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

Case No: 1403/7/7/21

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

12 Monday 20th March – Tuesday 21st March 2023

13
14 Before:
15 Ben Tidswell
16 (Sitting as a Tribunal in England and Wales)

17
18
19 BETWEEN:

20
21 Dr. Rachael Kent
22 **Class Representative**

23
24 v

25
26 Apple Inc. and Apple Distribution International Ltd
27 **Defendants**

28
29 Competition and Markets Authority
30 **Intervener**

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

34
35 Ronit Kreisberger KC, Matthew Kennedy and Antonia Fitzpatrick (On behalf of Dr. Rachael
36 Kent)

37 Marie Demetriou KC and Hugo Leith (On behalf of Apple Inc. and Apple Distribution
38 International Ltd)

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Tuesday, 21 March 2023

(10.30 am)

(Proceedings delayed)

(11.00 am)

Case management conference (Day 2)

THE CHAIRMAN: Good morning, Ms Kreisberger.

MS KREISBERGER: Good morning, Sir.

Sir, if I can begin by thanking you for the additional 30 minutes this morning.

THE CHAIRMAN: Of course.

MS KREISBERGER: I think on both sides we're very grateful.

The position is that the parties have been exchanging draft orders overnight and this morning and we have had discussions about the draft orders, and there is a measure of agreement. But, equally, there are certain provisions which look to be in contention. So this morning we will likely need to put before you certain sticking points, essentially, for determination.

THE CHAIRMAN: Yes.

MS KREISBERGER: We don't think it will take long to take you through the provisions and put the issues before you.

On our side, we're in the process of producing a composite draft which shows each side's position where there is no agreement. I think that will be the most useful basis to then take you through, Sir, these points that haven't been agreed.

In order to achieve that, could I ask for an additional 30 minutes? Ms Demetriou is nodding. I think that would just give us enough time to produce that composite draft order and then you can see what arises for determination, what's agreed.

I'm in your hands, Sir, as to whether you would like to see it before we come back at

1 11.30, so you have an opportunity to review the draft and then we can put the points
2 before you for determination.

3 **THE CHAIRMAN:** Well, I'm happy for you to have 30 more minutes if that's helpful,
4 so that's fine.

5 **MS KREISBERGER:** I'm grateful.

6 **THE CHAIRMAN:** I am equally happy for anything you want to be heard now, but if
7 that's not the way you would like to do it --

8 **MS KREISBERGER:** I think we're not quite ready. It's not quite ripe, but we're very
9 nearly there. Because without a composite draft it's very difficult for me to show you
10 what each party's position is on the disputed elements.

11 **THE CHAIRMAN:** Of course. That probably is more efficient. In which case, why
12 don't you let me have the draft and let's just start straightaway. You can take me
13 through it and I will manage on the go.

14 **MS KREISBERGER:** I'm very grateful for that. So, if we return at 11.30.

15 **THE CHAIRMAN:** Yes.

16 **MS KREISBERGER:** I'm grateful.

17 **THE CHAIRMAN:** Good, thank you.

18 **(11.04 am)**

19 **(A short break)**

20 **(11.30 am)**

21 **THE CHAIRMAN:** Yes.

22 **MS KREISBERGER:** Thank you, Sir.

23 It transpires that 30 minutes was quite optimistic. I am just waiting to receive the
24 correct version of composite order.

25 Has that been sent to you, Sir? Because you, of course, need to have that in front of
26 you. Has that been received? I think it's been sent electronically, with a request for

1 printing.

2 **THE CHAIRMAN:** In which case it will be on its way, but it hasn't yet arrived in my
3 hands.

4 **MS KREISBERGER:** I think we're going to have to wait because I can't sensibly
5 address you on it until you have it before you. We don't have access to printing
6 facilities.

7 **THE CHAIRMAN:** No, of course. I'm sure it is on its way.

8 **MS KREISBERGER:** It is, I think. I think the send button has been pressed.

9 **THE CHAIRMAN:** Would it be helpful just for you to tell me, just in general terms,
10 what the plan is? A sort of philosophy of what we're trying to do. Is that helpful, just
11 so at least we're all on the same page and understand what the objective is?

12 **MS KREISBERGER:** I think that would be if you will, Sir, grant me a little indulgence
13 because I'm essentially riffing at this point.

14 **THE CHAIRMAN:** Of course, it's all off script, I know, so that's fine.

15 **MS KREISBERGER:** I will do my best to summarise the issues that arise, and I hope
16 that at some point in the course of this process you will have a draft.

17 So, Sir, going through, I will summarise the key terms. The first provision is agreed,
18 happily, that Apple will disclose the Australian supplemental disclosure. That's going
19 to be disclosed shortly, by 6 April.

20 **THE CHAIRMAN:** That was about 1,700 documents or something like that?

21 **MS DEMETRIOU:** 7,000.

22 **THE CHAIRMAN:** Yes. So, you will get that in its entirety.

23 **MS KREISBERGER:** We will get that, yes.

24 **THE CHAIRMAN:** And that is just going come in an electronic format?

25 **MS KREISBERGER:** Yes. That's going to come in electronic format, and the order
26 provides for that. From our perspective, that's, of course, helpful for informing the

1 search terms process.

2 **THE CHAIRMAN:** Yes.

3 **MS KREISBERGER:** So, it gives some insight, and that's the 7,000.

4 **THE CHAIRMAN:** Can I just, in case I forget about it later, ask: has there been
5 a discussion between the parties about the format in which document are disclosed
6 electronically? Is that something which there has been engagement on?

7 **MS KREISBERGER:** Yes, it's to be agreed. So, we haven't arrived at a landing on
8 that. So, at the moment, the order provides for electronic format, but I think we will
9 need to take that to the technology providers.

10 **THE CHAIRMAN:** Yes.

11 **MS KREISBERGER:** We hope that can be dealt with in the correspondence.

12 **THE CHAIRMAN:** I would hope so. I just wondered whether it was an issue that had
13 been discussed yet.

14 **MS KREISBERGER:** So that's been agreed. Sir, then the next key point -- and this
15 is an important advancement in the process -- is that Dr Kent's team is going to serve
16 a list of issues on the other side. So that, Sir, is in the spirit of a usual High Court list
17 of issues that one would see. We, of course, have the CMA list of issues, but that was
18 an interim measure. So we will formulate a proposed list of issues, and we will send
19 that. It's agreed that Dr Kent will send that list to Apple by 6 April. So that's a couple
20 of weeks, essentially, to produce that list. That's going to be an important foundation
21 for what happens next.

22 The order provides for Apple to then let us know if they have any objections to anything
23 in that list. A timetable is set down for that. So there's a time period; there is a period
24 of 14 days for agreeing any areas of current disagreement and, if not agreed, we will
25 then put them to the Tribunal for determination. The order leaves it open. It may be
26 that matters can't be determined on the papers, and we may need to come back in

1 front of you, Sir.

2 **THE CHAIRMAN:** Just conceptually, this list of issues, obviously once created it's
3 created and it's a list of issues. But it's not intended to be a list of issues for the
4 purposes of the case more generally; it's been created for this specific purpose.

5 **MS KREISBERGER:** It's for the specific purpose of the disclosure process.

6 **THE CHAIRMAN:** Which I think is important, isn't it? Because I think if there are
7 going to be arguments about what's in it and what isn't that's the context in which it
8 has been given.

9 **MS KREISBERGER:** That is right.

10 **THE CHAIRMAN:** What I would be concerned about is if we were going to have great
11 arguments about whether something -- or about how a list of issues should be framed
12 for the purpose of experts or trials, or whatever it is. But we don't need to do that yet,
13 do we?

14 **MS KREISBERGER:** No, and it is very much the hope of Dr Kent that that can be
15 avoided. That is not the exercise at this stage. So if it were the case that there will be
16 a list of issues for particular experts to speak to that would be an entirely separate
17 exercise. This is purely for the disclosure process.

18 **THE CHAIRMAN:** Which means it can be rough and ready, and it should be
19 understood by --

20 **MS KREISBERGER:** Fairly high level.

21 **THE CHAIRMAN:** -- both parties that neither party is committed to it for the purposes
22 of anything other than this exercise.

23 **MS KREISBERGER:** Absolutely. I think we can all agree that's now been said in
24 open court and that's the basis on which this is being performed, so that should be
25 clear.

26 **THE CHAIRMAN:** Good.

1 **MS KREISBERGER:** You will see, Sir, from what I have said, that the timetable is
2 quite tight and it reflects that point precisely.

3 **THE CHAIRMAN:** I don't think there is any value in having great satellite arguments
4 about this.

5 **MS KREISBERGER:** Absolutely.

6 **THE CHAIRMAN:** Particularly -- and there may be a separate point on this -- if there
7 are things that are agreed at least people can be getting on with the things that are
8 not in dispute.

9 **MS KREISBERGER:** Exactly. It's meant to be a foundation for a constructive
10 movement forward.

11 **THE CHAIRMAN:** Yes.

12 **MS KREISBERGER:** Absolutely, that is the intention. But it's very helpful to have the
13 indication from you, Sir, that that's the purpose underlying and all are agreed with that.
14 So that's the list of issues. So, the parties will have identified any areas of
15 disagreement by two weeks after 27 April. I don't know what that date is. Those points
16 will go to you, if necessary. The hope is, of course, it isn't.

17 Now, within this part in the draft order -- Sir, I should just say I think the draft order has
18 been sent, so I don't know what the processes are on your side for receiving that. It's
19 obviously helpful if you have it in front of you, but I will press on, unless you tell me
20 otherwise.

21 **THE CHAIRMAN:** I'm sure that people are --

22 **(Pause)**

23 Yes, okay. Apparently we don't have it yet, but I'm sure people are looking out for it.

24 **MS KREISBERGER:** I am told the email has gone to the Registry, so it should be in
25 an inbox somewhere.

26 **THE CHAIRMAN:** That message is no doubt received and being investigated, and

1 | it's not very far away. Why don't you keep going. I appreciate it makes it more difficult,
2 | but it's helpful, I think, just to be able to make progress.

3 | **MS KREISBERGER:** Sir, I'm within the same provision of the order at this point.
4 | There is one point that I think is not agreed. Sir, you may recall we had a request for
5 | quantitative disclosure.

6 | **THE CHAIRMAN:** Yes.

7 | **MS KREISBERGER:** Now, we're going to go back and look at those. Apple
8 | responded on 10 March, in that 10 March letter, to say that has been superseded by
9 | what they were proposing at that stage, which was provision of everything. That's now
10 | fallen away. So, we just want to ensure that the quantitative disclosure isn't lost.

11 | What we are proposing to do, at the same time as providing the list of issues, is that
12 | we will provide a list of requests for data. So that document doesn't yet exist. The
13 | current quantitative disclosure requests are going to be superseded.

14 | Now, this is purely a pragmatic issue, which is why we're proposing that it be provided
15 | for in the order. It's this: we don't know, Apple can tell us in due course, but we
16 | anticipate that search strings may not be the best way to get at data.

17 | **THE CHAIRMAN:** So, I'm certainly aware there was an issue about the cut-off date
18 | for the transactional data. Are we talking about something different from that?

19 | **MS KREISBERGER:** We're talking about data more generally.

20 | **THE CHAIRMAN:** Yes.

21 | **MS KREISBERGER:** Where actually a key word search isn't going to -- it's actually
22 | more efficient, it's quicker to go to a particular database and print it off, that sort of
23 | thing.

24 | **THE CHAIRMAN:** Is the understanding or the expectation that this data sits within the
25 | repositories, as we call them?

26 | **MS KREISBERGER:** Yes, at this stage. This is purely everything -- I will let you know

1 when we leave the repository.

2 **THE CHAIRMAN:** Yes, so this is not a supplemental disclosure point?

3 **MS KREISBERGER:** No.

4 **THE CHAIRMAN:** This is how we deal with --

5 **MS KREISBERGER:** No. As I say, it really is just this pragmatic concern that Apple
6 may -- we anticipate Apple will find that key word searches are not the way to respond
7 to data requests. So we think it should be carved out.

8 **THE CHAIRMAN:** Can you identify the data or the existence of it from the requests
9 that have been made in the US and Australian proceedings? In other words, is there
10 sort of a paper trail, so you know what it is?

11 **MS KREISBERGER:** We are going to formulate them *de novo*. The quantitative
12 disclosure requests are something of a guide, but we think that's too broad at the
13 moment, because it will be superseded by some of this. So we really have in mind
14 that we're going to look at what data is needed. It's not appropriate to provide for data
15 requests in a list of issues. It's just a separate document.

16 **THE CHAIRMAN:** Yes, I understand.

17 **MS KREISBERGER:** I just want to make sure it's not lost.

18 **THE CHAIRMAN:** I understand the point.

19 Ms Demetriou.

20 **MS DEMETRIOU:** Sir, yes, so the practical issue -- so could you just turn up the
21 current request, please? So it's at core bundle volume 1, tab 10.

22 **THE CHAIRMAN:** Yes.

23 **MS DEMETRIOU:** If you look at the nature of the request. If we go to page 187 and
24 look at, for example, the first request or indeed the second request, so "Management
25 Documents from the launch of the App Store to date, relating to the App Store iOS
26 devices", et cetera. Then you see "Documents, from the launch of the Apple Store".

1 So this is the only set of what they call data or quantitative disclosure requests that we
2 have. Looking at them all, our position had been: well, those can be wrapped up in
3 the search strings, because they're really mostly in the nature of qualitative
4 documents, if I can put it that way.

5 So, Ms Kreisberger is going to come forward in the order, but there's an agreed
6 approach in relation to search strings and agreeing search strings and applying them.

7 So, our position had been: well, looking at the nature of these requests, that can all be
8 subsumed within the search string process.

9 But what we have been told this morning is that these are going to be revised
10 significantly and they're going to produce something that looks more like data
11 requests. Our position is: until we see them, we just can't possibly agree a way
12 forward.

13 So, what we would propose is that the data requests are taken off the table for the
14 purposes of the order today, that they do come back to us with their revised data
15 requests, and then hopefully we can agree a constructive way forward, in terms of
16 dealing with those. Either some or all of them might be capable of being subsumed
17 within the search strings; others, there may be other ways of searching for the
18 documents or the data. But, at the moment, we just don't know until we see what the
19 revised requests are. That's really the position.

20 **THE CHAIRMAN:** Thank you.

21 **MS KREISBERGER:** Our position is we will produce data requests in the same way
22 that we will produce the list of issues. I don't want you to be set off course by
23 quantitative disclosure requests. That's not what we're talking about now.

24 **THE CHAIRMAN:** No.

25 **MS KREISBERGER:** It will be things like costs. It will be essentially number crunching
26 which traditionally isn't caught by search terms. So, we do want it provided for in the

1 order because we don't want this to drop off.

2 Of course, Apple will come back and tell us if these data requests can be met or not,
3 but there's no reason not to order it now, in the same way that we're going to propose
4 a list of issues, and Apple can come back. But it is important because it is factually
5 correct that we have requests for data, like costs, which we're going to put to Apple as
6 part of this process that isn't what one thinks of as part of a list of issues. It's going to
7 be a separate document. We are going to put that forward, it should be ordered, and
8 Apple can tell us through this process.

9 This process is here to allow the parties to engage. Then for the Tribunal to determine
10 any outstanding matters. So, I can't see any reason at all why it shouldn't be in the
11 order.

12 **THE CHAIRMAN:** At the moment -- I now have the order --

13 **MS KREISBERGER:** You now have the order, I'm very grateful.

14 **THE CHAIRMAN:** -- you will be pleased to hear. At the moment, how does this
15 manifest itself in the order?

16 **MS KREISBERGER:** If I could ask to you read -- perhaps if I just give you a moment,
17 Sir, to read paragraph 2 of the order.

18 So paragraph 1 is the Australian disclosure. I have taken you there through that, and
19 we're now on to paragraph 2, and it's 2.2.

20 Sir, just so you can have it, Dr Kent's draft provisions are in blue and Apple's draft
21 provisions are in red.

22 **MS DEMETRIOU:** Sir, if I could just clarify, we don't object, as it were, I don't think, to
23 them providing the list of requests for data in 2.2. Obviously, that's sensible.

24 **THE CHAIRMAN:** The question is what you have to do about it.

25 **MS DEMETRIOU:** It's what we have to do. What you see at 5.2, once you read down,
26 is a separate process, separate from the search strings, and it's that that we're just not

1 in a position to agree to at the moment. We don't think that should be ordered yet until
2 we have seen what they are because we're told they're going to be radically different
3 to the ones that we currently have in front of us. So it just wouldn't be right, in our
4 submission, to order us to do something when we don't even know what it is that we're
5 being asked for.

6 **THE CHAIRMAN:** So, I think the question that arises is -- it's a bit like the search
7 strings being the solution to the issues. One is the expectation about how Apple is
8 going to find, in the 5 million documents, the data that you're asking for. Hence my
9 question about whether you have that road into it.

10 Because if you were able to identify from one of the requests they had -- I seem to
11 recall one of the requests, no doubt many of the requests, dealing with the costs and
12 revenues and other things. If you have that identified as a request, then that is a basis
13 to go to Apple and say: can we please have the documents that we're provided in
14 response to that request?

15 Now, I don't know whether that is something which Apple can just do or whether,
16 actually, that requires further work. But that seems to me to be quite different from
17 you saying to them, "We want to see all your costs", because clearly the question then
18 arises: how does Apple proportionately search in 5 million documents and find things
19 that produce data relating to costs?

20 I don't know what the answer to that is. That's sort of an unresolved point, isn't it?

21 Until we see what you're asking for and how you've put it.

22 **MS KREISBERGER:** Sir, what I say to that is: first of all, it's quite usual in competition
23 cases to have -- it's often done under an expert-led process.

24 **THE CHAIRMAN:** Yes, that's another way of looking at it. Just to be clear, I'm not
25 suggesting for a moment you're not going to get the data.

26 **MS KREISBERGER:** Yes.

1 **THE CHAIRMAN:** The challenge here is that we don't know if it's sitting in this
2 document population. It's not like an ordinary case where you're saying, "Please
3 provide us with your management accounts for the last five years", or whatever it is.
4 You may choose to ask for that, but as I understand it there are some issues -- "issues"
5 is perhaps the wrong word, the way in which Apple produces its internal accounting
6 material doesn't necessarily make that obvious and easy, as I understand it, from what
7 I have read elsewhere. I may have that wrong, but that's certainly my understanding.
8 But, here, we're talking about how do you access a very large volume of documents
9 to get what you want. We just need to make sure that the request you make sufficiently
10 signposts for Apple where it should be looking for those, so we're all clear they have
11 looked at the right place and have the documents, that's the point. If you were to say,
12 then -- I'm sure if you were to say to your experts, "What are the things you need to
13 see?" and they produce a list of, for example, profitability of the App Store, just to take
14 an example, no doubt somewhere that information exists, whether it's in the
15 repositories or elsewhere, or can be put together. But I think we do have to be
16 sensitive to the point that just asking for it doesn't solve the problem of where it is in
17 the 5 million documents or 6 million documents.

18 **MS KREISBERGER:** Yes. So, can I unpack that?

19 **THE CHAIRMAN:** Yes, of course.

20 **MS KREISBERGER:** Stepping back, the intention is to be as helpful as possible in
21 highlighting what we would like to see.

22 **THE CHAIRMAN:** Yes.

23 **MS KREISBERGER:** This proposal is a solution to the problem that Apple has
24 identified, in other words: tell us what you want.

25 So the most proportionate and cost-effective way to get access to the data, that of
26 course the economists on both sides are going to need to look at, is for us to just ask

1 for the data. So that's the first point.

2 The second point as to where that data sits, I don't think that's a matter on which
3 Dr Kent can assist. But it's helpful for Apple to see what data Dr Kent is asking for,
4 then Apple can go away and see how it can best be accessed.

5 Now, if Apple want to come back and say, "We're going to access it using search
6 strings", well, okay, that might be the position, but what we think is helpful for Dr Kent
7 to do is to articulate the requests for data with an eye on expert reports now. It's hard
8 to see how that's not a helpful process.

9 **THE CHAIRMAN:** Well, I think it does risk a degree of unhelpfulness, I think. It's
10 because we're not in the ordinary situation where there is no existing disclosure and
11 we're starting from scratch. If that were the case, then I think that would absolutely be
12 the right way to start. I'm not saying it isn't an approach that should be taken or it's
13 inappropriate in the general sense; all I'm saying is that if the immediate objective here
14 is to work out how we deal with these repositories, then asking for generalised material
15 in the repositories that isn't necessarily responsive to search strings may be more
16 complicated than we think.

17 I think all that Ms Demetriou is saying is that when we see what you ask for and how
18 you've put it, that may determine how feasible it is to deliver it with confidence that we
19 have the documents, the certain repositories that relate to that.

20 That actually is, I think, quite a different question from: how do both parties satisfy
21 themselves that this is a solid foundation of data for the experts to work on?
22 Which may involve disclosure from outside the repositories, if it turns out that the
23 documents are not there.

24 Now, I suspect that's not the case, because one would assume that this is a well-worn
25 path and two sets of proceedings and it's all in there somehow. The question is just
26 how you get it.

1 **MS KREISBERGER:** I wonder, Sir, if it's best if , as we get to 5.2, we can discuss the
2 point. Because the position is Dr Kent is going to ask for this data.

3 **THE CHAIRMAN:** Yes, of course.

4 **MS KREISBERGER:** Because it adds clarity.

5 **THE CHAIRMAN:** Yes, quite right. I'm not suggesting -- I mean, we all have a
6 vested -- that includes the Tribunal -- in making sure that both parties have the data.
7 I want to be absolutely clear this is not about whether you get it or not; it's just about
8 whether this particular exercise of how we attack the repositories is best served by
9 a generalised request for it and what the implications are for the searching of it. I don't
10 know what the answer to that is, but --

11 **MS KREISBERGER:** Sir, we had two key reasons why we wanted to have that in
12 now. The first is so that these requests don't get lost, it's not thought that data isn't a
13 separate, discrete area of material that Dr Kent hopes to access from Apple. So even
14 ventilating it today is helpful --

15 **THE CHAIRMAN:** Yes.

16 **MS KREISBERGER:** -- to that extent.

17 The second reason is the concern about delay.

18 **THE CHAIRMAN:** Yes.

19 **MS KREISBERGER:** It shouldn't be forgotten. We're now four months on
20 from November, and we just want to make sure that momentum is maintained in
21 relation to these requests.

22 **THE CHAIRMAN:** Well, absolutely, and I fully support all of that. I think the only point
23 that's being made, and which I do have some sympathy for, is: yes, you should make
24 your request; yes, they should be obliged to answer it, but to commit them to supply
25 documents without seeing your request may be a step too far at the moment.

26 **MS KREISBERGER:** It may that be we can address that in the wording.

1 **THE CHAIRMAN:** I think that's --

2 **MS KREISBERGER:** So it doesn't fall out of the order.

3 **THE CHAIRMAN:** It's the only point that's been made against you. I think that as
4 I understand it there is no suggestion that this shouldn't be a proper search for the
5 data; it's just a question of what is going to be feasible once they know what you have
6 asked for.

7 **MS DEMETRIOU:** Precisely, Sir. So of course we're not saying they shouldn't make
8 a request. We are happy for them to make the request; that's the paragraph 2 point.
9 But we haven't seen these requests and we're being told they are very different from
10 the requests that we have seen. So, we just don't want to be locked into a requirement
11 under an order to produce documents responsive until we have seen them, and we
12 can work out the best way of responding.

13 **THE CHAIRMAN:** Maybe I ask you the same question as Ms Kreisberger, which is:
14 presumably there were, in the US and Australian proceedings, requests for data of the
15 sort that we anticipate we're talking about and, presumably, it is possible for Apple to
16 identify to some extent -- maybe not absolutely, but to some extent -- where, for
17 example, the management cost and revenue information sits in the repository. So,
18 you may have a reasonable idea of where to look in the first place, one would guess.

19 **MS DEMETRIOU:** Sir, I'm not sure -- of course, they have all the requests that were
20 made, and we have shown them now -- we sent them on a couple of days ago -- the
21 landing, where that all ended up. So, they have all the requests that were made. So,
22 I think that will be a helpful guide. Obviously, if they replicate some of those requests
23 in so far as they are data requests, then they will be in the documents.

24 **THE CHAIRMAN:** That's exactly my question. Which is that if they were to find,
25 I would be surprised if somewhere in those requests -- I'm sure I have seen some
26 reference to it -- there isn't a request for management revenue cost information.

1 **MS DEMETRIOU:** Yes.

2 **THE CHAIRMAN:** If they were to replicate that request and the terms that were made
3 in the US and Australian proceedings; is it possible for -- it may be that this is
4 a question no one knows the answer to at the moment -- you to go and locate the
5 cache of documents that respond to that request?

6 **MS DEMETRIOU:** Sir, I think unfortunately the repositories are not organised by
7 request. But what we do know, because we have where the requests ended up, is
8 that insofar as requests were made -- and you have the final column in the information
9 that was sent to them, which shows you where it all ended up -- is those documents
10 will be in there.

11 What we need to understand is what the new requests are that are going to be made.
12 Then we need to work out, no doubt in collaboration with the Class Representative,
13 the best way of searching for them. So, we absolutely -- Ms Kreisberger I think has
14 the wrong end of the stick in terms of what our objection is. We absolutely are happy
15 for them to formulate their request; that's a helpful thing. But it's just not reasonable
16 to lock us in to an order to produce documents responsive to a request when we
17 haven't seen the request. That's really the point. It's a short point.

18 **MS KREISBERGER:** Can I cut through, Sir, please?

19 **THE CHAIRMAN:** Yes, please.

20 **MS KREISBERGER:** What we're suggesting is we lose 5.2, which we haven't actually
21 come to yet, and 5.4. So that's the provision moving forward. Those two provisions
22 provide for the information to come from Apple, the data request responses. We
23 suggest we take those out, so we strike through 5.2, 5.4, and instead have a separate
24 paragraph in the order along the lines: the Defendant shall provide disclosure of any
25 data responsive to the data requests following a reasonable and proportionate search
26 by a date to be agreed between the parties.

1 **MS DEMETRIOU:** No.

2 **MS KREISBERGER:** So, we take the date offline.

3 **MS DEMETRIOU:** That's exactly the same thing. Because the request might be
4 completely -- they might be relevant, but they might be completely unmanageable and
5 disproportionate in the context of these repositories. So, what we need to do first is
6 see the requests, and then liaise in order to work out how they're going to be
7 addressed.

8 So it may be, for example, that their economists say, "We want to see all of this data",
9 and we think that there's something else which will do, which is similar, which is easier
10 to identify; well, there needs to be a sort of process of collaboration. It's not just
11 a question of the date. It's that we shouldn't be ordered to produce anything which we
12 haven't seen yet. That's just not right.

13 **MS KREISBERGER:** Sir, you have 2.3 in front of you, because that is the process.

14 **THE CHAIRMAN:** I have 2.3 in front of me.

15 **MS KREISBERGER:** So, Apple has an opportunity to respond -- this is just the normal
16 way these things work. It's no different from the list of issues.

17 **THE CHAIRMAN:** Yes. So, I think a couple of things. Firstly, we absolutely should
18 have in the order provision for to you make the request.

19 **MS KREISBERGER:** Yes.

20 **THE CHAIRMAN:** And for Apple to make a response to it.

21 **MS KREISBERGER:** Yes.

22 **THE CHAIRMAN:** And I would like there to be a meeting of the parties --

23 **MS KREISBERGER:** Yes.

24 **THE CHAIRMAN:** -- as well, to discuss it.

25 **MS KREISBERGER:** Yes.

26 **THE CHAIRMAN:** So those three things need to go into the order.

1 Then, at that stage, if there is a disagreement on the way forward, then I suspect it is
2 going to have to come back here, which I hope we could do on the papers.

3 But it seems to me it would be very helpful if you could start this process by looking at
4 what's been asked for and given before, because I would be very surprised if there
5 wasn't an awful lot of material that was already -- we know is in the repositories,
6 because it's been asked for and because we have been told that it has been provided.

7 I completely understand that your experts may not think that's sufficient or may want
8 other things, in which case we're probably asking for material that sits outside the
9 repositories.

10 **MS KREISBERGER:** We don't know --

11 **THE CHAIRMAN:** We don't know.

12 **MS KREISBERGER:** -- the answer to that.

13 **THE CHAIRMAN:** But the chances are if you haven't managed to identify a request
14 that's responsive to that it will be a reason, whether it's a temporal reason or because
15 a type of financial information that hasn't been asked for, or hasn't been thought
16 relevant in other proceedings.

17 So, I wonder if it's just helpful if you can start with what we know is in the repositories
18 and ask for that.

19 I think that puts quite a burden, and seems to me puts quite a burden on Apple,
20 because it's very difficult at that stage for there to be any discussion about whether it's
21 in there or not. We know it's in there, and I do think that puts the pressure on Apple
22 to determine how they're going to deliver it to you because they know this material
23 better than obviously you or I do.

24 So I think that, from a process point of view, if I could suggest that's a good place to
25 start. I don't in any way want to shut you out from asking for other material, which you
26 should do now, or indeed later, if you wanted to wait and see what you get out of this.

1 But, just as a starting point, I think that would be helpful.

2 **MS KREISBERGER:** So we preserve the wording at paragraph 2, where we propose
3 our data requests.

4 **THE CHAIRMAN:** Yes.

5 **MS KREISBERGER:** Apple will consider them, let us know if they have a problem
6 with them.

7 **THE CHAIRMAN:** Well, unless there is violent disagreement in your team to my
8 suggestion, why don't we put into here that you will give a list of requests by data firstly
9 by reference to disclosure requests that have been made in other proceedings and --

10 **MS KREISBERGER:** I don't think that's how --

11 **THE CHAIRMAN:** -- secondly, any other requests you want to make.

12 The question is: if we're trying to find out what's in the repositories you want; why
13 should we not be using the requests as a pathfinder to know those things exist and
14 require Apple to produce them?

15 That's my question. I just don't understand why we're not doing that.

16 **MS KREISBERGER:** Sir, I will just take instructions.

17 **(Pause)**

18 Thank you, Sir.

19 **THE CHAIRMAN:** Yes.

20 **MS KREISBERGER:** It's obviously a moving feast.

21 **THE CHAIRMAN:** I appreciate we're all, I think, probably skating on thin ice on it.
22 I know less than anybody in the room, so feel free to tell me I am talking rubbish.

23 **MS KREISBERGER:** Not at all. The issue is this: we just don't think it's going to be
24 efficient to constrain this request by reference to the US production requests because
25 one is then attempting to reverse engineer. We just want to ask for -- Dr Kent's team
26 is going to look at what data they think they need for the purposes of experts. It's

1 going to be a bona fide request for data. It makes sense to put that to Apple as soon
2 as possible, i.e. now, within two weeks, and then we take that forward.

3 It becomes rather contrived if it has to be somehow tied back to the US request. I don't
4 think any of us want to go to the tables in the hour we have, but we're just not -- we're
5 not saying we won't do that. We will look at everything. But we don't want an order
6 that confines the data request in some contrived way. We just, in the usual manner,
7 want to say: this is the data we need.

8 Apple may say: we have given disclosure in the US, so we know where to look for it.
9 So they should be in quite a good position.

10 **THE CHAIRMAN:** I think the difficulty with that is we're talking about apples and
11 pears. Just to be absolutely clear, there's no suggestion that you should not be entitled
12 to a full search of the data, disclosure of a full range of the relevant data that you ask
13 for and is proportionate and reasonable. So, I'm not suggesting that for a moment.

14 All I'm saying is that this discussion is about a defined set of documents which are
15 responsive to a set of requests which we already have and the practical focus of this
16 discussion is: how do we get you those documents in a way that match up to the issues
17 in the case as quickly as possible and as efficiently as possible? That's what we're
18 trying to do here.

19 I recognise there may be all sorts of other things that are not in that repository, or for
20 some reason are difficult to extract from it, that you have to ask for and seek in
21 a different way. But it seems to me we have the luxury -- in some ways it's
22 a disadvantage, in other ways it's an advantage to have this pool of documents that
23 we can access pretty quickly and has been gathered together, and we know how it
24 was put together. So if there was any -- and the problem, I think, with the approach
25 you're suggesting is that if you go to Apple and say, "This is the range of data we
26 want", without any reference to whether or not it's in the repositories, then you

1 immediately engage a preliminary discussion about whether it's in the repositories or
2 not, so the whole thing just -- the wheels just come off at that stage. There is
3 an immediate question of whether they're looking in the repositories or elsewhere, and
4 how do they do it if it's not in the repositories? If nobody knows whether it's in the
5 repositories or not, where the focus of that search should be. I just think that's a bit
6 unhelpful.

7 There comes a point at which I can't really tell you how to do this.

8 **MS KREISBERGER:** Yes.

9 **THE CHAIRMAN:** I do think that there is a caution here that if you just go and -- it's
10 why we are where we are at the moment. If you ask for generalised material without
11 specific focus on things that we know exist, then you actually -- to your point about
12 whether Apple is complying with what it should be doing, you're allowing them much
13 more latitude not to do that, or to do it in a way that doesn't suit you. I'm not suggesting
14 I have formed any conclusion on that. But, if that's your concern, you're giving them
15 a lot of space to do that.

16 I would have thought that pinning them down in relation to these requests was a good
17 way to avoid that problem in the first instance, albeit there may be some things you
18 need to pick up later. That's what I am saying.

19 **MS KREISBERGER:** That's understood.

20 **THE CHAIRMAN:** I will stop on that point now because I have made myself plain.

21 **MS KREISBERGER:** Understood. It will be done by reference to the US repositories,
22 insofar as we can understand what's in them. That will then have to be a staged
23 approach. It may be the sensible way to go about this.

24 **THE CHAIRMAN:** I absolutely anticipate you may find that for all sorts of reasons that
25 doesn't get you there or anywhere near there.

26 **MS KREISBERGER:** And then we will need to come back.

1 **THE CHAIRMAN:** It may be that you find I haven't been through this thing other than
2 to catch a few references. You may find there is a very disappointing amount of data
3 that has been asked for and provided, in which case obviously you are going to ask
4 for it in a separate way.

5 **MS KREISBERGER:** We will take that staged approach. It's clearly now on the table.
6 We just want to cut through, so we will take that staged approach.

7 **THE CHAIRMAN:** By all means ask for all of it at once, but I think if you can
8 differentiate, for the purposes of this exercise, between what you think is in the
9 repositories and why, it seems to me that does create an expectation that Apple should
10 address that immediately and just get on with it.

11 **MS KREISBERGER:** We will do our best to do that, and Apple will just have to tell us
12 if our understanding is right because we obviously don't have the documents.

13 **THE CHAIRMAN:** Yes.

14 **MS KREISBERGER:** We will make sure the wording reflects that. That's fine.
15 I am conscious of time and it's probably not the biggest issue on the table.

16 **THE CHAIRMAN:** I see, I thought we were dealing with the big issue. Right.

17 **MS KREISBERGER:** No, I'm afraid to say the big issue is still coming down the track
18 at us.

19 So if we could move on to paragraph 3, Sir, could I ask you just to read that? Then
20 I will take you through it.

21 You see this happily is agreed.

22 **THE CHAIRMAN:** Yes.

23 **(Pause)**

24 Yes, so you basically exchange proposed search strings, but you also have the benefit
25 of an indication of the --

26 **MS KREISBERGER:** Sorry I didn't catch that.

1 **THE CHAIRMAN:** Sorry, you exchange proposed search strings and then you have
2 the benefit, additionally, of an indication from Apple as to how many documents they
3 think are responsive to their suggestion.

4 **MS KREISBERGER:** That is right.

5 **THE CHAIRMAN:** Then they will presumably give you the same. They give you that
6 information again in relation to your proposal, so you can compare the two. That
7 seems very sensible.

8 **MS KREISBERGER:** In fact, that information is likely to look like a lot like Appendix 3
9 to the Amended Disclosure Report. That's why, helpfully, this information is agreed.
10 It's something we know Apple can provide and they have indicated that.

11 **THE CHAIRMAN:** Appendix 3 was? Just remind me.

12 **MS KREISBERGER:** That was the spreadsheet that listed documents by
13 proceedings, custodian, file type. I don't think we need to go back to that now because
14 it's agreed.

15 **THE CHAIRMAN:** No, I remember seeing that and wondering what it was, actually.

16 **MS KREISBERGER:** Apple has confirmed it can provide this information. So, as you
17 see, Sir, there is a process of exchanging search strings.

18 **THE CHAIRMAN:** So are the search strings going to be, presumably, formulated by
19 reference to the issues or groups of issues?

20 **MS KREISBERGER:** Correct. So, you now see the purpose of 2.1.

21 **THE CHAIRMAN:** Yes, and it's going to be clear, everybody -- will there be a separate
22 search string for each identified issue or --

23 **MS KREISBERGER:** I think these are questions that will be addressed down the line.

24 **THE CHAIRMAN:** Yes.

25 **MS KREISBERGER:** They're technical questions, so we need to liaise with our
26 providers. But you will appreciate Dr Kent's concern is that she won't have the insight

1 into Apple's documents to have a precise understanding of all search terms, and that's
2 why this is a useful process. Apple tell us what they should be. We also tell Apple
3 what our proposed search terms are, with the caveat that of course we don't have the
4 insight into the documents.

5 Sir, when you look at the Commission search strings-- and, again, I don't suggest we
6 go back to them -- there are terms in there we have never heard of, and they're
7 obviously reflective of points Apple knows about.

8 **MS DEMETRIOU:** Sir, just to clarify, that's really part of the purpose of giving the
9 Australian documents, because that will assist the Class Representative in formulating
10 search strings of their own. In any event, this is all agreed.

11 **THE CHAIRMAN:** Yes, I understand.

12 **MS KREISBERGER:** We're happy with that.

13 **THE CHAIRMAN:** Next one.

14 **MS KREISBERGER:** Then, at paragraph 4, you see the parties meet --

15 **THE CHAIRMAN:** Yes.

16 **MS KREISBERGER:** -- in order to agree the search strings. So, this looks like a very
17 useful, constructive process to get to a set of agreed search strings to run over the
18 documents based as they are on the list of issues and having the benefit of Apple's
19 insight into its own documents.

20 **THE CHAIRMAN:** Yes, and if you don't agree then you will refer it here.

21 I have to say that I suspect that by the time you get to referring to US disputes about
22 search strings it's going to be a somewhat arbitrary answer. It's going to be quite
23 difficult. As difficult for you as it is for me to make decisions about it. I'm perfectly
24 happy to do it, but I don't think anybody should expect any great sophistication in that
25 process, so I think you --

26 **MS KREISBERGER:** Well, we're optimistic about it, Sir.

1 **THE CHAIRMAN:** Thank you, that's very kind of you. You may feel that you can skip
2 that process, by robustly agreeing some sort of compromise. If necessary, of course,
3 then we will do that.

4 **MS KREISBERGER:** Yes, I'm grateful, and we will all do our best to get to a sensible
5 landing on these technical questions of the search strings, but I think this is the best
6 viable approach to get to that position.

7 **THE CHAIRMAN:** Yes.

8 **MS KREISBERGER:** And, happily, we're agreed.

9 Now, Sir, I am moving on to paragraph 5, and I would like to introduce the issue before
10 I give you an opportunity to just read through the alternative approaches. The issue
11 is this: Dr Kent expects the usual approach to be taken. The usual approach is that
12 the defendant runs the strings over their documents and reviews them for relevance
13 by reference to the list of issues, which by this point is agreed, and those are the
14 documents that are disclosed for inspection to Dr Kent.

15 **THE CHAIRMAN:** So, when you say "relevance to the list of issues"; do you mean
16 differentiating between documents that are relevant to one issue and relevant to
17 another, or do you mean relevant to the list of issues in their entirety?

18 **MS KREISBERGER:** Relevant to the list of issues in their entirety. So the search
19 strings are, if you like, an initial filter, but we have seen that they can capture a lot of
20 irrelevant material. It was clarified yesterday by the CMA that the 20 per cent
21 relevance rate for the CMA documents was correct.

22 **THE CHAIRMAN:** That was the Commission search strings.

23 **MS KREISBERGER:** The Commission search strings and then reviewed by the CMA.
24 So, what normally happens is that one avoids the production of a lot of irrelevant
25 material by the disclosing party reviewing the material captured by the search strings
26 for relevance by reference to the list of issues.

1 **THE CHAIRMAN:** Yes, they say they have already done that --

2 **MS KREISBERGER:** They say they have already done that.

3 **THE CHAIRMAN:** -- to an extent. You might say not to the fullest because it was by

4 reference to another set of proceedings issues.

5 **MS KREISBERGER:** Correct.

6 **THE CHAIRMAN:** But they say: we have already conducted a relevance exercise,

7 which distinguishes it from the Commission search strings.

8 **MS KREISBERGER:** Yes, correct.

9 **THE CHAIRMAN:** So that's the dispute.

10 **MS KREISBERGER:** That's the dispute. Now, I would like to make some

11 submissions on that, if I may. I'm sure Ms Demetriou will respond.

12 The first point is that it is the ordinary approach for the disclosing party to do that

13 relevance review. We say it's not enough that there's been some relevance review in

14 a different set of proceedings, with different standards and different issues.

15 So, we say: look, Apple has said that it's prepared to conduct a relevance review over

16 the 370,000 Commission documents, and they already have reviewed the CMA

17 documents for relevance, discarding 7,000.

18 Apple say: well, we can do that because that's a manageable corpus of documents.

19 My submission is a very simple one in response. It is: well, if we have a much larger

20 corpus from the US production, that will be less manageable. The problems are

21 magnified if the relevance review is placed on Dr Kent's shoulders given we're

22 talking -- we don't know how many documents, but it is going to be a large corpus of

23 documents. It's going to be less than 6 million, but we don't know where it will land

24 because we're in the dark at the moment on what these search strings will filter out.

25 So my overriding submission -- it's an important one -- is one of proportionality,

26 cost-effectiveness and pragmatism that Apple's documents -- only Apple will have the

1 best understanding of those documents, Apple can ask its internal team what they
2 mean, they can ask about content, context, they can ask about technical contents, and
3 that's why the ordinary approach -- and it is the ordinary approach in litigation -- is that
4 relevance review is done by the disclosing party. It's going to be inefficient for Dr Kent
5 to do it. But, more importantly, it might mean that Dr Kent misses relevant document
6 because her team don't have that more sophisticated understanding of the content.

7 Now, I just want to separate out a few points on that, if I may, Sir, because I think it's
8 important that you have our full position on this.

9 So, one of the points which Ms Demetriou makes is that *Genius Sports* is authority for
10 abandoning any relevance review. I'm not going to dwell on that authority. It's
11 axiomatic, Sir, that one has to take a case-by-case approach. That is an authority that
12 stands on its own. Apple have only referred to *Genius Sports* and the *FX* proceedings.
13 It's not the usual approach and you can see that, and there are only two authorities.
14 *Genius Sports* sets out an approach that was appropriate on those facts. But let me
15 just show you briefly what was said in that judgment. That's at supplementary
16 authorities, tab 13.

17 **THE CHAIRMAN:** Volume 1 or 2?

18 **MS KREISBERGER:** So there's only -- volume 1, I'm sorry, Sir.

19 **THE CHAIRMAN:** Yes.

20 **MS KREISBERGER:** Now, as I said, I'm not go take you through this judgment.

21 **THE CHAIRMAN:** I'm familiar with it.

22 **MS KREISBERGER:** You're familiar with it. I'm very grateful.

23 So I just remind you, Sir, that obviously this was an approach tailored to the facts of
24 this case, but it is just worth looking at what the judge said at paragraphs 10 and 11.

25 So that's on page 286. He said:

26 ""Massive overdisclosure" doesn't give rise to the "real risk that the really important

1 documents will get overlooked ... electronic filtering ... gives rise to the real risk that
2 really important documents are not looked at by any human agent [whichever side that
3 may be]."

4 Then he then said this, quite importantly:

5 "Massive overdisclosure" (to put it tendentiously ...) ought to be adopted provided the
6 following conditions are satisfied ..."

7 If I could take you to (ii) over the page:

8 "There is no danger of the process being used to oppress any of the parties to the
9 litigation. There will be cases where the Receiving Party is not in a position to review
10 significant electronic disclosure in the manner I have described."

11 Sir, there is in evidence before you that this is such a case, and that's why the usual
12 approach should apply.

13 Now, I'm just going to show you that evidence. So, it is a very pragmatic submission
14 I am making. It's not purely at the level of principle. It is that Dr Kent's team can't do
15 an effective human review, eyeball review, of the documents, not as effective as
16 Apple's review would be.

17 Now, can I just show you the evidence on that, Sir?

18 **THE CHAIRMAN:** Yes.

19 **MS KREISBERGER:** So that's at -- just check the reference for Ms Hannah's
20 statement.

21 **THE CHAIRMAN:** Yes, I have read that.

22 **MS KREISBERGER:** So that's at tab 6 of the supplementary core bundle.

23 **THE CHAIRMAN:** Yes.

24 **MS KREISBERGER:** Again, in the interests of moving things along, I will take you
25 straight to the relevant passages, and that's at paragraph 11, on page 297.

26 Sir, she says this:

1 "If Apple were to disclose ... without ... [any] relevance review, my client would ...
2 have to conduct a relevance review ... [I]n my experience relevance reviews are
3 invariably better carried out by the party disclosing the documents in question for the
4 simple reason that they understand their own documents better than the receiving
5 party and have access to the relevant people to clarify matters that are not clear on
6 the face of the documents themselves."

7 Now, that's Ms Hannah's experience, and that applies in spades to the current facts
8 because these are very technical, likely to have a lot of technical material, which Apple
9 will have the best understanding of:

10 "Indeed, in my experience, prior to commencing a "manual" relevance review, I would
11 ordinarily conduct interviews with the client to understand certain matters which are
12 likely to be important and which would enable the relevance review to be conducted
13 effectively and proportionately. By way of example, these could include:

14 a. Which individuals within my client's organisation are involved in matters such as the
15 setting of policies and practices, ... making of decisions ... relevant to the ... case; b.

16 The processes [over the page, Sir] adopted by my client's organisation that lead to
17 decisions being taken and policies being adopted, including the names of relevant
18 committees, the regularity of key meetings and internal reporting lines;

19 c. Any technical language, acronyms or internal shorthand used in my client's internal
20 documents, including project names and code names.

21 13. [Now] In my experience, information of this type would generally be included in
22 a document review 'process memorandum' and/or briefing notes shared with the
23 review team in advance of them commencing their initial review of documents.

24 14. In addition, where the case concerns any technical matters which the review team
25 are likely to be unfamiliar with [she gives the examples of SDKs here or web apps,
26 native apps] I would liaise with my client to gather such information and provide this to

1 the review team to ensure that the review team had sufficient understanding of
2 relevant technical matters to conduct their relevance review.

3 15. This type of information is, in my view, necessary in order to enable me to instruct
4 a team of reviewers in how to identify relevant documents from within the wider corpus
5 of documents effectively and efficiently, not least in so far as costs are concerned."

6 We're likely dealing, Sir -- there is a scale issue. We're likely dealing with a very large
7 corpus of material, so these points become even more important.

8 **THE CHAIRMAN:** That's the rub of it, isn't it? Because if it is a large corpus of
9 material, I suppose there is -- it may well be, if there is a large corpus of material, there
10 is a large corpus of the material after the relevance review, so what happens there?

11 **MS KREISBERGER:** Then it will be relevant material, and it's material that must be
12 read.

13 **THE CHAIRMAN:** I'm not sure -- well, does that follow? Because obviously there are
14 degrees of relevance, and if it were to turn out there were 6 million documents that
15 were relevant in this case, you're not going to read all of them, presumably. I hope
16 you're not suggesting you're going to read all of them.

17 **MS KREISBERGER:** We have a good benchmark, Sir. We could take the 20 per cent
18 CMA relevance rate.

19 **THE CHAIRMAN:** I don't think that is right though, is it? Because that definitely is
20 apples and pears, because no one had ever looked at the European Commission
21 documents before, as they had looked at these.

22 **MS KREISBERGER:** Well, let me address you on that point then.

23 **THE CHAIRMAN:** These had been directed towards -- we have seen the requests,
24 and they are directed towards, on the face of it, perfectly sensible requests that relate
25 to the issues and cases which are quite likely. So, I suspect that's not really a useful
26 benchmark.

1 **MS KREISBERGER:** So, Sir, I would like to address you on the point about the US
2 relevance review, if I may, in a moment?

3 **THE CHAIRMAN:** Yes, of course, yes.

4 **MS KREISBERGER:** But litigation of this sort throws up these very real pragmatic
5 problems, of course. We just need to find a viable way through. Dr Kent's proposal is
6 being made in the spirit of pragmatism. As you say, Sir, someone has to do the
7 relevance review.

8 **THE CHAIRMAN:** That's my point, I'm not sure they do.

9 **MS DEMETRIOU:** No.

10 **THE CHAIRMAN:** Because isn't the point of the search strings to identify
11 a manageable body of documents that -- and then it doesn't really matter who reviews
12 them. That's --

13 **MS KREISBERGER:** So, what we have with the search strings is an initial filter, with
14 no eyeball element.

15 **THE CHAIRMAN:** Yes.

16 **MS KREISBERGER:** It's just the crude application of search strings in the way that
17 that's been done to the CMA documents.

18 Let's put aside the US relevance review, because I am about to address you on that.
19 I will deal with that point. But just sticking with the issue of scale --

20 **THE CHAIRMAN:** Yes.

21 **MS KREISBERGER:** -- with the Commission documents Apple accepts that they
22 should do the relevance review. So, they accept -- and, as I say, put aside the US
23 issue, I am coming to that -- that the right approach is you apply the search strings
24 and they filter out the immediate irrelevant material and give you the corpus. But Apple
25 is urging on you, and agreed by us, that they should conduct the relevance review for
26 that corpus.

1 Why are they saying that? For reasons of pragmatism; they're the right party to do
2 that relevance review.

3 **THE CHAIRMAN:** But also because they have never been reviewed for relevance of
4 any sort before. I appreciate that's the US relevance point.

5 **MS KREISBERGER:** I will come back to that.

6 **THE CHAIRMAN:** I think that is the reason, isn't it?

7 **MS KREISBERGER:** Given the scale of the US production, it must be right that if
8 there is a difficulty, technical challenges involved in the review of the material thrown
9 up by the search strings, the proportionate and cost-effective method is the usual one,
10 which is that the disclosing party reviews for relevance. Because the alternative is for
11 Dr Kent to do it, and she's in a less good position.

12 **THE CHAIRMAN:** I understand the point. I think I suppose the answer to -- and I'm
13 sure I'm going to get this from Ms Demetriou. But it is very obvious, isn't it? The
14 answer to it is that if what you're suggesting is that -- let's take the view that you agree
15 on a search string, or you want to pursue a search string that produces 3 million
16 documents, or 2 million documents, whatever it is. Now, at that stage, you can either
17 draw the conclusion the search string is too broadly spread, too broadly defined, or
18 you can take the view that someone needs to have a look at those 2 million
19 documents.

20 Now, I'm not in a hurry to order anyone to look at 2 million documents in this case,
21 from an eyeball point of view, because that seems to me to be a very disproportionate
22 cost and effort for what's likely to be the result. Because it seems to me it is
23 necessary -- if one steps back a moment, as I understand it, these documents in the
24 first place are the subject of a technological review of some sophistication, which of
25 course, as I'm sure you will rightly say, has been by reference to a set of requests and
26 a set of issues that are not identical. There may be some similarities. So, I completely

1 understand that point.

2 But that's where we are with this set of documents. There are some advantages and
3 disadvantages, as I said before, in having these repositories available.

4 So if that's the question of 2 million documents, I think I can quite understand your
5 point about being asked to review the 2 million. But I think I would be saying to you,
6 "I don't think you should be doing that, and equally I don't think they should be doing
7 that". I can obviously -- it might well be a million, it might be 500,000, it might be
8 300,000. But isn't the answer to most of this that the search strings need to define the
9 manageable population of the first instance, and that's a population you're happy to
10 review?

11 Then it may leave open the question as to whether there are other documents in the
12 document population you feel you don't have that you want to go back for.

13 **MS KREISBERGER:** That's the problem, Sir, because we can't agree at this stage,
14 not knowing how many documents will be thrown up by the strings, that it is enough,
15 and compliant with their disclosure obligations, for Apple to apply the search strings
16 and then hand over 2 million documents.

17 **THE CHAIRMAN:** Well, I wouldn't accept that would be a proper outcome either, but
18 that would be because that would not just be a single failure, that would be a dual
19 failure of the parties to come up with a sensible solution.

20 **MS KREISBERGER:** A relevance review will have to be conducted, of course.

21 **THE CHAIRMAN:** Well.

22 **MS KREISBERGER:** They need to be reviewed. Now, whether it's eyeballs or some
23 technology assisted approach --

24 **THE CHAIRMAN:** So, when you say a relevance review will need to be conducted,
25 I'm not sure that -- it's clearly right in one sense that somebody needs to work out
26 whether these documents are useful by reference to some of the issues in the case.

1 But that was my question about whether they're generally relevant or whether they are
2 specifically relevant to issues. At the end of the day, no one is going to be able to do
3 the second, except your team. They're the people who are going to work out which
4 documents they want to attach to which issues of the persons running the case. That's
5 a different exercise from the question as to whether the general body of documents is
6 the right one to be looking for in the first place.

7 **MS KREISBERGER:** Sir, I'm just going to take instructions for a moment.

8 **(Pause)**

9 I think, Sir, what's being said is -- how shall I put it? It may be that you're being a little
10 optimistic as to the functionality of search strings.

11 Now, of course, every effort is going to be made to have as robust a set of search
12 strings as can be done. But, when you look at the Commission search strings, you
13 see that the terms used are "app" or "price" or, you know, there's only so far one can
14 take it with search strings. So, one is not going to get from 6 million to 100,000 with
15 the search strings, there is going to be a very large corpus of material. There is no
16 way around the problem that litigation of this sort throws up, that that material has to
17 be reviewed by someone. The traditional and correct approach on these facts, given
18 the technical nature of the documents and the likely scale of the documents, is that
19 Apple does the relevance review.

20 Now, whether that's using technology or eyeballs, that's not a matter for us. But the
21 first cut to produce a manageable corpus of documents needs to be done by the
22 disclosing party because it's their documents.

23 I will come back to the US point, if I may? But that's the basic problem.

24 **THE CHAIRMAN:** Yes. I profess no particular expertise in formulating search strings,
25 so I'm prepared to accept that there are others who know a lot more about it.

26 I think I would say, though, that I don't think this is just a question of applying a search

1 string across 6 million documents, is it?

2 Part of the reason why you pressed for more information in the disclosure report, and
3 with some success, albeit I know you think it's limited. But one assumes that the
4 identities of the custodians and the location of the documents in their custodian
5 libraries, if one can call it that, is a pretty good starting place for reducing the number
6 of -- or reducing the scope of the return from the search string. So, I would expect you
7 to be saying and agreeing with Apple that when you're looking for terms and conditions
8 with developers you will go to the library of the person who's in charge of terms and
9 conditions, developers, and start with the search string there, rather than applying to
10 the whole piece.

11 **MS KREISBERGER:** That will be obviously a question for Apple as to their
12 methodology.

13 **THE CHAIRMAN:** I am assuming that's the sort of conversation that's going to take
14 place when you do this. Perhaps part of this, maybe where we end up with this -- and
15 obviously I need to hear Ms Demetriou on it -- it may be that we are not going to know
16 how this works until we see how it works.

17 So maybe part of this is going to be if we are in a situation where we do have to deal
18 with a bigger population of documents, because of the point you make, we will have
19 to find a solution for that. I'm not saying that's not going to happen. I'm just a bit
20 reluctant at the moment to -- well, if you're inviting me to establish a presumption that
21 there is going to be -- certainly it was put as largely as an eyeball review by Apple of
22 potentially millions of documents, I'm not in a hurry to be ordering that at the moment.

23 **MS KREISBERGER:** Sir, I think I misspoke on that because I just don't know how
24 they would do it. But what I am urging on you today is not to take an exceptional
25 approach. The usual --

26 **MS DEMETRIOU:** Sorry --

1 **MS KREISBERGER:** Ms Demetriou will have her opportunity.

2 **MS DEMETRIOU:** Ms Kreisberger, I haven't stood up before, and I'm sorry to
3 interrupt, but she keeps giving evidence as to what the usual approach is and what is
4 exceptional. We simply don't agree that the usual approach is an eyeball review, even
5 in standard disclosure.

6 **MS KREISBERGER:** Can I hand up a couple of orders, Sir?

7 **THE CHAIRMAN:** Yes, of course.

8 **MS KREISBERGER: (Handed)**

9 **THE CHAIRMAN:** I don't think it's ...
10 I don't think I'm going to find it particularly helpful to look at what's happened in other
11 cases, particularly other cases that are not like this, and these cases are not like this.
12 So, we're starting in a different place on this.
13 You may say there is a reason for it not being so different because of the American
14 exception, and I'm not going to decide now what the usual approach is to disclosure
15 and, actually, I suspect I know as much about it as anybody else in the room does,
16 because I have been doing that for quite a long time myself. So, actually, I don't think
17 that's really what this conversation needs to be about.

18 **MS KREISBERGER:** Sir, I appreciate that and I certainly don't want to teach my
19 grandmother to suck eggs.

20 **THE CHAIRMAN:** And I'm not accusing you of that at all.
21 What I want to do is find a reasonable and sensible solution to a practical problem.
22 You've fairly presented the practical problem, and we have had a debate about how
23 significant that might be, so let's not --

24 **MS KREISBERGER:** And you have that point.

25 **THE CHAIRMAN:** And the answer will depend on what's right in this case, not what's
26 happening in the other cases.

1 **MS KREISBERGER:** I appreciate that. That is my ultimate submission, it's
2 pragmatism in this case. But what I am saying is: there's a first order filter and
3 a second order filter, and the search string is the first order filter. There is going to
4 have to be a second order filter, that's inevitable. That should be done on Apple's side
5 because they're in a better position to perform that filter. That's the submission.
6 The only outstanding point I have is on the US disclosure. I do need to show you that,
7 Sir, because Ms Demetriou is going to say: well, it's been done.
8 You are not in a position to accept Ms Demetriou's submission that a relevant and
9 viable disclosure -- sorry, a relevant and viable relevance review has already been
10 conducted because it's been done in the States. I'm just going to show you a couple
11 of examples.

12 If I could ask you to turn to core bundle volume 1 and tab 8 in that.

13 **THE CHAIRMAN:** Yes.

14 **MS KREISBERGER:** All I am going to do, Sir, is just illustrate the problem by
15 reference to a couple of examples. It's certainly not as simple as saying: oh, it's all
16 been done.

17 So I just want to show you how broadly framed some of these US disclosure requests
18 are.

19 So it's right that they haven't been reviewed against an English standard of disclosure.
20 It's a US standard. They're really broad. So if I can ask you to turn to page 120, in
21 tab 8, and you see request for production number 2:

22 "Please produce ALL of YOUR COMMUNICATIONS, or DOCUMENTS memorializing
23 or referencing COMMUNICATIONS, with each of the PLAINTIFFS [this is the
24 developer class action] [for] at any time whether sent by or to YOU."

25 Now, inevitably that's going to sweep up a swathe of irrelevant communications and
26 irrelevant documents. It's incredibly broad. Emails with developers, and one can

1 | imagine. That's just one example of the breadth of these, and this is why we're going
2 | to have a problem of scale. It's also why we have 6 million to begin with. So that's
3 | breadth.

4 | Let me show you a couple of examples on relevance, irrelevance. Request number
5 | 10, on page 122:

6 | "Please produce ALL DOCUMENTS constituting or RELATING TO antitrust training
7 | and/or manuals or other materials made available to, or possessed by, any employees
8 | OR other person OR entities responsible for any aspect of YOUR App Store or related
9 | matters OR U.S. iOS developers' iOS DIGITAL PRODUCTS sold via or in YOUR
10 | App Store, including but limited to DOCUMENTS such as certifications of training."

11 | That's an irrelevant category. That's just one category. Entirely irrelevant, we're not
12 | interested.

13 | Page 168. This is the *Epic* set of requests in the US. Sir, if I could just show you
14 | request number 10:

15 | "Documents sufficient to show employment type (contractor or employee), training and
16 | qualifications, compensation type (e.g. wage, salary, commission) and compensation
17 | amount for the "reviewers, representing 81 languages, vetting on average 100,000
18 | submissions per week" involved in Apple's "rigorous, human-led review process for
19 | every app."

20 | We're just not interested in the documents in this request. I'm going to show you just
21 | one more, Sir, if I may? Page 244 in this document set. Sorry, this one is actually in
22 | the supplemental core bundle. It's appended to one of Apple's witness statements.
23 | So if we go to supplemental core bundle, page 244, which is behind tab 2, I think.

24 | **THE CHAIRMAN:** Yes.

25 | **MS KREISBERGER:** That's request number 55. This is in the consumer class action.

26 | So you can see that's:

1 "All DOCUMENTS CONCERNING the identity of each and every member of the
2 CLASS or that identify which APPLE IDs belong to which members of the CLASS,
3 including but not limited to the first and last name, email address, birthdate, [...]
4 [et cetera]."

5 So this is all documents relating to the identity of each and every member of the class.
6 These are completely irrelevant.

7 Now, Sir, you may say: well, we have the search strings.

8 But we don't have confidence that the search strings -- they are the first order filter.

9 We have seen how the application of search strings works in other contexts, like the
10 CMA one, and it's the second order filter which Dr Kent will be in real difficulty.

11 Sir, the ultimate problem is this: relevant documents will be missed if that review is
12 entirely shifted to Dr Kent's shoulders without Apple -- whose documents they
13 are -- having the first look. It's as simple as that. It's a pragmatic problem.

14 There are also the attendant costs of an inefficient process of Dr Kent's team
15 performing that review. But it throws up a real problem for taking these matters
16 forward.

17 **THE CHAIRMAN:** So the solution -- just to be clear about what you say the solution
18 is -- what do you say the answer is?

19 **MS KREISBERGER:** The answer is precisely what Apple is proposing to do with the
20 Commission documents, which is review them for relevance.

21 **THE CHAIRMAN:** So regardless of the volume?

22 **MS KREISBERGER:** Yes, because otherwise we're left in a world where Dr Kent has
23 to do it. There is no other alternative. It's a binary problem. So, really it's a relative
24 question: who is better placed to do it in the first instance? And we say Apple.

25 [Inaudible] If I may just take instructions.

26 **THE CHAIRMAN:** Yes, of course.

1 (Pause)

2 **MS KREISBERGER:** Sir, that's all I was proposing to say on that.

3 I don't know how you would like to take this forward? If you would like to hear from

4 Ms Demetriou?

5 **THE CHAIRMAN:** I think it would be quite helpful to deal with this point. Just so

6 I know: what else is in here that's going to require discussion? Is this the last point or

7 are there others, and, if so, how relevant are they?

8 **MS KREISBERGER:** Sir, in terms of points in dispute, we ...

9 There are a couple of other issues. Shall I just highlight them for you in the order?

10 **THE CHAIRMAN:** Why don't you, and see how contentious they are.

11 **MS KREISBERGER:** So paragraph 7 is parasitic, essentially, on the discussion we

12 have just had.

13 **THE CHAIRMAN:** Yes.

14 **MS KREISBERGER:** So that will depend on how this process is provided for in this

15 order.

16 **THE CHAIRMAN:** 6 deals with privilege, although I was a little bit surprised to see

17 that because --

18 **MS KREISBERGER:** Yes, so that's agreed.

19 **THE CHAIRMAN:** But then there seems to be some disagreement in 8 about it.

20 **MS KREISBERGER:** I'm going to come back to 8.

21 **THE CHAIRMAN:** Yes. So, privilege. Why is privilege an issue in relation to these

22 documents?

23 **MS KREISBERGER:** The issue comes down to what information Apple has to provide

24 in relation to -- yes, separate issue on privilege. It's just the information which Apple

25 has to provide in relation --

26 (Pause)

1 We're looking at paragraph 8.

2 **THE CHAIRMAN:** Yes.

3 **MS KREISBERGER:** The issue, at paragraph 8, is the detail which Apple provides in
4 relation to material withheld on grounds of privilege.

5 **THE CHAIRMAN:** Sorry to interrupt you, but the bit I am confused about is: why would
6 they be doing that? Because I understand the repositories are all documents
7 that -- the Australian and US repositories are documents in which there are going to
8 be no privileged documents. So are we talking about --

9 **MS KREISBERGER:** That's not our understanding, that there is no privileged
10 material.

11 **THE CHAIRMAN:** I appreciate --

12 **MS KREISBERGER:** What we're keen to do is avoid a rerun of what happened when
13 we had a sort of one-liner saying, "These are withheld on grounds of privilege". So,
14 we just want to make sure.

15 **MS DEMETRIOU:** Commission documents.

16 **THE CHAIRMAN:** These are the Commission documents.

17 **MS KREISBERGER:** I'm sorry Sir, that's my mistake, yes.

18 **THE CHAIRMAN:** So we're just dealing with Commission documents. So there is
19 a question about how we deal with whatever comes out of that process, okay.

20 **MS KREISBERGER:** Yes.

21 **THE CHAIRMAN:** You're saying that should be effectively a witness statement; is that
22 what you're saying?

23 **MS KREISBERGER:** Yes, we offer an explanation verified by statement of truth. It is
24 intentionally broad wording:
25 "The Defendant shall set out in sufficient detail to allow the Class Representative to
26 challenge those claims..."

1 It really is a proposal in the light of what's happened before in relation to privileged
2 material, so it's just a sensible mechanism for understanding where privileged material
3 has been withheld from the Commission documents.

4 **THE CHAIRMAN:** Yes.

5 **MS KREISBERGER:** Apple are proposing a different approach, and we're concerned
6 that it will be as sparse as was the case previously, which didn't allow any sensible
7 engagement on questions of privilege.

8 **THE CHAIRMAN:** Then some dispute about some dates, in 9.

9 **MS KREISBERGER:** At 9, there is a disagreement on dates. Now, we say 28 days
10 is completely inappropriate for Dr Kent to review the material and come back with
11 targeted disclosure requests.

12 Now, it's an end stop date in Dr Kent's formulation of this provision, and it's certainly
13 not Dr Kent's intention to wait to make any request for specific disclosure. They will
14 come. It may be that Dr Kent's in a position to ask for particular materials through this
15 process, and she will do that. But there should be an end point for making targeted
16 disclosure requests and those aren't, of course, confined to the repositories, Sir.

17 **THE CHAIRMAN:** No, I was going to ask that. This would include all supplemental
18 requests for disclosure?

19 **MS KREISBERGER:** Yes, absolutely. 28 days just won't be long enough to have
20 an end point for that. So that will, of course, include documents outside the time
21 periods in the repositories and may relate to particular issues, particular points. So
22 that is just a timing. The principle is agreed, helpfully.

23 Sir, then there is costs of the application in relation to the CMA documents, at
24 paragraph 10.

25 Sir, I am conscious that I skated over paragraph 6. The parties are agreed on
26 paragraph 6. I don't know if you want to cast your eye over it? So that's entirely

1 separate from the point I have addressed you on in relation to paragraph 8.

2 **THE CHAIRMAN:** Sorry, just -- I'm not sure I follow what's happening here. So

3 documents have been provided --

4 **MS KREISBERGER:** I'm sorry, Sir, are you in paragraph 6?

5 **THE CHAIRMAN:** Sorry, 6, yes. So if it's privileged -- so what's happening here is

6 this is just keeping the document in the outer ring until the privilege issues are

7 resolved?

8 **MS KREISBERGER:** Yes.

9 **THE CHAIRMAN:** Why, on the basis that there is no waiver because it's been

10 disclosed by mistake?

11 **MS KREISBERGER:** Correct. I think that's provided for:

12 "Shall not be regarded as a general waiver of privilege."

13 So, it just preserves the position.

14 **THE CHAIRMAN:** Just deals with the second. Yes, fine.

15 **MS KREISBERGER:** A mechanism for preserving privilege.

16 **THE CHAIRMAN:** Okay.

17 **MS KREISBERGER:** Sir, I think that concludes my free form --

18 **THE CHAIRMAN:** No, well done. Thank you.

19 **MS KREISBERGER:** -- walk through the draft.

20 **THE CHAIRMAN:** Thank you very much.

21 Ms Demetriou.

22 **MS DEMETRIOU:** Sir, so I think 8 has moved on. We can agree 8 now, so we can

23 take that off the table.

24 **THE CHAIRMAN:** Yes, good.

25 **MS DEMETRIOU:** Can I please address you on the big point relating to the further

26 relevance review?

1 **THE CHAIRMAN:** Yes, of course.

2 **MS DEMETRIOU:** So we say that's the opposite of a pragmatic and proportionate
3 approach. It's wholly unnecessary. The documents have already been reviewed
4 once. Now, they are -- as you said yesterday, we can take it that they're broadly
5 relevant to these proceedings. There may be a number that are not relevant.

6 As regards Ms Kreisberger's reference to various of the disclosure requests, I haven't
7 been able to follow them all through. She, of course, took you to the disclosure
8 requests. But I did pick up, for example, that one of them she went to, request number
9 55, that's not where it ended up at all. So the request was formulated very broadly.
10 There was an objection. So the request was all members -- so communications with
11 all plaintiffs, with all members of the class, and then it ended up being a search for
12 communications with six plaintiffs.

13 So, I mean, we don't need to get into the nitty-gritty, but the point is it is not safe to rely
14 on the requests themselves because some of them were narrowed.

15 But be that as it may, the very purpose of the whole process, in relation to agreeing
16 the search strings, is to further narrow the set of documents, to make it manageable,
17 which I thought was the discussion we were all having yesterday.

18 Going back to the transcript yesterday, you said, Sir -- so you made the point that
19 "relevance review" is perhaps not a helpful expression. What we have is a general
20 pool of documents which are broadly relevant, and what we're trying to do is narrow
21 them down to a more pragmatic set of documents, and you said:

22 "I don't think one would expect there to be an eyeball review."

23 And Ms Kreisberger said:

24 "Absolutely."

25 So she was agreeing.

26 The order that we had from them yesterday, the draft order that was circulated, did

1 indeed not provide for a further relevance review. So this is a change of tack. We say
2 it's an unnecessary change of tack that's going to add unnecessary expense and
3 delay.

4 Now, the purpose of the search strings and the rather involved process that we have
5 is precisely to end up in a position -- and the production of hit reports and so on -- is
6 to define a set of search terms, such that we end up with a position where we do have
7 a set of documents that's much more tailored to these proceedings and is a much
8 more manageable size.

9 We also have, of course, the Australian documents, which we're providing in their
10 entirety, the supplemental Australian documents, which will provide a very good guide
11 to the types of documents that are likely to be relevant. As well as, of course, the US
12 exhibits, which refer to the documents -- which tell you the documents which were
13 actually referred to in the course of the US proceedings, and which documents in the
14 pool were referred to in the US proceedings.

15 So we say that this is designed to increase costs and delay. If we follow this process,
16 what we will end up with is a further refinement of a set of documents which is already
17 broadly responsive to the issues in the case. It really is entirely unnecessary to go
18 further and to have somebody look at them again.

19 In any event, the documents have to be looked at by the Class Representative. So
20 even if one were conducting some sort of further eyeball review, one would end up
21 with perhaps a slightly smaller set of documents, which in any event the Class
22 Representative will have to review. So their proposal results in two firms reviewing
23 these documents rather than one.

24 We also say that the Commission documents, they're in a completely different position
25 for two reasons. One is that there has been no relevance review of them at all, which
26 is why we are proposing to conduct a relevance review of those documents and,

1 secondly, because Apple wasn't involved at all in the search strings. So those were
2 search strings which the Commission demanded of Apple without any engagement
3 with Apple as to the suitability of those search strings. So it really is not right to say
4 20 per cent relevance is a benchmark.

5 This process that we have agreed is providing for a much more nuanced and
6 sophisticated way of arriving at search terms and search strings, designed to refine
7 the pool of documents much more significantly.

8 In any event, it's not the case that Apple is saying: we're going to manually review
9 300,000 Commission documents.

10 Because the proposal is first to run the search string terms through them, refine that
11 category of documents, and then search them. So it's not 300,000 documents that
12 would be searched, but presumably a much smaller set of documents would then be
13 reviewed for relevance. Because they haven't been reviewed before at all.

14 My learned friend took to you Ms Hannah's third witness statement, but those points
15 don't really help in circumstances where what she was addressing there was the
16 6 million documents. So that was our proposal in light of the fact that they said they
17 couldn't give us categories of documents, that we provide all the documents on the
18 basis that they had been reviewed and are broadly relevant. So the practical points
19 made by Ms Hannah in her statement relate to that.

20 But this is, of course, different, because we will be running the search terms through
21 the documents in order to refine the documents further.

22 In terms of costs, we say that the proposal of the Class Representative will increase
23 costs, for the reasons I have given. First, because this is unnecessary and, second,
24 because they're going to have to look at the documents produced in any event.

25 In any event, it's difficult to see. So we say that it's duplicative, so costs will be
26 increased. It's duplicative.

1 In any event, it doesn't really work to say, well, the Class Representative shouldn't
2 bear the cost of reviewing (a) because they will have to look at the documents in any
3 event, but (b) because essentially costs, whoever reviews them, will come out in the
4 wash in the litigation anyway. So whoever wins the litigation will recover their costs.
5 So, Sir, those are essentially the reasons. I haven't had much time. But those are
6 essentially, in a nutshell, the reasons why we say that this proposal, which has come
7 at the 11th hour and is contrary to their position yesterday, is just wrong-headed.

8 **THE CHAIRMAN:** I don't want to cut you short, and I'm sure we can go a little bit over
9 1 o'clock if that's helpful. Actually, it would be quite interesting just to explore with
10 you -- I think the problem here is we don't know to what extent there may be a degree
11 of documents which are not relevant to these proceedings in the repository. So that's
12 the problem that's put as the proposition.

13 The consequence of the problem, I think -- and I invite a disagreement if this isn't
14 right -- is the possibility either that the Class Representative might end up with a whole
15 lot of documents to review within which there is a large proportion of irrelevant
16 documents and so time is wasted and so on. Or I think corresponding with the other
17 side of the problem is the search terms might be narrowed so much in order to produce
18 a manageable set of documents, which would include on this hypothesis a whole lot
19 of irrelevant documents, so that some relevant documents would be excluded because
20 the population had to be narrowed down so much. So that's, I think, the problem we're
21 presented with.

22 I suppose if one is thinking about the solution to that, I wonder if the answer is partly
23 we need to see where we get to with this. I do wonder whether we need to try this
24 process a little bit and see what comes out of it.

25 **MS DEMETRIOU:** Sir, yes. I think I can see that as a pragmatic way forward.
26 Just on the latter point -- because I did understand the first point that was being made,

1 and I did hear Ms Kreisberger make the second point, about documents being missed,
2 but I didn't quite follow that. Because I had thought that her proposal, or the Class
3 Representative's proposal, was that we apply the search terms that are agreed and
4 refined and that are following discussion, and then the review takes place, the review
5 they want to take place takes place in relation to that narrower set of documents.
6 I thought that was the proposal.

7 **THE CHAIRMAN:** Yes, I think that is right. But if we don't do that, I think on your
8 approach, if we say -- and indeed this is the hare I started running yesterday, so I take
9 some responsibility for it. But if you say we're going to try to deal with the volume of
10 documents effectively by search strings narrowing the pool, the risk that's been
11 identified, I think, is that in order to reduce those to a manageable amount, you're
12 obviously making a judgment about whether your search strings are leaving some
13 relevant documents in the pot, in the repository, unreviewed. That, of course, is
14 a factor of litigation.

15 I think we would all accept that you're never going to find every relevant document.
16 But this skews this situation further because the existence of potentially irrelevant
17 documents means that when you select a sample of 50,000 that you might sensibly
18 look at, you actually are only getting 25,000, so you're leaving more behind.

19 I'm not sure that's how Ms Kreisberger was actually putting the point, but that's
20 certainly a concern I have that seems to correspond with the other side of the point; if
21 you give them too many documents, they won't be able to process them.

22 **MS DEMETRIOU:** Sir, I can absolutely see that concern, so I can understand that
23 there is a possibility of either of those things happening. But we say that the solution
24 is in proper engagement and in discussion in relation to the search strings, rather than
25 what we say is a very large sledgehammer to crack a nut, or a potential nut, even,
26 which is that we're ordered now to conduct some further relevance review in

1 | circumstances where, on any measure, there will have been two sets of review of
2 | these documents to cut them down to size.

3 | So we do think that is an issue that can be ironed out in the process.

4 | It may be that having produced the hit reports and so on, and having come up with the
5 | population of documents, that some sampling takes place. Of course, there will be the
6 | Australian documents -- which are all there -- against which they will be able to check
7 | these search terms. So if search terms are agreed and they're run and they do exclude
8 | relevant documents in the Australian set, then that will be manifest and we can come
9 | back to the table and expand the search strings. But I really don't think that would be
10 | sensible, with respect, at this stage to say: well, there might be a potential problem
11 | down the line and we're now going to say, "Well, that can't be managed in the process
12 | that's been agreed", so we're going to order a wholesale further review of the
13 | documents. We do think that would be disproportionate.

14 | **THE CHAIRMAN:** Perhaps you weren't at the previous discussion, so you had the
15 | pleasure of missing that. But one senses a degree of distrust about this, and perhaps
16 | a little bit of mutual distrust as well, and certainly I'm very encouraged that clearly there
17 | is a much better dialogue. But I think part of this comes from a lack of trust that you're
18 | actually going to engage and be helpful in the way that I would certainly expect you to.
19 | So there is a little bit, here, of having to earn that trust back, I expect.

20 | **MS DEMETRIOU:** Sir, I hope we have shown ourselves to be extremely constructive.
21 | We do want to engage and move this litigation forward.

22 | As I indicated yesterday, we have tried to meet at every stage -- we took on board the
23 | messages that you gave us, Sir, at the last CMC. I wasn't here, but I have spoken to
24 | everyone involved and had a look at the transcripts, and we have taken all of that fully
25 | on board and we have endeavoured, really, to be as constructive as possible. I hope
26 | that's clear.

1 Certainly our proposal to give all of the repositories was not, as it seems to have been
2 taken, an unhelpful suggestion. We were trying to be constructive.

3 As soon as the Class Representative said, "Well, that's not going to work for us; would
4 you like to go back to a more targeted approach?" We said yes.

5 We have engaged very constructively in relation to this order. As I said yesterday, the
6 order that we were faced with did not envisage a further review at all, so we are, as it
7 were, having to respond to very last minute changes of position.

8 But, on this point, we are certainly going to be constructive. We hear you loud and
9 clear. That's why we have agreed to a process, in relation to the search strings, that
10 requires proactive engagement by Apple, as well as a meeting and so on. So we are
11 endeavouring to be constructive. We want to push all of this forward. But, really, with
12 the best will in the world it just wouldn't be right to say at this stage, "Yes, we agree to
13 do a further review", in circumstances where this whole process is designed really to
14 embrace the fact that we have these repositories that have already been provided and
15 avoid the disproportionality inherent in a standard disclosure exercise. It would really
16 defeat the purpose of using these repositories.

17 So that's why we say: let's carry out the process that we have all agreed to and see
18 where we get to.

19 As I say, my client will engage constructively with ensuring that what we end up with
20 is a manageable pool of documents, and we will respond to queries that are raised
21 and, as I say, we will engage.

22 **THE CHAIRMAN:** Can I ask you just an altogether different question about
23 Mr Watson's statement?

24 Am I right in thinking, if you think about the process here, as I understand it, and just
25 check that I have this right, the parties made their disclosure requests which we have
26 looked at? We have looked at some of those. Then, the documents that were collected

1 from that disclosure request, were then subject to the sort of review that Mr Watson
2 describes in paragraph 16; is that right?

3 The point being that the raw material from the document requests was not just put into
4 the repositories. There is an intermediate step of --

5 **MS DEMETRIOU:** Exactly, that's correct. You can see, from paragraph 16 of his
6 statements, that there were in excess of 12 million documents for the Class Action,
7 11 million documents for the *Epic* proceedings and there was then a review process
8 involving human review and TAR methods and I'm told a very sophisticated -- I'm sorry,
9 I don't have the right language -- machine learning; I should know this.

10 **THE CHAIRMAN:** So if one is thinking about the nature of the problem, it is quite
11 different from the Commission documents where you might have CVs, you might have
12 all sorts of emails, about all sorts of emails and other sorts of things that happened to
13 be captured by the strings.

14 **MS DEMETRIOU:** Exactly.

15 **THE CHAIRMAN:** But here there has been a process that at least ensures these
16 documents, with a very wide request -- and some of them are very wide -- have been
17 filtered, so that they -- or one might best be satisfied, be relevant to the US
18 proceedings. So the question then becomes the gap between the US proceedings
19 and these proceedings, that's the real risk here, isn't it?

20 **MS DEMETRIOU:** Sir, exactly. So we're starting from a different point. So we're in
21 a different position because there has already been a review in the US proceedings.
22 That cost, I am told that cost, that process of review cost tens of millions of dollars. So
23 it's an expensive, sophisticated review.

24 Now, I quite accept that is liable to have yielded documents which are irrelevant to the
25 present proceedings, but we're not starting from scratch by any stretch of the
26 imagination.

1 What we then have is the process that's been agreed, in terms of liaising to produce
2 search terms which can then be run over the documents to refine the pool more
3 narrowly.

4 In relation to that, we're also different to the Commission proceedings where the
5 search strings were just ones alighted on by the Commission with no engagement. So
6 we're in a very different position here, because we can expect these search terms to
7 be much more targeted and sophisticated.

8 We're also in a different position because we have the, as it were, experiment of the
9 Australian Supplemental Disclosure which they're going to have, which is
10 a manageable set, against which this can all be tested.

11 Of course, once they have the pool of documents, it's open to them to run any
12 electronic searches which are not -- I'm sure that there are additional searches they
13 may wish to run which are not onerous, which can be done electronically, against
14 which they can check whether or not documents they would wish to see have been
15 produced. There can be a series -- there can be a further process of engagement.

16 All of that we accept can be carried out, but what we don't think is reasonable at this
17 stage is to say: well, without knowing where we're going to end up and what the size
18 of the pool is, you, Apple, are ordered to review all these documents. We say that just
19 defeats the object of using this repository which has already been the subject of a very,
20 very expensive review.

21 **THE CHAIRMAN:** Can I ask you again on that timing point -- it's a small point but
22 does come from what you have just said -- 28 days is quite a short period of time, isn't
23 it, for them to process some of the things you've just mentioned. Isn't three months
24 a bit more of a reasonable time?

25 **MS DEMETRIOU:** Yes. Is this the point about --

26 **THE CHAIRMAN:** This is the point 9 point about how long they have to make further

1 requests.

2 **MS DEMETRIOU:** Let me just take instructions on that.

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

4 **(Pause).**

5 **MS DEMETRIOU:** So our concern -- is this the point about 28 days or three months?

6 **THE CHAIRMAN:** Yes.

7 **MS DEMETRIOU:** I think where we were coming from in saying they should be able
8 to do this more quickly is we were concerned about the trial steps from then on. So
9 I think that's where we were coming from and so there's always a balance.

10 **THE CHAIRMAN:** I think the problem is I think you -- the exercise you described of
11 them analysing what does and doesn't work is not going to be straightforward,
12 perhaps, and I think asking them to do it in 28 days is not entirely reasonable.

13 **MS DEMETRIOU:** No, let me just ...

14 **(Pause).**

15 Yes. So, Sir, on the proviso that you're with us on the main points that we don't have
16 to conduct a relevance review, then we would then accept that three months is -- we're
17 not going to dispute the three months.

18 **THE CHAIRMAN:** Thank you, that's helpful.

19 **MS DEMETRIOU:** And then we will have to have a further discussion about the
20 remainder of the trial steps. I think we're in a reasonable place because the trial isn't
21 until 2025.

22 **THE CHAIRMAN:** Yes, I think we have a bit of time to do that but we shouldn't lose
23 sight; I think we are going to need -- there's quite a lot going on, isn't there.

24 **MS DEMETRIOU:** There is.

25 **THE CHAIRMAN:** We're going to need a bit of planning for that, I think.

26 **MS DEMETRIOU:** Sir, I think that paragraph --

1 **THE CHAIRMAN:** We have dealt with the --

2 **MS DEMETRIOU:** The next one, 7, if you're with us on the main points then we need
3 7 because that does, we say -- we will conduct a relevance review so we need 12
4 weeks rather than six weeks. That extracts the Commission documents and treats
5 them differently.

6 **THE CHAIRMAN:** Thank you.

7 **MS DEMETRIOU:** Thank you.

8 **MS KREISBERGER:** Thank you, Sir. Can I respond to those points?

9 **THE CHAIRMAN:** Yes, please.

10 **MS KREISBERGER:** Sir, Ms Demetriou made a submission that was wrong on the
11 facts. She said Dr Kent's proposal results in two firms reviewing all of the documents,
12 but of course that's not right. What Dr Kent's proposal is designed to avoid Apple
13 handing over irrelevant documents. So there's the application of the search strings,
14 inevitably a blunt tool because of the way search strings operate, and then the second
15 order filtering for relevance.

16 It's only those documents within the corpus of the second stage filtering for relevance
17 by reference to the list of issues here which would be handed over to Dr Kent. Her
18 team wouldn't be going behind that second order filtering, so the documents that are
19 filtered out by Apple as a result of a sensible relevance review, a proportionate
20 relevance review, those documents are then disregarded; so it's just not right.

21 **THE CHAIRMAN:** I think what she was saying and I think it may be -- I think what she
22 was saying was, and she may not have put it quite like this, but to the extent that you're
23 going to look at a bunch of documents anyway, which you will do once you're given
24 them, there is a duplication --

25 **MS KREISBERGER:** The product.

26 **THE CHAIRMAN:** The product, there's a duplication because those would have been

1 | looked again by them as a preliminary. I think that's the point.

2 | **MS KREISBERGER:** Everyone will look at the documents identified to be relevant,
3 | but that's the ordinary course.

4 | **THE CHAIRMAN:** Yes.

5 | **MS KREISBERGER:** What my proposal avoids is Dr Kent looking at material which
6 | is irrelevant.

7 | **THE CHAIRMAN:** Understood, yes.

8 | **MS KREISBERGER:** I'm grateful. Sir, I come back to my submission that there is
9 | potential here to be oppressive and you saw a key concern in the *Genius Sports*
10 | judgment.

11 | There is the potential here to bury Dr Kent in millions of documents which her team is
12 | not best placed to understand and review for relevance. That's the problem.

13 | And as I said, Sir, search strings only get you so far. It's a pretty blunt tool, so the
14 | product of those search strings will inevitably contain a lot of material which is
15 | irrelevant to these proceedings and Dr Kent will be in real difficulty if she has to grapple
16 | with those documents without the benefit of the insight which Apple has to them.

17 | Now, Ms Demetriou urged on you yesterday that the Tribunal has no jurisdiction to
18 | order irrelevant documents but inevitably, if we rely on search strings alone, this
19 | approach, Apple's rival approach, will result in the handing over of irrelevant
20 | documents.

21 | Now, let me put it --

22 | **THE CHAIRMAN:** I think I disagreed with her about that and actually I think that isn't
23 | right that there is no jurisdiction albeit that it seems like not a -- it's not the sort of
24 | thing you would do --

25 | **MS KREISBERGER:** It's not an attractive place to be.

26 | Now, on that point, Apple -- Ms Demetriou has helpfully highlighted the intensity of the

1 review they conducted in relation to the US issues, which of course are not the issues
2 here, but she said it was very expensive.

3 Apple have looked at these documents. They have spent a lot of time looking at these
4 documents. They know these documents. I don't know what internal workings they
5 have but they have been over these documents.

6 In those circumstances, it must be more efficient and there must be economies of
7 scale to Apple's team having the first relevance review of those documents rather than
8 crudely applying the search strings and simply handing them to Dr Kent's team.
9 Dr Kent's team has never seen them and will inevitably have issues grappling with
10 their content, their meaning, their context.

11 So Apple should constructively use the benefit of the analysis they have performed to
12 say: well, okay, we know what the list of issues are in these proceedings. We're going
13 to filter out the irrelevant by reference to that list of issues. So it's efficient, it's
14 cost-effective, it's proportionate. And the alternative risks real oppression, real danger
15 that documents will be missed and costs will escalate.

16 I also just want to respond to the point she made that this is a last minute change. It's
17 a bit of an odd submission. We engaged on search strings 24 hours ago, so --

18 **THE CHAIRMAN:** I'm not sure it takes us anywhere.

19 **MS KREISBERGER:** No, I just wanted to make sure that was clear. This was always
20 Dr Kent's understanding, that one approaches this by reference to search strings;
21 review for relevance. That is the reason why we propose a list of issues be agreed
22 between the parties, so that everyone is on the same landing as to what's relevant and
23 then the disclosing party, Apple, do that review.

24 Sir, unless there is anything else I can help on.

25 **THE CHAIRMAN:** No, I think that's very helpful.

26 I think I won't deliver an answer now, partly because of the time but also partly

1 because there are a number of little intricacies and I think there may be a degree of
2 novelty about this which warrants having a clear ruling on it.

3 **MS KREISBERGER:** That's quite understood, yes.

4 **THE CHAIRMAN:** I will try and get you that as quickly as possible, because
5 I appreciate you want to get on with it.

6 What I would like to think is that you would be getting on with it anyway because
7 obviously you can be producing --

8 **MS KREISBERGER:** Absolutely.

9 **THE CHAIRMAN:** -- we're all clear you need to do the list of issues and we're all clear
10 we need the search strings for the meetings, so please don't await developments. I
11 can understand it's relevant to how we do this, but I would like you to get on with this
12 if that's possible to the extent possible.

13 Just in terms of the order, are we clear about the other bits where we've got to in
14 relation to, for example, the data? So I think we have dealt with it haven't we; are you
15 in a position to provide a redrafted order and manage --

16 **MS KREISBERGER:** I think that's the way to do it. We will do that in very short order.

17 **THE CHAIRMAN:** So nothing else you need from me at the moment? It's clear --

18 **MS KREISBERGER:** I think that's clear. Paragraph 8 is now agreed, which is helpful.

19 **THE CHAIRMAN:** Good.

20 So unless there is anything else.

21 **MS KREISBERGER:** That's it from me, Sir, and I'm very grateful for the flexibility this
22 morning.

23 **THE CHAIRMAN:** Thank you, not at all.

24 **MS DEMETRIOU:** I just wanted to clarify one point in which what I said may have
25 been slightly inaccurate, so you asked about the number of Australian documents.

26 **THE CHAIRMAN:** Yes.

1 **MS DEMETRIOU:** And I said 7,000 which was the number in my head. I think there
2 were around 7,000 disclosed by 5,700 relate to Apple Inc, and are likely to be relevant,
3 therefore, in these proceedings and I think the remainder of the 7,000, it's just a small
4 point but I didn't want to you leave you with a --

5 **THE CHAIRMAN:** Thank you. I think I remembered 1,700, which may or may not be
6 right, but is closer to the answer, so that's good news for me. Good, thank you.
7 Thank you very much.

8 **(1.20 pm)**

9 **(The hearing concluded)**

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