**IN THE COMPETITION APPEAL TRIBUNAL**

Case No:1408/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 21st June 2023

Before:

Bridget Lucas KC
Tim Frazer
Michael Waterson

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**Class Representative**

**Elizabeth Coll**

V

**Defendants**

**Alphabet Inc. & Others**

---

# A P P E A R AN C E S

Mark Hoskins KC & Jennifer MacLeod (On behalf of Elizabeth Coll & Others)

Josh Holmes KC & Owain Draper (On behalf of Alphabet Inc. & Others)

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

**Wednesday, 21 June 2023**

**(10.30 am)**

**Case Management Conference**

**THE CHAIR:** Good morning. Before you start --

**MR HOSKINS:** I thought you might say that. But it's polite.

**THE CHAIR:** You probably all know it by heart by now too, but I will give the normal warning. Some of you are joining us on livestream on our website, so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced, but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court. Thank you.

I wonder if could you just give me a moment whilst I ...

**MR HOSKINS:** Of course.

**THE CHAIR:** Yes, Mr Hoskins.

**Submissions by MR HOSKINS**

**MR HOSKINS:** Thank you very much. You have obviously had the skeletons and I think between us we've done, I hope you'll agree, a reasonable job of trying to chop this up into bite-size pieces because it's not the most digestible fare taken as a whole. If you are happy, I was going to suggest we do the oral advocacy that way as well in a sense. So, for example, if you -- I guess you have a choice, you could either do all the experts, me and then Mr Holmes, or you could do the economists and then the -- I am in your hands about how digestible you would like it.

**THE CHAIR:** We thought we might like a bit of a meerkat action, so if you could address us on each of the experts separately.

**MR HOSKINS:** Absolutely. Think it's probably helpful to start with what the existing directions are because of course this is not the first time this case has been before the Tribunal.

**THE CHAIR:** Yes.

**MR HOSKINS:** If we could go to core bundle tab 34 at page 789, this is the order that the Tribunal made on 16 December 2022. Just to show you the main bones of what the existing directions are, paragraph 1 provided for two elements of early disclosure. We are going to come back to now a fairly narrow point in relation to 1(b). That disclosure has been given, but there is a small issue in relation to that.

Then paragraph 2, Google was required to file a disclosure report and an EDQ and that's been done, and we'll see that. You will have spotted the obvious that the disclosure lies pretty much all on the Defendants because the Class Representative doesn't have any disclosure to give.

**THE CHAIR:** Yes.

**MR HOSKINS:** So it's an odd asymmetric situation.

Paragraph 7, as things stand the disclosure to be given by Google has to be given by 25 August 2023. So that is the current direction and any variation to that will obviously have to be ordered and approved by the Tribunal today because otherwise that's where we are with disclosure.

At paragraphs 8 and 9, witness statements of fact by 15 December this year and reply statements by 16 February 2024. Again, that's probably going to be largely Google witnesses of fact because at the moment we don't anticipate having any, depending on what happens with the expert applications, but again that's going to be largely Google's witness experts of fact.

Then the experts report, paragraph 10, are to be sequential in this case. Our expert reports are due by 12 April 2024. I just pause to note, therefore the disclosure has to

be done in time for our experts to get on top of it in order to produce their reports in April 2024. That's the sort of crucial date for us when we are working back from disclosure.

The Defendants' experts' reports, by 27 September 2024, our reply reports, by 24 January 2025, and the joint statements by 7 March 2025. Then paragraph 21 provides there's to be a trial with a time estimate of eight weeks -- and we'll come back to time estimate -- to be listed from the first available date on or after 1 September 2025. Now that has not actually been listed yet.

**THE CHAIR:** No.

**MR HOSKINS:** The first week is to be a reading week for the Tribunal and I underscore that, because whatever we do with the time estimate I am sure you want to keep a reading week for yourselves.

Those are the existing directions, so we actually have a complete set of directions to trial, so anything that happens today are really variations around that.

Just to lay the cards on the table for us, what our concern is, is to make sure that the disclosure happens in good time to allow our experts to have sufficient time to prepare their reports and to make sure that the trial can happen, and that's why we have been attempting to hold the Defendants' feet to the fire. You've seen our request for information, et cetera. That's all designed to try and make disclosure move forward. So, we are very keen to make sure that the timetable works.

If I turn to experts, there is a degree of agreement and some disagreement. If we go to our draft order, which is in core bundle tab 6, core bundle tab 6. In terms of the agreed experts, obviously subject to the Tribunal's approval, it's paragraphs 1.1 to 1.3. So that's one expert witness in economics, that's agreed, the question is whether there should be provision for two; 1.2 one expert witness with expertise in IT and/or mobile security; 1.3, one expert witness with expertise in the use and/or integration in

payment systems, and the payment systems expert was one both we and Google wanted and it's been agreed between us.

Then in paragraph 2.2, this has now been agreed post the skeletons, expert witness with expertise in accounting to address profitability and, if required, quantum. So those are the bits, as long as the Tribunal is happy, those four experts are agreed which leaves us with three areas of disagreement.

At paragraph 2.1 is whether there should be provision for a second expert economist. Paragraph 2.3 is what we've used the shorthand an 'app expert', essentially an industry expert. Paragraph 2.4 it says behavioural economics expert, but my client, the Class Representative, is very keen that that should read behavioural science expert for reasons we've explained in the skeleton.

So, before I turn to each of those there is another aspect that has been agreed which is that there should be an expert process and we don't claim any great credit for this because it's cribbed from what's happening in Apple, but it seemed to us to be a sensible idea. Our suggestion for this is set out in paragraph 3 of the draft order. I think this is a pretty much agreed word for word, save for the dates, by which things are to happen, so I will walk through and tell you what the alternate dates are.

First of all, paragraph 3, we say by 28 July and the Defendants say by 19 July, "...the Parties shall exchange:

[3.1] a list of the issues which they propose each of their experts shall address; and

[3.2] where the parties have been granted permission to call more than one expert in a … field of expertise, [they shall also] set out the proposed division of issues …". You will see that duplication is one of the issues we are going to be addressing you on this morning but that is catered for already in terms of management in this proposed expert process.

Then paragraph 4, we say by 18 August, and the Defendants say by 9 August, "…the

Parties shall respond to the Expert Issues Proposals made by the other Party for those expert(s)." So, a chance to comment on the other side's proposals.

Then [paragraph] 5, we say by 8 September, the Defendants say by 30 August, "If, … the Parties are not able to agree the Expert Issues Proposals, the Parties are to submit any points in dispute to the Tribunal for determination."

Then [paragraph] 6 , "Once the Expert Issues Proposals have become final, either by agreement … or [by] order …, they shall become the "Expert Issues"." So, you will see that there is a system for managing the expert evidence going forward and, if necessary, the Tribunal will get involved and knock our heads together and make sure it's all sensible.

**THE CHAIR:** Can you just remind me which is your date for paragraph 4, sorry?

**MR HOSKINS:** Four, we are 18 August and the Defendants are 9 August, so you will see there's not a great deal between the dates. It really starts with our proposal for the list of issues and duplication being 28 July and the Defendants being 19 July. There's not much in it, but we do ask for 28 July simply because we need the time. We won't know until today precisely the experts we are able to instruct. The experts generally aren't instructed because we cannot do so until we know we can instruct them, and the timetable, in our submission, works perfectly well on our suggested dates and we'd ask for that time.

**THE CHAIR:** I seem to recall when we made our order, the first directions order, I think we asked for the issues for the experts to be considered in that order.

**MR HOSKINS:** That's right, and you've had submissions from the parties. I am going to take you through them, particularly when we look at the app expert and the behavioural science expert. Each party has given you information as to the issues they say the experts should cover and with reference to particular paragraphs in the pleadings. So, you have had those, yes.

**THE CHAIR:** Thank you.

**MR HOSKINS:** I don't know if you want to hear from Mr Holmes on those dates. I am about to move on to the expert economist if we are going to take it in bite size chunks.

**THE CHAIR:** That sounds sensible.

**MR HOLMES:** We don't mind particularly about the dates. We thought it was better to have the dates in the body of the order rather than to have weeks by reference to when the order was made. That's the only point.

**THE CHAIR:** Yes.

**MR HOLMES:** But if they need an extra week to launch this process that's fine with us.

**THE CHAIR:** Thank you.

**MR HOSKINS:** So plain sailing so far, let's move into the choppy waters.

You'll have seen the parties have agreed it's necessary to have expert economics evidence and the only issue is whether that should be confined to one expert or whether permission should be given for two experts. It's our position that permission should be given for two experts for the following reasons.

The first point is the complexity of the economic issues in this case. At a very high level, economic evidence will have to address market definition, dominance, the exclusionary abuse in relation to app distribution, the exclusionary abuse in relation to payment systems, abuse by excessive pricing, causation, what we've called incidence, which is a form of pass-on to the class members and quantum. It doesn't take a great familiarity with competition and/or economics to realise there's a lot in there.

Our submission quite simply is in order to permit those issues to be addressed effectively within the timetable that we have to trial, we say it will be necessary for two experts to be instructed. So that's the main point, but let me develop some other points.

There's a level playing field point because, as you will be well aware, the Defendants have been engaging with the relevant issues or similar issues before multiple courts and regulators for several years now throughout the world. They are repeat players in their own defence.

The Defendants also obviously have an intimate knowledge of their own business and they have an intimate knowledge of the business in which they operate, the markets in which they operate, and therefore, for all those reasons they have a considerable head start over us in considering relevant expert issues and in our submission allowing the Class Representative to instruct two expert economists will go some way to palliating that imbalance that exists between the parties.

The third point relates to overlap by which I mean this: the expert economist instructed by the Class Representative in this case, Mr Derek Holt, is also instructed in the *Kent v Apple* proceedings and the overlap between the timetables in the *Kent v Apple* proceedings and these proceedings would further exacerbate the difficulties if only one expert had to deal with all the economic issues and was having to deal with both cases at the same time.

If I can just give you the relevant overlap by way of the dates. In *Kent*, the expert reports are due on 1 March 2024. It's not sequential in *Kent*, it's all parties on 1 March 2024. In our case, which is sequential for experts' reports, our expert report is due on 12 April 2024, which is only six weeks later than the *Kent* date. So, Mr Holt, if he's acting alone, will have a report to put in in the Apple case, so there he does have two economists, but he'll still have to do his part in Apple, and he would have to do his part in Coll by 12 April 2024.

Then in *Kent*, the reply expert reports are due on 30 April 2024, which is only 14 days after the deadline in Coll. So again, Mr Holt is having to produce a reply report in Apple 14 days after filing his report in this case. So, there is an overlap there in terms

of the filing of the expert reports.

Then just to carry on with the relevant dates, in *Kent*, the experts' joint statement is due on 28 June 2024. Then in our case the Defendants' expert report is due on 27 September 2024, so again Mr Holt has to start dealing with that in our case from 27 September 2024.

In *Kent*, the trial begins on 6 January 2025 and ends on 28 February 2025. During that trial, our expert reply report is due on 24 January 2025, so Mr Holt will be having to produce an expert report during a trial in which he is appearing as an expert witness. The *Kent* trial, as I said, ends on 28 February 2025 and in our case the experts' joint statement is due on 7 March 2025 which is only one week later. So, Mr Holt is in a trial as an expert and, as one knows, that doesn't end when he sits down from giving evidence, he may well be involved in assisting with closings, et cetera. One week later he has to be producing the joint statement in this case.

In our submission, it's pretty obvious, Mr Holt is a very experienced and effective economist with a big team, but Superman would struggle to manage that timetable, and that's another reason why we submit it would be fair and appropriate to allow a second expert economist.

Now one point --

**THE CHAIR:** Is one way of addressing that to alter the timetable in some way for the different stages?

**MR HOSKINS:** It would be, but query whether that's the appropriate result. It's a choice between the second expert and/or timetable. There are other points I am making to you that wouldn't be resolved by the timetable issue. For example, the complexity issue I say stands regardless of the timetable overlap issue. It's exacerbated by the timetable overlap issue, but there is still an awful lot in the expert issues in this case. And the level playing field issue applies regardless of timetable.

So yes, you could change the timetable to lessen the degree of the overlap and it would palliate some of the problems, but it wouldn't remove the complexity problem and the level playing field issue.

**THE CHAIR:** Then there is the sort of, I suppose, elephant in the room, which is: does it have to be Mr Holt?

**MR HOSKINS:** That is another issue. He has been intimately involved, as you've seen, he's produced a detailed report. It would be, -- in a case that's brought on behalf of the class in which time and money has been invested in a particular expert -- it would be unfortunate if all of his work to date in terms of his learning were to be lost. But, yes, I mean, that is another thing that the Tribunal could do. But we would strongly prefer to keep Mr Holt for those obvious reasons. He has already invested a lot of time and work in this case and has done a lot of thinking. It would be a shame to lose him.

**THE CHAIR:** So, you don't say that another expert couldn't cover all the issues?

**MR HOSKINS:** No, I still have that point. If you were to bring in one expert, it would still be a very big ask for one expert to cover all those issues. I take the example: it looks quite innocent sitting there, there's an excessive pricing claim. Professor Waterson and I have had the pleasure of sitting in an excessive pricing claim in the CAT in a case called Pfizer and Flynn. That on its own was a very substantial exercise. It took many weeks to try, there were a lot of difficult issues. It looks sort of quite anodyne on paper to say it was excessive pricing, but that on its own on a different case was a trial of six weeks.

We do say that even if it's not Mr Holt, then it is still desirable to have two economists. Then an important point to make is because there's a sort of bit of smoke and mirrors with respect going on in the Defendants' skeleton, we are not looking for two experts to cover the same topics, we are looking for two experts to cover different topics that

will be divided between them. The draft order we've suggested expressly indicates that there should be no duplication on economic issues.

The Defendants then complain they say: well, the Class Representative hasn't provided a precise explanation in advance of this CMC of what that division of issues will look like. They say that's a reason why we should be refused permission for a second expert. But the truth is we are in a chicken and egg situation here because ideally and obviously what should happen is that if permission is given for two experts, the experts themselves will talk about a sensible division.

**PROFESSOR WATERSON:** So, you don't have a sensible division -- you don't have a division in mind at the moment?

**MR HOSKINS:** We have ideas. I could give you my ideas, but clearly it is far more sensible for the expert economists who have been instructed to have input into that and to help and make sure that's sensible and they can both work to that. But, of course, the chicken and egg is, we can't instruct a second expert until we have permission to do so and so that conversation can't take place. But in our submission, there's no great worry about duplication because, as I have shown you, the parties are agreed that there should be an expert process and part of that expert process, the very first stage, includes identifying the issues to be addressed and the division between the expert economists. It's all going to be managed. It's all going to be done in the open. It's not going to be a case in which suddenly just before trial you get two expert reports from economists and from us and everyone goes "Oh, my God, they've covered the same stuff". Absolutely not, it's going to be managed.

**THE CHAIR:** You say there's a neat division -- it's going to be possible to do it? It isn't a case where each issue feeds off every other issue and therefore it's impractical?

**MR HOSKINS:** We do believe it will be feasible. I don't want to bust privilege, but obviously we've had discussions with Mr Holt and nothing in those discussions has led

us to believe that it will not be possible to come up with a sensible division, but we just want to be able to talk to the other experts as well in relation to that.

In *Kent v Apple* -- and I appreciate there are similarities, but this Tribunal will decide what's appropriate for this case -- but in *Kent v Apple* the parties agreed that it was appropriate to have up to two economic experts and that was approved by the Tribunal. So, in *Kent v Apple* this spectre of duplication was not felt to be such a frightening apparition that the Tribunal thought it wasn't appropriate to allow for two economic experts.

The final point on this -- and it's a point made in the Defendants' skeleton -- if the Tribunal decides it is appropriate for the Class Representative to have permission to call two experts economists, obviously we are content for the Defendants to have that same ability. We are not seeking to gain an advantage over them, we are simply trying to palliate the imbalance that currently exists between us and them in terms of knowledge of the industry and where their experts are at compared to ours in terms of knowledge and experience of the issues.

Those are the submissions I wanted to make in terms of the second economics expert. I will leave it to Mr Holmes to tell you why I am wrong.

**THE CHAIR:** Thank you.

**Submissions by MR HOLMES**

**MR HOLMES:** Madam, if I could begin by just taking a step back to explain our concerns about the expert evidence more generally.

**THE CHAIR:** Yes.

**MR HOLMES:** The Class Representative currently seeks permission to call a total of seven experts at trial and we oppose their application for three of those as you've seen. On any view, seven experts for an individual party or single represented group

at a trial, even in substantial litigation, is a large number.

The starting point in relation to the Tribunal's role in policing expert evidence is set out in the Tribunal's Guide to Proceedings. I know the Tribunal is well familiar with it, but just to remind ourselves briefly, we've set out the relevant quotations in our skeleton argument at paragraph 17, if you have that to hand.

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

**MR HOLMES:** This is a very familiar passage. It was set out, of course, in the *Kent* disclosure ruling which the claimants identify as the touchstone now in the Tribunal proceedings.

Two points to note. Experts' evidence in the Tribunal should be restricted to what is reasonably required and in exercising its supervisory role. The Tribunal takes account of the principles and procedures under CPR Part 35.

Just to recall the origin of Part 35, for those with a long enough memory of course it originated in the Access to Justice Report of Lord Woolf, who had identified a concern that uncontrolled expert evidence was a major generator of unnecessary cost and complexity, and so this important gatekeeper function was established applicable to large litigation and small.

In my submission, the Tribunal's role is particularly important in collective proceedings of this kind. There is a question, I suppose, about whether collective proceedings should somehow be treated differently as the Class Representative has at times seemed to suggest. We say not. If anything, the gatekeeper role is more important in this context.

The importance of active case management is clear in the context of collective proceedings. It's reflected in the certification requirement, and it also applies post certification in the *McLaren* case with which I know you are familiar, Madam. The Court of Appeal underlined the need for active case management after certification to

ensure that what it described as "potentially sprawling … [litigation of this kind is run efficiently and does not] absorb an unfair amount of judicial resource."

In overview, we say that underlying each of the concerns we've identified is a lack of clarity at this stage about either the division of issues or the issues which the contested experts will be addressing. The Class Representative's approach, if it's not too much of a caricature, is to say that: the Tribunal should take it on trust in exercising its supervisory role; a clear division will emerge, will be provided subsequently: the issues will be identified subsequently, although as you rightly observed, Madam, the original order, directions order, already provided for the identification of issues at this stage of the process, precisely so that the Tribunal can keep a proper check on the expert evidence before it is submitted.

So, we've got ourselves into a tangle and the Tribunal needs, in practical terms, to decide how to deal with it. We say that the answer is not to admit the evidence or to give permission for the evidence to be adduced and ask questions later. The practical course is for a clearer definition and articulation of the expert evidence which is proposed. We can consider it. It may be possible to agree it, of course, subject to the Tribunal's oversight, but the matter should be dealt with after the various stages set out in the proposed directions order regarding expert evidence for those three contested experts.

Turning to the first contentious topic, which is the Class Representative's request for permission to call two separate experts in the field of competition economics, the case law applying Part 35 indicates that permission for a party to call more than one expert in the same field of expertise can only be justified exceptionally. There is a presumption against it. One sees that from the Court of Appeal's judgment in the *ES* case, which is in the authorities bundle, if you have that, Madam, at tab 5 on page 61. If you are working from the electronic copy, I think you need to add three to

the PDF page references, so that will take you to 64.

**THE CHAIR:** Actually, I have it at A61.

**MR HOLMES:** A61, yes. Do you have that?

**THE CHAIR:** Yes.

**MR HOLMES:** Now, as the headnote explains, this was a claim for professional negligence brought against an obstetrics registrar and a consultant obstetrician for harm sustained as a result of complications in pregnancy, so a different context but we say the principles are of a more general application.

The claimant's position is explained five lines from the bottom. She contended that if she was permitted to rely on only one expert, there was a significant risk that his evidence wouldn't be representative of the profession as a whole, whereas the defendant would be relying on an independent expert and the evidence of the two consultants who would inevitably give evidence that their conduct was consistent with the appropriate standard of care.

The Court of Appeal was swayed by that three-against-one feature: the fact there would be a chorus of people skilled in the relevant line of practice all giving evidence. And, on that basis, they granted permission for two experts. But in doing so the Court emphasised on a number of occasions the exceptionality of allowing a party to call more than one expert from the same specialty.

Lord Justice Brooke gave the leading judgment. And starting on page 66, paragraph 14, do you see that he cites Lord Woolf and his report on Access to Justice as a source of assistance? The comments of Lord Woolf here are, of course, of general application; they are not confined to any particular context:

"The basic premise of my new approach is that the expert's function is to assist the court. There should be no expert evidence at all unless it will help the court, and *no more than one expert in any one specialty unless this is necessary for some real*

*purpose.*"

Obviously possible to have more than one, but that is very much the exception and not the rule.

Beneath the quotation, Lord Justice Brooke observes that:

"While Lord Woolf's report does not of course have the force of a statute, it provides a … reminder that it will only be in a really exceptional case that more than one expert in any particular specialty will be permitted."

That was a point to which Lord Justice Brooke returned at the end of his judgment on page 69, at paragraph 27:

"Nothing in this judgment must be taken to give any sort of green light to the calling of two experts in a single discipline in any case … [that] does not have exceptional features. On this appeal the presence of three consultants on the defendants' side constitutes such an exceptional feature."

Lord Justice Kennedy, who agreed with Lord Justice Brooke, also stressed the exceptionality of allowing a party to call multiple experts in the same field of expertise in a general summation of the applicable principles in the case of expert evidence. You see on A73, page 73:

"In my judgment the importance of this case is [that]it affords an opportunity to emphasise that:

(1) the general rule must be as envisaged by … [the court below], namely that in the vast majority of cases there should be no more than one expert in any one specialty..."

Then at point two, the point that of course “The court must recognise that it has the discretion to be flexible …” if it is persuaded that that is appropriate. In other words, of course there may be exceptional cases. But in the vast majority of cases, the general rule is that no more than one expert -- there should be no more than one expert in a given field, and it is only in a “really exceptional case” that two experts in

the same field will be permitted.

That rule exists because of the obvious risk of overlapping evidence that arises where two experts of like specialism give evidence for a party. The risk is not only of direct duplication, which can of course be controlled after the event in the reports prepared for trial, there is a wider concern that the two experts will give evidence either, in writing or in their oral evidence, at trial which covers the same or similar ground.

That's clearly inefficient: it adds to the costs and complexity of the proceedings; it makes the handling of the experts much more challenging at trial where they stray in their comments in response to cross-examination into one another's terrain; and it makes the job of the Tribunal harder in assessing what the expert evidence is on any given point.

As my learned friend observed, this panel consists of experienced individuals who have sat through lengthy litigation and they know, you all know, the burden that expert evidence imposes. And it's a simple and straightforward point: if you have more experts in the same field for a single party, that creates risk of overlap, and it makes matters harder to manage. It's a proportionality concern.

Now, these concerns weighed with the Competition Appeal Tribunal in the *Kent* case when assessing whether to give permission for various types of experts. My learned friend noted that in that case, two economists were agreed on each side and so it wasn't really the subject of any discussion or argument, but it's worth seeing how the Tribunal approached matters in relation to contentious topics to see the care and concern with which they approached the risk of experts of the same professional expertise giving evidence for the same side.

So that's at authorities bundle 18. I will come back to this later on in other topics, but if we could start at page 586 where the Tribunal considers the digital markets expert for which Apple was seeking permission, an application that was opposed by the class

representative.

Paragraph 26 sets out the sort of disagreement between the parties. The argument concerns potential for overlap between the evidence of the proposed digital markets expert and that of the two competition economics experts which each party already has permission to provide.

Paragraph 26 -- sorry, paragraph 27 shows the Tribunal's conclusion. They agreed with the class representative. And the Tribunal expands on its concerns over the page in paragraphs 31 and 32. If I could just ask that the Tribunal, please, to review those paragraphs.

**(Pause)**

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

**MR HOLMES:** First, a concern that the expertise was not materially different and, second, the practical point that having another expert would materially expand the scope of expert evidence and the practicalities of arranging a hot-tub for the economists. In that connection, a concern that the hot-tub process could become fragmented and elongated. And, in my submission, the efficiency and proportionality concerns which I identified as arising from potentially overlapping evidence underlie these paragraphs of the Tribunal's ruling in *Kent*.

**THE CHAIR:** Mr Holmes, do you say it will be difficult to find a dividing line in the issues in the case?

**MR HOLMES:** I absolutely do and that's a submission I will come on to make, if I may. The issues in this case do not admit, as we understand, of a clear and neat dividing line. We were interested to hear that consideration has been given to this by the other side, but it's clothed in privilege. It's not something they are prepared to share now with the Tribunal; they propose to do so four weeks after permission is granted. And this is the blank cheque approach which we say is not the right way of proceeding.

The Tribunal needs to be clear that there is a workable division, but I will come, if I may, in a moment to the submission about how different aspects of the case overlap.

**THE CHAIR:** Because this case, for example, in the *Kent* case, it was a very different situation. You had two competition economists and then you had another area of expertise and the concern, as I understand it, for the Tribunal was the Venn diagram and where those two separate aspects would overlap, and this situation is different.

**MR HOLMES:** I think they were concerned they weren't clear about how the digital markets expert differed from the evidence that would be given by the competition economist. So, the concern was about having another economist addressing overlapping topics that they would expect the competition economist for which permission had been given to deal with the point. But you've seen that in terms they were concerned about the overlap, the risk of overlap, which therefore resulted and a practical question of proportionality. In my submission, they apply equally in this case to the question of whether two competition economists should be permitted to the Class Representative.

**THE CHAIR:** Yes.

**MR FRAZER:** Mr Holmes, in paragraph 33, in the last sentence it does say it's "… a matter for Apple whether they use Professor Hitt as one of thos two experts, …".

**MR HOLMES:** Yes.

**MR FRAZER:** But it wasn't -- it seems, from that paragraph, the question of overlap wasn't primarily in mind. It's just that the Tribunal didn't want to give permission for three experts where there was significant overlap, but it was quite happy that there would be some way of efficiently having Professor Hitt as one of two experts.

**MR HOLMES:** Yes, I see your point. The Tribunal had already accepted, had already swallowed the pill of, two competition economists. As I read this paragraph, it's saying Apple can make an election it's now two, but it was not prepared to go to three. The

reasoning nonetheless reflects a concern about overlap and in another passage in the Tribunal's ruling later that concern, I think, is even more apparent. Page 592, it's dealt with briefly, but we see the approach that is taken. It's in relation to IT, Mobile and Internet Security Experts and paragraph 40 introduces the bone of contention, Apple had expressed a concern that it might not be able to locate a single expert to cover what was said to be a wide-ranging subject - the security arrangements applicable in relation to IT mobile and internet. The question therefore arose whether it would be appropriate to have two experts with overlapping specialisms. The Tribunal's response, in my submission, shows the care taken to avoid a proliferation of experts, not a blank cheque approach: instead, a process that needed to be completed before a green light would be given.

"If Apple or the Class Representative consider, having identified potential experts in this area, that it will in fact be necessary to use two experts, then they should:

(1) List the issues which it is proposed that both experts will cover.

(2) Provide the names of the proposed experts and their backgrounds.

(3) Identify precisely which expert will cover which issues."

So, they didn't leave the division as a matter of trust; they wanted chapter and verse on it before they made their decision.

In my submission, *Kent* shows that where there are experts in overlapping fields of expertise the Tribunal requires a good indication of whether there is a workable division. It won't take it on trust that such a division will emerge when giving permission, where that has not yet been articulated or explained.

Now, turning to the Class Representative's application, when it first -- when the proposal first came to light, we immediately asked what division was envisaged. That's at -- I don't know if you need to see it, for your note it's correspondence bundle page 110. That was followed by repeated requests.

The answer that was received during the course of this correspondence was that an appropriate dividing line was under consideration. That was set out in Hausfeld's letter some months ago on 28 March 2023 at paragraph 6(b). For your note, that's correspondence bundle, tab 34, page 113.

But we've yet to receive the information and there's none before the Tribunal. Instead, a claim of privilege in relation to the question of division.

The underlying concern on our part is that the economic analysis is interconnected in this case. By nature, it overlaps. So, taking the building blocks, the various elements, under consideration, market definition is a means to an end. That's well understood. The end is assessing market power. So, it's very difficult to see how market definition and dominance could be torn asunder.

Similar debates in this case are likely to arise when assessing dominance and the alleged effects of the conduct that is characterised by the Class Representative as infringing, in particular the circumstances in which and the credibility of consumers accessing apps from other sources than the app store. That will be a key feature of debate in relation to the effect of conduct, the alleged -- the conduct alleged to be abusive, the security measures and so forth, and also the assessment of dominance. We don't see there's any neat division that can be drawn there either.

The assessment of quantum will depend on a counterfactual analysis which is in turn bound up with the effects analysis when assessing whether there is any infringement, either of an exclusionary kind or of an exploitative kind. Again, we think it's very difficult to see how you could separate quantum, certainly from an assessment of whether there's excessive pricing, but more generally from the assessment of whether there's exclusionary conduct. So, we have concerns.

But at this point I think all I need to do is to give you a flavour of those concerns because in the absence of any clarification from the Class Representative about where

the dividing line will be drawn, we are really shooting in the dark. We need to see the division so it can be debated and considered, and the Class Representative has not responded to repeated requests for clarification. As matters stand, we simply don't know the division proposed.

Now, my learned friend showed you the provisions in the order and said, “Don't worry - this is taken care of in the draft order. There's an arrangement in place to explain the division after we're given permission”. But we say that's to put the cart before the horse. To exercise your gatekeeper function effectively, you need to know now that there is a workable division to assure yourself of whether an overlap can be avoided or managed and therefore to understand the proportionality of the request.

Now, instead of grappling with the difficult questions of overlap, the Class Representative has focused on its own resource-based reasons for preferring to have two experts. It's said the issues are complex, although Mr Holt at certification addressed the whole gamut of them in his report on certification, and he at that stage seemed comfortable with the idea that he would deal with the entirety of the case.

He is, in any event, part of a global consultancy firm, supported by a team of economists. There are six AlixPartners economists in the confidentiality ring. And it's preferable to provide him with the support that he needs to cover the issues than to attempt a division which we think will be very tricky. We were also, just as a side point, concerned at the suggestion that a second economist was needed to “support” Mr Holt. These economists will be giving independent expert evidence, and the premise of the application against me is that they will be covering independent ground. So, the language of “support” we found somewhat troublesome.

But we say in any event that the resource concern isn't a justifiable one. The second point made was a suggestion that two experts are required for a level playing field. We don't understand this concern at all. Certainly, from Google's perspective, being

sued simultaneously in multiple jurisdictions doesn't feel like an advantage of any kind at all. It feels, on the contrary, extremely burdensome to the teams around the world that are dealing with this.

In any event, the experts will be giving independent testimony to the Tribunal. They will be giving their own independent opinion evidence about the issues that arise. They won't be trumpeting a case for either party which has been pre-packaged in other proceedings. That's just not how it works.

So, we say the appropriate course is not to give permission immediately for two economic experts. The Tribunal cannot be satisfied that this is the appropriate course without at least an explanation of how the division is to be achieved and overlap avoided. Instead, the Class Representative should first explain and justify the proposed split. We would work cooperatively with the Class Representative and the matter, should it need to be reconsidered, can be done so in light of the explanation provided.

It's unfortunate we find ourselves in this position, but on the material before you the Tribunal cannot responsibly decide that two separate competition economists are the appropriate course.

Unless you have any questions, those are my submissions on that.

**THE CHAIR:** What do you say about the practical difficulty that the overlap in the proceedings will inevitably present?

**MR HOLMES:** I am grateful that you raise that - I had meant to address it. I think you hit the nail on the head, Madam, if I may respectfully say so.

Insofar as there are practical difficulties with timetabling, they should be addressed. The timetables were designed in an awareness already on both sides of the fact that there are these two pieces of litigation on foot. And we understood at least that the Class Representative had chosen the dates with a view to the practical difficulties that

might be presented by running two parallel pieces of significant litigation.

The first course would have been to cooperate responsibly with us in order to see whether an alternative timetable could be agreed and proposed to the Tribunal. But the appropriate course isn't to sacrifice the Tribunal's gatekeeper role as a matter of principle in relation to expert evidence. That's to elevate practicalities above what, in our submission, is quite an important point of principle.

Equally, if these really are not resolvable, then there's a question about whether Mr Holt is the appropriate person to be giving evidence in these proceedings. The new individual who might be selected wouldn't, of course, be starting from a blank sheet. Mr Holt's team has already done substantial work. It may be that another individual could be found within AlixPartners. In any event, if Mr Holt is the blockage, then the Class Representative should at least explore the possibility of finding another competition economist who could deal with matters. There's obviously no evidence before you as to any particular difficulties with that course.

Subject to -- anything else? Thank you.

**Submissions by MR HOSKINS**

**MR HOSKINS:** Let me deal first with the overview points. First of all, it's said: seven experts; my, that's a lot. Well, with respect, these are very complex cases. *Kent v Apple* is a very complex case, and the Tribunal has allowed seven experts there and it clearly thinks that that's manageable and practical and indeed necessary.

Of course, one shouldn't look at the question of whether a second economic expert is required or not simply by looking at the total number of experts. The question for the Tribunal is what is necessary and appropriate in the circumstances of this case. That's the question, not what's the total number of experts going to be.

We are not asking the Tribunal to take this on trust. With respect that's clearly not the

case. You've seen the expert process. It's not a case where we are trying to get away with something, trying to hold something back until the expert reports go in. We are trying to do this in a sensible managed way and the management involves us having a conversation with the second expert, if that's allowed, in order to make sure that that independent expert is happy with the division. Because it's all very well for me if I popped up on my hind legs now and said division is going to be this, this and this and if we went to the second expert and he said: I have a concern about this division, what about this? There has to be an allowance for the second expert, if you think that's appropriate in any event for the reasons of complexity and imbalance, being able to have input into the division. There has to be because they are independent experts.

**THE CHAIR:** What if the second expert says: actually, I don't think there is a logical dividing point?

**MR HOSKINS:** Then we'd be coming back to the Tribunal, we would be under an obligation to report that to you. Of course, we would. If we can't come up with two experts who say they can live under that scenario, then we would have to come back to the Tribunal with that. But we believe we will be able to find experts who are happy with that.

I can pluck an example out of the air. I am not sure it's very helpful, an obvious example is excessive pricing. That could be a self-contained case in itself. It has been in other cases, excessive pricing cases. An expert could deal with excessive pricing and quantum and other experts deal with other aspects of the case. But that's just me saying -- I am a mere lawyer. It's clearly sensible if you accept my arguments on complexity and us trying to catch up with Google's learning in these matters, if you accept those arguments, it's clearly sensible for the experts to be involved in coming up with a division.

You were shown the *ES v Chesterfield* case. Perhaps we can just pull that out again

quickly, authorities 1, tab 5, page 73. I am not really sure how far this takes us. It's a medical negligence case very different on the facts. In that medical negligence case, for the reasons given, it was considered appropriate to have more than one expert. I don't shy away from the fact that it's unusual to have two experts in one field, I don't think you need authority for that. That's obviously correct. But you have my submissions why the complexity of this case and the need for us to catch up with Apple means this is a case in which two experts should be given.

Let's look at what was said from Lord Justice Kennedy's judgment at 73. You were taken to paragraph 43, 43(2):

"The court must recognise that it has the discretion to be flexible in response to the facts of an individual case."

But then the next sentence:

"The underlying question to be asked is whether additional expert evidence will assist the court to do justice, and to be seen to do justice between the parties".

And that's the point. It's not a presumption against a second expert. What the court has to do is ask itself: is it necessary, is it appropriate to have a second expert? If the answer is yes, then permission should be given.

Now, you were taken to *Kent* and the digital markets expert, but I think, with respect, that point will have been knocked on the head because of the dialogue between the bench and the bar.

In *Kent* the Tribunal granted permission for two economists and it clearly felt that that was not going to be such a serious impediment it couldn't be tried properly because of risks of duplication or there be any sort of obscurity. It allowed two economists.

What it didn't do was allow Apple to call an expert in what was said to be a different field which was, in fact, the Tribunal thought, very similar to what the economists would be dealing with anyway. So, *Kent* says: no, not a third expert when you, Apple, haven't

justified that there's something specific that the digital markets expert could bring when we've already got two economists. But it's quite clear from *Kent v Apple* that the Tribunal is comfortable with having two economists, it thinks it's sensible, it thinks it's manageable.

You have my points on why I say it's sensible. I won't go over them. You have the complexity point. You have the imbalance point. Mr Holmes says it doesn't feel like an advantage to Google to be sued and pursued by regulators in multiple jurisdictions. Of course, that's right, but that doesn't meet my point which is that as a result of being pursued in those various jurisdictions Google is all over these issues.

Now, it might instruct an expert that it is using in another case. It might not. If it does, that independent expert will have learning. But even if their points are completely new, something has not appeared from before, the point is that Google has that learning when it comes into instructing the expert, to give an expert the information that the expert needs to deal with the issues. Google is miles ahead of us in terms of that learning because of the other cases and because it is Google's business. That is one of the real points we are trying to palliate by having a second expert.

Just finally, you have the point. We are not asking you to take it on trust, we are trying to manage this, and that's why the expert process expressly includes the need for the division to be made clear once the experts have had a chance to discuss it and to make proposals as to what the division should be. We are not trying to pull the wool over anyone's eyes. We are trying to act responsibly and sensibly in the interests of the class and that's why we ask for the permission we seek.

**MR FRAZER:** Mr Hoskins, you said you can't really envisage what division would be because you are a mere lawyer. I am a mere lawyer, too.

If you can't and we can't at this stage, I think we'd rather envisaged that we would know what the division would be before making the decision -- before today.

Mr Holmes has expressed a concern that there won't be a division that's feasible and practical. How do you suggest we proceed?

**MR HOSKINS:** Well, I have explained our chicken and egg situation because we need permission to instruct a second expert and we want to be able to discuss the division with the second expert, so we are in a chicken and egg, and that's the advantage that Mr Holmes is seeking to sort of ram home against us to stop us getting the second expert.

You could say to us: you have one expert. You come up with a division and you make that proposal and then we'll look at it. Or, you could give permission for us to appoint a second expert, we will do that. We will be required by the expert process to explain the division and, as I said, if it doesn't work at that stage then the Tribunal will be able to manage that and have a say and indeed Google will be involved in that. But that resolves the chicken and egg argument, if you see what I mean.

In my submission, it's far better, given these are independent experts, for the second expert to have input into the division, otherwise we risk a situation where we come to you with a proposal, we've discussed it with Mr Holt, you say that's fine, go and get your second expert and we have the discussion with the second expert and we have to come crawling back to you and say: actually, we've found a second expert, they are not sure about the division, what about this. It's purely a management issue.

There is a first question which is: is it wise to have a second expert because of complexity and imbalance, and then there is a second, and in my submission, secondary issue about the management of how the division is defined ultimately. But those are really two separate issues. The first one is the more important one: is this a case fit for a second economic expert?

**MR FRAZER:** Thank you. **(Pause)**

**THE CHAIR:** Thank you, Mr Hoskins. I think shall we move on to the next expert?

**MR HOSKINS:** Thank you. I am sorry.

**THE CHAIR:** Yes.

**MR HOSKINS:** Mr Holmes is enquiring whether to have a break for the shorthand writers, I am not sure whether ...

**THE CHAIR:** I was thinking of going until quarter to, but I suppose it rather depends how long you think we'll be with the next issue.

**MR HOSKINS:** I would rather crack on to be honest.

**THE CHAIR:** Yes.

**MR HOSKINS:** I appreciate the human welfare aspect, but we need to go on.

**THE CHAIR:** I think we can go for a bit further.

**MR HOSKINS:** So, the second contested issue is what we've called the 'app expert' or the 'app industry expert' for shorthand. Just to remind you of the order we seek, it's core bundle, tab 6, page 129. It's paragraph 2.3.

The reason why we seek permission for an app expert is simply one of basic fairness, and you'll see echoes of that in some of the submissions I have already made this morning. The Defendants have inherent deep knowledge of the app industry. They are central figures in that industry. If they so choose -- and indeed we submit it's likely -- they can call their own employees to give evidence in relation to the app industry. All that information is at their fingertips.

But if permission isn't granted for the Class Representative to rely on expert evidence in relation to these matters, she will not be able to counter the Defendants' evidence. It's as simple as that. We say that would be manifestly unfair. It seems like a very simple point, but sometimes simple is best. That's the point.

Again, I will take you to *Kent v Apple*, you are in no way bound by *Kent v Apple*, but I think it's useful for you to see what happened there and why. There is a material similarity between the *Kent* case and this case, and I can just show you the summaries

of the issues so you can get that fixed.

Can we go to our Amended Claim Form in this case, that's core bundle, tab 18, page 202, paragraph 9. You see the heading "Summary" at the top of the page:

"…the PCR contends as follows:

a. Google occupies a position of dominance … in each of ..."

And then there's a number of markets identified.

Then over the page at (b), these are the allegations of abuse, and they are allegations of exclusionary and exploitative practices. First of all, “bundling the Play Store with other important Proprietary Apps …”. So there is a bundling allegation. And then, at (ii), there is an allegation about foreclosure in relation to distribution of apps. And then at (iii) there is an allegation of abuse in relation to reserving the ability to make payments through the Google Payment system. And finally at (iv), there's the excessive pricing allegation.

Just to compare that with the *Kent v Apple* issues, you can get those from authorities bundle 2, tab 18, page 580. Apologies to Mr Frazer who is already well aware of all these issues. At paragraph 3, if I ask you to just quickly read that, you'll see allegation of dominance, allegation in relation to distribution, in relation to excessive prices, and in relation to requiring payments through a particular payment system. You'll see the similarity.

Now, I should say, if you turn back to page 578, you'll see this is the Tribunal's ruling on expert evidence in the *Kent v Apple* case and you can see the punch line in terms of what the Tribunal ordered at page 593, paragraph 47. You'll see the two experts in competition economics at one and one expert each in respect of the app industry. So that's what we are effectively seeking in this case.

Now, in our submission, the reasoning and conclusion in this *Kent* judgment is equally applicable in this case. If I can show you that analysis. If we can go to page 581, the

legal principles are helpfully summarised there. If I could ask you in particular to read paragraphs 12 and 13 which go to the nature of expert evidence. **(Pause)**

Those principles are applied beginning at paragraph 16 on page 583. If you wouldn't mind, I would ask you to read quickly through paragraphs 16 to 24, please. **(Pause)**

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

**MR HOSKINS:** There are two points I would like to take from that. First of all, from paragraphs 19 to 21, in our submission, that establishes that this is an area, an aspect of evidence, which is capable of being addressed by expert evidence because the CAT found as such in the *Kent* case.

Secondly, as in the *Kent* case, we say that the position is the same here it's the one I have described of basic fairness. The Class Representative here will also be at an unfair disadvantage if she cannot call expert evidence to respond to the Defendants' factual evidence about the app industry. It's really unimaginable we could go to trial and have succession of factual witnesses from the Defendants and about evidence from the industry and we are supposed to simply sit and listen and cross-examine or attempt to cross-examine without any evidence of our own.

Now, again, the way in which the Defendants say that permission should be refused is they say well, the Class Representative has not identified with reasonable specificity what ground the witness will cover. Well, with respect, that's simply not correct. We have done that and it's a reference to the letter, Madam, you asked me about this morning in terms of what has been provided to the Tribunal prior to this CMC on the issues to be covered.

Can we go to Hausfeld's 6 March 2023 letter to the Tribunal. That's at correspondence bundle tab 4. So, you'll see page 8, this is a letter sent to the Competition Appeal Tribunal. This was to comply with the order that we saw at the outset this morning.

In relation to each expert, you'll see paragraph 4 sets out the issues to be addressed, and in relation to the app industry expert, that's on page 9 at (d), and you'll see as well as the description a (d) of issues to be covered footnote 5 then gives a string of references to the pleadings and these are said to be examples of the issues that an app industry expert would address.

You will be no doubt relieved to hear I am not going to take you through all those references because, in my submission, a few will do to make the need for an app expert crystal clear.

Can we please go to the Defence, Google's Defence, core bundle, tab 23. That begins at page 379. If we could pick it up at page 389. If we start at paragraph 32 and begin four lines down, if you could read to yourself:

"OEMs can and do supply Android devices in the United Kingdom ..."

And read to the end of that paragraph.

**(Pause)**

You will see there a series of submissions, allegations, assertions, whatever you want to call it, by Google about the app industry. They are no doubt going to provide evidence to make good those assertions and I ask the rhetorical question: without an expert, what are we supposed to do to counter them or test them?

Page 394, paragraph 39, if I could ask you to read that. It relates to assertions about other distribution channels.

**THE CHAIR:** Yes.

**MR HOSKINS:** Page 397, paragraphs 52 and 53. **(Pause)**

**THE CHAIR:** Yes.

**MR HOSKINS:** Then just for a different flavour on page 398, alleged technical restrictions on GMS device users, paragraph 54:

Google asserts “It is straightforward for a user to delete the Google Play Store icon

and disable the Google Play Store so that it disappears from the user's home screen and app drawer."

I could go on, but it's diminishing returns.

There are myriad assertions about the app industry. Basic fairness means we need to be able to respond to those.

Again, there's a duplication spectre raised. It suggests in this context that there is a risk of duplication between the issues to be covered by an app expert and issues to be covered by the economics expert and the payment systems expert and the security expert. With respect, that is an absolutely baseless spectre. From the limited references I have shown you, it's crystal clear that there are issues that will be specific to an app expert and as the president of the Tribunal has made clear, both in judgments and indeed in public speeches outside the Tribunal, before one gets to the economic issues, the Tribunal has to understand the industry we are dealing with. It's fundamental. The economists don't opine in a vacuum. You need to have the evidence about the industry.

In many respects, the specific evidence about the app industry is going to be the bedrock of this case and we need to be able to contribute to that.

Now, the normal practice is both in courts and this Tribunal is for permission to be given in a particular expert field in the form you see in our draft order, rather than by, for example, identifying a particular expert by name or by specific qualifications. The draft order we are seeking is in perfectly normal form. Therefore, in our submission, the relevant question for the Tribunal is whether it should grant permission for an app expert as we have defined it. On the basis of what I have already submitted, I had hoped the answer to that question is not in doubt.

Google does try and say: well, we are not sure this an area of expertise. I find that odd given *Kent v Apple* and they don't really explain a way round the fact that *Kent v*

*Apple* found this was an area of expertise. But there -- if there is any risk of that, let's assume we are foolish enough to instruct someone who is not fit to be an expert in this field, it's very quickly going to come to light. There is the expert process and if Google wants to challenge the person we have appointed, they will have the opportunity to do so.

Again, what Google are trying to do is they are trying to make it difficult for us in terms of specificity required before the normal order is made which is there is permission to call an expert in the field of apps or the app industry. They are just trying to create technical hurdles to put in front of what would be the normal process.

Then finally on this point there are two authorities that the Defendants rely upon. It's in their skeleton argument, you'll see how they seek to rely on them. So, the skeleton argument, if you have it in the bundle, core bundle, tab 2, page 2.10. It's paragraphs 37 and 38. You will no doubt have read these passages when you were preparing.

There's a case of *Fenty v Arcadia* and *Merricks v MasterCard*. These are cited, you'll see, for example, at 37(c):

"Deciding whether evidence given by a trade witness amounts to expert evidence "*cannot be done*" without close examination of the evidence itself in the context of the issues in the proceedings…"

Then in relation to *Merricks v MasterCard*, the point is made that Mr Justice Roth had required a draft of the expert evidence to be produced for him to look at.

But that is not the normal procedure and neither of those cases have remotely anything to do with the situation we are in now which is simply the Tribunal considering whether it's appropriate to grant permission for expert evidence.

Let's look first of all at the *Fenty* case, authorities bundle 1, tab 7. For those celebrity spotters, Fenty is Rihanna's surname, so this is all about Rihanna merchandise being

produced by Top Shop.

In *Fenty v Arcadia*, one party challenged some of the factual witness statements submitted by the other party because they said those witness statements were not, in fact, factual evidence but expert evidence. So that's the context. If you look at paragraph 1:

"At the start of 2011, Topshop sold a T-shirt which carried a picture of the famous pop star Rihanna on it."

Paragraph 3:

"The claimants sued for passing off and trade mark infringement. The trade mark claim is settled. The passing off claim is due to come to trial in two weeks' time, floating from 15 July."

Paragraph 4:

"At the case management conference Master Marsh set a timetable for witness statements of witnesses of fact, with statements due in December 2012. The parties were given permission to apply for directions about expert evidence. No directions were applied for, so neither party has permission to rely on expert evidence."

Paragraph 5:

"On 26 June the defendant's solicitors objected to a large part of the claimants' evidence: five witness statements in their entirety and parts of the statement of the claimants' main witness, Ms Perez. The five witness statements are …. The evidence objected to is what is often called trade evidence. The five witnesses all describe their experience in their particular businesses, and then describe that field and make various statements which I will come back to."

Then 6:

"The main objection is that the evidence is expert evidence which is inadmissible without permission and no permission has been sought."

It was in that context that the judge examined the witness statements to decide whether they are in reality expert evidence. With all due respect, that's absolutely nothing to do with the issue before this Tribunal. This case is about -- the *Fenty* case is about evaluating the admissibility of factual evidence that has already been served. It's absolutely nothing to do with whether to grant permission to serve expert evidence in the first place.

*Merricks v MasterCard* is even further removed from the current application before you. That's authorities bundle 2, tab 14. Now, this ruling by Mr Justice Roth concerned an application made at the end of May 2023 to adduce expert evidence for a trial beginning at the start of July 2023. So literally about six weeks later. This is a case about the late application, the very late application, of expert evidence, not about the relevance of expert evidence.

We can trot through this quite quickly. Paragraph 3:

"The trial of the proceedings is now proceeding in stages ... Pursuant to an order … [of the] trial of two specific issues of (a) the causal link …, and (b) the volume of commerce, is due to commence at the start of July."

Paragraph 7:

"…on 11 May 2023, the CR's solicitors wrote to Mastercard's solicitors to say that he would seek to serve evidence from a further witness who would give both factual and industry expert evidence."

You see paragraph 8:

"On 25 May 2023, the CR made a formal application for permission to adduce that evidence …"

If you drop to the bottom of paragraph 8, four lines up:

"…it was on that basis that the CR made what was recognised to be a very late application. However, Mr Bronfentrinker in his witness statement still did not give any

clear indication of the particular issues which as a matter of expert evidence that witness would seek to address."

Then, in 9, it's against that backdrop Mr Justice Roth directed that a draft witness statement should be served and it was served on 30 May 2023 and the "…application came to be heard as a matter of urgency".

Paragraph 11:

"… Mastercard strongly objected to those aspects of his statement which it contends amount to industry expert evidence…"

13:

"I should make clear that the question arising on the application is not one of relevance [so it's not the one we have before us today]. Had the CR applied for permission to call an industry expert at the September CMC, or indeed before the January Order, I expect that it would have been granted. But that is very different from the situation at the time when the application was made, under six weeks before the trial and when the exchange of expert reports had already taken place."

With all due respect, the attempts to draw some general principle from *Fenty* and *Merricks v Mastercard* to apply it to this application we submit is wholly misplaced and it's on the basis of those submissions we'd ask you to make the order sought. Thank you.

**THE CHAIR:** It is now midday so I think we might take our break at this point. We'll be back at -- we'll just take 5 minutes. Five past.

**(11.58 am)**

**(A short break)**

**(12.05 pm)**

**Submissions by MR HOLMES**

**THE CHAIR:** Yes, Mr Holmes.

**MR HOLMES:** Madam, I hope I can deal with this quite shortly. Can I just make clear what we are not saying first of all so that there is no doubt.

First of all, we are not suggesting for one moment that the Class Representative should not be permitted to call evidence of some kind in relation to the app industry. We are not suggesting they should sit on their hands and listen to Google witnesses and not have an opportunity to counter them.

Nor are we suggesting that one could not formulate some expert propositions in relation to the app industry and find an expert of appropriate qualifications to give evidence on matters relating to the app industry. That's not our concern here.

Our concern is a much simpler one. On the material that we have seen, I'm afraid we don't understand with clarity what evidence it is that this witness is proposed to give and whether it is really expert evidence or is instead evidence of fact. That in a nutshell is our concern and that has practical implications for the trial.

The Class Representative's application you saw briefly, but can we just go back to it. It's core bundle 4, tab 7 -- sorry, page 7, I beg your pardon. I am not working with tabs, so I can't tell you what tab it is. It's at page 7, if that helps.

**THE CHAIR:** Yes.

**MR HOLMES:** This is Hausfeld's application letter of 5 June. It's [page] C7. Have you got that?

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

**MR HOLMES:** Yes, thank you. You see from paragraph 15 that the evidence to be given by the app witness is extremely broadly framed. It's said that they will "… address the development, distribution, monetisation and use of apps and / or digital content for and on devices and / or platforms."

Now, just at the risk of stating the obvious, that in itself isn't an issue. It's a very broad

subject matter about the coverage such a statement might have. It's not quite correct to say that the Tribunal's practice is invariably to make an order that is confined to an identification of the area of expertise. On occasion the Tribunal, as in the High Court, will specify a list of issues, and that's particularly the case if there's any doubt about what the coverage of the evidence is. It's a useful discipline so that it can be understood what the evidence is intended to cover.

Looking down the page, you see that there is a little more detail provided as to what this expert is intended to -- about the kind of person that the Class Representative has in mind. We see at 16(a) we get some explanation of their background. It seems that the person has worked in the trade and has extensive industry experience in app development and business experience in relation to app distribution and monetisation. So, it looks as though they are a business person on the developer side if we understand that rightly.

It's said that they have qualifications in the field of software development and computer science, but it's not clear to us at least how those qualifications relate to the evidence they will be giving. That appears to be detached. It's simply an explanation of their background.

No specific issues or matters of opinion are identified in this letter to assist in clarifying what evidence this developer, business person will be giving.

Mr Hoskins took you to the correspondence bundle, tab 9, or page 9, rather, which was the letter on the issues. Yes, it's page 9, I beg your pardon. CR9.

**THE CHAIR:** Yes.

**MR HOLMES:** You will see there, as Mr Hoskins showed you, that there is a reference again to this very broad formulation, not an issue. And it's said that footnote 5 clarifies what issues this expert will speak to. As you can see, that is simply a long list, a laundry list, of diffuse references to the pleadings. I won't take you back to them for

the reasons of time, but the paragraphs that Mr Hoskins showed you in the Defence are paragraphs setting out propositions of fact. It's not clear in relation to those propositions what matter of expert opinion evidence they engage.

Really those broad references to the pleadings that Mr Hoskins developed today - I don't blame him for doing so, it's the material he has to work with - but what they don't do is identify anything in the nature of an expert issue.

**THE CHAIR:** How do you say, Mr Holmes, that Mr Hoskins' client is to challenge those factual assertions?

**MR HOLMES:** We say that there is nothing at all to prevent the Class Representative bringing forward factual evidence to meet factual evidence. This witness is a business person who understands operation of the industry. The references in our skeleton argument to *Fenty* and to *Merricks* were not put in because they are analogous to the situation that you are dealing with today. Of course, they are not. They are put in to show that there is a category of trade witness, well established in the case-law who gives factual evidence which can stray into opinion evidence about the operation of the industry.

We say actually that the concern that we have about the nature of this evidence is underlined by this reference to equality of arms and to the fact that Google is putting factual evidence. That suggests to us at least that the genesis of this application is a desire to put in evidence to meet our factual evidence and we say the appropriate way to do that - the appropriate form to do that in - is likely to be further factual evidence. There may of course be expert evidence issues that arise as well, but we just at the moment don't know what they are.

If we could go back now - I am sorry to jump round - to the application letter in the core bundle at page 8. The equality of arms point is developed at paragraph (b)(ii) and there it is explained that the "… evidence is necessary to ensure an equality of arms

between the CR and Google. [That is because,] Whereas Google is likely to have employees who can give evidence on the payments and app industries, the CR does not. As the Court of Appeal has recognised, the class representative in collective proceedings is not and cannot be expected to adduce factual evidence in the ordinary way…". A reference is given there to a Court of Appeal authority.

It appears that what underlies this application is a concern that the Class Representative is somehow precluded from proceeding to meet factual evidence with factual evidence and so, to restore the balance, that evidence of a factual nature needs to be given in the context of an expert report. That is how we read this.

That, we say, is just wrong in principle. There's nothing to prevent the Class Representative putting in factual evidence. If we go to the Court of Appeal authority which is cited, it really isn't authority for the proposition that the Class Representative is constrained in the way suggested.

So that's in authorities bundle at tab 11. That's volume 1 if you are working from the hard copy. At page 186 of the rolling numbering. Does the Tribunal have that?

**THE CHAIR:** Yes.

**MR HOLMES:** This is just to contextualise. It is a series of observations on the Microsoft test made by Lord Justice Green giving judgment for the court and he notes at paragraph 62 - the reference, which is cited in the letter - that:

"The appellants criticise the class representative for not being prepared to put up class members as witnesses to support the methodology. This is misplaced. The logic behind an opt-out order is that the representatives of the class will *not* have contact with class members … prior to distribution and in an aggregate damages case not only is the CAT forgiven the task of considering individual evidence but the probative value of evidence from a small handful of carefully selected consumers out of millions might be strictly limited. The class representative is not prohibited from looking to the class

representative, for instance to answer a survey [from looking to the class, I think that should be]. But the CAT is unlikely to be moved by a generic complaint that the class representative is not calling individual members."

So, you can see that's a really very narrow point which is being discussed. The question is whether at the certification stage or afterwards would it be appropriate to put in volumes of evidence from individual class members and whether the Class Representative can be criticised for not doing so.

It's not setting out as a general proposition that the Class Representative can't call factual material such as, for example, this business person in the field of app development, to meet the evidence that's put in by Google's witnesses of fact.

The Court of Appeal is really addressed to a different point, and it's not laying down any general proposition about what the Class Representative can do.

In the Claimant's skeleton argument there is a further authority cited, and that is the *Kent* case. Just to see how it's cited - I will address the points that my learned friend made about *Kent* in a moment - but if we could just see the citation in the skeleton, it's at page 5, paragraph 18 of the skeleton.

You see in the *Kent v Apple* proceedings the Tribunal gave permission for "*one expert witness in respect of the app industry*" because, it's said, the class representative there is not in a position to provide factual evidence whereas by contrast Apple is able to provide factual evidence on the alleged app market.

The reference in the footnote is to paragraph 16 of the Tribunal's ruling on expert evidence to which my learned friend took you. If we can go back to that, please, to see what paragraph 16 is about. That's in the authorities bundle at tab 18 at page 583.

This, of course -- I hope Mr Frazer will forgive me, he knows this ruling already very well I know. Our reading of paragraph 16 is that it's recording the submissions that were made by the class representative. So, you see at the start of the paragraph:

"The Class Representative says that she should be permitted to provide evidence from these experts for the following reasons:".

Then at subparagraph (3), over the page:

"The Class Representative is not in a position to provide factual evidence, and … that might be considered unsatisfactory by analogy with the observations … of the Court of Appeal in [the] *London & South Eastern Railway Limited [and others] v Gutmann* case … [the one we went to], where the Court of Appeal cast doubt on the probative value of a Class Representative calling evidence from a small number of carefully selected class members."

Here you see a similar, if not the same, submission being made by the class representative in *Kent* as is made in this case - that there is some obstacle to the calling of factual evidence. As we read the reasoning that follows, that was not a point that found favour or was adopted in the Tribunal's subsequent reasoning.

On the contrary, the point which appeared to have influenced the Tribunal was at paragraph 19 where it is clear from the materials before them that the Tribunal had been able to understand and to identify what issues in broad terms the app industry expert will address. Things like the commercial drivers and relationships between platform developers and the likely responses, a matter of opinion, of market participants to the changes which the Class Representative will put forward in her counterfactual case. So, material to support the counterfactual.

It may be that there is a similar role for an app industry expert here, but it's not one that we've heard articulated by the Class Representative in support of her application. Instead, the application suggests that what the Class Representative is interested in is calling trade evidence. And if that is the case - and Mr Hoskins' references to the defence gave us no confidence that it wasn't the case - we say it's misconceived. That evidence can and should be put in as evidence of fact.

Having a mismatch between factual witnesses and experts, if it can be avoided, is not by any means ideal. So, if the expert report here is really intended just as a vehicle for addressing Google's factual evidence, it's not the right vehicle. You can immediately perceive the practical problems just in terms of the way this evidence will unroll: the factual evidence goes first, the expert evidence follows. What you'll have is Google's factual witnesses putting in their evidence, apparently no evidence from the -- factual evidence from the Class Representative or unlikely to be any; we'll then be into expert evidence. Expert evidence will be produced by the app industry person, this business person, and Google's factual witnesses will need to be given an opportunity to respond to the factual propositions contained in that report…to the evidence being given on a different track by this industry person, which could create mishaps in the trial timetable.

You see a similar problem once you get to trial. There will be the factual evidence and then expert evidence. What if the expert who is giving factual -- advancing -- it's a vehicle for factual propositions -- gives some evidence with which Google's experts of facts take issue? There's a real risk that you will end up having to recall the factual witnesses.

If this is a vehicle for factual evidence, we say it's really the wrong one.

**THE CHAIR:** But is it a question of basically form over substance? You wouldn't have any objection -- obviously I'm talking in most generalised terms -- to the substance of what the Class Representative will need to do to put in facts to rebut your factual assertions. You don't have any objection to that, the substance, but the label of the independent expert and the form of an independent expert report is what you have an issue with?

**MR HOLMES:** Yes, and it's more than a question of form as I have tried to articulate.

**THE CHAIR:** Yes.

**MR HOLMES:** It raises practical questions for the organisation of the evidence and the testing of the evidence both during the process of providing written evidence and at trial. That is why you have a gatekeeper function at this stage to determine whether there are well-defined expert issues - matters of opinion evidence - that call on a field of expertise. We don't dispute that there could be a field of expertise in the field of app and the app industry, but that needs to be policed now. That's part of your gatekeeper function, and we say it's very difficult for you to do that because the issues haven't been clearly articulated by the Class Representative.

Instead, what the Class Representative's application suggests is that this will be factual evidence. And that does need to be teased out to avoid the risk of procedural mishaps and potential derailment later with further rounds of factual evidence following the expert process and a disruption to the order of factual then expert evidence at trial. That's why the division between fact and expert evidence needs to be quite carefully inspected at this stage. It's not obvious in the absence -- you don't require reports now and you don't need to dissect them. But what you do need is confidence that there are identifiable issues for an expert to deal with, and I don't think on the material before you that you have that at the moment. That's my submission.

**THE CHAIR:** On the basis of your submissions, if there was a -- because the Class Representative is in a position of having less knowledge about it on the facts, if it's a blend of the evidence they want to produce is fact and what you would say might well fall within an area of expertise, do you say that the Class Representative needs to produce two people to depose to that?

**MR HOLMES:** Well, that's an interesting question. I think the first thing to do at this stage is to identify whether there are questions -- issues of expertise, what they are, so that they can be identified.

It may well be that, in fact, this boils down to material that can perfectly well be dealt

with by factual witnesses. Google is putting forward factual witnesses in relation to this field, and we say it would make perfect sense for the Class Representative to do so as well.

**PROFESSOR WATERSON:** Would it be feasible, would it be possible, for the same person to at one stage in the trial give factual evidence and then at a later stage in the trial to give expert evidence?

**MR HOLMES:** I doubt very much if that would be -- I have never heard of such an arrangement. I think it would be an unusual one. If it turns out that the balance of this evidence is primarily expert driven, then factual propositions can be advanced by an expert, and we don't object to that. To be clear, our concern is more that we don't understand at this point what are the expert issues that will be spoken to and our concern was heightened by the reference to equality of arms, which we took, in the absence of any clear identification of expert issues, to be an indication that what was really sought here was an opportunity, a platform to respond to factual evidence in circumstances where the Class Representative understood from the *Gutmann* authority that there was some difficulty in her doing so in the normal way by factual evidence.

Does that --

**THE CHAIR:** Thank you.

**MR HOLMES:** -- make things clear?

**MR FRAZER:** If the areas of expertise were as described by the Tribunal in the *Kent* order to which you've drawn our attention, would that satisfy you?

**MR HOLMES:** I am so sorry, I was momentarily distracted by a note. Will you forgive me and repeat the question?

**MR FRAZER:** Of course. Of course. If the areas of expertise were as identified by the Tribunal in paragraph 19 of the *Kent* order to which you have drawn our attention,

would that be satisfactory to you?

**MR HOLMES:** If those -- if the Tribunal is confident, based on the material before it, that those are the expert issues that are engaged, then that will be for the Tribunal to conclude. We obviously don't have access to all of the record which was available and was the basis for the ruling in *Kent,* so we don't know whether a more extensive and detailed job was done in that case in terms of identifying in advance of the hearing and at the hearing what the expert would speak to.

Ultimately, in an adversarial process like this, it's for the Class Representative to satisfy you and you need to take a view on the material before you of whether you are satisfied that there are expert matters engaged here.

My submission is that that is not apparent from the materials that are currently available. It's another issue which arises as a result really of the failure to grapple with the Tribunal's sensible direction previously that issues should be identified in advance of this process of engagement over expert permission.

**MR FRAZER:** I understand. Thank you.

**MR HOLMES:** Thank you.

**Submissions by MR HOSKINS**

**MR HOSKINS:** I think I can be brief because there's not a lot missed, but I think it was clear by the end in response to questions by the Tribunal:

Mr Holmes accepts that the Class Representative must be able to respond to Google's factual evidence. He accepted that there are relevant expert issues for an app expert, and he accepted that an appropriate expert can address factual issues.

Now, given those three matters that have been accepted, I am struggling to see what else is left for the Tribunal other than perhaps the detailed wording of the order. We've asked for an order which is entirely normal terms. In response to Mr Frazer's question,

I don't think paragraph 19 of *Kent* would quite do the trick because I think, as a "for example", it's not a definitive description of the expert evidence that would be permitted, but we simply ask for an order in an absolutely normal form.

Insofar again, to these spectres of which we don't know exactly what issues will be dealt with, there is an expert process that has been agreed by the Defendants. I say metaphorically scratching my head because we agreed that there would be this process where the issues would be identified, where duplication would be dealt with and yet every time this morning the objection taken is: oh, what about the issues? But Google have agreed to the process for that. They can't agree to a process but then say but the process isn't going to be good enough.

**MR HOLMES:** I really hesitate to interrupt but these were paragraphs that were put forward in the application by the Class Representative. We don't take issue with them given where we find ourselves, but as you rightly observed, Madam, there was prior provision in the order, in the first directions order, for the issues to be identified well in advance of this hearing and for good reasons.

**MR HOSKINS:** So, the expert -- I don't understand it to be disputed that the expert process is agreed. That was my submission. There was an expert process that was agreed and yet continual complaints about issues that are intended to be dealt with by the expert process.

But unless you have any further questions, I don't have anything else to add on this topic, Madam.

**THE CHAIR:** I have one question for Mr Holmes. In this case, contrary to what has been ordered in Apple, the expert reports are sequential.

**MR HOLMES:** Yes.

**THE CHAIR:** Leave to one side for a moment Mr Hoskins' point about the agreed process for identifying issues between experts within the next few months. With the

sequential exchange of reports you would know what the Class Representative was going to say in advance of your expert having -- or your -- well, will you because it's the factual witnesses who are go doing be doing it? I see nods behind you.

**MR HOLMES:** That's exactly the concern. There may be practical workarounds, but we thought it was important to flag this now because we do apprehend -- we were conscious when we were framing our submissions today of the fact that sequential exchange does somewhat attenuate the concerns that might otherwise arise of ships passing in the night. But I think what the Tribunal should now have very clearly flagged is that there may need to be further factual evidence from Google's witnesses of fact outside the usual timetable --

**THE CHAIR:** Depending on --

**MR HOLMES:** Depending on -- and, you know, the scale of that problem is really hard to gauge because we don't have an issue, expert issues identified and the one source that seemed to me a stable potential basis on which we might move forward, which is the *Kent* ruling given the very great similarity of issues that Mr Hoskins drew attention to, is one that he has expressly disavowed. We are now really still in the dark about this.

**MR HOSKINS:** I am sorry.

**THE CHAIR:** Is an answer to the practical problem of factual witness statements -- and forgive me I don't have the date when they are due to be exchanged in my mind, but if they are before expert reports, which I presume they are -- is it a work around to have the app expert report exchanged as a factual witness?

**MR HOLMES:** That was also something that struck me personally as a possible way through this issue. I think it would create some comfort if we could see that at the time of first round factual statements because then the factual points could be addressed in the provision that's made for factual reply evidence, and it could avoid the risk of

hiccups down the line. So that might well be a way of cutting through this issue.

What I do want to impress on the Tribunal is this isn't about forensic advantage. We are not trying to throw up technicalities, as my learned friend suggested; we are just trying to work out a workable way through given where we are today. I should check and see whether I have instructions for the approach that's just been suggested.

**MR HOSKINS:** Madam, there is a potential problem with that approach because our app expert will want to see what the Google factual witnesses are saying as well.

**THE CHAIR:** Right.

**MR HOSKINS:** But, again, we are not trying to -- we just want fairness, we want to be able to run a decent case. We are happy for equality, indeed the order envisages if we get permission for an app expert, Google can have app expert. Google will equally have issues how it addresses issues of fact and issues of expert opinion in relation to the industry. They will be in exactly the same position as us except they have the benefit of a mixture of factual witnesses and app experts if they wanted.

When it comes to them responding to our app expert, who will include some matters of fact and some matters of expert opinion, if they want to have the ability to respond to that through their own app expert and/or through any further witness statements of fact, we would be perfectly happy with that and that deals with the problem.

**MR HOLMES:** That's a useful indication. Another possibility, of course, would be the app industry experts to work something up and then perhaps to lodge at a convenient time after first round factual evidence. It would only require a tweak to the timetable. We actually have a reasonably accommodating timetable to trial. So that might be a way of avoiding the risk of any derailment later. You'd have first round of fact; you'd have the app industry expert at a convenient time after that; and then you would have second round factual evidence.

I throw that out there. I don't know whether my learned friend would be interested in

that solution, but it does strike me as a practical way through.

**MR HOSKINS:** I think the problem with that is, given where we are headed with disclosure and when disclosure is going to be closed off, there's not going to be enough time between Google completing its disclosure and bringing forward the app expert. The app expert is going to need time to consider the disclosure. So, I do prefer my suggestion, you won't be surprised to hear, because there's no downside to anyone, it ensures all the evidence is before the Tribunal.

**THE CHAIR:** It sounds like between you; you know what the issue is. It's how we address it in practical terms.

**MR HOSKINS:** It is, and if Mr Holmes is content with the suggestion I've given, which is the permission for an app expert and the permission for factual witness statements in response to our app expert, if he can live with that, that seems to me to cover all the bases to be perfectly obvious.

**MR HOLMES:** Madam, in the end, I think the Tribunal has to work out what it thinks is the most workable procedural solution here. My concern about that is just once you are through the expert evidence there's more of a risk of derailment if you have further rounds of factual evidence because you'll then need potentially further round supplemental expert reports to address the new factual material, and it can spiral out of control; whereas it's quite a contained solution, actually, the one you have suggested with a modest tweak to take account of the concern that Mr Hoskins has identified with the need for the app industry expert to have seen factual material before expressing an independent opinion.

**THE CHAIR:** Thank you.

**MR HOSKINS:** I have run into the buffers on this.

**THE CHAIR:** That's fine. As you say, the Tribunal can consider the submissions and decide the way forward.

**MR HOSKINS:** The final expert issue is the behavioural scientist. Again, just to show you what we are asking for in our draft order, it's core bundle, tab 6, page 129. It's paragraph 2.4. You should replace “economics” with “science” for the reasons described in our skeleton argument, if you would, and that's the order. We seek again an order which is in an absolutely normal form.

If we can see what the Defendants' position is on this, their skeleton, paragraphs 46 and 47. You have that in the core bundle at tab 2 at page 2.12. Paragraph 46:

"Google accepts [that] both behavioural economics and, more generally, behavioural science are recognised fields of expertise."

So, I am assuming that's not an issue.

Then secondly, you see the final sentence of paragraph 47:

"Permission should be refused at this stage, with permission to re-apply following the identification of the specific issues in relation to which evidence from a behavioural scientist is necessary or otherwise reasonably required to resolve the proceedings."

We are again back in this world of us seeking a normal order and I will take you through again some of the issues we've identified and Google saying: well, we are not saying you can't have it, we just want the issues specified, which brings me back to my expert process point, but there's a certain repetition going on here.

In terms of the relevance of behavioural science, in terms of what, in general terms, the evidence might go to, if I could ask you -- we refer to Dame Vivien Rose's Article, which I think is helpful at high level, of identifying how this might fit in at this case. That's at authorities bundle 2, tab 23. You may not have had a chance to look at this, but can I ask you to read section 2, Economic evidence in competition litigation, because I think it's a very useful description of how economics and behavioural science potentially assist each other. **(Pause)**

**THE CHAIR:** We have read it.

**MR HOSKINS:** I am very grateful. The particular point I want to draw your attention to is on page 625. There's the interesting story about the dinner party and then the paragraph, penultimate paragraph, except of course people do not. There is a reference to SIFs; supposedly irrelevant factors. Then it continues:

"A typical SIF that operates in a powerful way on people's decision-making is inertia, i.e. the tendency of people to fail to take action, even if it is explained to them how much they would benefit from taking that action. Another powerful SIF is loss aversion. People will typically avoid the risk of losing something they have even if that means foregoing the opportunity to gain something additional."

Then on page 626, if I can just pick it up at the top of the first column, you see the word "Irrational", I am going to pick it up at the end of the fourth line:

"The importance of the behavioural economists' work is not just in concluding that often people act irrationally. The key insight is that they do so in predictable ways. This means that their apparently irrational conduct is as amenable to study and modelling as the behaviour of the non-existent rational Econ. That is why this new branch of economics can be used to predict outcomes either for the future or when considering a counterfactual for the past."

What Dame Vivien's article explains or summarises the learning is that understanding human behaviour, such as decision-making inertia, can prove the explanatory power of economics. In our submission, it's absolutely obvious the decision-making inertia and human behaviour in relation to decision making will be important in deciding this case.

To put that another way, the mere existence of alternative options and choices does not equate to effective competition if people will generally not take advantage of those options and choices. I apologise, that's a very crude way to try and encapsulate the difference, but hopefully it's an effective way of encapsulating the difference.

We have identified the relevant issues. We've done it by reference to the pleadings. Back to Hausfeld's letter in correspondence bundle at tab 4, page 8. If we can turn to page 9 of that letter, it's (f), it deals with behavioural economics and behavioural science, and there's a description of three areas in which such evidence would be useful.

I should say these descriptions go way beyond what one finds in a normal order for expert evidence. We've already gone beyond what we'd expect to see. But in addition, you then have the references to the pleadings at paragraphs 7, 8 and 9. So we go even more granular than one might expect.

Again, I can show you some examples. First of all, if we can go to our claim form. That's core bundle at tab 18, at page 219. If I could ask you to read paragraphs 61 to 62 and then 64 to 65. It's sufficient to read to the bottom of page 220. You don't have to go over the page. **(Pause)**

I am concerned particularly with the references to human behaviour being relevant. You see it in the final sentence of paragraph 64. You see it in the first two paragraphs of 65 about the effect of the unsafe warning will have on consumers. These are clearly issues that go to how consumers will react to particular situations.

Other examples one can find in Google's defence. If we can go to tab 23, page 410. This is Google's point, 83 (a), they say:

"Users are able to choose between Android and Apple's iOS; and / or switch from Android to Apple's iOS; and / or to multi-home through ownership of devices running each operating system."

Then at (d), over the page:

"As a result, Google is subject to significant competitive constraints and must work constantly to improve the Android OS and to maintain the quality and range of apps available for use on Android devices."

You see that reflects my point that the existence of choices doesn't guarantee effective competition, for example, in the face of consumer inertia. Who knows where these issues go, but you simply see at this very simple stage the types of issues that are likely to arise.

I could go through other examples, but again I think we are into diminishing returns. Those show the types of examples.

Again, this may boil down, I am not quite sure where this will end up with Google, but if it's just a question of Google saying: well you haven't shown with sufficient specificity what behavioural science will deal with, my submission is you have, we've gone far beyond what you'd normally expect in the letter and indeed in the references.

The order we seek is in a completely normal form. Insofar as there are any issues about the issues that will be addressed, we've got an expert process that Google has signed up to that is expressly intended to deal with that. We'll see what Mr Holmes says, but again, I am slightly at a loss as to see what the real problem is here if it's just about specificity of issues.

**PROFESSOR WATERSON:** Just before you sit down, Mr Hoskins, are you suggesting this is a completely different field from the field that your -- the two economists you are asking for would be covering?

**MR HOSKINS:** Well, they complement each other. I do say they are different expertise. It's not a field --

**PROFESSOR WATERSON:** There are, of course, people, including myself, who have written in both areas.

**MR HOSKINS:** Absolutely.

**PROFESSOR WATERSON:** I am not suggesting for a moment I am your expert witness.

**MR HOSKINS:** I think that ship has sailed. No, you are right, you do see an economist

dealing with behavioural issues and that's one of the reasons why our Class Representative was actually keen to make the distinction between a behavioural economist and a behavioural scientist because that expertise of behavioural scientist is intended to be a bit broader than simply what economists may be expert or qualified to comment on, and so that's why we are seeking permission for a particular expertise of behavioural science, though I appreciate there are overlaps and complementarities in there.

**PROFESSOR WATERSON:** Thank you.

**THE CHAIR:** With the proposed behavioural science evidence, how does that actually fit with the economic evidence? I mean, I think in your skeleton you put it, and Dame Vivien Rose said in her article, it can improve the explanatory power of economics. So how are you envisaging that that meshes?

**MR HOSKINS:** Again, we have not instructed these people yet, so this is the lawyer's crystal ball. I would imagine that the behavioural scientist will be looking at, for example, the options that are available, said to be available, for distribution of apps and will be using their expertise to comment on the effectiveness or equivalence of those options from a consumer perspective. For example, there might be reference to consumer inertia.

Then that evidence as to consumer behaviour, I would expect, would be taken account of by the economists when analysing whether, for example, there is foreclosure or not. Because foreclosure will, for example, look at the possible forms of distribution from an economic perspective that will also then have to add in the consumer perspective, I would have thought, in reaching a conclusion. Then we get a sort of Professor Waterson figure who -- he has it in one body which is the pure economics and behavioural scientist, but this would be the two meshing and supporting each other. Thank you.

**Submissions by MR HOLMES**

**MR HOLMES:** Madam, we have two concerns. The first is a lack of clarity about the relevant field of expertise - what the evidence will address. The second is a concern about proportionality and the risk of overlap and duplication.

Taking those in turn, the Class Representative's application was for a behavioural economics expert. Subsequent to the application, we were informed that the expert should be restyled as a behavioural scientist. We were told that that focus includes psychology. Behavioural economics was said to be subset of behavioural science generally.

We have an immediate uncertainty about who we should be approaching if permission were given for this expert and we would need to do that well in advance of receipt of their report.

The scope of permission for evidence in the field of behavioural science we say risks being too broad without a reasonable degree of specificity as to the issues the proposed expert will address. There are some general references in the correspondence to survey evidence or experimental evidence which to our mind raises concerns as to focus and proportionality.

It's not -- I know that Mr Hoskins has sought to present this as a sort of stuck record, but we do think that the identification of the issues is a really important aspect of the process by which this Tribunal can exercise constraint. We -- I am afraid this came to light very late in the day, so I apologise for the fact that it's not in my skeleton argument and I have not shared it previously with my learned friend. It's an order from the *Le Patourel* proceedings in which expert evidence was permitted in the field of behavioural science by Mr Justice Waksman. If I could ask for those to be passed up, sorry.

Do you have enough?

It's a very short point. There is an argument about whether behavioural evidence should be permitted. In fact, there was a draft short form report before the Tribunal to inform its assessment which we don't have here. But you can see from paragraph 6 of the order that in exercising its gatekeeping function the Tribunal considered it important to identify with specificity what the behavioural evidence would relate to. We've got a clearly formulated issue.

We say, given the concern about overlap with the economist, by a person who may well be an economist in their own right -- this is, of course, additional to the economists sought by the Class Representative -- it would be appropriate to take care and to require a properly formulated issue of this kind before giving permission, not least so that Google can work out how it is going to meet this evidence.

We say until further clarity is given as to the specific issues to be addressed by this evidence, permission should be withheld. That's the short point. Thank you.

**Submissions by MR HOSKINS**

**MR HOSKINS:** Two points are taken. First of all, it's said there's a lack of clarity about the scope of expertise. I have shown you Google's skeleton argument, paragraph 46, which accepts that behavioural science is a recognised field of expertise.

In relation to the lack of specificity, we are, I'm afraid, into the broken record, not just on Mr Holmes part, but also in my response is the same broken record.

You have the expert process. Can we go back to it, it probably bears revisiting? At core bundle tab 6, page 130. What's said here is that, because of a lack of specificity about the issues, Google won't know what expert it will have to go and approach and what issues the expert will have to deal with, but that's simply not right on this process because we will have to provide a list of issues to be covered by the behavioural

scientist by 28 July. Then you'll go through the process so that by 8 September, if there are still any issues in dispute, it will come before the Tribunal to be determined. By definition, under this process, any ambiguity about issues will be resolved, one would imagine, in September which will leave Google plenty of time to identify and instruct a behavioural science expert. So again, I really do submit that this specificity point just runs into the wall because of the agreed expert process.

**THE CHAIR:** I do have some concerns about that because I have just looked back at the order we made before -- and I may sound like a broken record -- but paragraph 4(c) is in very similar terms to three, 3.1 and so the Tribunal did envisage knowing what these areas of expertise were going to be when we were determining whether or not to grant permission in relation to expert evidence on certain issues. We now seem to be kicking that down the road after having granted permission.

**MR HOSKINS:** We are trying not to kick it down the road. We want permission today. If we have disappointed the Tribunal or if we have not done exactly what you wanted, I apologise for that, but I have shown you Hausfeld's letter in which they have described in terms which are in many of the categories more granular than one would expect in an order, for example.

**THE CHAIR:** I think the problem is if you refer to paragraphs in a pleading, it's quite difficult to extract from that paragraph the exact issue that you are proposing your experts will address.

**MR HOSKINS:** I say it's too granular is the complaint in relation to that. Because what one would have to do is go through all the pleadings and then collate and collect all the issues that arise from the pleadings into subheading issues.

**THE CHAIR:** Well, extract them, yes.

**MR HOSKINS:** And present to the Tribunal a list of --

**THE CHAIR:** A list of issues.

**MR HOSKINS:** Exactly. But we've done that, we say, in the letter. We are simply between a rock and a hard place and Google are in the same place as us because they were ordered to do this as well. So, what you have is definitions of the issues at a high level, as one would expect to find in the order -- and that applies just as much as Google are seeking experts and they've done the same as us for the agreed experts -- and then you have both Google and we have given you then these detailed references to paragraphs. What it is missing is the thing in the middle which sort of collates and gives you something more granular than the headline and less granular than the paragraphs.

In our submission, if it's just a timing of identifying the issues, I say there are two separate questions for the Tribunal today. One is: should any of these orders be made because you are satisfied that this expert evidence is going to be appropriate and helpful to the Tribunal? If the answer to that is, yes, then the order should be made. Then there's the issues point. But we have the expert process for that and any specific issues relating to the issues -- I am sorry, that's terrible tautology -- will be flushed out and necessarily determined by that process. I don't see any, with all due respect, I don't see any benefit in -- if the Tribunal is satisfied, for example, we should have a second expert economist or we should have app expert or we should have a behavioural scientist, and saying we won't get permission now because we want more information on the issues. Because if you are satisfied at the general level it's going to be necessary, my submission is: please allow us to have that permission because then we can instruct the individuals and then we can work with them on the issues. We are again in this sort of chicken and egg situation for us.

**THE CHAIR:** You mentioned chicken and egg, you mentioned it earlier actually and I wanted to come back to you on this in the context of whether or not there should be two competition experts. It also arises in this context. Presumably, Mr Holt can give

a view about where the dividing lines can be and in asking for a behavioural expert your team have formulated a view, even at a high level, as to what general issues you expect the behavioural scientist to address, so --

**MR HOSKINS:** I wouldn't say we have certainly done that for the behavioural scientist in that letter, because it's not just references to the paragraph.

**MR FRAZER:** With respect, the Hausfeld letter in paragraph (f), as with the other expert areas, it does say at least it's kind of a minimum rather than an actual description of the areas as a whole where the expert would cover. As you can see, "One expert in the field of behavioural economics, addressing (at least):" one, two and three, so it doesn't really give us a clue as to the complete area of expertise that you are looking for.

**MR HOSKINS:** I understand. I am looking at it is -- maybe this is too binary, but maybe it helps to break it down. The first question is, as I said before: is it appropriate or necessary for there to be an expert in behavioural science? To answer that question, the Tribunal doesn't need to know every issue it might come within that expertise or be dealt with in that report. It's sufficient for you to come to a conclusion: yes, we are clearly going to need a behavioural science expert on, for example, one or two issues and you say, yes, I can see how this is going to arise.

Then there is an issue as to the scope of that evidence, precisely what issues, beyond the ones that are necessary to show you need that sort of expertise in the first place, are going to be dealt with and that's a more granular aspect of case management and that's what the expert process deals with.

But they are absolutely, I accept, related questions but they can be approached as distinct questions.

**MR HOLMES:** Madam, may I ask one question of clarification from Mr Hoskins? I am not currently -- I don't currently understand in relation to the chicken and egg problem

why it is said that the Class Representative's team couldn't engage with potential experts in advance of their formal instruction. That happens every day and as a matter of course and, for example, in relation to the app industry expert, a candidate has been identified. That is made clear. It seems that there may be an unduly rigid view being taken about the discussions that can be had at this stage, but perhaps Mr Hoskins can clarify.

**MR HOSKINS:** Experts are like lawyers, there are conflicts issues. It's all very well having initial discussions with an expert whether they would be prepared to accept an instruction, but as soon as you start discussing the specifics of the case with them, if they then are not instructed because, for example, you prefer someone else, they are conflicted and for obvious reasons, just as lawyers are loathe to enter into detailed discussions of cases before instructions, it's the same with experts.

In addition, this is a field, this is an area in which there is a lot of litigation, a lot of experts are conflicted or have an eye on a particular prize, and there's not a surfeit of experts out there, to be perfectly honest, that one can find.

My solicitors have been working very, very hard to find appropriate experts, but it has not been easy, they are not hanging on trees, and you simply go and pick them off.

**MR HOLMES:** Madam, with respect there's no question of a conflict which would arise from discussions in the abstract about the evidence that might be given.

**MR HOSKINS:** There is on specific division of issues. I simply don't accept Mr Holmes' submissions.

**THE CHAIR:** That's on the two competition experts point, yes.

I am quite concerned about the behavioural economics and -- sorry, behavioural scientist issue. It just seems a very broad issue and from what you are telling me you haven't been able to talk to a behavioural scientist about it to determine whether or not appropriate expert evidence --

**MR HOSKINS:** Not the precise issues.

**THE CHAIR:** No.

**MR HOSKINS:** I am sorry, I am not trying to be unhelpful, I have to be careful about privilege with discussion with potential witnesses. That's another reason for the fact I am treading somewhat on eggshells.

**THE CHAIR:** Can I just take you to the correspondence bundle and page 9, which is the March letter setting out the issues on which behavioural economics might be required? It's paragraph 4(f)(i) behavioural economics addressing -- and I accept it's science now – "in relation to market definition, barriers to switching by users between devices and / or platforms, taking account of their decision-making processes in the circumstances of the case". Then if you go to the footnote, footnote 7 --

**MR HOSKINS:** Yes.

**THE CHAIR:** -- that refers to paragraph 29 of the claim form.

**MR HOSKINS:** Yes.

**THE CHAIR:** Now, if we go to paragraph 29 of the claim form. I have now got to find it. That should be at page 219 of the core bundle.

**MR HOSKINS:** Tab 18.

**THE CHAIR:** Yes. So page 219. Sorry, 209. 209. I am now not finding it. Bear with me. 209. Does that have paragraph 29 on it?

**MR HOSKINS:** It does, yes, it's at the top of that page.

**THE CHAIR:** If you look at 29, I was trying to work out how the behavioural science is going to be relevant to that paragraph.

**MR HOSKINS:** I have been through all of these references and hand on heart some of them are more obviously issues for behavioural scientists than others. So that's why I have been binary in the approach. I am not seeking permission -- and you'll see the order is not frame in that way -- for every single one of these paragraphs to be

dealt with. These were given, you'll see, by way of example.

That's absolutely right, the question is: are there some issues which clearly require a behavioural scientist? If so, I say you should make the order. Then the question is: and what specific issues should they address? And that's a separate process. I make it absolutely clear, these are given by way of examples. In my own personal capacity, preparing to present this, I read through them and I thought: well, not all of these are obviously (inaudible).

**THE CHAIR:** You only referred us to one example actually, which was at page 219 of the bundle. I think it's probably about time we broke for lunch, do you want to --

**MR HOSKINS:** I think I took you to one in the defence as well.

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

**MR HOSKINS:** The examples I gave you were claim form, core bundle tab18, page 219, paragraphs 61 to 62 and 64 to 65; the defence, core bundle tab 23, page 410, paragraphs 83(a) and (d). The other one, which I didn't take you to, page 422, paragraph 110(b) and 111.

**THE CHAIR:** Are you able, over the break for lunch, to identify any other examples that you want us to look at?

**MR HOSKINS:** Yes, I can certainly do that, yes.

**THE CHAIR:** Thank you. Shall we come back at 2.10?

**(1.10 pm)**

**(The luncheon adjournment)**

**(2.10 pm)**

**THE CHAIR:** Yes, Mr Hoskins.

**MR HOSKINS:** There may be a bit of coming and going, but that's because some people are trying to agree some of the bits that might otherwise come up this afternoon.

**THE CHAIR:** That is to be encouraged.

**MR HOSKINS:** If there is shuffling -- exactly, it's definitely to be encouraged.

You asked me to come back to the behavioural scientist point and in particular to give you some more examples of the sorts of issues that might arise, so I have come armed and ready to do that.

Let's just remind ourselves from Dame Vivien Rose's article that there were two high level types of issues identified in the article that might well benefit from evidence of a behavioural scientist.

The first one was inertia, which in the article is loosely defined as the tendency of people to fail to take action. I think we all recognise that. Loss aversion, people will typically avoid the risk of losing something they have, even if that means foregoing the opportunity to gain something additional which might be a bird in the hand type point.

With that framework in mind, can we look -- I will take you to certain paragraphs of Google's defence, if I may. That's core bundle 1, tab 23, and again at page 398. This is not intended to be exhaustive, just to satisfy you with these examples.

**THE CHAIR:** Yes.

**MR HOSKINS:** Paragraph 54, the final sentence:

"It is straightforward for a user to delete the Google Play Store Icon and disable the Google Play Store so that it disappears from the user's home screen and app drawer."

The point here is you are not tied to using the Google stuff, you can delete it and use something else and we say that's an area where you will need evidence on loss aversion because the mere fact that you can do it does not tell you how likely it is that someone will do it. So that's paragraph 54.

Then at page 402, paragraph 65:

"OEMs can and do install rival app stores on the majority of the mobile devices distributed in the United Kingdom. They can and do display them prominently. There

are a multitude and increasing number of alternative and available distribution channels, which developers and GMS Device users can and do use."

That's talking about the phone manufacturers.

Then it switches to users of the phones:

"To the extent that users prefer to obtain apps via the Google Play Store, this reflects their choice from among the available options and competition on the merits."

Now, where you are dealing with consumer choice, as I said this morning, the mere fact you have a number of alternatives does not tell you everything you need to know about whether there's effective competition. You need to know how likely it is that choice is to be exercised, for example, because of inertia.

Again, if you are like me, you will have a device and you'll have certain apps on it and you will be quite attached to them and the idea of going to a new app certainly fills me with fear. But this is an example of that.

Page 411, paragraph 85(b):

"Users can choose to purchase apps and / or in-app content through other distribution channels and not use Google Play Store’s billing system."

Again, there is a choice there and the question is: will they? Will inertia prevent them from actually taking advantage of alternatives?

Page 417, paragraph 102(e):

"Users can and do ignore pre-installed apps and can obtain alternative apps quickly and easily through other distribution channels."

So, there is a question about inertia immediately.

"There is also no obligation on GMS Device users to use, or keep any app forming part of the GMS Suite. They can delete the app's icon or disable the app [so there is loss aversion]. On each occasion users wish to obtain an app, users have the choice as to which app store they use [again query whether inertia will play a part]. Users

can also obtain rival app stores directly and easily by use of many alternative, non-Google Play Store distribution channels."

Again, a potential inertia point.

Paragraph 103(f), so just over the page:

"Users can and do ignore pre-installed apps and can obtain alternative apps quickly and easily through other distribution channels."

That users can and do ignore pre-installed apps is a specific pleading about, we say, about human behaviour.

"There is also no obligation on GMS Device users to use any app forming part of the GMS Suite: they can delete the app's icon and disable the app [so again a loss aversion point]."

Then over the page on (g):

"Users can choose between the many distribution channels available to them to obtain an app or digital content. Users can also obtain rival app stores directly and easily by use of the many alternative distribution channels available to them."

Again, an inertia point, but will they avail themselves of those opportunities?

**PROFESSOR WATERSON:** Mr Hoskins, can I just raise this?

**MR HOSKINS:** Please do.

**PROFESSOR WATERSON:** I think the theme of your remarks is along the lines of how likely are these things and so then the question is: well, is that a factual issue, how likely are they? Or is it an issue on which you require expert opinion which will presumably be based on factual material?

**MR HOSKINS:** Yes, or it could be an ‘and/or’ on those things. I guess you could try and do a purely factual case. You could do a case where primary facts are obtained and an expert opines upon those facts. But I accept that both of those are possibilities.

**PROFESSOR WATERSON:** I am coming to -- looking at the question of whether you

need an expert to make these points or whether, for example, one of the economists could, if you have two economists, themselves distil the evidence, as it were, and therefore give their expert opinion on the evidence which follows from the facts, I think. You know, one might expect Google to provide some quantification of these remarks which are very broad-brush remarks that anyone could make.

**MR HOSKINS:** You might expect, we don't know yet, we have not seen the disclosure which I appreciate is not an answer to your question we don't know what we are getting.

Where we are coming from is the economist we have in mind are maybe not as multifaceted, professor, as you are in terms of -- and you will be aware that, like barristers, economists have different specialisms and strengths, et cetera.

To go back to this morning, given the complexity of, if I can call them, the pure economic issues, it won't surprise you to hear that even with two economists we think the pure economists -- if that's not an offensive term, I don't know what the appropriate term is -- will have enough on their hands dealing with the economics. If it is, for example, necessary to obtain facts to deal with these sorts of consumer behaviour issues, then that is something we want, we would like to be able to instruct a specialist to do.

You will see from the examples I am giving you these aren't some isolated points where I am just picking out a little point here, a little point there, this runs a thread through Google's case which is ‘don't worry because there are all these other options’ and, in our submission, this issue - regardless of the possibility - is that an answer to the competition question is not going to be the whole issue. There is going to be a fundamental issue about the extent to which in practice, because of these sort of human behaviour characteristics, these are viable or practical options and that's why we want to have this evidence. It's to meet Google's case as pleaded against us. We

are concerned that the economists we have in mind and their specialisms will not allow them to deal with that and/or they will not have time to focus on it because it is going to be an important part of the case, not a peripheral part of the case.

I could carry on with more examples, but I don't think it's going to help you. I have either crossed the threshold or I haven't, I think, with those examples.

**MR FRAZER:** Could I ask you a supplementary on the examples you've given? It seems that the behavioural scientist will be able to say why a consumer, a typical consumer, may well have availed him or herself of those opportunities and therefore why they did or didn't choose some alternatives.

But won't the competition economist or economists be saying whether or not they did? In other words, they will have the data for the proportion of consumers or others who have and who have not gone to an alternative and therefore will the Tribunal not have enough knowing what happened rather than knowing why, what motivated a consumer to do or not to do something? In other words, what will this scientist add to what the economists will already be giving in relation to, say, market definition, market power and share, et cetera, et cetera?

**MR HOSKINS:** Hand on heart, I don't know. It's possible that that is a situation that could arise coming out of the evidence. But looking forward, what my submission is to you is if you look at Google's pleading, these languages about choice, willingness, et cetera, they plainly put in issue these sorts of issues of consumer behaviour and I am concerned if we simply went down an economist route and the situation, Sir, you've described doesn't prove to transpire, the Tribunal is going to be left with a very big gap in evidence in relation to an important issue.

But I can't now rule out the possibility that you describe.

**MR FRAZER:** What about the possibility of overlap? I noticed in the Hausfeld letter one of the first examples is in relation to the behavioural scientist contributing towards

market definition, for example. That's obviously what the competition economists or economists are going to be doing as well.

**MR HOSKINS:** Yes.

**MR FRAZER:** Again, is there a danger that we are looking at two experts on the same topic?

**MR HOSKINS:** I think I was asked and hopefully answered a similar question this morning, which is we very much see the behavioural scientist as complementary to the economists. So insofar as a behavioural scientist has an opinion on issues that are relevant to whether it be market definition or any of the alleged abuses it is then the economists who will take account of that evidence in producing their own opinion. That's the way we see it.

It also ties into the sense of what Professor Waterson was asking me, is it something the economists could do themselves? You have my answer to that and that's why we see them as complementary. They are different expertise and that's not in dispute between us, as I showed you this morning, but we see them as complementary rather than one person dealing with the same point.

**MR FRAZER:** So, you'd see this as somehow upstream of competition economists?

**MR HOSKINS:** I think that's the way it would work, yes, rather than downstream. It would work that way round, I would have thought, absolutely.

**MR FRAZER:** Okay.

**THE CHAIR:** So, would the competition economist expert report be making -- be drafted on the assumption that what the behavioural scientist said in their report was correct? Is that how you envisage it? Sorry, it may be unfair.

**MR HOSKINS:** No, no, it's absolutely fine, because this arises in other cases where there are intertwining experts. This isn't the first case where this has happened. What generally happens is the experts' reports are prepared sort of in tandem, they have

sight of each other's drafts and then in final report, X will say: I have read Mr Y's report and I base my report on the following assumptions which were established in this report. So, there's not a practical problem there. It's common to have cases with intertwining experts in that way who are required to deliver their reports at the same time and that's the way it's done.

**MR HOLMES:** Madam, I don't mean to prolong this. Obviously, these submissions were in response to a question from the Tribunal before the break. I just have one very brief submission to make, if you will permit me to?

**THE CHAIR:** Yes.

**Submissions by MR HOLMES**

**MR HOLMES:** It was really in response to Professor Waterson's question. It's simply to note that there is, of course, data about what users actually do which the economists will be addressing and will be negotiated as part of the stage one disclosure where Google Play transaction data, broadly understood, will be under consideration.

This isn't a question where one needs to speculate about how users might behave on the basis of aversion or loss aversion or the unwillingness to act; we can see what they actually do. There are revealed choices which will be the subject of discussion by the economists.

Of course, the test for an expert isn't whether it's nice to have, whether it would be an interesting matter as general relevance to the themes under discussion, but whether it's reasonably required for the Tribunal to decide the matters before it. There is a real concern on our part that this will needlessly complicate and to add to the expense of what are already vast, sprawling proceedings, to use the language of the Court of Appeal in *McLaren*.

**THE CHAIR:** Thank you.

**Submissions by MR HOSKINS**

**MR HOSKINS:** I think, just in response, the word "sprawling" is used. I mean, these are allegations that Google is facing throughout the world, and they require -- they are worth a lot of money, and they are complex. We don't shy away from that. Again, Google can't fall back on this, it is all going to be a bit too expensive. It's really not apposite in this context.

Are you raring to begin with disclosure issues?

**THE CHAIR:** Absolutely, never a better moment.

**MR HOSKINS:** I can tell from your faces.

Again, there's some agreement but not others and I think we've done quite a good job, pat ourselves on the back, and try and identify what remains in issue.

The current position, just to remind ourselves, is the Defendants are due to give disclosure on 25 August 2023, subject to any further order, so that's where we sit today.

The parties have agreed to conduct a two-stage disclosure process, but not all the details of that process. The parties have agreed that documents identified in the existing repositories, which are identified in section 1 of Google's disclosure report dated 20 February this year, which we refer to the 'DR' for short, will form the starting point for that disclosure.

If we can, let's go to the DR and see what those existing repositories are. That's core bundle tab 8, page 137. There is a series of repositories. You probably just want to quickly look because I am going to be returning to some of them. In particular, number 1, which is existing US proceedings. I am going to refer to two, which are, in fact, disclosure from the US which postdates the US proceedings, so it brings us up-to-date.

Four is the EU Commission's Google Android investigation. I will need to comment on R11, which is the UK Google Play financial data, but I will identify each one when we come to it, but this is what Google has offered by way of stage one disclosure.

Now, you'll appreciate that with this information and with the EDQ, which is behind the next tab, which is more about the mechanics of how the searches will be carried out, we start without knowing very much about exactly what documents are available. One of the exercises we have been doing is to ask Google a lot of questions, I don't shy away from that, to try and get a handle on what they are offering to try and work out whether this is going to work or not because it's in everyone's interests disclosure has to work and has to be given time for all the expert reports, et cetera, to follow. This has to be got right.

If we can go back to our draft order, just so you can see what we are seeking in relation to disclosure. So that's core bundle, tab 6. If we can go to it, page 130. At the bottom of the page, disclosure process. We are asking Google to provide disclosure of the documents identified in Stage 1 Disclosure. So that's to be in the repositories by 25 August 2023.

7.1, as I said a moment ago, those existing repositories are to form the starting point for disclosure.

7.2 is for Google to carry out certain tests on those repositories to try and work out how many documents are likely to be disclosed if you put in certain search terms and/or certain custodians. So, it is to allow the parties to try and get a grasp on proportionality.

7.3 is for us to make proposals about custodians.

7.4 is for us to make proposals on search terms. Again, Google has been proposing custodians and search terms, but there is a difficulty for us in trying to contribute to that. We are doing our best to get information from Google so that we can

meaningfully contribute to that, but it's not an easy process.

7.5 “Google shall then apply the Agreed Initial Search Strings to the Initial Repositories by reference to the Agreed Initial Custodians, resulting in a universe of responsive documents for production”.

Then 7.6 is relating to a particular aspect of electronic documents. So that's effectively stage one.

Stage two is we then have to review that Stage 1 Disclosure -- and I pause and point out that's going to be quite an onerous task -- and then we have to submit any supplementary disclosure requests in stage two.

So that looks nice and simple. You can see the sense in it. But it's going to be a big and quite difficult job. We are suggesting that there should be a CMC before the end of this year so that you can knock our heads together on anything that has not been agreed and we are suggesting that the stage two disclosure should be completed by 12 January 2024. That's not agreed.

But bear in mind the sort of crucial next date for us in the timetable is our expert reports are due on 12 April 2024. As I said this morning, we need to have the disclosure in good time to allow the experts to analyse, process it and produce their opinions. So that's the sort of hard line we are all working up against. That has to work.

Annexed to our skeleton there was a very unappetising table with various information --

**THE CHAIR:** I am saying nothing, Mr Hoskins.

**MR HOSKINS:** No, absolutely. I think I have said it all. That's why I passed that particular task to Ms MacLeod, who will be addressing you on that, if need be. I am not even sure how many of those are going to be live.

I will explain the purpose of that information request was to inform us so we could play our role in stage one in terms of input on custodians, on search terms, et cetera,

I mean, that was the purpose of that. But I don't want to hold out too much hope, but that is what the scurrying is about and hopefully we will deal with quite a lot of those by way of agreement.

The first issue between us is the nature of the review of repository one documents.

**THE CHAIR:** Yes.

**MR HOSKINS:** So that's the existing US proceeding documents. The Defendants' proposal is that they filter the documents by means of custodians and search terms and then disclose that universe of documents without doing anything else to it. So that's Google's proposal.

Our proposal is that after the custodian and search terms have been applied, Google should conduct an individual document review for relevance to these proceedings to further whittle down the disclosure that's provided. That's what lies between us, that extra step.

We don't have any particular demands about how the individual review can or should be done. It can clearly be done by humans, depending on the number. But also, there are appropriate machine learning programs these days which are more sophisticated than just putting in a search term and the program learns what's relevant. It takes time obviously to educate the system, but once you've educated it can then assist in that further review. We don't mind if it's a combination of those two or which process is used.

The reason that this dispute is relevant is that if a process using only custodians and search terms were used, it's likely that a large number of irrelevant documents will be disclosed. That's our concern and given the tightness of time for us in terms of analysing the Stage 1 Disclosure and making our specific disclosure requests for stage two, we are concerned that we can actually do the work in the volume of documents coming in to us. Obviously, it impacts on our ability to do that.

I will be corrected if I am wrong, but it doesn't appear to be disputed that someone is going to have to do a further individual review of the documents that will be produced by search terms and custodians. I think the only issue is whether it should be us doing that individual review or whether it should be Google doing that individual review. The reason I say that is if you go to Google's skeleton at paragraph 61, so that's core bundle, tab 2, page 2.16, paragraph 61.

**THE CHAIR:** Yes.

**MR HOSKINS:** The final sentence:

"…once the documents are disclosed, the CR's legal team can deploy technology-assisted review to reduce the burden and costs of the process".

It seems to be accepted that a further individual review has to take place, it might be human and/or technology assisted, but the only issue between us is who should do it. In our submission, it's Google that should do that task for the following reasons.

First of all, the normal procedure in any commercial litigation, civil litigation, is it's for the disclosing party to review documents for relevance before disclosing them. That's just how it's done. It's obvious why that is the case -- and this is my second -- sorry, no, I'll come on to it, it's obvious why it's done, and I will explain that in a minute.

My second point is that Google originally -- well, as far as we understood -- originally proposed to conduct a review of individual documents following keyword searches. I would like to show you that. This a dispute between us and I don't want to dwell on it because it doesn't actually matter to you who said what, I just want to show you why we thought what we thought.

If we go to the EDQ, that's core bundle tab 9, at page 139, so this where it is set out the sort of mechanics of the search. If you look at section 6 on page 142, methods of search, keywords, if you could read section 6 -- and I emphasise the words in the final box (2) – “The keyword searches will be supplemented by a review of individual

documents, including reviews for relevance and privilege."

It appeared to us that Google was originally intending to conduct individual reviews. A lot of heat has been generated about that, but --

**THE CHAIR:** That's where it comes from.

**MR HOSKINS:** That's where it comes from, for what it's worth.

My third point -- and this does tie into why it's the disclosing party that normally has to review documents for relevance -- is the disclosing party knows its own documents. It is far better placed than the receiving party to conduct an effective relevance review, so there's an effective point. Equally, because it knows its own documents it's going to be quicker for the disclosing party to conduct the review and it's doing to be cheaper for the disclosing party to conduct the review than it would be for the receiving party to do it.

The fourth point you have already which is that under the stage one process we will have limited time to review the documents disclosed and to identify any specific disclosure requests for stage two, and we say in those circumstances it would be unfair to require us rather than Google to have to review the documents for relevance to sort the wheat from the chaff.

The fifth point is that Google's skeleton suggests that for obvious reasons of proportionality it does not wish to conduct a relevance review for disclosure. So, Google wants to put a proportionality point to you. But in our respect, that argument doesn't hold water on the material they've put before you.

If we can go to Google's skeleton. That is at C, tab 2, core bundle tab 2, back to page 2.16, at paragraph 60(a), they are talking about repository two, which is the post US production material. You'll see at 60(a), final sentence:

"The position is of course different as regards the Post-US Production, in respect of which Google proposes to conduct a manual review..."

So, they are going to do a manual review of R2:

"... of around 180,000 documents (based on its proposed search terms.)"

What they are saying is we'll put the search terms in, that will produce around 180,000 documents and we will individually review those documents before disclosing them. So, 180,000 is doable. That's what Google are telling us.

But then one sees what they say about R1 and that is at paragraph 52(a) of their skeleton argument. You'll see at the bottom of page 2.13 a similar part:

"Applying Google's proposed search terms (refined since the DR) to the documents 13 custodians would result in the disclosure of approximately 120,000 documents."

We don't understand the proportionality point where Google says it's proportionate to review 180,000 documents before we disclose them, but we couldn't possibly review 120,000 before we disclose them.

Now, these figures aren't fixed because part of stage one is, of course, we get to comment on the custodians and search terms, and I am quite happy to accept that the likelihood is that the number of results produced by search terms and custodians will go up because we will want more than Google are currently offering. I fully accept that. If Google want to come to the Tribunal and depart from the normal process of a manual review, it is for them to convince you it's disproportionate to require them to do so. In my submission, on the basis of what they've produced to you, it's not possible to conclude that a manual review of R1 is disproportionate.

There is a slightly have my cake and eat it argument here in any event because, of course, the more R1 documents that are to be reviewed, the more efficient it will be for the Defendants rather than for us to do it. The bigger the universe the more important that Google does it, not the less important. So, this proportionality point doesn't really help them, it helps us.

What I was going to do was just -- these are all issues about the repositories, so I will

do -- I've done R1. I've got a similar point on R4, and I have something I need to raise on R11 and then I will sit down and give a bite size approach because I think it will be a bit too bitty if we don't do that way.

Moving on to the review of repository four documents. Just so you can remind yourself what those are, if we can go back to the disclosure report, so core bundle tab 8, page 137, repository four. Google documents produced in case AT.40099, Google Android and that relates to the investigation by the EU Commission that led to the Commission taking a decision against Google.

If I can show you what the Defendants say about this in their skeleton. Core bundle tab 2, page 2.14. It's paragraph 54. They say:

"Aside from documents from Google Android, documents from these additional repositories [which are identified above] will be manually reviewed."

The point is no manual review of R4 Google android documents.

Then they go on to say:

"Documents for disclosure from Google Android (which total around 90,000 of which c.40,000 were disclosed in the US Proceedings) will be identified by the application of search terms. Tests using Google's proposed search terms capture 6,435 responsive documents."

What Google has told us in correspondence is that the search terms have been applied to the 40,000 documents disclosed in the US proceedings, not the whole corpus of 90,000 which they hold. That's why you get a figure of 6,435 if you apply the search terms to the 40,000 but not the 90,000.

There are simply two disputes in relation to R4. First of all, we submit that Google should apply the agreed search terms to the full 90,000 EU Android documents. We've asked them to run that test, but they haven't done it, so we haven't got to the stage of knowing whether that produces a proportionate result or not because they haven't

done it, they have only done the test on the 40,000. But we say the 90,000 should be in play because what are we comparing? The EU Google Android decision was a decision applying EU law to Google's practices. There's far more likely to be a read across from that EU investigation to our case than from the issues in the US proceedings to our case and that's why we think it's important that the 90,000 are reviewed.

The EU Google Android decision, it's not the same as our case but just to give you a notion of the similarity, it's a decision that found Google had infringed Article 102, so it's an abuse case, and the main abuses were:

"Tying the Google search app to its Play Store app store. Tying its chrome browser to the Play Store and its search app, and making manufacturer's licensing of the Play Store and the Google search app conditional on agreeing to so called anti-fragmentation obligations which meant that OEMs wishing to install these apps in any devices were prohibited from selling other smart mobile devices rather than alternative Android versions."

So not the same, it's an abuse case and we just say if you are looking at apples and pears or apples and apples, Google Android is a Golden Delicious and we are a Scarlet Lady, or whatever that type of apple is, and the US proceedings are a pear. So, let's see all the apples is basically the submission here.

The second issue in relation to repository four is once the search terms had been applied, we say that Google should conduct an individual review for relevance. It's the same point as R1. Whilst the search terms have not yet been agreed, the Defendants' proposed terms produce 6,435 documents when those search terms were applied to the 40,000.

Now, even if they applied those search terms to 90,000, let's stick our finger in the air, we are talking about 15,000 documents. There can't be proportionality issue about

manual review of all those 15,000 documents, but it could make a difference to us because of course we are not just getting R4, we are getting all other repositories. We need Google's help so that we can effectively manage the stage one disclosure and make sure the timetable holds.

That's on R4. Then R11, I can't ask you to do something on this today, but I want to put it on your radar so I will deal with it relatively quickly. This only came to light on Monday as far as I am aware, but I want you to be aware of it because it may well come across your desk in the weeks to come.

You know that one of the Class Representative's claims is that Google has been engaging in excessive pricing and you will all be aware that an excessive pricing case generally starts with, requires, a comparison of the revenues and costs relating to a particular activity and to put it crudely, you look at the difference between the revenues and the costs and you see whether the difference is excessive or not. If only it were that simple, but that's the rubric of excessive pricing cases.

That quite obviously requires detailed financial information, and particularly I think in relation to costs because, of course, there will be costs that are common to the business and a certain proportion of those costs has to be assigned to the certain activity in order for the comparison to be fair. So, there's an exercise to be done there in terms of number crunching.

Now, let's look at what Google have told us they are going to provide in relation to that. If we go back to their disclosure report, core bundle tab 8, page 138. R11 at the top of the page we are told we would be getting UK Google Play financial data. There has been correspondence about whether that would be manually reviewed, et cetera, and we got a response on the 19th, which I think is Monday. That is in the correspondence bundle at tab 78. As you see, it's a letter from RPC dated 19 June. It's over the page at page 260, if I could ask you to read paragraph 6, please.

Now, bear in mind that the way disclosure works is that we plead our case and then there is an obligation on Google to identify particular sources of relevant information and in this case to tell us about them.

We plead a case of excessive pricing with all that that entails. We are told there is R11 and then on Monday we get this letter saying: actually, all you are going to get is some profit and loss accounts and some data on UK revenues if you want that, but you can't have anything on UK costs. Now, you will immediately see the problem. That just won't do. There is actually an obligation on Google to engage with what is alleged against it and to identify what information, what data it has that will allow the Tribunal to resolve that issue. That goes not nearly enough to that obligation, and it is an obligation.

What Google has said is you tell us what you want, but with respect that's not the way it works. In the first instance, the whole purpose of the disclosure report is for Google to tell us what they have and then the parties can engage, but just to tell us that there is UK Google Play financial data and then say: over to you, Class Representative, you tell us all the material you need. That simply isn't good enough.

Now, there's no application today because this arose on Monday, we'll have to take it up in correspondence, but this clearly a fundamental issue because the excessive pricing case is going to have to be tried. We are going to have to take this up in correspondence, but I simply put it on your radar because this is going to have to be resolved in short order.

Just very briefly, despite my wittering, there are really three issues for you to decide: should Google conduct a manual review of the R1 documents before it discloses it to them; should they conduct a manual review of the R4 documents before they provide those to us; and should the search terms, custodians, et cetera, be applied to the 90,000 R4 documents or the 40,000 documents? Those are the three issues that

arise out of all this detail. Thank you.

**Submissions by MR HOLMES**

**MR HOLMES:** Thank you very much. Madam, can I very quickly pick up the repository 11 point to begin with?

**THE CHAIR:** Yes.

**MR HOLMES:** I understand that Mr Hoskins is not actually asking for anything today, but I do want very firmly to refute any suggestion that there is anything inappropriate in the way that Google has approached the question of the financial data. Google is a company which holds, of course, data about its financial performance, its profitability and the costs that are incurred in the course of doing business.

The proposal is, which is accepted, that there will be forensic accountants who will address the question of whether pricing is excessive by means of an analysis of Google's financial data.

The Class Representative will be working with their accountant and the accountant will be well placed to identify what financial data they require for that analysis. There's no rocket science about that. Moreover, they can ask for further data if they require it.

The offer contained in correspondence, which Mr Hoskins showed to you, was ours -- after asking for clarification about what financial data they wanted -- this was our proposal as a way of cutting through. It's a sensible, obviously well-directed proposal for the kind of material that will be relevant to assessing profitability for Google's businesses for the purposes of excessive pricing analysis.

If they want other data, they are at no disadvantage in understanding what financial data will be relevant for the purposes of an excessive pricing analysis, and we are no better placed than they are to know what that data is. Really it is for them to make requests as to what financial data they would like to have disclosed going beyond the profit and loss quarterly -- provided on a quarterly basis -- which should, we think,

provide a good basis for analysis. But really there's no basis for the criticisms that are made by Mr Hoskins about that.

**THE CHAIR:** I have that point on board. I assume that you will be corresponding about this point after today's hearing.

**MR HOLMES:** I hope that there will be sensible requests. There will be an attempt to identify what financial data their experts consider will be helpful for the purposes of analysis going beyond profit and loss accounts which I think are a very used by -- for management purposes which are the obvious place to start. But really to push the onus onto Google isn't realistic in those circumstances in relation --

**THE CHAIR:** There's something to be said for a staged approach. Can some items be provided in advance?

**MR HOLMES:** Quite. Given the two stages, I think that fits well, Madam, if I might say so. Obviously, we are going to be providing the profit and loss data as we've offered. If there's further material that they need, they should come forward and ask for it at whatever stage they consider appropriate. But it can certainly be addressed at stage two. But there's really no way in which Google can be faulted for the approach which it's taken in relation to repository 11.

The suggestion of a relevance review for repository 11, which we've heard a few times from the Class Representative, and which I think my learned friend mentioned on his feet, makes no sense to me at all. How does one review a financial database for relevance? It's not like a set of documents that one can interrogate to see how they fit with the issues in the case. Anyway, that's my position on repository 11.

**MR HOSKINS:** Just one -- all we know about the (inaudible) information is the R11 description in that letter.

**THE CHAIR:** I would obviously encourage the parties to --

**MR HOLMES:** Liaise.

**THE CHAIR:** -- get to a point where they can and if it has to come across our desks, it will, I am sure.

**MR HOLMES:** Of course. We are open and we are ready to receive requests: requests for information or requests for data. And we'll consider those when they land. But I think the suggestion that Google hasn't behaved appropriately in relation to that repository is not well founded.

Can I turn now to consider the question of manual relevance review for the documentary repositories? And I have in mind there the US discovery materials - that's repository one, and the Android disclosure - that's repository four.

The short answer to this is that both of those repositories have already been the subject of individual review -- manual review for relevance -- in the context of the US proceedings, and it would be wasteful and duplicative to require a re-review of many tens of thousands of documents in those circumstances. That is what is disproportionate here, and it's what sets these repositories apart from repository two which is the post US discovery repository which hasn't been subject to any equivalent review process. So, there we recognise that a fresh review is required and responsibly we will take that on board.

But for those that have already been reviewed, we say it is disproportionate to conduct a further review. That was the approach arrived at in *Kent,* and we say that it was the right approach. It's the one that should also be adopted here.

The Claimant's essential reasons for proposing a manual individual document relevance review for these repositories are twofold, and it might be worth just seeing how they put it in their skeleton argument. I can't lay my hands on it. It is at paragraph 30(c) which on page 7. You see there that they say that "…a large number of irrelevant [this is the third line from the bottom] documents are likely to be disclosed and it would fall on the CR to conduct an individual document review for relevance."

That's point one.

Two points there. First, they say without manual review a large number of irrelevant documents are likely to be disclosed; and, the second point, they contend that without a manual review they will themselves need to conduct a review on an individual basis for relevance. We say that neither of those propositions is correct.

The documents from the US discovery have already been focused by reference to the issues in this case. That is because of the substantial overlap between the US proceedings and these proceedings. It follows also from the fact that a massive manual relevance review has already been done in the States.

The appropriate means of obtaining a relevant and proportionate disclosure set is therefore best done by using search terms and custodians without reviewing tens, if not hundreds of thousands, of documents manually for a second time.

The Claimants' proposal is a recipe for imposing massive unnecessary expense and also substantial delay to disclosure.

**THE CHAIR:** Can I just pause you there? My computer is telling me it's about to run out of power.

**MR HOLMES:** That would be problematic.

**THE CHAIR:** That is all right. It's as simple as switching a switch. Thank you, carry on.

**MR HOLMES:** Switch it on.

**MR HOSKINS:** Good to see the level of technical expertise.

**MR HOLMES:** (Overspeaking).

The Claimants, we say, are also wrong to say they would be required to proceed by way of individual review following disclosure. Their review also will be assisted by targeted electronic search techniques allowing them to focus in on the documents of most interest to them in prosecuting their case.

Now, by seeking to raise this issue now the Claimants are rearguing a point on which they were very recently rejected in the *Kent* collective proceedings. Of course, it's a different client, and I am not suggesting for one moment it's binding authority on you, but my point is that the factual context of the disclosure debate in *Kent* was very similar to this case, and I will show you that by reference to the *Kent* disclosure ruling.

The Tribunal decisively rejected the claimant's proposal that Apple needed to conduct a second manual relevance review of the US disclosure and we say its reasoning applies equally in this case.

To develop those submissions, I will first focus on the US discovery and explain why it's unlikely to yield large volumes of material that's of no relevance to the claim; secondly, I will consider the Tribunal's reasoning in the *Kent* case; and, thirdly, I will deal with the Claimant's subsidiary submissions in favour of a manual review.

The overview of the US discovery was provided in my solicitor's letter of 3 May in the core bundle at C, 156. You see in paragraph 2, fourth line from the bottom, that this was a "…repository of over 3 million documents (amounting to approximately 21 million pages of material) [disclosed in the US proceedings and] which, given the overlap of issues between the US Proceedings and the Play Proceedings (as noted below), will contain documents likely to be relevant to the Play Proceedings."

Then over the page at paragraph 3, there is an explanation of the US proceedings. If I could ask you just briefly to review that. **(Pause)**

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

**MR HOLMES:** So, all relate to allegations relating to app distribution and payment processing issues at the heart of these proceedings. In developing the app distribution allegations, at least one takes issue with Google Play's policies and licensing arrangements with Android device makers, matters to which this claim also relates, and there are also challenges to the level of the service fee. Again, an issue at the

heart of these proceedings.

At paragraph 4, you see that the conclusion drawn by my solicitors:

"… the US Proceedings and the [UK] …. Proceedings substantially overlap in terms of the issues raised."

At the foot of the page, in paragraph 5, you have an explanation of how the US discovery was compiled, "…substantial searches … against many millions of documents held by 44 agreed custodians. The process involved the application of search terms and a subsequent process of manual review."

The overlap identified by Google is also reflected in the Class Representative's pleaded case. If we could go, please, in the core bundle to page 260. You see that reference is made at the foot of the page to other proceedings. At paragraph 169:

"These Claims are of a standalone nature..."

You see that "…Google's conduct already [forms /] has formed the subject matter of a number of … private claims in several jurisdictions around the globe, …".

**THE CHAIR:** Yes.

**MR HOLMES:** Then points about private claims are then developed in page 170. Sorry --

**THE CHAIR:** Paragraph.

**MR HOLMES:** -- paragraph 170. C2 -- 171, I should say, on page 263. You see at the top of page 264 reference to the US proceedings:

"This consolidated action in the US combines several claims issued by US Android App developers … and GMS Device users concerning Google's alleged anti-competitive conduct on the market for the distribution of Android Apps to Android Device users through the Play Store, as well as the market processing payments for Android mobile app digital content."

Then moving on to page 264 -- sorry, that was 264, forgive me. Page 270. You see

at subparagraph (d) a further point made:

…the PCR has adequate funding for the claim and will be able to pay the Proposed Defendants' recoverable costs..."

Over the page, one of the reasons given in the middle of the paragraph is:

"This level of cover is adequate and appropriate given that Google will already have substantial knowledge of the factual and legal issues that will arise for determination in the present proceedings which, overlap substantially with the issues arising in respect of the proceedings which are the subject of … legal proceedings in … [various places] around the world..."

In the circumstances, we say that it's clear that the content of the US discovery is likely to be relevant; the US proceedings overlap substantially in subject matter. And there has already been a manual relevance review.

Going back to Google's solicitor's letter of 3 May at C, 158, you see what Google was proposing. It's paragraph 6. You see that what's said there is that:

"The wide-ranging nature of the US Proceedings, the approach taken to identifying potentially relevant materials and the scope of US discovery mean that the US production will be in some respects over-inclusive and thus include [some] material [or will include material] that is irrelevant and/or disproportionate… Accordingly, we consider that a process to appropriately refine this extensive repository for the purposes of the Play Proceedings should be carried out. As set out in the EDQ, Google proposes this be done primarily by the identification of appropriate custodians and the application of appropriate search terms [otherwise you see the proposal that]. To the extent that specific categories of irrelevant and/or disproportionate material from within the US repository can be identified, they can be excluded."

It's quite clear in this letter of 3 May that what was being proposed was not a manual relevance review; it was a review by reference to search terms and custodians. And

that was to produce a manageable pool of clearly relevant documents.

Just while we are on that document, paragraph 9, you see an indication that Google is prepared to collaborate constructively in order to agree appropriate search terms and custodians. So that's the approach we were proposing.

This type of approach was recently endorsed by the Tribunal in the related *Kent v Apple* proceedings and the Tribunal's ruling on disclosure is at authorities bundle 2, tab 17. Starting at page 569. You see at paragraph 3 that in that case as well the debate concerned repositories of documents disclosed in the United States in parallel proceedings there.

Paragraph 4 explains that the repository was prepared based on a similar winnowing process in the US to the one that Google applied in this case. You see the repository was reduced from 12 million documents in the middle of the paragraph down to 6 million. You see at the bottom of the page, bottom of the paragraph, “The review involved a combination of technology assisted review methods and manual (that is, conducted by a human) review.” That's the same process that Google has undertaken in the States.

On page 570, over the page, at paragraph 7, the Tribunal explains the agreed process for production of documents from the repositories in that case. You see at 7(b) that this involved applying search strings -- search terms or strings -- with the parties cooperating to agree appropriate terms.

A recognition in that case, as in this one, that some further refinement of the US discovery was needed to achieve a focused and proportionate disclosure set.

Then over the page at 571, paragraph 8 introduces the dispute between the parties. This was whether Apple should be required to conduct a relevance review of the documents identified in 7(d) above. That's to say, the outcome of applying the search terms to refine the US discovery set.

You see in the fifth line down in paragraph 8 that the class representative's submission was that a relevance review was "…necessary, as she will otherwise … [have] to review large volumes of irrelevant documents in order to process the Responsive Documents produced to her." That is the same point we saw Ms Coll was advancing in her skeleton argument in the present case. At the end of the paragraph, Dr Kent's counsel framed the question as being a choice between whether the class representative, with limited knowledge and resources, or Apple, with much greater knowledge and resources, should undertake the necessary review of the responsive documents.

At paragraph 10, at the foot of the page, the ruling records the submissions of Apple's counsel. She maintained that no review for relevance was required. "The documents in the Repositories have already been the subject of a detailed review for relevance … in the US … and [the issues in the US] are sufficiently similar to these proceedings to be confident that there will not be large numbers of irrelevant documents."

The process of conducting searches based on the agreed search strings provide comfort that the responsive documents will be largely relevant, and finally the point that to require Apple to review the documents would create an unnecessary layer of cost and some duplication given that the class representative's team will need to review all the documents that are produced in any event. We say those points apply with equal force in this case.

The chairman's assessment begins at paragraph 11. He notes that "The problem identified by the Class Representative [namely the disclosure of large numbers of irrelevant documents] only arises to the extent of divergence between these proceedings and the US proceedings in the approach for determining relevance. That might arise …[as a result of some -- ] as a result of the test for relevance being different …. It is more likely to arise, and to be a problem, if the proceedings are dealing with

different issues. Put … [differently], the greater the overlap of similar issues between the US proceeding and these proceedings, the less likelihood there is that the Repositories contain …" irrelevant material.

At paragraph 13 he notes "… that the US proceedings do concern subject matter which is similar to … these proceedings." He notes that "… the Class Representative relies on … the US proceedings … in paragraphs 135 to 137 of her … Claim [in that case], asserting that Apple's conduct already forms the subject matter of a number of high-profile regulatory investigations and private claims in a variety of jurisdictions around the globe." and those are submissions in language materially identical to that which I showed you from the claim form in these proceedings.

Over the page at the top of the page, you see that the same point was made in *Kent* -- Dr Kent's claim form -- as is made here, "… that Apple will … have substantial knowledge of the factual and legal issues that will arise for determination …" as a justification for the level of insurance cover against an adverse cost award.

Paragraph 14, the chairman's conclusion is that the risk of a significant volume of irrelevant material ought, therefore, not to be very high.

Over the page again --

**THE CHAIR:** Pausing there, it looks like the chairman conducted a review of the pleadings and judgments there which I -- we have not seen.

**MR HOLMES:** No, that's -- it does look as though he did that. I don't think anyone takes issue, there's certainly been no suggestion that in any way --

**THE CHAIR:** Not just an overlap.

**MR HOLMES:** There isn't an -- and equally that the description contained in the letter from my solicitors of the proceedings doesn't accurately capture the content of those proceedings. It's reflected also, as I have shown you, in the Class Representative's own specific reference to those proceedings in the course of the claim form.

**THE CHAIR:** Thank you.

**MR HOLMES:** Over the page again, the chairman makes the important point that a manual review by the Class Representative wouldn't be the necessary or correct way for her to proceed. And this addresses the second point from the Class Representative -- in this case the skeleton argument -- namely, that if Google does not conduct a manual review, the Class Representative will have to do so.

If I can just ask you to review, please, paragraphs 18 and 19. **(Pause)**

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

**MR HOLMES:** The sensible first step is for the parties to agree search terms to narrow the population and following disclosure the Class Representative will be able to manipulate the document population using technology, including the straightforward application of further targeted searches.

At page 577, the overall conclusion, the chairman declined the Class Representative's invitation to require Apple to conduct a relevance review prior to production and I would invite you in this case to take the same course.

I should say for completeness that the Android -- just to be clear, the Android repository was subject to the same manual review process in the States, so that has also, we say, already been reviewed and a re-review would be equally wasteful in that context.

What we are really concerned with is finding ways to reduce a large number of documents to levels that are manageable. The documents are from a repository that's prima facie likely to be -- it's been pre-selected as suitable for disclosure in this case and search terms and custodians are a sensible way to do that.

They are also, I think, the only way in which it can be done within manageable time frames realistically. So those are my submissions.

**THE CHAIR:** Can I just check? Do your submissions address the 90,000 point?

**MR HOLMES:** Yes, I am so sorry. The 90,000 to the 40,000 is the point that there has already been a manual review process in the States.

**THE CHAIR:** Right.

**MR HOLMES:** It was testing those documents against the issues in the US litigation which are very similar to those in the UK litigation as you have seen described in the Class Representative's claim form and in the letter from my solicitors. We say that it would be really wasteful to conduct a further review of those 50,000. The sensible course is to apply the search terms and the custodians against the 40,000.

**THE CHAIR:** Thank you.

**Submissions by MR HOSKINS**

**MR HOSKINS:** Thank you, Madam. A starting observation is we've already accepted that the starting point for disclosure should be the existing repositories to take account of the fact that there is overlap, et cetera. We are not going out and asking Google to pretend none of that happened and to start from scratch. We are starting from a point at which we have accepted the existing repositories precisely because of the overlap, et cetera.

You've seen the judgment in *Kent*. It's a case management decision. You have to decide what's appropriate based on the circumstances of this case. Let's just have a look at what those circumstances are.

In relation to R1 and R4, it's said there's been a review, a manual review, in the US for the purposes of the US proceedings and while there is an overlap, they are not exactly the same.

An important part of this case is an allegation of abuse by way of excessive pricing. US law doesn't recognise a freestanding infringement or offence of excessive pricing, so when you see references to separate super competitive prices, et cetera, that's in the context of factual circumstances of this case, but there isn't American equivalent

of excessive pricing under Article 102.

There are differences between the US proceedings and these proceedings and these proceedings themselves are substantial, they are complex and they are important and they merit proper attention.

**MR HOLMES:** Madam, just to be clear, we don't accept that excessive pricing isn't relevant in the context of assessing exclusionary abuse in US antitrust proceedings. It is a part of the US proceedings. I showed you what was said in our letter.

**MR HOSKINS:** But I don't think, unless Mr Holmes wants to correct himself, it's a freestanding infringement or offence under US law.

**MR HOLMES:** No, that's quite correct; it's not freestanding, but here you have a combination of allegations of exclusionary abuse and exploitative abuse and the two are being considered together in the US, which is why excessive pricing is within the ambit of the US proceedings.

**MR HOSKINS:** There is a difference, we submit, between the UK and US law, but when one also gets to the particular circumstances of this case, again remember what we are asking for. We are not suggesting a review of all the R1 documents. Again, we are not saying go back to the start of the whole corpus of US documents and go through them. We are only asking for a manual review after agreed search terms and custodians have been identified.

Now, as you have seen on Google's own test, that's about 120,000 documents.

**THE CHAIR:** Mm-hmm.

**MR HOSKINS:** So, the question of proportionality is very much confined to that sort of level of documentation. I have shown you they are prepared to do a manual review of 180,000. That's not disproportionate.

The other really important point, in my submission, someone is going to have to do this to get to grips and the only question is: is it Google or is it us? That's not been

suggested to be wrong. Google have simply said well, we can do it, but you have all my points about why Google are far better placed than we are to willow the wheat from the chaff before the serious work can begin and you have my point, the time constraint will be on us to get our ducks in order to make the stage two disclosure requests. That's why whatever happened in *Kent*, very interesting, but the facts of this case, in my submission, suggest that Google should be doing that relevance review.

**THE CHAIR:** I think you said in your submissions that the number of 120,000 could be higher because you haven't agreed the search terms and custodians yet. If Google -- this is stretching into the world of hypothesis now -- if Google conducts the relevance review themselves, how likely is it -- you probably can't say -- that your client will then go back and say we don't accept your concept of relevance?

**MR HOSKINS:** Well, the relevance review, again let's -- a normal disclosure exercise, an old-fashioned disclosure exercise.

**THE CHAIR:** Relevance always seems to be the most controversial thing where one side says well you have applied --

**MR HOSKINS:** It is, but the onus in the first place is always on the disclosing parties, the solicitors conduct the relevance review, because that's the only way it can sensibly work in pretty much any case because the idea that relevance can start with the receiving party rather than the disclosing party. So, you are absolutely right, but the norm is the disclosing party will conduct the relevance review and then particular issues will come up out of that and will be dealt with.

The important point here is what is the starting point, and the starting point is the disclosing party, for obvious reasons, not the receiving party.

**THE CHAIR:** Thank you.

**MR HOSKINS:** I think that deals with the repositories. There is an issue on deadlines for disclosure.

**THE CHAIR:** Yes.

**MR HOSKINS:** As matters stand, I keep saying this, Google has to provide all its disclosure by 25 August. We've agreed the two-stage process which, if the Tribunal is happy with it, will extend the 25 August for some of those dates and so, for example, in relation to R2, there is a specific agreement for the parties to work on that and there's not a specific date suggested or agreed as it stands.

But in relation to the other categories, we say Google should stick to the existing timetable of 25 August and if they want to ask for the order to be amended in their favour, then it's up to them to make specific requests and to justify their position. So that's really a matter for Mr Holmes, but can I show you what the order is that we are seeking and then I will leave it up to him?

**MR HOLMES:** I was just going to say there's no dispute that all repositories bar repository 2 will be disclosed by 25 August 2023, I believe. I don't know whether --

**MR HOSKINS:** I am delighted if that's the case, that's good news. I had understood that to be a problem, so not a problem.

I have a really painfully small issue which I have to finish with on disclosure. You thought it was bad already. Early market study disclosure.

**THE CHAIR:** Yes.

**MR HOSKINS:** Can I take you to your --

**MR HOLMES:** Sorry, no, no, I simply want to make sure there's no misunderstanding. The 25 August date is agreed. The idea of a longstop date for second round disclosure is something that we need to debate. So, I -- have you developed your submissions? If it's convenient to the Tribunal, it may be sensible if we just address that.

**MR HOSKINS:** Let me show you what we are asking for and Mr Holmes can tell me if it is agreed or not and we can take it from there --

**THE CHAIR:** I have to say I am never very comfortable about tasks drifting without at least some order imposed on it, if you see what I mean. Yes, that's probably more a point for Mr Holmes to persuade me of.

**MR HOSKINS:** Indeed, we are very keen you hold everyone's feet to the fire in terms of dates, and that includes our feet as well, because otherwise in a case of this sort to allow it to drift is a recipe for future pain. So, we are very keen to fix dates for everything.

Our draft order is core bundle, tab 6, page 130. I think I have shown you this before actually, so I can take it very quickly. Paragraph 7, Stage 1 Disclosure 25 August 2023. I understand it's my fault, I think, for being misleading. We've agreed that R2 can go beyond 25 August 2023, but stage two disclosure we are asking for by 12 January 2024.

**THE CHAIR:** Yes.

**MR HOSKINS:** Mr Holmes says 'no' for some of those categories. But our point is as things stand, they are obliged to provide all the disclosure by 25 August so it's for Mr Holmes to convince you if he is to have leeway beyond 25 August for any categories which have not been agreed by us.

**THE CHAIR:** That's R2.

**MR HOSKINS:** That's R2.

**THE CHAIR:** As I understand it, you are not asking, Mr Holmes --

**MR HOLMES:** R2, which I had taken it was agreed. I think there's no dispute between the parties that R2 can go beyond 25 August.

**MR HOSKINS:** It is, that's agreed, but there's no specific date laid down. If you want to hold our feet to the fire, you could do so.

**THE CHAIR:** I see what you mean.

**MR HOLMES:** The difficulty in relation to both repository 2 and stage 2 is that we

don't yet know what the scale of the exercise is. So, for repository 2, the proposal is that timing will be agreed once the scope of the searches to be undertaken is agreed and that was agreed between the parties as the appropriate way forward for the second tranche, in other words for repository two.

The parties are going to liaise to agree on appropriate custodians and search terms. And until we know which custodians we are considering and how many search terms and what volume of documents are produced, it's really difficult to commit realistically to a date because this is the repository in relation to which Google will be undertaking a manual review for relevance, a review for privilege, a review for confidentiality over an indeterminate pool of documents at this point. So it's very, very difficult to know what date would be appropriate for that second tranche of the first stage disclosure, the repository 2 disclosure, and that's why we propose that the parties should liaise and try to reach agreement about it.

Of course, they could do so by involving the Tribunal; there could be provision for the parties to come back if a date isn't agreed once the search terms and the custodians are agreed. But at this point it's very hard. It's not like I can offer evidence from my solicitors explaining how long it will take because we don't know what the exercise is. That, of course, applies in spades to stage two because the idea about stage two is that they come back with any supplemental requests that they have once they've looked at stage one.

Now, there is the comfort -- and I understand entirely the desire to keep this on track and it's something that we, for our part, share the concern that things could spin out of control in relation to disclosure -- there is the comfort of an agreed case management conference to be listed, I think, on a date before 23 -- 22 December, so there will be another occasion at which any concerns will crystallise.

To fix a date now, I just think will be provisional. It will be a thing writ on water,

because until we know what they are going to ask for and it's agreed and debated or agreed or debated before the Tribunal, the scope of the exercise is indeterminate, uncertain.

**THE CHAIR:** I do understand the problem, but on the other hand, I don't want to get to the next case management conference and find that everyone is still discussing when stage two disclosure is going to take place and neither party then urges the Tribunal to make an order and we drift.

I wonder if a way of dealing with it is to have the parties liaise and try and agree a date for R2 and notify the Tribunal what the position is.

**MR HOLMES:** We would be content with that. It does occur to us for stage two that it might buy sensible to adopt -- to go for an earlier CMC so that the Tribunal can take the water. That would hold the parties' feet to the fire --

**THE CHAIR:** Yes.

**MR HOLMES:** -- because it would crystallise the debate. I understand the Tribunal may not be keen to return early doors for another discussion on disclosure, fascinating though it is as a topic, but it would focus all of our minds. So that's just a possibility to plant with you.

**THE CHAIR:** Yes, it's just whether it's scheduled for when it's anticipated stage two disclosure may have happened or before.

**MR HOLMES:** Yes, understood.

**MR HOSKINS:** That's why I rose to my feet because, of course, as to when we get to stage one disclosure --

**THE CHAIR:** That dictates what follows.

**MR HOSKINS:** -- we then have to get into the process of identifying the requests, et cetera.

Just to be really unhelpful, I remind you of the hard date at that moment in the timetable

that we have to serve our expert reports by 12 April 2024. Disclosure has to be done well in advance of that. That's why we are suggesting 12 January. It's only three months for disclosure to be completed until the expert reports. It's already not a lot of time.

A date focuses minds. That's why we are proposing a date. It's a date that works. Then, if anyone wants to depart from that date, they will have to come and convince you for why they should depart from it. But not setting a date now really does risk drift.

**THE CHAIR:** Yes.

**MR HOSKINS:** You've seen the nature of the disputes, they are important, but they are fiddly.

**THE CHAIR:** Yes.

**MR HOSKINS:** They don't get crystallised easily. That's the trouble.

**THE CHAIR:** I think I have the shape of the issue. It sounds like it's probably a timetabling point and can maybe be dealt with by forms of directions and listing the CMC at an appropriate moment that means that most of the disclosure has at least happened by then.

Right, I have been given a note saying “have pity on the transcriber”, so I think we should probably break now until maybe quarter to. How are we doing time-wise?

**MR HOSKINS:** I think we are doing well, because I just have the very painful points. I think most of the annex points have gone, and the timetable is what it is. You've seen what we say. So, I think we are on track to finish. Yes.

**MR HOLMES:** I am sure. So sorry, I was just seeing whether there were any -- I think they may have gone -- my understanding is they may have gone away entirely.

**MS MACLEOD:** They may have done.

**MR HOLMES:** We can use the time --

**THE CHAIR:** Could you possibly have a chat during the break about how we could

get round this listing of the CMC, what the appropriate time for doing that and notifying the Tribunal as to where the parties are at with agreeing dates for R2 and stage two.

**MR HOLMES:** Yes.

**THE CHAIR:** So that when the CMC is listed it's effective.

**MR HOLMES:** Given that we are on good track, I think, to finish by 4.30 or in advance, shall we take slightly longer than 5 minutes --

**THE CHAIR:** Certainly.

**MR HOLMES:** -- to allow that process of discussion.

**THE CHAIR:** How long would you like?

**MR HOLMES:** 15 minutes. Would that allow sufficient time for --

**MR HOSKINS:** Yes, I have not gone -- I have switched off -- I am trying to think about whether we are going to be able to do things 15 minutes or whether it is better taken offline and we put proposals to you and if they are agreed and you like them, all good. If they are not agreed, we can put in alternatives and you can rule on it. I am slightly worried about everyone doing it at a canter. It's too important. I know it looks easy but I am just worried it's too important.

**THE CHAIR:** Sometimes we all need to take the risk and go for a gallop.

**MR HOSKINS:** Well, we'll gallop, quarter to.

**THE CHAIR:** No, I am happy to go with that suggestion. So, we'll come back at quarter to and we'll let you take the debate as to timetabling -- but I think you know where we are going on that -- offline.

**(3.36 pm)**

**(A short break)**

**(3.48 pm)**

**THE CHAIR:** Yes, Mr Hoskins.

**MR HOSKINS:** There's been quite a lot of galloping, but I am not sure it's actually

taken us anywhere.

Just to clarify, we will provide you with proposals for our R2, stage two; either it's agreed or you will just have to decide what you want to impose on us.

**THE CHAIR:** How CMC would fit into that scenario so that that is an effective use of time?

**MR HOSKINS:** Exactly. Understood.

Early market study disclosure. Can I show you your 16 December 2022 order. That's core bundle, tab 34. I need to look at page 790. Paragraph 1 provided for two categories of early disclosure and (a) was data from or relating to UK Google Play Store transaction data, so it was numbers; and "(b) the documents referred to in paragraph 5 of the Defendants' letter to the Class Representative dated 24 November 2022 …". If you want to see that letter, that's at correspondence bundle, tab 14, page 31.

**THE CHAIR:** Yes, let's have a look at that.

**MR HOSKINS:** You'll see paragraph 5:

"Google is also willing to provide early disclosure of relevant material provided by Google to the CMA pursuant to the CMA's Mobile Ecosystem market study [a proposal about the date]. … Such relevant material has already been identified and disclosed in the course of the Epic UK proceedings, … [as the source] is available for early disclosure."

There was some heat and light about whether, therefore, that was limited to the package that had already been disclosed in the Epic proceedings or whether it was a more general corpus, and we agreed we'd take the narrow Epic material.

As an upshot between the order and discussion between the parties that required Google to give inspection of relevant material provided by Google to the CMA pursuant to the CMA's mobile ecosystem market study insofar as such material had already

been identified and disclosed in the course of the Epic UK proceedings.

**THE CHAIR:** Yes.

**MR HOSKINS:** The reason why we sought that early disclosure was to assist us in identifying custodians and search terms for stage one of the disclosure process. You've seen what we were given by Google, and we have to try and make sense of it and find our way into it so we can actually engage meaningfully with what we need.

The Defendants disclosed 33 documents, 28 of them were redacted. The majority of those documents were heavily redacted and that meant that the early disclosure has been of little utility to us so far in identifying appropriate custodians and search terms. Bear in mind that's the only disclosure we've had from Google that can help us with custodian and search terms; the transaction data is just numbers. So beyond publicly available information that we can find, that's all we have.

**THE CHAIR:** Mm-hmm.

**MR HOSKINS:** Google has indicated that they intend to review the other documents from the market study for relevance, i.e. those not disclosed in the Epic proceedings and disclose them by 25 August 2023.

The only issue for us today is a narrow but important one which is this: should Google re-review the 28 documents that have been disclosed early now or can they wait until 25 August 2023 to do so?

**THE CHAIR:** Basically the 33?

**MR HOSKINS:** The 33 exactly, of which 28 are redacted.

**THE CHAIR:** You are prepared to wait for the 25th for the other documents disclosed to the CMA.

**MR HOSKINS:** Exactly, yes. It's just that corpus of 33 that we are talking about.

The point is a simple one again. Given that the whole purpose of this early disclosure for us was to give us something to work on for custodians and search terms, we need

it in good time so that stage one can work and that's why we have asked for it by 26 June. As to there are only 33 documents, reviewing them for relevance and confidentiality we say can't take that long. We simply don't understand why this is an issue, to be perfectly honest, but I am sure Mr Holmes can explain why they say they can't do it.

**Submissions by MR HOLMES**

**MR HOLMES:** Madam, at an earlier stage of this process we certainly had understood that 25 August was agreed between the parties for this re-review process. But we understand what my learned friend is saying. We have heard it.

**THE CHAIR:** Yes.

**MR HOLMES:** We are keen to get this done as quickly as practicable and we have already offered to do it as soon as we can and to disclose it ahead of 25 August as and when it's done. I've asked for instructions about what would be possible.

**THE CHAIR:** Yes.

**MR HOLMES:** The difficulty of the challenge is that some of this material does raise questions of policy, and there are certain passages that are sensitive and that require careful consideration in conjunction with the client when reviewing the redactions. We are doing the best we can. I am told that three weeks is an achievable date. I am not sure when that takes us to, I'm afraid. But that would be our proposal if the Tribunal is prepared to entertain that.

**THE CHAIR:** Right.

**MR HOSKINS:** If you could look at our draft order, core bundle, tab 6, page 131, we are obliged to propose refinements to Google's initial 13 custodians by 12 July and they are asking us to wait three weeks for the only information they are going to give us to help. With respect, they've known about this for weeks if not months --

**MR HOLMES:** Just to be clear we think that these documents, with or without redactions, will not be of use for the purposes of refining the search terms or the custodians. To be absolutely clear, I understand that is the elision that is being made on the other side. It's also not true to say that we haven't provided material relevant for determining search terms and custodians. On the contrary, we've given -- the search terms are clear on their face. Anyone who is used to disclosure exercises can read the Boolean terms that have been proposed. We've given them the US terms. We've given them the initial terms that we've proposed. We've given them the refined terms when we discovered the original terms were so inclusive they generated vast numbers of documents.

That's all visible for them. So, this document pool, just so that no one is under any misapprehension, will not be -- it is very, very unlikely to assist them at all in the process of the search terms.

As regards the custodians, they know who the custodians are. They are going to get hit counts for the individual custodians as a result of agreement arrived at between Google and the Class Representative. That's how you are going to refine the custodians. We are very happy to discuss the identity of the custodians and to consider the addition of further custodians. None of that is affected by the CMA market study documents which really have nothing to do with that process.

**THE CHAIR:** Do we know how many pages there are?

**MR HOLMES:** I don't know that, I am afraid, Madam. Yes, I am afraid I don't have that information here.

**THE CHAIR:** Because three weeks does sound like a very long time.

**MR HOLMES:** That's the date on instruction that has been suggested. We can try and refine it further -- we will do it sooner if we can, it’s all that I am being told but ...

**THE CHAIR:** Give me a moment. **(Pause)**

**MR HOLMES:** Madam, another suggestion, if it helps, is we can do it on a rolling basis. That's another possibility to try and break the logjam. I know this seems a bit obscure from the outside, but this is based on experience of the challenges of gaining instructions.

**THE CHAIR:** On your side?

**MR HOLMES:** On our side, yes.

**THE CHAIR:** Well, as you probably worked out, we have not yet finished, but we won't be giving any ruling today. In this particular respect ... we would expect you to be providing the unredacted versions, insofar as they should be unredacted, within ten days.

**MR HOLMES:** I am grateful.

**Submissions by MR HOSKINS**

**MR HOSKINS:** There's one other point that arose while the galloping was taking on which I thought had been agreed but the galloping revealed not.

There were issues about the mechanics of disclosure, just to make sure it's all coming in a useful form, and the Defendants' proposed order, if you can look at that, in relation to this. Core bundle, tab 6.1, page 4 -- sorry, 134.4 or internal four. You'll see form of disclosure and some sort of technical requirements laid down.

Now, on the basis of that draft order from the Defendants, we thought this was agreed because we can agree to this, but Mr Holmes has alerted me to the fact that in relation to 12(b) and the statement that disclosure would be accompanied by confidentiality designation pursuant to the CRO order dated 13 April 2023, either -- that's not what Google wants to do, let me put it in that neutral way, I will leave it to Mr Holmes to explain. But otherwise, we were content with this order, but including that confidentiality designation wording.

**Submissions by MR HOLMES**

**MR HOLMES:** I am delighted to hear that 12 is acceptable in its present form, save for (b). The issue which arises in relation to (b) is this: the US discovery is subject to confidentiality designations which are on a whole document basis.

**THE CHAIR:** Mm-hmm.

**MR HOLMES:** So, what it currently doesn't have is highlighted passages in it which are the specific confidential material, and so --

**THE CHAIR:** So, designation for documents rather than identifying the passage?

**MR HOLMES:** Exactly. Exactly. We understand that the Class Representative is keen that we should now provide a designation on a document-by-document basis which indicates the specific confidential material. Now, that will be a big exercise in relation to what is a large pool of documents, 120,000 documents, and it will slow things down.

It's also not clear why it should be needed to be done now because this isn't a case where you've got lay clients outside the confidentiality ring who need to give instructions and who can't see the material. As we understand it -- and of course, you know, we will hear what my learned friend has to say about this -- those people who need to see the documents are within the confidentiality ring: the Class Representative's solicitors, their experts and of course the Class Representative herself. So, this is all visible and can be debated amongst them all.

Now, by trial we recognise that it will be necessary to have more precise confidentiality markings, but rather than doing that on a wholesale basis now in relation to a very large pool of documents, delaying the disclosure process to no obviously useful benefit for the Class Representative, we propose to do it later, once the sifting, which inevitably goes on during this process, has been done and the parties have identified

the documents that will be going into the trial bundle. That seems to us a more proportionate solution.

The difficulty is -- and this is something for which I take responsibility, I apologise to the other side that this wasn't clearly flagged -- the draft order here suggests that disclosure will be given in accordance with the confidentiality ring order and the confidentiality ring order does seem to be more refined on its face than the process that I have been describing.

If you look at the confidentiality ring order, that is in the core bundle and the relevant passage is at page 805.

**THE CHAIR:** Yes.

**MR HOLMES:** You see at 3.2 at the foot of the page:

"Each Party shall be responsible for labelling and highlighting any Confidential Information in documents disclosed by them in the following ways:".

You see at 3.2.2:

"The specific text in a document that is Confidential Information will be highlighted."

Now, perhaps rather optimistically I had been assuming that this didn't actually specify at what stage of the proceedings that highlighting was to be done. My learned friend fairly makes the point that this is in the context of 3.1 which is discussing the notification of disclosure and that that might be read as suggesting that this mark-up should be done at the time of disclosures. So, we will be looking to the Tribunal if matters can't be agreed between us for a practical work around to this.

What I would suggest is, if my learned friend is amenable and if the Tribunal is content, that we take this away, we seek to agree a form of words that preserves the need for precision by the time of a future hearing or trial but which doesn't require this all to be done in time for the disclosure of --

**THE CHAIR:** On 25 August.

**MR HOLMES:** Exactly. Which just really can't be done.

If there's disagreement about that or any other aspect of the mechanics of disclosure, we will obviously try to keep that to a minimum. We don't want to try the Tribunal's patience, but perhaps we could present that in the usual way with a form of order showing alternative wording both of the confidentiality ring order by way of revision and of the draft order following your ruling on disputed matters at this CMC.

**THE CHAIR:** What do you say about that, Mr Hoskins?

**MR HOSKINS:** Mr Holmes is seeking an amendment to an existing order. I have not seen the proposed amendment. I suggest he puts it to me, and we will see if we can deal with it.

As things stand again there's an order in these terms. It is disappointing, for example, you've seen just in relation to the market study disclosure that was just put in *en masse* everything confidential without any highlighting for 33 documents. As we all know, this is exactly the sort of issue that gets left and it's a nightmare just before trial. Confidentiality is really important, and people know because we've all given undertakings. We need to know what is confidential and what's not.

But I await a proposed amendment. I am not going to kick up more of a stink than I just have today.

**THE CHAIR:** All right. Are there any other issues?

**MR HOSKINS:** There's information requests and proposed trial timetables. Information requests is Ms MacLeod's bit, so I will let her tell you where we've got to and then I will pop up for trial timetables and then we should be done.

**THE CHAIR:** In regard to early disclosure of market study report, I have just worked out that the date I said within ten days that takes us to 1 July, which is a Saturday which no one will thank me for, so I am going to --

**MR HOLMES:** (Overspeaking) weekend, 3 July rather the than Friday.

**THE CHAIR:** I was actually going to say I wonder whether I should bend in favour of Mr Holmes on this, but to give you the benefit of the weekend, it sounds like you've jumped on that opportunity. Is that all right?

**MR HOLMES:** I am much obliged.

**MS MACLEOD:** I don't want to disappoint the Tribunal, but unfortunately the requests in the detailed annex have now, in the main, been resolved.

There were just sort of seven points still on the radar at the outset today that have all been resolved by agreement.

Now, the timing for the steps that have been agreed between the parties may have some minor effect on the timings in the current draft order, because in the current draft order, for example, there are proposals as to search terms and custodians and that's precisely what the information requests have gone to.

**THE CHAIR:** Yes.

**MS MACLEOD:** I am really in your hands. I can walk the Tribunal through what has been agreed in respect of the seven requests that were outstanding today or that is something that we can update the Tribunal on in respect of any draft order with any consequential knock-on effects which I think both parties are agreed should be very minor, but just to those first stages in terms of agreeing the search terms and custodians.

**THE CHAIR:** I think we've got quite a lot of dates to keep juggling around in our minds as it is. I think it's probably best if we come up with a ruling and a proposed draft form of order and then you will indicate, presumably, if that doesn't work.

**MS MACLEOD:** I am grateful.

**MR HOSKINS:** It brings us to the draft timetables.

**THE CHAIR:** Yes.

**Submissions by MR HOSKINS**

**MR HOSKINS:** I don't think anyone has an axe to grind here, we are just trying to help the Tribunal and ultimately it's a matter -- if it's helpful, you've seen what an eight-week trial would look like and we've seen what a ten-week trial would look like. The Tribunal's time is precious. The comparators, if you want to have them in front of you, correspondence bundle, tab 9.4, page 20.5. There isn't a huge amount between us in terms of --

**THE CHAIR:** It's very early days actually to be coming up with a timetable. It is just because you've asked for an extension to the trial timetable --

**MR HOSKINS:** Exactly.

**THE CHAIR:** -- that we wanted to go through this exercise.

**MR HOSKINS:** Just to say -- sorry, Madam, to interrupt, but I don't think either of us are suggesting --

**THE CHAIR:** This is writ in stone.

**MR HOSKINS:** -- we are wedded to this.

**THE CHAIR:** No.

**MR HOSKINS:** It's just to help whether it's nine weeks or ten weeks because the Tribunal's time is precious.

**THE CHAIR:** Yes. So, I think where we've got to, is that we would still like to see this trial completed in eight weeks, but we do accept that there may be a need to accommodate more time. But that was likely to be crystallised further down the line, if you like, when we know where we've gone, and you've had our ruling and various other issues in disclosure are shaken out. So, I think we were inclined to say eight weeks, but we will reserve another week, and then presumably we can revisit at the CMC when hopefully a lot of these issues will have crystallised on that.

**MR HOSKINS:** We are very happy with that.

**MR HOLMES:** We are content with that. At this stage it's really crystal ball gazing. We would put in a plea in due course for a four-day week for the trial because my experience is they are very heavy things and, from counsel's perspective at least, it's immensely helpful to have an additional day for preparation, which may affect the overall window. But we are content with the Tribunal's plan to reserve a further week.

**THE CHAIR:** Thank you.

**MR HOSKINS:** The thing we have to come back to, which is a date for the CMC to crystallise stage two disclosure, is that all you want from us? It is not a remodelling of the timetable, it's just having an earlier CMC, when would that work?

**THE CHAIR:** I am rather hoping that, by the time we get to that stage, if there are any issues that have arisen in relation to issues for experts, for example, failure to agree, all of those things can be wrapped up at one hearing. So, we need to pick a date that accommodates keeping disclosure on track, keeping your expert reports on track and allowing any disputes about the issues the experts are to consider to be shaken out.

**MR HOSKINS:** Yes, so it's just that, it's a proposal for a date?

**THE CHAIR:** Yes. So, I think, having made initial enquiries, I think November is looking tricky for the Tribunal.

**MR HOSKINS:** Right.

**THE CHAIR:** The parties had already suggested December, hadn't you?

**MR HOSKINS:** I must confess it's our own draft order and it's agreed. But when I read it, I went: that looks a bit late.

**THE CHAIR:** Too close for your --

**MR HOSKINS:** December looks a bit late --

**THE CHAIR:** -- expert --

**MR HOSKINS:** -- if we are going to get the expert reports done in time.

**THE CHAIR:** Yes. If you could -- as I say, if the parties could go away and consider

an appropriate schedule that -- and come up with a date which should work for a CMC that is effective to deal with all of those issues, experts and -- yes.

**MR HOSKINS:** Sure.

**THE CHAIR:** Yes, sorry.

**MR HOSKINS:** Would you like us to try and liaise with the Registry so that we don't pluck a figure out in the air that then doesn't work? At least we can try and get something --

**THE CHAIR:** That sounds sensible.

**MR HOSKINS:** -- if you are happy for us to try and do that.

**THE CHAIR:** That sounds very sensible. I have just been asked whether the parties, and whether the Tribunal in fact, would want to specifically list the hearing for the first available date after 1 September 2025 because that's just floating around at the moment.

**MR HOSKINS:** Yes, we can fix that, yes. Can we get the clerks to --

**THE CHAIR:** Yes, if you can squeeze us in.

**MR HOSKINS:** -- liaise. It's not so much that. I will get shot if I sign up to something -- but we will chase the clerks to get that done.

**THE CHAIR:** Okay. Thank you.

**MR HOSKINS:** Thank you. Unless there is anything else or from the Tribunal -- look at that, 2 minutes shy. Thank you very much.

**THE CHAIR:** Thank you very much, and obviously we'll let you have the ruling as soon as we can. Thank you.

**(4.13 pm)**

**(The hearing concluded)**