least you've reached your view on it -- at that stage, why shouldn't you provide the documents that you consider relevant, albeit recognise there may need to be some further -- I think maybe if that's the point you could take some instructions on, that will be helpful.

MR KENNELLY: I can clarify the point before taking instructions. The filleting exercise is not done finally by the time you file the disclosure report. The disclosure report tells you where the depositories of documents are and how we propose to approach disclosure, how we propose to identify relevant documents and filter them out from irrelevant documents. It tells Dr Kent and the Tribunal how we will go about doing the job.

It's not the same as having done the job which is the filtering exercise which may take more time.

THE CHAIR: Okay. So maybe to give you a different challenge to explore with your client, maybe -- what is the earliest date -- and you maybe want to do this in parts. Maybe you start with the market study and then -- with the -- forgive me, what's it called? The work that the CMA has already done. Sorry.

MR KENNELLY: To be clear, the market study is not -- that's not --

THE CHAIR: It's not in your offer.

MR KENNELLY: It was never part of the offer. We were offering the information that the CMA had sought as part of its request for documents in its anti-trust investigation. That's where there was overlap.

THE CHAIR: Why don't you start with that. But the point I am making is we would like to know how quickly you can carry out the exercise of determining relevance and the body of documents we all know is going to be of interest and in which there will definitely be some relevant materials. And if you can do that in parts and supply that earlier to Dr Kent than 16 January, it seems to us there's no reason why you

shouldn't be doing that, albeit Dr Kent may have some views about whether you have correctly identified the ambit of relevance or anything else that you choose not to produce.

That's the question.

MR KENNELLY: Yes.

THE CHAIR: I hope you will understand the thrust behind this. We want to make best use of this time and it seems to us on the current timetable, we are allowing the best part of six months to elapse without Dr Kent getting any documents, other than transaction data which you fairly point out is available. But we want that material to be available before April 17, unless there is some good reason why the process needs to be carried out before then. It does not seem that that applies to this body of documents because it does seem we all agree it's going to contain some relevant documents and once you've decided which ones you don't think are relevant, why should you not hand them over?

MR KENNELLY: I am sure my team is not idle behind me but before I turn to get the information, one last point I make to you before I take instructions. When one speaks of providing relevant documents, the Tribunal may well say to me there are documents which must be obviously relevant now, however the pleadings turn out. I take that point. But the fact remains that pleadings in this case are really not complete. We are putting in a response, that very detailed request for further information, which also seeks questions about our market definition and they will be responding with amendments, having reviewed our response to the RFI.

The issues in the case don't crystallise until one has pleadings, till the pleadings are complete. So there is a lot of work left to do on pleadings before the issues can be finally crystallised.

THE CHAIR: I am sure that's right. I don't think that affects the analysis in any way

and as far as we are concerned, as the pleadings currently stand, it is abundantly clear that there are some documents which, subject to the question of relevance, your clients could expedite the production of and we would like you to do that in the time frame that's achievable.

MR KENNELLY: I will take instructions now. Thank you. It will take a few seconds.

THE CHAIR: Of course. **(Pause)**

MR KENNELLY: Thank you for the opportunity to take instructions.

Plainly, of the documents provided to regulators, the pack, the set that is most relevant is the set provided to the CMA. But even that set contains irrelevant documents and it's a substantial data set -- sorry, not data, a substantial set of documents provided to the CMA.

Because of the size of the set and because of the work involved, we will need until the end of the year to filter it and provide them to Dr Kent. But we can, I am told, do the review and filtering exercise of the entire set of documents provided to the CMA on the Competition Act investigation which was always the position and provide those to them before Christmas, before the end of this year.

THE CHAIR: I mean it's entirely a matter for your clients. There's a question as to whether they want to spend all that time and money identifying what they think might be relevant material on something which is probably going to be a matter of contest as well. I make that point as a matter of practicality. I don't know how much that's going to cost and you have not, I think, identified quite how much material. I think you told us yesterday it wasn't millions of documents but it's not really for me to push that any further, Mr Kennelly. It just seems a slightly unhelpful situation, to have a body of documents which I think we all know is going to find its way from that side of the court to that side of the court and I am getting the sense that's really not happening as quickly and easily as one might expect. It's no criticism. I understand

the practicalities of this but you sense where we are coming from on this.

MR KENNELLY: I absolutely understand where you are coming from and really, if they get this substantial set of documents before Christmas, filter it and hand it over, in view of all the other jobs that both sides have to do between now and Christmas -- nobody on their side will be sitting around doing nothing and neither on our side. We are all heavily engaged now in bringing this process forward. And since no application is made, this is already a lot from Apple to do the work and to bring this forward.

We do so in the expectation that the Class Representative's team will engage with the transaction data so that we are all working in parallel towards an agreed approach to disclosure which then we can bring before the Tribunal in the New Year. But we do offer the filtered and relevant set of the CMA documents before Christmas to Dr Kent.

THE CHAIR: Just one last thing before I go back to Mr Armitage. I think looking at the Practice Direction, it's not entirely clear to me, having reminded myself about it, how helpful it is in the situation. I think to the extent there is -- and I don't want to get into a debate about it now but to the extent there is anything in the Practice Direction that's required to be done in order for that to happen, clearly that needs to be done, whether it's applications or any other correspondence with the Tribunal and, of course, if the Tribunal receives that application or material, then it will respond. So it's just an invitation that if there is anything in the Practice Direction that's needed to unlock that exercise, then we are receptive to an application for it.

MR KENNELLY: Indeed, but what's very clear from the Practice Direction is that any request for this type of documentation needs to be focused and can only be by reference to relevant documents.

THE CHAIR: I am not completely sure that's clear. I venture that Mr Armitage may

have a point to say about it but I am not sure we particularly want to have an argument about it today. All I am saying is that to the extent it applies to the documents in question, then obviously it must be complied with but we are receptive to any application or request for whatever needs to be done, in order to take that forward.

MR KENNELLY: Hopefully we've bypassed that by reference to the offer I am making but if they want to make an application, we will be very interested to see a focused application, as the Practice Direction says in express terms, explaining why all the documents in a particular set are relevant because we know, for example, much of the European Commission set is not relevant but I hope we've reached a landing --

THE CHAIR: I think your expression of hope is our expression of hope that your offer will resolve this but let's see what Mr Armitage has to say about it.

MR ARMITAGE: To say we are surprised by the stance Apple is now taking is an understatement. The solution to disclosure that was being proposed by Mr Kennelly yesterday has suddenly become vehemently opposed. In particular, they now say for the first time the productions they've made to the CMA and European Commission in relation to matters that are on any view related to the matters that are advanced by Dr Kent, contain large numbers of irrelevant documents. Now that has never been said before by Apple. Can I show you what they did say, please, in correspondence and in their skeleton.

So could the Tribunal take up the correspondence bundle, please, at 31. Tab 18.

THE CHAIR: Yes.

MR ARMITAGE: This is a letter sent by Apple's solicitors to us on 22 February 2022. Forgive me for reading some of it out:

"We propose a straightforward approach, whereby relevant elements of disclosure

given by Apple to date ... "

There is a reference to the US litigation.

THE CHAIR: Paragraph 8.

MR ARMITAGE: Paragraph 8, page 31. Sorry, does everybody have that?

THE CHAIR: Yes. Yes, please go on.

MR ARMITAGE: There's a reference to documents given in a US litigation so that's fallen away for now. They also say:

"... and relevant elements of productions made to the CMA and European Commission."

So the proposal is provided to my client.

THE CHAIR: I am sorry to interrupt you, Mr Armitage. It does say "relevant" there, doesn't it? I am just wondering -- I don't want to dissuade you from putting the point but regardless of what has been said before, I think there is a basic problem here which is that Mr Kennelly says that their position is Apple's position is not all of these documents are relevant. I think he's right, that it's not straightforward for us to make an order requiring him to produce them by 7 October. So I think what we are really trying to find and I hope you will appreciate the points I have made to Mr Kennelly about moving this thing along, I think what we need to find is a workable solution. The question really, I think, is are you prepared to accept an agreement to provide the data, the documents, with the benefit of the time and effort that Apple seem to want to invest in determining relevance which you may well contest later but at least you ought, one would hope, to get a series or set of documents by Christmas, before the end of the year, or are you pressing for something else?

MR ARMITAGE: May I take a moment?

THE CHAIR: Yes, of course.

MR ARMITAGE: I am grateful for those indications. In relation to the CMA

Chapter II investigation, we say that's in a different category and it's perplexing to suggest there might be material quantities of irrelevant documents there. You saw paragraph 9 of Mr Gibson's skeleton argument which set out the overlap.

As I say, the idea that documents provided to the CMA in the course of an investigation that seems to overlap almost entirely with the present case is unreal and the effort involved in going through the relevance process in advance, we would say would outweigh the upside.

In relation to the CMA Chapter II investigation, we would press for disclosure of all those materials by 7 October.

THE CHAIR: Well in order for that to happen, you are going to have to make an application, aren't you, because what Mr Kennelly is going to say is -- I don't know what his witness statements are going to say but presumably, Mr Kennelly is going to say he's entitled to put in a witness statement which asserts relevance and he's telling us he's going to do that and so in those circumstances, I don't think I can make the order without giving him the benefit of that opportunity.

So I mean I am entirely sympathetic to the point you are making, Mr Armitage. I hope you get the sense that we want to get on with this as much as you do but the reality is that if Mr Kennelly says that there is a relevance point here and he's either entitled to argue that or if it's not argued, he's entitled to rely on it. And he's put to you, I think, the choice of: do you want to accept his offer or do you want to make an application? If you want to make an application, of course that will have to be dealt with appropriately which may be possible if you agree on the papers but, again, Mr Kennelly may not agree to that.

I think that's the choice you are faced with.

MR ARMITAGE: Yes. I think the position is we are going to make an application separately and as soon as possible.

THE CHAIR: So for present purposes we -- there's probably no point then in recording any further disclosure under paragraph 4. That will be dealt with as a consequence.

MR ARMITAGE: We'll take that away and give it further thought.

THE CHAIR: I think maybe just to allow you the opportunity to reflect, I think if you were to come back and tell us that you were happy to accept Mr Kennelly's offer, I imagine it would remain on the table.

MR ARMITAGE: Yes.

THE CHAIR: For a short period of time at least.

MR KENNELLY: Indeed, but it was contingent on this being an agreed process. We are not obliged to do it -- but obviously, we are always open to constructive engagement on the question of disclosure.

THE CHAIR: Yes, so perhaps why don't you take that away and have a think about it. I don't think anyone would think it was a bad thing if you changed your mind on it. But if you decide to proceed with the application, then that's absolutely fine, we'll deal with it appropriately.

MR ARMITAGE: We understand and we're grateful.

THE CHAIR: Thank you.

MR ARMITAGE: To be clear, just in case there's any -- we are not going to be seeking anything that we're not entitled to under the Damages Directive. We couldn't if we wanted to. That was never envisaged.

THE CHAIR: Before we move on from disclosure, the transaction data, without in any way wanting to get into the history, I think Mr Kennelly must be right when he says it would be good to have some close engagement on that, the format of it and Dr Kent's team's view on how excessive, if there's any issue you have but let's get those out in the open sooner rather than later.

MR ARMITAGE: Were it to be necessary, we'd have things to say about engagement but I appreciate they're not going to be of interest to the Tribunal today. We entirely agree that sort of engagement is useful in relation to disclosure of this kind but I think we have the principle. We have agreement as to the date and the Tribunal can expect the parties to be constructive about the mechanics.

THE CHAIR: If there are any issues with that, then we would be perfectly happy to receive at least a request to assess prior to 16 January and we could do that, one imagines, on the papers if need be. Good, okay. Is that everything on -- whatever it is, page 2 of this thing? Paragraph 9. The estimate was shaded in yellow but presumably that's not something we need to have a discussion about?

MR KENNELLY: No, that's agreed.

MR ARMITAGE: (Inaudible).

MR KENNELLY: Indeed. The date is also agreed.

THE CHAIR: Good. Okay, thank you. That's helpful.

MR ARMITAGE: Paragraph 10, I think that's where the disagreement begins. We're in the Tribunal's hands as to how we approach this. As I said, I think the dispute starts at the opposite end of the timetable, in the sense that the question is whether it's manageable to bring this on the trial by the date we propose in this timetable. Mr Kennelly tells me, having liaised with his clients, it's not going to be workable by reference, I think, to some of the interim steps.

THE CHAIR: Does that mean we need to -- we probably ought to hear about the interim steps from him, just to see -- perhaps we should go through them and just see where the difference is --

MR ARMITAGE: Yes, of course.

THE CHAIR: -- and then we can try and work out --

MR ARMITAGE: Yes.

THE CHAIR: -- because I suspect that --

MR ARMITAGE: Yes.

THE CHAIR: I can absolutely understand the point you are making, but I suspect the answer is probably the realism about the interim steps and some degree of compromise.

MR ARMITAGE: Yes, the difficulty is the interim steps, rather than, for example, availability to do the trial.

THE CHAIR: Yes.

MR ARMITAGE: I think it's the former, so I agree with that. Well we made provision at paragraph 10 -- obviously this would be subject to any different order at this proposed third CMC, the disclosure hearing if you like, but we think it's useful to have a deadline now as to when disclosure would be envisaged by.

In our submission, 17 April seems entirely reasonable. As I say, subject to any contrary order at the CMC.

THE CHAIR: Mr Kennelly.

MR KENNELLY: Thank you. So just looking at that next step and it's disclosure, the deadline for disclosure, the date proposed is 17 April from Dr Kent. We propose 1 May. Again, on this massive issue of disclosure for unitary trial, we pressed our internal clients as to how quickly they can do it, dealing with all of the abuse, objective justification issues we discussed yesterday and 1 May 2023 is the very earliest it can be done. Any earlier would be simply impracticable and would not be a completed disclosure set that would be provided and it's not really a very big difference.

THE CHAIR: It's not a very big difference, is it and I don't think we need to spend a lot of time on it. The point we identified when we looked at this and consistent with the discussion we've just had, I think to the extent you are able to give disclosure as

we go and I appreciate that may not be much in advance of 17 April but what I envisage is that we may well get to January and have a debate about a number of different items, some of which you say are going to take you some time to process and won't be done by 17 April. So in a way I rather expect that when we get to CMC three, there's going to be probably quite a variety of different dates for landing some of this.

Now I would like to think that there is material you are going to be able to tell me at CMC three is ready for deployment and ready to go prior to the 17th. In fact, it probably may be that's not, for various reasons, the case. I guess the point I am making, I am not sure the date matters terribly much because I think we are going to revisit it. I mean, you know, the obvious thing to do in my position, if you are faced with this, is to take a date in the middle and say 24 April, isn't it?

MR ARMITAGE: It is, sir. If it's just a long stop -- and obviously, we said we may make an application, there will be stuff considered at the CMC -- we are happy with the long stop being the date Mr Kennelly proposes. I think it's a bank holiday, actually, that date so it would have to be 2 May.

THE CHAIR: I think the most important thing, really, here is to the extent you are able to provide material before then, you do that and if there's a good reason not to, of course we'll understand that but it would be useful to have that conversation on 16 January: what is your schedule up to 2 May, in order to provide that? If we can work on that basis, then is that satisfactory to you?

MR KENNELLY: I respectfully agree wholeheartedly because by 16 January we'll have not only the disclosure report but also discussion between the parties as to what can be agreed and what needs to be disclosed and, therefore, the issues will have crystallised and Apple, internally, will have a much clearer idea as to what can be done and at what pace. So indeed, if things can be done sooner, that can be

explained in January. If there are road blocks, again we can come to the Tribunal with specifics in January. So, yes.

THE CHAIR: Thank you. Where do we go next?

MR ARMITAGE: I think factual witness statements, we propose 14 September 2023. Again, that's a number of months after the disclosure and it's likely to be -- I think we are reserving the possibility we may put in factual witness statements but that's only so that we have the option but we don't have any particular factual statements in mind. It's going to be, as you say, asymmetrical, so Mr Kennelly may have points to make --

THE CHAIR: It's just helpful, I think, if you can indicate at the outset the difference between you as to the extent you know it.

MR ARMITAGE: I am so sorry. I think part of the issue is just, in light of the discussions, we haven't actually had the chance to --

THE CHAIR: You are not sure when yet.

MR ARMITAGE: -- discuss that, I am afraid. I'm sorry, it's just in the time available --

THE CHAIR: Perhaps, Mr Kennelly, you can help. What's your sense of this?

MR KENNELLY: Here, again, having taken instructions, we propose 29 September 2023. Again, on its face, not an enormous difference between myself and Mr Armitage. Mr Armitage indicates he's agreed but for the Tribunal's sake, just to explain because all through these steps, we've borne in mind the Tribunal's urging to move things more quickly than previously discussed between ourselves.

The reason why we can't produce these statements of fact earlier than 29 September has to do with the individuals concerned, their seniority and the fact we have August in the middle.

This is a burden that falls, really, primarily on Apple. These are our witnesses of fact

and that's why even doing it by 29 September will involve a lot of work in August. But practically speaking, I am told it can't be done any earlier than 29 September.

THE CHAIR: It does not seem to us to make an awful lot of difference, really, unless you are telling us it's going to make a big difference at the other end and I completely understand those points. So maybe subject to looking at it from the other end, why don't we just work on the basis the 29th. What then happens in terms of next steps? Presumably 26 October gets pushed out by --

MR KENNELLY: With the same gap, it's pushed out to 10 November 2023 and that's obviously important as well. It's not a very big gap but it's necessary.

THE CHAIR: So sorry to interrupt you but just to be clear, these are witness statements from Dr Kent though, aren't they?

MR KENNELLY: Both. Both. Because Mr Armitage has indicated he may --

THE CHAIR: I see, I am sorry --

MR ARMITAGE: I can't give any -- all I am saying is we have not discounted the possibility of putting in evidence of fact.

THE CHAIR: Yes.

MR ARMITAGE: We have not reached a view. We don't have any specific people in mind. It's not me deliberately obscuring matters, that's why we've got the provision.

THE CHAIR: I suppose the point is that this may not be a particularly consequential step because if you haven't put in any witness statements, then presumably there's not an awful lot for -- I expect there is an awful lot for the defendants to say about it but certainly the other way around, one assumes that's not going to be the case. Okay, that's fine. So then we get into experts. Is it necessary to have a consequential change there to December or can we leave it more or less there or do you have a different view on that date anyway?

MR KENNELLY: We have a different view on that date.

MR ARMITAGE: Yes, just to be clear, if it helps, then maybe Mr Kennelly can take you through. He's the one who has the -- we essentially stick to our guns from here on in. We say this timetable works and it will sufficiently allow a trial to come on before the summer and that's our position.

So Mr Kennelly --

THE CHAIR: Presumably what happens is if we start to push it out very much further, then we trip over the summer vacation. That's presumably what the issue is.

MR ARMITAGE: Yes, I think we get into -- because there's an interrelationship between the expert evidence and the CMA intervention, this has been quite carefully calibrated and as I say, agreed as between Mr Gibson and myself. The CMA's written observation's I think in there, so that's paragraph 19, 23 February. They effectively are fixed by reference to the reply expert report, so the CMA has the benefit of all of those.

THE CHAIR: But is there any reason why, if that's two or three weeks later, it makes any difference? What's the impact of that?

MR GIBSON: May it assist if I talk through the reason --

THE CHAIR: Yes, it's probably easier.

MR GIBSON: So the starting point is that we followed the template the President laid down in *Epic v Google*. The template there was just to start from when the expert reply reports were filed which you see at paragraph 13(b) as 12 January 2024.

Then if I take you to paragraph 19, that allows a six week period between the reply expert reports and the written observations from the CMA.

The thinking there is that six weeks is the crucial period for us to allow us to see the precise contours of what the parties' respective positions are, with the benefit of both

the factual evidence and expert evidence and then allow proper time for the CMA to address what are obviously important issues for the CMA from a public interest point of view and to draft a position and then obviously to go through the internal checks. You appreciate this is probably going to require some careful consideration from quite high echelons within the CMA, given the importance of the issues. That's the starting position. Then again in the *Epic* case, four weeks was considered appropriate for the primary parties, if I can call them that, to submit observations in response, if so advised. That's what you see at paragraph 20, a four week period.

Again, obviously it's not a matter for us to decide whether four weeks is enough, we anticipate the parties will want that amount of time to consider what are important issues, not just public interest but for their private interests in the case.

Then we haven't previously suggested but we considered overnight the possibility, as I intimated earlier, to have observations in reply. That's paragraph 21, if so advised. We obviously have no desire to put in unnecessary submissions but once we've seen what the parties actually say in response on these critical points, we think it would be more efficient for us to have provision for that in the timetable now rather than trying to insert it at a later stage.

We've allowed three weeks there between 20th -- paragraph 20 and 21 and that's because it falls across the Easter weekend. The Easter Sunday that year is 31 March, so that will allow us a week leading up to Good Friday, a week afterwards and time for us to finish the process, taking mind of Easter holidays and the like.

So that is where we come into the process. Thereafter you mentioned the possibility of applying for permission to make oral submissions.

THE CHAIR: Yes.

MR GIBSON: We thought that would be most conveniently done at a pre-trial review which then takes us back to paragraph 14 and the date at paragraph 14, 22 April,

you will see, is designed to allow for ten days from the filing of any reply submissions on Friday, the 12th, to take us to Monday, 22 April. That's the bit that we are concerned with.

THE CHAIR: Yes.

MR GIBSON: Paragraphs 15 and 16, we are obviously agnostic as to whether those steps take place on the basis that Dr Kent is proposing or that some other timing should be proposed thereafter, but that's the gist of where we are at.

THE CHAIR: That's very helpful. Can you help me -- and I don't want in any way to pin you down on this, it's really more to understand it a little bit, what this will look like -- the written observations, they seem to be somewhere in between a pleading and a skeleton. What do you envisage will be the nature of them?

MR GIBSON: I think that's quite an apposite description. I think we want to reflect on what's going to be of greatest assistance to the Tribunal. There's been provision for written observations to be made in other cases and I believe in the *Le Patourel* litigation, some relatively brief written submissions, written observations, were put in by the CMA in that case. I just need to turn my back. So that's the only case where written observations have been put in so far and that was a very specific case dealing with what might be a relatively narrow issue on the excessive pricing point. This case, as we've intimated in our skeleton, has two categories of reason to put in observations. There's the excessive pricing point again but there's also a wider spectrum of issues relating to past, current and likely future work in the digital sphere more generally.

So for that reason we anticipate we would want to have, as with the *Epic v Google* case, at least six weeks and the precise nature of the written observations, I think we'd need to reflect more carefully but I certainly think it may be somewhere in the hinterland between pleading and submissions.

THE CHAIR: That's very helpful and in a way it actually -- it almost goes as much to the question of what the responses from the parties are going to be and indeed your reply. Because I suppose the parties, of course, will have the opportunity to file skeletons, not too much longer after that but --

MR GIBSON: Yes.

THE CHAIR: It's an interesting challenge, I expect, for the counsel teams for both parties, exactly how they deal with this document at that stage. But that's helpful.

MR GIBSON: Yes, that's an interesting observation. Counsel for Apple did make the observation that there will be provision for skeletons and the sort of slightly amphibious nature of our document could sort of tend towards being seen as part of the skeleton process.

We, as presently advised, would prefer to follow the approach we've set out here. For two primary reasons -- well three reasons. One, it's the template the President has endorsed in *Epic*. We think it's a sensible way to go for that reason. Two, we think it's important that people know what the position is on these issues before preparing skeletons for trial because we've seen much more of an input rather than being something to go into the trial process with.

Thirdly, we think it's convenient to have this written process before the PTR rather than afterwards where skeletons would come up, for the simple reason it's going to be one critical decision as to whether or not we make an application for oral intervention and whether we think that's necessary. And I think it would be best to flush out what everybody thinks on these issues so we can reach an informed view on that and then everyone knows where they stand after the PTR, in terms of planning the details of how the trial is going to run.

THE CHAIR: I think that the no surprises point does suggest that it's helpful to know earlier rather than later what they are going to say. They've asked the question

really about what the parties respond to.

Okay, that's very helpful, Mr Gibson, thank you. I wonder, Mr Kennelly -- so, firstly, having heard that, does that make sense to you? Is that broadly where you are as well?

MR KENNELLY: In terms of the CMA's role and the steps that are needed for the CMA to make its observations for us to respond and potentially the CMA to respond to us, if I may, I will come back to that. One can see the sense of what Mr Gibson is saying for sure, not least because of the importance of the role of potentially the CMA and the points we made about parallel investigations yesterday. But really, as he said himself very fairly, when that happens depends on the next steps in the process itself and so if the Tribunal permits me --

THE CHAIR: Yes, of course.

MR KENNELLY: -- maybe I should deal with that and then come back to the CMA dates before the PTR, as Mr Gibson said, to resolve it before then. Because really this next stage is critical and it goes to when the expert reports are due.

8 December is the date Dr Kent seeks. We propose 26 January 2024, after Christmas. I will explain why that is.

There are a number of factors. First, it is very important that the experts have time to consider the factual evidence, the witness evidence of fact, which must include the reply statements which will be provided on the timetable in mid-November 2023.

They need the facts in order to produce their expert evidence. Although, as the Tribunal intimates, the reply statements of fact may not be very voluminous, we don't know because we haven't seen what the statements are, whether we need reply evidence but there must be a proper gap built in to allow the experts to consider the statements of fact which would inform, and we know they will inform, their expert reports because we know the expert reports are highly dependent on the particular

factual evidence.

The second problem with 8 December is it ignores the Thanksgiving holiday in the US and again, here in the UK, we may think well, that's not really a problem we encounter, it's not normally a material consideration but, again, I respectfully remind the Tribunal that this statement is coming from Apple in large part and it's coming from experts who either are based in the US or need instructions and material and assistance from the United States. Thanksgiving is on 23 November 2023 and it falls right in the middle of this gap between 10 November 2023 and the dates for expert reports. After Thanksgiving, of course, we have Christmas and, again, the Tribunal has in the past set deadlines immediately after Christmas holidays but it must be a factor taken into consideration, where this most critical stage of the proceedings is being done over the vacation, effectively.

The expert reports will be of vital importance. My final point and this may, in fact, be the most important, is that Apple is engaged in an 18 week trial in Australia which begins in March 2024, where there is significant overlap between the issues in our case and the ones to be litigated in Australia. The deadlines for the provision of expert evidence in the Australian proceeding run from October 2023 to February 2024 but the initial reports must be lodged in October 2023.

That means on the timetable proposed by Dr Kent, we have the experts -- and there will be an overlap between the experts involved in Australia and in our case, although they are facing slightly different issues -- they will be expected to work in parallel in the Australian proceeding and in this proceeding.

THE CHAIR: Are they the same experts?

MR KENNELLY: We have not confirmed yet exactly who our experts will be, so I cannot be sure if it's a complete overlap or not but the support they will need from Apple will be exactly the same --

THE CHAIR: No, I understand that.

MR KENNELLY: -- and the same people in Apple will need to support them and as you've seen already from this case, huge amounts of the expert analysis will be based on factual material and documentary support from Apple internally. So that means that there is real unfairness in asking Apple and its experts to engage in a parallel 18 week trial -- the expert process leading up to that 18 week trial in Australia and undertaking the expert process in England at the same time.

THE CHAIR: If we were to agree to that and you were to work through the consequential changes, does that inevitably have the effect that we can't do a 3 June or a June trial window? Is that where we are going?

MR KENNELLY: That's where we are going, exactly.

THE CHAIR: Do you want to just walk that through with us. So you would say 26 January for the experts. The replies --

MR KENNELLY: May I give you the dates, sir, as you go through?

THE CHAIR: Yes.

MR KENNELLY: 26 January for the expert reports. 1 March for the reply expert reports. I think I am following the same gaps.

Then the meeting on 22 March 2024, again following the same gap. The joint statement by 5 April 2024.

THE CHAIR: And then the date, so 1 March, then reads over to paragraph 19; is that right?

MR KENNELLY: On the CMA intervention?

THE CHAIR: Yes, the CMA said they would like six weeks, was it?

MR KENNELLY: Yes, exactly. Here we have the CMA's six week period to file their observations. Although Mr Gibson said that -- I think in *Le Patourel* he said the CMA's time to do those observations ran from the experts' reply reports, it may make

more sense, in fact, for the time to run from the joint statement because then the CMA will have the joint statement from the experts as to exactly what the position is.

THE CHAIR: I mean, look, if we were to try and fit it in before the summer vacation, then that might make sense but I am just trying to see whether we can do that. So put that aside for a minute and let's just see how this works.

MR KENNELLY: The CMA then has six weeks to do its observations.

THE CHAIR: Middle of April, does it?

MR KENNELLY: Forgive me, sir?

THE CHAIR: I am sorry, it becomes the middle of April, does it?

MR GIBSON: It would be around 12 April. I am just calculating it quickly in my head. I think we may have to fine-tune it but --

THE CHAIR: Yes, but just roughly speaking, we end up with 12 April.

MR KENNELLY: So we then get their observations on --

MR GIBSON: I think roughly 10 May.

MR KENNELLY: 10 May.

MR GIBSON: One observation on that -- sorry to interrupt, Mr Kennelly. If it's 12 April for our observations, that six week period will fall across Easter, so I may just have to take instructions on the implications of that. But if we work on that basis for the moment and then come back.

THE CHAIR: The next date would be --

MR GIBSON: The next date would then be four weeks on, roughly speaking be 10 May. I may be getting these dates slightly wrong.

THE CHAIR: No, that's fine, we just want to get a sense of them.

MR GIBSON: Then three weeks on from that will take us to 31 May, paragraph 21, which will then take you back -- and then Mr Kennelly will pick up the pre-trial review date. If you wanted to allow ten days, that would be around about 10 June.

MR KENNELLY: So we have the PTR listed at the earliest available date after 10 June and following that, we have skeletons for trial.

In Dr Kent's original timetable, sequential skeletons were proposed which we think was a good idea, remains a good idea and, therefore, there should be sequential exchange.

THE CHAIR: So sorry, this is -- paragraph 15, you think sequential, you would say?

MR KENNELLY: Yes.

THE CHAIR: I don't know what that date is now, it's clearly something quite different.

MR KENNELLY: May I --

THE CHAIR: Yes.

MR KENNELLY: Before we go into dates for skeletons, of course one has to prepare for the trial, thinking of our own – to actually prepare for the trial and ordinarily for a seven week trial like this, you would have two months to prepare it and so that is why we propose a date in October for the trial and we could have Dr Kent's skeleton argument, for example, on 6 September 2024 and our skeleton argument on 20 September 2024. So sequential exchange, as Dr Kent suggested before, which would mean ships don't pass in the night in these very important written submissions before trial and then we would propose the trial be listed for the first available date on or after -- as early as 1 October 2024 which is, again, a very short gap between skeletons and trial but again, bearing in mind --

THE CHAIR: That doesn't give us much time, does it? That is quite short.

MR KENNELLY: It may be necessary to start the trial a little later than 1 October 2024.

THE CHAIR: (Inaudible).

MR KENNELLY: Indeed, yes.

THE CHAIR: Okay. So Mr Armitage is there -- we will just take a minute to have a conversation about this, I think, but is there anything you wanted to add before we do that?

MR ARMITAGE: I think a few observations. As I say, we maintain this is a workable timetable. Our proposal, even if one takes Mr Kennelly's date in paragraph 10 of 2 May as a long stop for disclosure, that is then -- I make it about seven months until expert reports are going to be filed, so that's, we say, a perfectly workable, one might say leisurely timetable, particularly as this is not a case -- although I am not suggesting for a minute the economic exercise is going to be minor, it's not a case involving complex econometrics of the kind you sometimes see in competition litigation and which are, obviously, highly data intensive and so on and so forth.

If the issue is the time between the witness statements of fact and the expert report deadline, well, as we've discussed, the burden there is going to largely fall on Apple. On the proposal I think we are currently working on, that's a very leisurely timetable indeed. The suggestion is September next year for witness statements of fact. So if that's the blockage, there may be room for manoeuvre there.

But we say, essentially, this is perfectly workable. If the issue is it all stems from the time for expert reports, we say it can be done by 8 December.

Once that happens, the remaining timetable is, as I understand it, absolutely fine. So the question really is whether that 8 December deadline is a reasonable one.

THE CHAIR: And I mean it's, I think, probably witness statements rather than disclosure that's the driver here. I don't know, Mr Kennelly, I mean it is a long time between now and 14 September 2023 which I think was a date you didn't agree to anyway. Is it really going to take you a year to produce the witness statements, bearing in mind you have all the documents already that are largely going to feature in this case?

MR KENNELLY: Absolutely. The reason why it was important to go through each step in the process is it demonstrates why it takes so long, why it takes so long to get to these steps and why each of these steps is consequential on the other.

But just so we don't lose our sense of reality here, Dr Kent is describing the timetable that is proposed as very leisurely but they are suggesting a timetable earlier than they said that a preliminary issue hearing could be accommodated.

I mean we have to just engage with what's actually happening here. Apple is the one doing the work, Apple is the one that has to finalise the disclosure. These witness statement deadlines we've advanced are genuine, realistic dates which are the earliest that can be achieved by Apple having taken instructions. It's not enough simply to say: you have documents, you can start working. Until issues are crystallised and disclosure is examined, the particular disclosure that's going to be before the trial has been examined by the teams and by the lawyers, the witness cannot be expected to complete their witness evidence. Obviously, Apple will begin whatever it can as early as possible and wants to be properly prepared but Mr Armitage has not explained to you why any of the deadlines I have suggested are unrealistic.

The real problem, I think, from his perspective, is the times needed for the expert evidence.

THE CHAIR: Just -- sorry to interrupt you, I just wanted to come back to you on that point about the witness statements, to be fair to Mr Armitage. You had a go and he's responded to it. It's just the question of whether you need between now and 14 September which is exactly a year's time, to do witness statements -- there isn't really an anterior exercise, other than the pleadings, of course, but they are largely -- I think you may say there's work to be done but they are largely there. So it's a question of whether you need a year to produce -- I don't know how many

witnesses, maybe you don't know, but how many witnesses you envisage producing statements for. It's a long time to produce witness statements.

MR KENNELLY: But, sir, we discussed yesterday the unitary trial, the scope of the unitary trial. This is covering all of the factual questions we need to address from market definition and dominance, all the factual evidence that Apple needs to show on the question of foreclosure, all the evidence we need to show for objective justification, demonstrating our positive case on privacy, reliability, security and all of the evidence we need to demonstrate lack of causation and quantum.

It's a huge amount of factual evidence that needs to be advanced by Apple in order to address what's being done. In any commercial trial of this nature, the witnesses can't be expected to produce their evidence until the issues have crystallised, until disclosure is given and the client, the party knows what the witnesses will need to speak to, how extensive their evidence needs to be, what are the points that need to be focused on in the witness evidence. That informs how one obtains the witness evidence. It makes a huge difference, it's not an exercise that can begin now. So it would be extremely unfair and create real injustice for Apple to be expected to produce witness statements earlier than is currently outlined, based on the steps that lead up to the production of witness evidence. So one must not lose sight of what's actually involved in a case of this magnitude.

The facts that we produce in our witness evidence will be fundamental to the trial and to the work the experts have to do and it cannot be short circuited, notwithstanding the fact the documents are mostly Apple documents.

THE CHAIR: Yes, thank you. Mr Armitage, just any other observations you want to make on that before we rise for a minute? Also, is there anything else in here that's not agreed? I see there's some questions on costs, I don't know whether they are contested.

MR ARMITAGE: I should address you on costs. I will just ask if there is anything else on the timetable.

MR KENNELLY: I had not actually finished on the timetable. There's one final point. Just very quickly. Mr Armitage made a couple of points on the timetable. I will be really short.

THE CHAIR: Yes, of course.

MR KENNELLY: Ultimately, even if we could do the factual evidence earlier, it's not going to make a difference because that trial in Australia which begins in March --

THE CHAIR: Is it October -- you said evidence --

MR KENNELLY: The expert evidence will begin in October 2023 but the trial itself is in March 2024.

THE CHAIR: You are still left with a problem.

MR KENNELLY: We still have an overlap.

THE CHAIR: I understand, okay. That's understood.

MR ARMITAGE: So the only other observation, there's not much I can say about it but I'd invite you not to give any weight to the Australian proceedings -- Apple is a global business and this is the sort of thing that happens. I don't think that's a factor one can sensibly take into account today, in my submission, but otherwise, as I say, we stick to our guns on the workability of the timing.

THE CHAIR: Yes, thank you. So am I right in thinking that -- is there an issue as to costs?

MR KENNELLY: Before Mr Armitage answers that question, one last point on the timetable and hopefully it can be agreed. For all the deadlines that are 4 pm, I am urged to ask the Tribunal to change that to 8 pm.

THE CHAIR: 8 pm.

MR KENNELLY: Because our clients are in the United States in California.

THE CHAIR: Of course.

MR KENNELLY: We are continually needing to speak to them and deal with them and 4 pm deadlines are almost vexatious in difficulty and so we ask for 8 pm.

THE CHAIR: I am not prepared to give you a view on that because I'll probably get into trouble with the Registry if I do, but I am sure we can sort that out. We will just park that for a moment. Is there anything else that we should consider -- I would like to rise for just 5 minutes and then we can come back and sort this out and then we can all go --

MR ARMITAGE: We are happy with that.

THE CHAIR: Yes, fine, thank you.

MR ARMITAGE: Nothing else, other than the costs of the CMC and the preliminary issue application.

THE CHAIR: Yes.

MR ARMITAGE: I don't know if you would like me to address you briefly on that now before you rise?

THE CHAIR: Well, if you want to say anything about it, yes, please.

MR ARMITAGE: Very briefly. We apply for the costs attributable to the preliminary issue application. We say, and I will be very brief, that that was a discrete issue, a discrete application that did generate significant costs. It certainly increased the work required in preparing for this hearing. Without it, I would suggest, respectfully, we wouldn't have needed one and a half days of court time and therefore we ask for an order that Apple pays the costs that are attributable to that discrete issue.

We don't have a cost schedule, and there's a degree of complexity in distinguishing between those costs and the costs of the CMC generally, although, as I say, we say there are significant discrete costs. So we are only asking for an order in principle, not summary assessment. Otherwise, I am sure it's agreed that the costs of the

CMC are costs in the case. So that's all I wanted to say: a discrete issue, associated costs, we'd ask for those.

THE CHAIR: Yes, thank you. If you just give us a moment.

Mr Kennelly, I don't think we need to hear from you on that. I think we think this is part and parcel of case management. It was an application that seemed to us a sensible application and it was well argued. We actually found it quite helpful in terms of elaborating on some of the issues in the case. We certainly don't think there's any basis to treat it any differently from costs in the case so we will order costs in the case.

We will rise for what I hope will only be 5 minutes and we'll try and come back and just resolve that issue of the end date.

(1.10 pm)

(A short break)

(1.22 pm)

Ruling

THE CHAIR: This is a case in which we have encouraged the parties to get on with the process and to get on as quickly as sensibly possible to trial. An issue has arisen about whether that means that we should have a June 2024 or October 2024 trial. The primary driver for which of those dates is appropriate is the preparation of witness statements, which are currently proposed to be prepared for September 2023. Those witness statements are largely a burden that fall on the defendants who are expected to produce most of the witness evidence.

We are sympathetic to that position. We accept that it is a significant task for the defendants, albeit it's also a very significant period of time, and we do agree with the defendants' submissions that it is likely to be a tight timetable to get from September

through to a June trial.

I should say, in reaching that view, we take no account of the Australian proceedings that have been referred to involving Apple, which we don't think is a relevant consideration for this point.

Accordingly, it seems preferable to set a firm date for trial in October, rather than risk a timetable which has a real likelihood of failure and therefore a need to adjust, and so we will set a date of 1 October. The date to go into paragraph 16 of the proposed order should be 1 October 2024. We intend to treat that as a date that is, if not set in stone, set in some fairly firm substance and we will not be intending to change that without very good reason. So the parties should treat that as a firm date for trial.

As a consequence, we end up with the dates Mr Kennelly suggested, by and large, in paragraphs 11, 12 and 13, so 29 September for signed witnesses of fact, 10 November for reply witness statements, 26 January in 13(a) for expert reports, 1 March for reply reports, 22 March for the meeting and 5 April for the joint statement. That suggests, I think the date was, 10 June reference point for the pre-trial review.

I appreciate those dates may need some adjustment, depending on where they fall exactly, because we did that slightly on the hoof for some of them, and we are open to minor variations of those, if agreed between the parties, otherwise we will resolve that.

We agree that skeletons should be sequential and we will leave it to the parties just to finalise those dates suggested, the 6th and 20 September. The only point we would make is that we will need some good reading time and we may need to utilise the first part of October or some of that first week to do that.

In relation to the consequential effect on the CMA's timetable, we might just leave those dates just to be firmed up between the parties by agreement, but I am sure

that that is something you can agree to make it work within that timetable.

The only other item to raise is the 8 pm filing deadline which, having consulted the Registrar, has not been met with much enthusiasm. Their position is that this is a court in the UK jurisdiction and the times should reflect that.

Having said that, we are sympathetic to the points you have made, Mr Kennelly, and it seems to us that if the consequence of the time difference would be effectively for your clients to lose a day, then it may well warrant an adjustment for some of those dates to the next day for 10 am. So if that is how the timetable ends up we would be happy with that as perhaps a compromise for that solution, and hopefully that would not cause Dr Kent's team any difficulty.

Is there anything else arising out of that that we need to pick up?

MR GIBSON: Just one very small point on which I don't anticipate there will be any controversy. In paragraph 18 there's provision for the CMA to receive factual witness statements and the expert reports, pursuant to paragraphs 11, 12, 13(a) and 13(b). We think it would be helpful for us to see the joint statement of the experts, which is at 13(d), as well. Even though we don't propose that that should be the trigger point for us to prepare our submissions, we would like to actually have sight of that document, at least in the context of the proceedings as a whole.

THE CHAIR: That seems sensible, and I see Mr Armitage nodding. Yes, Mr Armitage is still nodding.

Mr Kennelly.

MR KENNELLY: No, nothing further from us, thank you, sir.

THE CHAIR: I don't know whether you picked that up.

MR KENNELLY: No, I didn't.

THE CHAIR: Mr Gibson was just making a point about the CMA seeing the joint statement.

MR KENNELLY: Yes.

THE CHAIR: And the expert --

MR KENNELLY: Yes, of course. I think that might have been one of my suggestions, that they see that before doing their submissions.

THE CHAIR: Yes. Good.

MR KENNELLY: Thank you.

THE CHAIR: Thank you. I think we are done, unless there is anything else, Mr Armitage?

MR ARMITAGE: No, only to thank the Tribunal for the extra time, both today and yesterday.

THE CHAIR: Thank you, and thank you all for your help with all of that. We have moved things forward a lot. We will look forward to seeing you I think probably in January, and hopefully not before, but we do leave you with the observation that we are keen for all aspects of the disclosure process to be moved along, and the transaction data and anything else that can be disclosed earlier rather than later, and we would be keen to hear in January that that process had moved along considerably.

Thank you very much for all your efforts. Thank you.

(1.29 pm)

(The hearing adjourned)

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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?

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