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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 14th December 2023

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

BETWEEN:

Dr. Rachael Kent
Class Representative

v

Apple Inc. and Apple Distribution International Ltd
Defendants

A P P E A R A N C E S

Mark Hoskins KC & Matthew Kennedy
(On behalf of Dr. Rachael Kent)

Marie Demetriou KC, Daniel Piccinin KC & Hollie Higgins (On behalf of Apple Inc. and
Apple Distribution International Ltd)

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Thursday, 14 December 2023

(10.30 am)

Case Management Hearing

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Mr Hoskins.

MR HOSKINS: Good morning. Just to do the roll call, you have myself and Mr Kennedy for the Class Representative, and then Ms Demetriou KC, Mr Piccinin KC, and Ms Higgins for Apple.

I was just going to launch into the agenda.

THE CHAIR: I think the agenda is shorter than it was, as I understand it.

MR HOSKINS: I think a lot of the points are agreed or just not live, so we will go through them and just mark where we are.

THE CHAIR: Yes, let us do that.

MR HOSKINS: I think there are only really, I think, two live points between us.

THE CHAIR: Good, let us do that, then. Thank you.

MR HOSKINS: Agenda item 1 is the expert issues proposals. The Tribunal ordered the parties to seek to agree a list of expert issues and we have agreed a list of issues.

That's at core bundle 3, tab 44, page 1506.

I must confess I was not planning to read this out or take you through it because it is 20 pages long, but it is agreed between the parties.

THE CHAIR: Could you just give me that reference again.

MR HOSKINS: Certainly, core bundle 3, tab 44, page 1506. Sorry, I've given you the wrong reference, that is why.

THE CHAIR: That's good.

MR HOSKINS: That's a good start, isn't it? I am so sorry.

THE CHAIR: I am pleased it is you, not me. It is tab 41, I think.

MR HOSKINS: Sorry about this. It will get better as I go on, I promise. It can't get any worse.

THE CHAIR: I have it at tab 41.

MR HOSKINS: Thank you very much.

THE CHAIR: I don't think you do need to go through it. We saw the last version where there were some matters in dispute and we had a discussion about that. I think perhaps -- I can't remember if we gave you any feedback on it or not, but we certainly were familiar with it at that stage. There were a couple of points I just wanted to pick up with you. You are maybe going to pick them up with me.

MR HOSKINS: We have a caveat down in relation to a couple them of, but I don't think I need to trouble you with that caveat today. If I can just explain it, we put the caveat down that relates to Apple's pleaded case in the sense that they put an issue down about what other charges might have been imposed in the counterfactual, to which we say you have not really particularised whatever charge would be on the pleadings. That's really a pleading point.

The reason for the caveat is just to say that by agreeing to that being one of the issues, we are not giving up the chance, if we get lots of new stuff to say, hang on, you have not pleaded that, at a later date. That's why we say the caveat doesn't concern us today because it is a problem that doesn't exist yet and if and when it does arise, it will be a pleading point rather than a list of issues point.

THE CHAIR: That will presumably emerge either in witness evidence from the defendants or expert reports.

MR HOSKINS: If it arises at all.

THE CHAIR: If it arises at all.

MR HOSKINS: If Apple puts in a case and we say, hang on, that was not pleaded and we will hash it out then. It is not a live issue at the moment.

THE CHAIR: It is not something you need us to deal with today?

MR HOSKINS: No. That was the only point I had.

THE CHAIR: I had one question about the list, which is we had noticed -- just for confirmation -- that the IP valuation expertise is no longer in the list. Does that mean that that is no longer intended to be expert evidence in the case?

MS DEMETRIOU: Not expert evidence, correct, yes.

THE CHAIR: Yes, thank you.

Then just in relation to experts generally, actually again Ms Demetriou, a couple of questions I think really more for you than Mr Hoskins. I don't think we know who your economic experts are going to be yet. I think we are assuming it is going to be Professor Hitt. There is no need to tell us now, it is really just a question of that exercise of distinguishing who was going to do what.

MS DEMETRIOU: Yes. That is under review. We very much have in mind that there should not be overlap and there should be a clear dividing line. That is being discussed. We have not reached a landing, but we very much have that in mind that there will be a clear dividing line between the spheres of responsibility of the two economic experts.

THE CHAIR: Yes, and I am certainly not expecting you to do that today. But it would be, I think, from our point of view helpful to make sure that is done as well in due

course to see how you see that playing out. That will be really helpful.

MS DEMETRIOU: Of course.

THE CHAIR: I am not clear whether you are intending to call a forensic expert or not. That might become relevant in the discussion we are going to move to shortly. What is the position on that? Is that a decision that has been made or is it something you are still thinking about?

MR HOSKINS: I can help with what we know about that which is there is permission for Apple to call a forensic accountancy expert, but they have indicated to us that they do not intend to put in a forensic expert report at the same time as we do, but have reserved the right to do so by way of reply to our expert. That's my understanding, that is what we have been told.

THE CHAIR: That's what I had got to as well.

MS DEMETRIOU: That's correct. We have reserved the right to call a forensic accountancy expert, but we -- at the moment it is a reservation of right at the moment to do so.

THE CHAIR: Just thinking about how this would play out at trial: one way it might play out is that you see what's put in by the Class Representative and then effectively we get a sequential exchange of forensic expert reports. That's one way.

The other way -- I was not sure whether you intended to do this -- or whether you might be trying to deal with it through factual witness evidence. I suppose I had not thought completely through how that might work, but if you were to do that, that might create some complication with the way it was dealt with at trial, make it slightly more cumbersome. Maybe you are not in a position to deal with that today, but that's certainly something that occurred to me.

MS DEMETRIOU: Yes, I am not in a position to give you a final answer because I

think we will have to see what their evidence is to work out how best to respond to it, if we want to respond to it. That's why we have reserved our right. It may be that, once we have seen it, we do need to put in a short factual statement. I just can't say until we have seen the evidence.

THE CHAIR: The sequencing is not going to work very well for that, is it, because the witness statements presumably need to be done before the expert reports?

MS DEMETRIOU: Yes, we are not proactively putting in factual --

THE CHAIR: That's really my question. At the moment you are not expecting to deal with it through a factual witness, you are saying it may be necessary, if a factual basis is required, to put something in.

MS DEMETRIOU: Can I just double-check that is right.

THE CHAIR: Yes, but actually more likely is if you are -- if you receive the expert report then you may wish to reply to that on a sequential basis as expert material.

MS DEMETRIOU: Yes.

THE CHAIR: It is not really for me to tell you how to present your case, but certainly from our point of view I think it would be easier if we were dealing with experts arguing about things rather than a factual and expert --

MS DEMETRIOU: I entirely see that and that would be the normal way to respond. I just don't want to foreclose anything given that we have not yet seen their evidence. But I take your point, sir, and that does seem to me the logical way forward as well.

THE CHAIR: That's very helpful, thank you, yes.

MR HOSKINS: There may be issues arising whether we get to reply to the respondent. Again, that's not a problem that has arisen yet, so let's not burn bridges today. We will burn them when we get to them.

THE CHAIR: I think what I got from that exchange from Ms Demetriou is if you put in

a forensic expert accounting report and then they wish to reply, then presumably we would move to a consequential model for that evidence.

MR HOSKINS: That is right and the question is whether we then move to the disagreed/agreed statements or whether we put in something in the middle.

THE CHAIR: We can work something out if it happens.

MR HOSKINS: Yes.

THE CHAIR: Yes, thank you. Good.

MR HOSKINS: So that was agenda item 1. Unless anyone has anything else.

THE CHAIR: Just before we move on from that. You did, I think, the Class Representative did put in a short report from Dr Singer.

MR HOSKINS: Yes.

THE CHAIR: I don't know whether there was any issue about that or we need to discuss anything.

MR HOSKINS: Nothing has been flagged up to us.

THE CHAIR: No. And we have no questions on that either, so that, I think, deals with that.

MR HOSKINS: Thank you.

THE CHAIR: Thank you.

MR HOSKINS: Now we move on to the main event of the morning, if I can put it like that, which is agenda item 2, which is our application for financial data and information. If I can begin just by unpacking a bit what is the issue that our application is seeking to address, what lies behind it? The application is concerned with the excessive pricing part of the collective claims. One of the infringements alleged in these proceedings is that the Commission, with a capital C, charged to developers using the App Store is excessive. As part of that allegation it is also necessary to look at the

payment system that Apple operates because you have to distribute through the App Store and you have to use the Apple payment system. There are exceptions, but again we don't need to go into that today, but that's the allegation we are dealing with. Now, one of the common ways -- one of the standard ways even -- of assessing excessive pricing is to calculate the profit on a particular activity in order to assess whether it is excessive. I can show you that if one looks at our re-amended claim form. So that's core bundle 2, tab 27.

THE CHAIR: Yes.

MR HOSKINS: If you can turn, please, to page 644.

THE CHAIR: Yes.

MR HOSKINS: It is paragraphs 116/117A. If I can ask you just to read paragraphs 116 and 117A, that will be the quickest way.

THE CHAIR: Yes.

MR HOSKINS: You see it is absolutely standard stuff. There is nothing funky going on here.

As part of this exercise, the Tribunal will be required to assess the profitability of the App Store, and that involves identifying the revenue earned by the App Store on one side, then subtracting any direct costs attributable to the App Store, plus any relevant attribution of indirect costs, i.e. costs which are not specific to the App Store which are relevant to it. Again, you all know this very well, this is not surprising stuff.

The parties have agreed that this is a relevant disclosure issue. Now, I can take you to core bundle 3, tab 44, page 1522, this is the parties' agreed list of disclosure issues.

THE CHAIR: Yes.

MR HOSKINS: B(6), excessive pricing, “[I]s the Commission, [capital C,] excessive or unfair?” Correct. Then at the bottom of the page, excessive limb:

"Does Apple allocate costs and/or revenues specifically to the App Store / ASPPS [which is the payment system], and, if so, how."

And then you see the questions which follow. So the questions are about the exercise I am describing, including the allocation of indirect costs.

The second column, you will see our second column is headed "CR descriptive examples" and this is where we gave examples of the sort of information that we would be seeking or think would be necessary in order to deal with those agreed disclosure issues.

Now, in excessive pricing cases, it is not uncommon to find that the relevant undertaking doesn't perform these sorts of allocation exercises as part of the running of its everyday business or as part of its accounting functions or its reporting functions; it's just not required to do it and it doesn't do it.

To take an example from some of the cases that have been before the Tribunal in the pharmaceutical excessive pricing cases, you might have a company that produces ten drugs, ten products, and the allegation is that they have indulged in excessive pricing in relation to one of those drugs. And in relation to the indirect cost, the general costs to the business, the company doesn't allocate by way of course those general costs to each of its products. We have all seen in those cases that there is then an exercise undertaken by the experts who do seek to allocate an appropriate proportion of the indirect cost to the particular product being considered.

So it is not uncommon to find a situation in which the allocation isn't done by the undertaking itself for any purpose, but the allocation needs to be done for the purposes of the trial. So Apple isn't special in this regard. I will show you their evidence now, but what they say about this, it's an affidavit of Ms Casey which was filed in the Australian proceedings on behalf of Apple. You will find it in the core bundle 1,

tab 26A. If you look at page 253, you will see this is the affidavit of Ms Casey filed in March 2023 in the Australian Epic proceedings.

THE CHAIR: Can I just check something with you about confidentiality?

MR HOSKINS: Of course.

THE CHAIR: In your skeleton, when you talk about some of the issues we are about to talk about, I think they are marked as being confidential.

MR HOSKINS: It has been narrowed down.

THE CHAIR: Good.

MR HOSKINS: Because we were stuck with quite a broad regime.

THE CHAIR: That's really the point. I don't particularly want to have an argument about that now, but I don't want us to put our feet in anything.

MR HOSKINS: I am similarly sort of tiptoeing of.

THE CHAIR: Yes.

MR HOSKINS: It has been narrowed down. I believe I have been given a hard copy set which has the up-to-date confidentiality markings. So I shouldn't be making any mistakes and if I am, either Mr Kennedy will shout, or somebody on the other side will shout. But it is narrower than it was.

THE CHAIR: Yes. It seemed to me that there was material in this statement which looked like it wasn't subject to confidentiality, whereas some of the broader propositions that are talked about by Ms Casey are treated as confidential in your skeleton. So I was not quite sure what we can or can't say about that.

Now, are we able to treat the statement as being on its face -- can we refer to it as being not confidential unless it is marked in green; is that the position?

MR HOSKINS: I think the green is the marking that was produced for the Australian proceedings.

THE CHAIR: Yes.

MR HOSKINS: So technically it is not marking produced for these proceedings, but certainly I will not be going to anything marked green and the paragraphs I will refer to are 11 and 14. They weren't confidential in Australia and, given their content, it will be surprising if they were confidential today. I make it clear that's what I am going to refer to so --

THE CHAIR: That's fine. The concern I have is the first line in 11 is material that in your skeleton is marked as confidential. That's what we want to talk about. I just don't want to be talking about it in those terms, but it would be helpful if we could.

MR HOSKINS: Apple's response to our skeleton was originally designated confidential. When we did our skeleton anything that we cited from their response we had to mark as confidential.

THE CHAIR: Yes, understood.

MR HOSKINS: Since then they have produced a slimmed down version for confidentiality of their response.

THE CHAIR: Yes.

MR HOSKINS: That's why we are stuck with that sort of --

THE CHAIR: I understand the history. I think the point is I just want to be able to be comfortable. Paragraph 11 encapsulates the debate we are going to have, it seems to me, and I would like to be able to refer to it in its entirety as it is set out in paragraph 11, but obviously if it is going to cause a problem, I shouldn't do that. But that's very helpful. Thank you.

MR HOSKINS: Paragraph 11:

"Apple maintains its P&L at the enterprise level and that enterprise-wide P&L is "fully burdened," meaning that it includes all direct and indirect costs for the entire company,

but is not fully burdened for individual products or services (meaning that it does not fully and accurately allocate all direct and indirect costs attributable to that product or service)."

So that is Apple's practice, everyday accounting practice, but as I have already submitted, that's not the end of the story for an excessive pricing case.

Paragraph 14 is important because it tells us what Apple does or doesn't do:

"Apple does not track or report P&Ls that attempt to allocate all direct and indirect costs incurred with respect to those products or services. Consistent with its philosophy that Apple products and services are part of an integrated ecosystem, Apple's business is organised by functional units rather than business units."

Then the important bit:

"While revenues and certain directly attributable costs (for example, credit card fees from App Store transactions, and salaries of app reviewers) are tracked by individual product or service, largely for the purpose of conducting trend analyses, the vast majority [but not all apparently] of Apple's operating expenses (e.g., R&D, marketing, and Selling, General, and Administrative expenses ("SG&A")), are not tracked by product or service."

So what paragraph 14 tells us is that certain revenues and certain directly attributable costs are tracked by individual product or service. That's part of the equation that we need to fill in.

Paragraph 14 also tells us that the vast majority -- one assumes by implication not all -- of Apple's operating expenses are not tracked by products or service and these are the classic indirect costs that the expert would seek to allocate to the particular service under consideration in our case.

The most recent statement of Apple on this is their letter sent yesterday. That's at

core bundle 1, tab 26B. So it is just the next tab in this bundle. It is a Gibson Dunn to Hausfeld letter of 13 December 2023.

THE CHAIR: Yes.

MR HOSKINS: Now, this letter is consistent with the position in the witness statement -- or affidavit rather -- as one would expect. There is stuff marked confidential here, so I will not read it out, but I will ask you to read it. If you could read, please, paragraphs 7 and 8.

THE CHAIR: Yes.

MR HOSKINS: You will see that consistently with the Casey affidavit, these paragraphs confirm their availability of data on revenue and certain direct costs for the App Store.

In relation to indirect costs, if you read paragraph 10, please.

THE CHAIR: Yes. Just to be clear about where you are, we have revenue, we have direct, we have indirect costs. They seem to be saying you have information about revenue and direct costs. Are you satisfied that you have that or is that still part of your application?

MR HOSKINS: I am going to come on to various things we could do --

THE CHAIR: Yes.

MR HOSKINS: -- to actively case manage this issue.

THE CHAIR: Yes.

MR HOSKINS: That will include some submissions on revenue and direct costs, but the point I am making at the moment is that Apple accepts -- they have told us that revenue and certain direct costs attributable to the App Store are tracked.

THE CHAIR: Yes.

MR HOSKINS: It's available. It's done as part of the normal business. I will develop

where I go with revenue and direct costs, but that's the point I am trying to establish at the moment.

THE CHAIR: Yes.

MR HOSKINS: So Apple say, well, we don't do this indirect allocation exercise, and it will be terribly difficult to do it. With respect, that's not an answer to an excessive pricing claim. When an excessive pricing claim is brought, it is not a defence for the defendant simply to say: we don't do this as part of our normal business, and then everyone has to go away.

In an excessive pricing claim, if the allocation isn't done as part of the business, as I've said, the experts then do what they can with the information available to do the exercise. But the defence is not "we don't do it, nobody must do this, that's the end of the matter".

It is actually in everyone's interests to make sure that proper disclosure, full information, whatever one wants to put the portmanteau on, proper disclosure is given on this issue. It is in our interests, it is in the Class Representative's interest, because our expert wants to conduct as full an excessive pricing analysis as possible. We are trying to do the standard approach, we are not trying to do something off the wall.

It is in Apple's interest to have a proper attribution of indirect costs to the App Store because that will reduce its profitability in the equation we are looking at and that will make it less likely that its profitability is found to be excessive. It is actually in Apple's interest to have this done properly.

It is also obviously in the Tribunal's interest because you have to decide this at trial. You want to be able to decide it on the facts not on the absence of facts in evidence. That would be a very unsatisfactory situation for everyone.

If Apple isn't prepared to engage in this exercise, and there are other

consequences -- for example, depending on what you do today, but if you accept Apple's submission, so we are left with the status quo, in our submission what Apple couldn't do is produce relevant documents as part of factual evidence or as part of a reply expert forensic accountancy report on excessive pricing at a later date; i.e., they say what we say, and then they suddenly produce the relevant documents and say "aha, you are wrong, because ...". So that's just one consequence if we don't engage with this problem today.

Secondly, Apple's ability to turn up at trial and say that the excessive pricing analysis of our expert is defective because it has failed to take proper account of indirect costs will be constrained by the attitude that Apple takes today. It can't be satisfactory to turn up at a CMC and say, "don't let them have anything". Then, as a consequence of us not having anything, they say, "aha, your expert evidence is defective."

Now Apple has said -- you have seen in their letters and their skeleton -- this was all fine in Australia, but let me show you what Apple's position was in Australia. It's not in the bundles, but we have handed up a hard copy of the expert report of Tony Samuel.

I am told I have to treat the whole of this document as confidential, so I will ask you to read bits and I won't read anything out.

So you see *Epic Games v Apple*. This is the Australian Epic Games case, report of Tony Samuel. At paragraph 3, you read his instructions. Then there is a summary of Mr Samuel's conclusions on page 8, paragraphs 19 to 23. If you could read those, please.

THE CHAIR: Yes.

MR HOSKINS: So without breaching any confidentiality, this is not an exercise where the experts have written up and argued about the allocation of indirect costs, this is

a case in which the Apple expert turns up and says "aha, your expert analysis is not good enough because it doesn't deal with the following issues."

And that's what we are trying to avoid here. That's what we don't want to happen.

There is another element to this before I come on to how can we case manage this issue and that's the time sensitive nature of this application, because this application is time sensitive. The parties' expert evidence has to be filed on 26 April 2024. As you know, we were given permission to instruct an expert forensic accountant, and we have done so. It is Mr Louis Dudney of AlixPartners, and he has been instructed to conduct an analysis of the profitability of the App Store. That's the equation we are talking about. Revenue minus direct cost minus allocated indirect costs. And that analysis, the profitability analysis, is an essential input into the analysis of our expert economist who is dealing with excessive pricing, who is Mr Derek Holt, also of AlixPartners.

So we need to do the profitability analysis in good time to allow the excessive pricing economic analysis to be filed on 26 April 2024. That's what we are facing.

Now, in order for that timetable to be met, we believe that Apple would have to provide the relevant data and information by the end of January 2024. That would allow Mr Dudney to finalise his report on profitability by the end of February 2024. Bear in mind what that means; it means him producing a draft, us seeing the draft, providing any appropriate comments, him finalising the draft. It's not a one-off, here it is. You know, it is an iterative process from your experience.

Mr Dudney finalises his profitability report at the end of February 2024 and that gives Mr Holt two months to take account of it in his expert economic report. So that is the timetable.

In terms of timing, I should also deal with the fact that we have unfortunately, in the

run-up to this hearing, lost four weeks that could have been used to progress this issue.

On 14 November this year, the Tribunal wrote a letter directing that any applications for determination at this CMC should be filed by 22 November 2023. In accordance with that letter, on 16 November 2023, Hausfeld, the solicitors for the Class Representative, wrote to Gibson Dunn, the solicitors for Apple, setting out this independent application for financial data on application and information. Could we look at that letter, that's at core 1, tab 23A, and it's at page 204.

You will see paragraph 2:

"We set out below the substance of our client's intended application for directions that your clients disclose specific financial data."

If you turn to pages 207 and 208, you will see that that included annexes A and B which are the subject matter of the application today. So in the first letter we set out the detail, including annexes A and B.

Gibson Dunn replied on 17 November 2023, so the next day and that's at page 209.

If you turn, please, to paragraph 4 and perhaps if you would just read that to yourself.

What Apple said there is this shouldn't be dealt with at the CMC, there is no time for us to consider it, and they suggest that it should go off. The reason they suggest it should go off is to "allow the parties to properly engage with the issues and attempt to reduce them as far as possible so as to ensure the efficient use of the Tribunal's time and resources."

Now, bear in mind this is the 17 November 2023. There were still four weeks for this CMC. There was still ample time for Apple to "properly engage with the issues and attempt to reduce them as far as possible". There was four weeks.

Now, we wrote back on 21 November 2023. That's at page 211. If you read

paragraph 3, please, you see our response is, that's great you want to engage with us. That's precisely what we wanted. Let's engage on this and let's get this sorted.

On 22 November 2023, in accordance with the Tribunal's direction, we filed our application on a "precautionary" basis because we expected at that stage that there would be further discussion and we hoped that it might be able to be resolved. But what's actually happened is that Apple hasn't engaged at all with the substantive issues raised in the application.

In subsequent correspondence -- I won't take you through all the letters, I want to move the dial -- including in the letter written yesterday, Apple's position has been either that this application shouldn't be heard at all at the CMC, or that it should be dismissed. It hasn't made any constructive proposals as to how this issue should be addressed beyond you should go through the 1.7 million documents you already have and then make the application at that stage. So that's the extent of Apple's constructive engagement, et cetera.

Now I am absolutely sure the Tribunal has no interest in attributing blame here. Apple think we have behaved terribly. We don't think they have behaved very well. So what? That's not going to help anyone.

I have identified an issue that exists, it's a time sensitive issue and what matters is how we deal with that issue now. I simply make the point which is that we are in mid-December now, expert reports are due on 26 April next year, and we have lost four weeks. So if and when Apple, in response to my submissions, say it is all too tight, et cetera, bear in mind we lost four weeks and we didn't have to. So the tightness of the timetable results from that.

Can I deal with the disclosure to date? I intend to deal with it quite briefly. Apple has provided very substantial disclosure to date, it is about 1.7 million documents. At

various times Apple has suggested that our application for specific disclosure of financial information should wait until we have reviewed all of that disclosure.

At least in relation to indirect costs, that is not going to help because it looks like relevant documents, or certainly all the relevant documents, are unlikely to be found because Apple does not, as a matter of course, conduct allocation of indirect costs in the course of its business. So it is not a case that if we go through the 1.7 million documents suddenly it is all going to fall out. Apple has been very careful, it has not said you will find all the things you are looking for in annexes A and B there, which I think is quite telling. Because we have said if the stuff we are looking for in annex A and B is in the 1.7 million documents, just tell us. Just give us the ID numbers and we will be happy. But they have not done that so nobody knows exactly what is in there except for Apple and they have not been prepared to confirm that what we are looking for is in there.

THE CHAIR: That's actually why I asked you about revenue and direct costs. The question, I think, is: have you been able to find material in that 1.7 million documents that is useful?

MR HOSKINS: Yes, we have found some material that is useful, absolutely.

THE CHAIR: Yes. And one assumes that -- well, maybe one shouldn't assume, but given it is a matter that is in issue and clearly identified in the disclosure schedule and your supposition is that Apple should track it, one would like to assume it should be in their disclosure somewhere. There should be a proper body of disclosure for that material.

MR HOSKINS: Whether it is all there, we don't know yet.

THE CHAIR: And are you saying you are not sure about your position to access it?

MR HOSKINS: Yes. That point I am going to come onto now because it is a case

management issue. Let us assume there is valuable information in relation to revenue and direct costs in the 1.7 million pool of data, we are having trouble processing it.

If we show you our application at core bundle 1, tab 23, page 198, paragraph 12b., this is a good example of the sorts of problems that we are encountering.

THE CHAIR: Yes.

MR HOSKINS: This is an example. The way I put it is Hausfeld -- this is actually to quote from Apple's skeleton argument, so I am quoting what Apple say about Hausfeld -- "Hausfeld is a well-resourced international law firm with experience of conducting large-scale disclosure review exercises", and "numerous fee earners have been allocated to this matter."

What you have is a firm instructed by the Class Representative, which is one of the leading claimant firms in this jurisdiction and other jurisdictions, and they are very experienced in dealing with this sort of matter, and they are having problems, because they have been given a vast amount of disclosure and it's not as simple as simply coming up with some sort of automated search programmes which will produce the magic answers. Paragraph 12b. is an example of that.

If Apple thinks that all the relevant material on revenues, on direct costs, even on the stuff we are asking to help us allocate indirect costs, is in the 1.7 million documents, one easy way of dealing with it is for Apple just to give us a list of those relevant documents. The whole ethos of this Tribunal is the parties have to cooperate with the Tribunal, the parties have to cooperate with each other, the Tribunal will actively case manage issues to ensure that they are dealt with efficiently and cost effectively. Simply saying to us: somewhere in the 1.7 million documents, which you are having trouble filtering because it is not just a case of drawing up an automated search programme to do it, are the answers, you should just go and do it, really is the antithesis of how

this Tribunal operates. It is antediluvian. It is the sort of thing that happened in litigation pre the CPR. Here is a big pile of stuff, you sort through it, you make your case; that is not how the Tribunal operates.

What are the options? Now, I hope you will excuse me in saying this, usually when the Tribunal utters the words "active case management," it is usually about to do something that both of the parties hate. Everyone says, "we are begging you today for active case management. Please, please, actively manage this issue." Because it is crying out for it.

I am sure you will have your own ideas about how to deal with this, but let me put some options on the table, some suggestions.

The first option is to make an order in the form sought in our application. Mr Dudney, based on his expertise as a forensic accountant, has identified the categories of information that he would like to receive in order to carry out his profitability analysis, and that includes allocation of indirect costs.

If we can look at those annexes, it is core bundle 1, tab 23, page 201. You will see that he's not simply saying: "Give us all your internal allocation of indirect costs". Apple keep saying "you have missed the point, we don't do that.". We understand that. That's why we are not asking for that. What we are asking for is the information that will allow an expert to carry out an allocation exercise rather than simply saying because Apple doesn't do it as a matter of course, we all give up, which is not, as I have said, a defence.

So we are not seeking off-the-peg allocations of indirect costs, what we are seeking is off-the-peg data and information that would allow Mr Dudney to carry out that exercise.

THE CHAIR: You have moved onto indirect costs now. I just wanted to come back to revenue and direct costs. I don't know if you are going to give me some options in

relation to those.

MR HOSKINS: Let me do that then.

THE CHAIR: Can we just stick with those?

MR HOSKINS: There is one distinct thing that could be done for revenue and direct costs.

THE CHAIR: Yes.

MR HOSKINS: Some of the other material I am looking at actually covers all three.

THE CHAIR: I can understand that.

MR HOSKINS: But here is a specific one for revenue and direct costs. The Casey Australian affidavit tells us that certain revenues and directly attributable costs are tracked by individual product or service.

One thing that could be done is the Tribunal could direct Apple to give us the document ID numbers that relate to that tracking of direct revenues and direct costs for the App Store and the payment system. That would greatly assist. That would save a lot of money. That would save a lot of time.

You might even go further than that, if you want to actively case manage this, with a view not just to how do we solve this disclosure exercise, but how is this issue going to be dealt with at trial? What is it going to look like at trial? That's really why we are here. Disclosure is not an end in itself. We are trying to make this an effective trial.

The Tribunal could direct that Apple produce a document setting out the revenues and direct costs for the App Store and ASPPS. It might be broken down by year, I don't know to what extent Apple does the exercise. It could be done by month, if available.

But Apple produces that sort of document and that would be useful because then we could seek to agree that document. Imagine how much time, effort, cost we will cut through if we come to the Tribunal with a document that says, "these are the revenues

attributable to the App Store and the payment system. These are the direct costs attributable to the App Store and the payment system."

And maybe with a few narrow disputes between the experts. That would be hugely advantageous. That would assist enormously and that is not an unusual method for this Tribunal to use to try and break through these sort of expert issues and trying to reduce costs.

That would not deal with indirect costs, but it is a way -- I am just trying to think creatively -- if I was in your shoes and if I wanted to actively case manage this, that is one of the things that the Tribunal might do.

THE CHAIR: Thank you, that's helpful. Because I understand and I think there is a difference -- there may just be a difference in the quality of the problem, but there is a difference between the revenue direct costs where we understand the information exists, it is tracked and it's a question of identifying it and making sure it has been properly disclosed. And then, as you say, I think we would certainly expect that by the time we got to trial -- and indeed at some stage before that in the expert engagement -- we would want to know that the experts, if there were indeed two of them, were dealing with a common body of data.

MR HOSKINS: Because one of the options is -- Apple say we just do our best with the 1.7 million and Mr Dudney produces his analysis of revenues and direct costs and then Apple will tear into that.

There is another option which is, even if they give us the document ID numbers and we are able to pull all the direct cost and revenue stuff out really quickly and save a lot of time and money, and we produce it, and then again Apple will probably still tear into that.

That's why the suggestion -- I am trying to think, how do we save time and money?

Why doesn't Apple produce its list -- because Ms Casey tells us that they do do that as part of their business, as part of their reporting process. That's what they do. So they must have an it easily at hand. Do we create the wheel or they just wheel the wheel along and let us look at it. That's really what I am talking about.

THE CHAIR: On that basis, you really seem to be accepting that this should be done by a sequential exchange of experts, if indeed an expert is instructive. Why would you agree to that in those circumstances? We have made an order that primary expert reports be served on 26 April 2024.

MR HOSKINS: This is not going to the report, because the direct costs and revenues are only something that goes into the profitability analysis. It is part of the building blocks. There are still other elements to it. I am just looking at how we deal with data.

THE CHAIR: Yes, but actually --

MR HOSKINS: This would happen outside. It wouldn't be part of the formal trial process, it would be a subset of that, if you like.

THE CHAIR: Yes, I understand that. But as with any expert engagement, what we want to ensure is that there is a proper focus on the issues that the experts are engaging on. A common set of material that they are looking at, as far as that is possible, and if that's -- if it is necessary to have engagement between the experts in order to make that happen, then we would expect that.

MR HOSKINS: Yes.

THE CHAIR: Here we have a problem because we only have one expert, as things currently stand, and that undermines really the ability for all of those things to happen in the ordinary course. So if this was any other area of expertise and we knew, for example -- in a way, that was the whole point of doing the list of issues. The whole point of doing the list the issues was to make sure that we were clear, as between the

respective expert groups, what they should be reporting on.

I don't get the sense that's where we are with this. I get the sense we are quite a long way away from that in the sense that you don't have any -- there is no counterpart to engage with, if necessary, in order to get to that point and, therefore, there is no ability to explore the sort of issues you are talking about as between experts, which is really the way in which one would expect this to unfold.

I appreciate there is a sequencing in this, so this is all happening prior to the economic experts, but I don't think that makes any difference to the way in which it ought to be dealt with.

MR HOSKINS: No, but Apple has a choice. If the Tribunal is attracted by this sort of active case management, it can use its employees, factual witnesses that know about this stuff, to produce the lists. This sort of case management shouldn't break down because Apple chooses to appoint a forensic expert, but rather to rely on its own knowledge of its own business. That shouldn't be something that breaks this.

This can be dealt with factually by Apple. We have to deal with it through an expert because the Class Representative doesn't have their own expertise in this. But there is absolutely no reason why, in terms of just coming up to the practical way to try to produce a list, as I have suggested, that can't take place between the appropriate factual person at Apple and our expert. If they want to have lawyers in the room, that's absolutely fine. I am not interested in problems. I am just interested in ways to make this work.

THE CHAIR: Yes. I suppose when we get on to indirect costs it is different, because we know there is going to be an argument about methodology.

MR HOSKINS: Yes.

THE CHAIR: And that is a matter for trial.

MR HOSKINS: That's right.

THE CHAIR: So actually we are not really in the business of making the experts discuss or commit to that, but we would certainly want them to be agreeing what the evidential base should be for that discussion.

MR HOSKINS: Yes.

THE CHAIR: Yes.

MR HOSKINS: So there is a difference. The reason why I have distinguished them is for revenue and direct costs, Apple has told us we do track this relative to --

THE CHAIR: Yes.

MR HOSKINS: They have told us they don't do that for indirect costs. You are absolutely right. There are two different streams of how we would actually case manage this.

THE CHAIR: With the indirect costs, bear in mind that the question of the right method to allocate is not for now, what is that common set of data that helps you move the thing forward? Just forgetting for a moment about the way this is set up, just an ordinary sequence where you might have two experts engaging and talking about what material they needed in order to produce their reports. What is the connection between the granularity of the data and the ability to allocate?

If we know that it isn't done as a matter of course inside Apple now, what information do you suspect might exist about cost treatment that will give you assistance in relation to allocation? That's the question.

MR HOSKINS: I can't do any better than annexes A and B, because that's what Mr Dudney has told us he would want.

THE CHAIR: Yes.

MR HOSKINS: In his view, this sort of material could or is likely to exist, depending

on the category, and he believes, in his expertise, that this would assist him to perform an allocation exercise.

THE CHAIR: Is that because of granularity of the costs and the information about the way in which it is coded in the general ledger might give some clues as to the best way to allocate it?

MR HOSKINS: Absolutely.

THE CHAIR: But it might not, of course.

MR HOSKINS: I accept that as well.

THE CHAIR: Yes.

MR HOSKINS: I accept that as well. Ideally, the ideal situation is we would end up with Mr Dudney's report, doing an allocation exercise, and Apple coming at that with detail and saying "well, we don't accept that allocation, or this allocation is too much", but at least then you are actually doing the exercise rather than faced with what the suggestion is at the moment, is Apple just turns up and says "we don't do this, that's the end the matter". So you haven't considered this, you haven't considered that." And that's because we never had the information, we never had the engagement.

THE CHAIR: If you take the example -- I think Ms Casey gives, it might be somewhere else, but I think it is Ms Casey, where you have an engineer -- a set of engineers and the engineers are doing work which might benefit the hardware and might also benefit the App Store, and the question that arises is, well, what sort of information about the way that's coded, the way it's recorded, presumably in the general ledger somewhere, the cost of those engineers is going to help you decide how to fund? It is not immediately obvious how that will help, actually. It may depend -- I don't know, it depends entirely on how it is recorded, but you are saying you just need to see it.

MR HOSKINS: I am saying that Mr Dudney thinks it might help.

THE CHAIR: Yes.

MR HOSKINS: Again, let's just think about what we are trying to do here. The idea that Mr Dudney is going to produce to the nth degree an allocation of Apple's business costs over the last ten to twelve years, that's not going to happen. Nobody is trying to do that. But given this sort of information, can he come up with a reasonable analysis of allocation which will allow the Tribunal to decide whether profits are excessive at trial. That's what we are trying to achieve.

THE CHAIR: Ideally -- I think from our point of view -- ideally what we would like to have is a range of different ways of doing it --

MR HOSKINS: Of course, this is not our only --

THE CHAIR: Yes, yes. Precisely. But actually if there were different allocation methodologies, then clearly understanding what those might be, I think Ms Casey gives an example of a couple.

MR HOSKINS: That's right.

THE CHAIR: And then says they are not necessarily appropriate --

MR HOSKINS: That's right. We will find some of those documents -- I can't refuse the ones in the formal allocation -- the ad hoc allocations of them, I think, is the phrase she used, and of course we are poring over that stuff. But you are absolutely right, you need in excessive pricing cases, because of their nature you need a number of touch points to allow you to decide the issue.

But this is a core one; the revenue versus minus direct costs and indirect costs is generally at the core of this sort of excessive pricing cases. Not a sort of "it would be nice to have", this is economics 101-type stuff.

THE CHAIR: Yes.

MR HOSKINS: So that is option 1. It is annexes A and B. Apple hasn't said that it

doesn't have or can't provide the data and information sought. You have seen Apple's approach to this application, which is for another day, or dismiss it because we don't, as a matter of course, allocate indirect costs in the course of our business.

What they have not said is we don't have A and B or we can't give it to you, et cetera.

We just don't know because they haven't told us. But Mr Dudney believes that this stuff is likely to be or should be readily available.

Now, the major advantage of this option, beyond the fact it will actually let us crack this issue to get a grip of it, but the major advantages of this option is speed. Because the information, such as it exists, this sort of information which should be capable of being provided by Apple very quickly. You can see that just from the sorts of descriptions. It is standard business documents.

As I have said, if Apple believes that any of the relevant documents in annexes A and B have already been disclosed, just give us the document ID numbers and we will be delighted, but it is unlikely that everything we need is in there for obvious reasons.

That's option 1. The second option -- and Mr Frazer is probably waiting for me to come to this -- is to adopt the same approach as the Tribunal in the *Coll v Google* case, which had a very similar, not identical, but similar issue. So let us have a look at that active case management option.

The Tribunal's ruling is in authorities tab 6. It is the disclosure in the *Coll v Google* case. Can I ask you to read paragraphs 17 to 25 and then I will just highlight some points, if I may.

THE CHAIR: Yes.

MR HOSKINS: So you will see from paragraph 17, it's a very similar application. Mr Dudney is also the Class Representative's forensic accountancy expert in the Google case.

At paragraph 19, you see the Tribunal accepting that this exercise requires financial information to provide a level of granularity. That's the same submission we are making to you today.

You see at paragraph 21, Google's response was very similar to Apple's, and then they will go away and review the 2 million documents and then come back.

You see at paragraph 24, the last sentence, that Mr Draper, who was counsel for Google, accepted that there were levels of detail underpinning the P&L reports provided to management. Now, of course, that must be the case here, because these high-level P&L reports, something is feeding into them, so there must be information below them.

You will see the order the Tribunal made. "[A] witness statement... explaining their accountancy policy and practice, and provid[ing] a response to the points made by Mr Dudney in the Annexures to his first witness statement." Now those annexures were similar to A and B in our application, but not identical because the Google situation wasn't the same.

Then number 2, "within one week of the Third CMC, provide the financial data underpinning the P&L accounts provided down to the level of "general ledger entries".

And then, number 3, a meeting to discuss what would be necessary.

These are options I am putting to you. It is not either one or the other. You could take bits of each of them. For example, you can see that number 1, here, number 2 might work -- that would be a swift way of providing some information and moving this forward.

So as a sort of option, option 2, you know, generally looks as if it would work. But the problem in this case, the disadvantage of just taking this across in our case, is delay. It's the time issue. Because as I have said, we believe that Apple would have to

provide the relevant data and information by the end of January 2024. But that I don't mean the initial -- any initial information, I mean all of the relevant information. That's to allow Mr Dudney to finalise his report on profitable by the end of February 2024.

So if we were to go down this route, we would certainly have to have a more truncated timetable than that adopted in Google. I don't know, of course, it is all subject to the Tribunal's availability, but really it would be necessary that any disputes could be crystallised and determined in early January 2024 if this sort of iterative process was going to work. You will have your own ideas on whether that is feasible given your availability, et cetera, but that's the problem with option 2 in our case. It's delay. That's why we say the first option is preferable.

We have thought about it, you know Apple have not said they can't do it, and it would get round the delay point.

THE CHAIR: What's the difference, do you think, between paragraph 25(2) which is the provision of financial data down to the general ledger entries, and your request number 1 for financial statements? Are they materially different, do you think?

MR HOSKINS: I don't -- I have to be a bit careful. There were differences in that Google had a different approach in its general business to allocating its indirect costs.

THE CHAIR: Yes, they seem to have done an allocation and be able to reproduce the case --

MR HOSKINS: Exactly.

THE CHAIR: Yes.

MR HOSKINS: That's why I am hesitating, because I don't know the detail and I just can't tell you what the relationship between 2 and 3 is. Mr Frazer --

THE CHAIR: I can always ask him.

MR HOSKINS: You can ask him afterwards, yes.

THE CHAIR: I suppose the reason for the question is that in a way you could read 25(1) and (2) as actually being your options 1 and 2 bundled together, so you are actually getting a whole lot of financial information and you are getting a witness statement which explains it.

MR HOSKINS: Yes. That's why I said to you it could be a mix of these things. 25(1) and 25(2) look helpful in their own terms. Whether we need something else is another matter. 25(1) and 25(2) on their own terms I can see the merits of.

THE CHAIR: You are saying that just asking for a witness statement, which explains it all so we understand it better so we know what to ask for, might be helpful but it doesn't help the timetable.

MR HOSKINS: It doesn't help the timetable. And I gave you that gentle reminder. I was not trying to put blame and I am not trying to put blame, but we lost four weeks on this application, so when you are looking at the timetable of what is there, that wasn't our fault losing the four weeks. I am not asking you to make blame, et cetera, that's just a fact. We could have been four weeks further along on this.

The third option -- these are all sub-options we are discussing, so I am just putting these forward as broad headings so we can all think about it -- the third option is that proposed by Apple, but it's really not an option at all.

Let's go to Apple's response to our application, core bundle 1, tab 26. If we pick it up at page 251, and perhaps you could read paragraph 18. You see the heading "Proposed Way Forward".

Apple has suggested that the Class Representative completes her review of the 1.7-odd million documents disclosed to date and then bring any specific disclosure requests relating to this excess pricing issue along with any other requests. That doesn't work for two reasons. First of all, as I have already explained, much of the

information sought is not likely to be in the existing disclosure. Apple hasn't told us it is there, it's just said "go and look and see if it is there." If it is there, as I have said, there is a short cut to this, Apple just gives us the document ID numbers and that short-cuts anything, if it is there.

The second point is the delay point. We are currently due to make any specific disclosure applications by 27 December 2023. You have to hear me on whether you are going to grant us an extension in relation to that. Even if you don't give me any extension when you hear me on that, postponing consideration of the current request for financial information until the end of December 2023 will make it very unlikely that Mr Dudney will have what he needs in good time. It is an easy point. The issue is squarely before the Tribunal now and should be resolved now. Further delay, on top of the four weeks we have already lost, is not going to help anyone, and that includes Apple.

THE CHAIR: Can you tell us, with the document review -- you may not be able to answer this at the moment, but in terms of where you are with progress through that, I think there were different subsets, weren't there? There was a subset of 1,500 and something which had been looked at, and there were two further subsets, one of 900,000 and one of 700,000, something like that. Do you have any sense of how far through that exercise -- perhaps stepping back a bit, is the disclosure review a document-by-document review? In other words, are you going to look through all of it on a manual basis?

MR HOSKINS: I don't know the details.

THE CHAIR: No.

MR HOSKINS: So I am loathe -- what I can say is the people sitting behind me are Hausfeld who know how to do this stuff.

THE CHAIR: Yes. It is more a question of what's the expectation about when that exercise will be finished, if indeed there is an expectation.

MR HOSKINS: That's the extension application.

THE CHAIR: Yes.

MR HOSKINS: So what Hausfeld has done is it has been working on this now for a number of months. It knows what it has done. It knows what remains to be done. And its best estimate is it needs another four weeks to complete the exercise. So it is based on their own experience --

THE CHAIR: I see. That's helpful. So the expectation is that in four weeks -- I don't want to pin anybody down to the last document -- there will have been a review of most of that material?

MR HOSKINS: That's right.

THE CHAIR: Yes, that's helpful. Thank you.

MR HOSKINS: That's where we are at.

So just to conclude on this. We are asking for active case management of this really for two reasons. One, because this issue has to work at trial. You have to be in a situation where you can make a meaningful decision on this. If we all turn up and the case is simply that the information isn't there, the data isn't there to support an allocation, that's really a world that -- I mean, Apple I understand would want it, because they would be delighted, but in terms of justice that is a really bad result and clearly a bad result.

Then there is another issue which is the Tribunal's overarching requirement to actively case manage cases so that they are dealt with efficiently and economically. The suggestion that we simply pass through 1.7 million documents with the difficulties, some of which I have given you examples of, is just not the way the Tribunal does this

sort of thing and nor should it. That's why this really is a heartfelt plea to help us, to make this work in terms of justice, to make it work in terms of costs and please actively case manage this issue. That's the application.

THE CHAIR: Good. Shall we proceed on the basis that Ms Demetriou is going to respond to that? It might be helpful for us to hear that or do you want to move on and deal with other matters?

MR HOSKINS: The only other matter is the extension. Given the degree of overlap it might be worth me just dealing with the extension well because some of it ties in.

THE CHAIR: How long will you be with that? How long will you be with that, do you think.

MR HOSKINS: 10, 15 minutes.

THE CHAIR: Yes, good. Let's do that. We will take a short break for the transcribers and we will come back at ten to 12 and then we will let you deal with that and then we will hear from Ms Demetriou.

(11.41 am)

(A short break)

(11.52 am)

THE CHAIR: Yes, Mr Hoskins.

MR HOSKINS: I am going to deal with agenda item 3, which is our application for an extension of time for making further disclosure requests.

If we can begin with the current order. That's supplemental bundle 2, tab 103, page 377.

THE CHAIR: Yes.

MR HOSKINS: This is the order in which the Tribunal set out the disclosure scheme we have. The particular paragraph we are looking to amend is paragraph 9:

"By no later than 4pm on the date three months after inspection is provided pursuant to paragraph 7, the Class Representative shall have made any further requests for disclosure of and/or proposed further searches for documents" et cetera.

That date of three months after inspection is provided, is 27 December 2023, this month. We are applying for an extension of four weeks to that date, i.e. until 24 January 2024. The fact we are making that application probably doesn't come as a great surprise to you.

When we go to the disclosure ruling that relates to this order, that's in this bundle, supplemental bundle 2, tab 110. So this is the ruling on disclosure which underpins the order we have just looked at. It wasn't me appearing for the Class Representative on this occasion, it was Ms Kreisberger, but you probably remember this particular aspect of the disclosure issue.

If you look at paragraph 6, you will see the heading "The Agreed Process". It is tab 110 in this bundle, in supplemental bundle 2, and I am on page 440. You see the heading "The Agreed Process" paragraph 6:

"In its Disclosure Report, prepared pursuant to Rule 60 of the Competition Appeal Tribunal Rules, Apple has proposed that its obligations to make disclosure in these proceedings should be discharged substantially by the production of documents from the Repositories. The Class Representative agrees with that approach, at least as a starting point." And at paragraph 7:

"The parties are also agreed that the appropriate process for production of documents from the Repositories is as follows..."

And you are familiar with that process. But then heading number 4, "The Dispute":

"The dispute between the parties is whether Apple should be required to conduct a relevance review of the documents ...prior to the production of those documents to

the Class Representative. The Class Representative says that this is not only established practice, but also necessary, as she will otherwise need to review large volumes of irrelevant documents in order to process the Responsive Documents produced to her. That would be oppressive and inefficient, given the relatively greater knowledge which Apple has of: the documents; the US and Australian proceedings; and the nature of the Repositories themselves. Ms Kreisberger KC, for the Class Representative, put it 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."

Considering the problem on the basis of the evidence and the submissions you had at that time, you found for Apple and you found against the Class Representative and that led to the order we have.

If you go to page 11 of the ruling, paragraph 26, you see the decision:

"I have declined the Class Representative's invitation to require Apple to conduct a relevance review of the Responsive Documents in the Repositories prior to their production. The documents in the Repositories have been subject to a relevance review which ought, given the apparent similarities between the US proceedings and these proceedings, to be sufficient for present purposes. The parties are to proceed to co-operate with each other to progress the agreed process and should notify the Tribunal if difficulties are encountered."

That's fine. I obviously don't quibble with the ruling that is made, but you did invite us to come back to notify you if difficulties were encountered and this is that notification.

Can we go to our application, core bundle 1, tab 23, and pick it up at page 197, please, paragraph 10. We explain that the review is ongoing, and we refer to the different categories of material that's been disclosed. The total of documents disclosed is

around 1.7 million. Obviously they come in all sorts of different forms. There are hard copy documents, there is electronic stuff, spreadsheets, emails, everything is in there.

A cornucopia of disclosure.

Paragraph 12b. you have seen. That gives you an indication of the sorts of difficulties being encountered, and in paragraphs 16 and 17, we set out our application for a further four weeks.

Let's deal with Apple's objections to that request for an extension. To pick it up in Apple's skeleton argument, core bundle 1, tab 3, page 22, if you could read, please, paragraph 20b. I have referred the quote to you before about Hausfeld being a well-resourced international law firm, et cetera, and that numerous fee earners have been allocated to this matter. Hausfeld know what they are doing. They do this a lot. There is no reason for Hausfeld to play games or be obstructive. They are doing their best.

The problem is not the manner in which the exercise is being conducted by Hausfeld, the manner is simply the scale of the task and what is involved in it. In our submission, when a firm as capable and experienced as Hausfeld says it needs more time, to be honest, we should listen to that, that is an absolutely good faith statement.

There is another aspect to this which is important. The Tribunal's Guide to Proceedings 2015, at paragraph 5.87, states that disclosure "is not to be used as a weapon in a war of attrition". Now the Class Representative acting on behalf of the class, in our submission, should be given sufficient time to review the very large number of documents disclosed. It defeats the purpose of having disclosure if you just run out of time and you have to give up going through it.

But there is an important aspect to this which relates to this particular case and collective actions, which is that the Class Representative doesn't have unlimited funds.

She's not a commercial organisation suing to claim damages or protecting her rights. In certifying these collective proceedings, the Tribunal approved the amount of funding as being reasonable. That's one of the requirements that a Class Representative has to satisfy in order to be certified. But having had that budget approved, the Class Representative has to live within her means. She can't just throw money at issues. There is money earmarked, obviously, to take us to trial and she has to be aware of that budget and has to be careful with it.

The Tribunal, in our submission, should be careful to ensure that the manner in which disclosure is conducted doesn't bust that budget because that would be a denial of justice, which is the whole purpose of allowing these claims to be brought in the first place.

So it's not a case -- a commercial case -- where you stand up and say, well, just throw more people at it; it's not that sort of case.

The second point that Apple makes is at paragraph 20c. of its skeleton argument. It is the suggestion that the extension that we seek might have a knock-on effect on the future timetable. We don't agree with that. As we said in our skeleton argument, 24 January 2024 would be the latest date on which, under the amended order, we would be allowed to make further requests for disclosure. We are perfectly happy to say that we will make every effort to make further requests on a rolling basis, in advance of the 24 January 2024, and on that basis we will try to avoid -- it will almost certainly not be the case that all of the requests are made at the very last minute on the very last day. It is in our interests to make this work as well. We are trying to be co-operative with Apple and the Tribunal.

The deadline for serving factual witness evidence won't be affected, because we are not serving factual witness statements, because -- you know why. Apple's ability to

prepare and serve its factual witness statements, of course, isn't dependent upon Apple having to provide disclosure to us, they are their documents, so that issue doesn't arise. So you don't have to worry about the factual witness evidence.

In relation to experts, of course the experts can and have started working on the basis of the documents disclosed to date. It's not a situation where everyone has to down tools until the very last day when any specific disclosure requests are made. Everyone is already working on this stuff. Insofar as further material does come to be disclosed, then they can take account of it, but it is not everyone sitting waiting for this; the work is happening.

In our submissions, for those reasons, we would ask for a further four weeks and to amend the existing order accordingly. Those are my submissions on agenda items 2 and 3.

THE CHAIR: Thank you.

Thank you, Ms Demetriou.

MS DEMETRIOU: May it please the Tribunal.

I was listening to Mr Hoskins' submission with some bemusement, in fact, because if we turn up the letter -- let's start here. If we turn up the letter that my solicitors sent to Hausfeld that Mr Hoskins took you to, the letter of 13 December 2023, which is at core bundle, tab 26B, page 608.1, now you will recall that Mr Hoskins -- you, sir, put to Mr Hoskins what practical way forward are you suggesting in relation to revenue and direct costs?

Mr Hoskins said, well, we would like at least the document ID numbers of the materials referred to in the Casey affidavit which do address revenue and direct costs. If you look at the letter, Apple has indeed provided the document ID numbers. They are footnoted. So if you go to page 608.3 -- I am not going to read it out, it is

confidential -- but if you could have a look again at paragraphs 7 and 8 which explain what Apple has previously disclosed to Dr Kent in terms of revenues and direct costs. Indeed, at paragraph 9 the document ID numbers are all footnoted. So those have been provided.

I am going to come on to say in due course that it's simply not the case that Apple has sent over all of this disclosure without identifying those documents that relate to data. That's a separate point I am going to make, but in relation to specifically to one of the key ways forward identified by Mr Hoskins, that has already been done.

Now his second point was he said "even better, Apple should produce a document setting out revenues and direct costs in one document". Well, it has produced such a document. One of these footnoted documents is such a document covering several years. So this really is illustrative, in my respectful submission, of the fact that this, I am afraid, is an ill-prepared application that simply doesn't focus on what has been provided, even where that is labelled and handed over on a plate.

So those two particular case management solutions that Mr Hoskins is urging on the Tribunal have already been done by Apple voluntarily.

THE CHAIR: Could I just pause for a minute, just to make sure I completely understand that and how it relates back to the requests.

MS DEMETRIOU: Yes.

THE CHAIR: I am conscious of the confidentiality. But in paragraph 7 we are talking about a particular assessment. I don't think that would, on the face of it, encompass necessarily all direct costs.

Paragraph 8 seems to suggest that there is a further assessment which extracts other costs, and therefore -- so is the submission that you are making that that amounts to an overall assessment of effectively the direct costs?

MS DEMETRIOU: Sir, my submission is that, to the extent that Apple tracks revenues and direct costs for the App Store, those have been disclosed. Those documents have been disclosed and we have now provided -- we have here provided the document ID numbers.

If you could go over the page, if you look at paragraph 10 of the letter, please --

THE CHAIR: Yes.

MS DEMETRIOU: -- in fact, would you just read paragraph 10 to yourselves?

THE CHAIR: Yes, of course.

Yes. That seems to be moving on to talk about indirect costs as well, doesn't it?

Am I right?

MS DEMETRIOU: That's absolutely right.

THE CHAIR: Yes.

MS DEMETRIOU: Sir, the position is -- I really didn't understand it when Mr Hoskins was saying, well, Apple has never said that the documents that are in our annex A and B don't exist. Well, we have said that. Ms Casey said that in her affidavit. Those documents -- we will come back and look at annex A and B, but they don't exist and so when Mr Hoskins says that option 1 is to grant our application, so grant that the request for documents in annex A and B to be produced by the end of January 2024, obviously that is only sustainable if such documents exist and they simply don't exist.

THE CHAIR: Yes. It may not be the way you have thought about it, but it certainly seems helpful to me to think about revenue and direct costs separately from indirect.

So we will come back to indirect costs.

MS DEMETRIOU: Yes.

THE CHAIR: I just want to nail down the point I think you are making about paragraphs 7 and 8 and indeed paragraph 9. I think, if I understand it, if I have this

right, if you put a finger in that and go back to Ms Casey's affidavit at paragraph 14 --

MS DEMETRIOU: Yes.

THE CHAIR: -- which Mr Hoskins anchors us back into, and she says that there are revenues and certain directly attributable costs are tracked, you are saying, I think, that those are -- that exercise is reflected by the descriptions in paragraphs 7 and 8.

MS DEMETRIOU: Yes.

THE CHAIR: And that in paragraph 9 you have identified that you have given -- you have identified the documents in -- the disclosure that has been given already.

MS DEMETRIOU: Yes.

THE CHAIR: That served that purpose, I think you say, therefore, for a period of a number of years in the middle of paragraph 9.

MS DEMETRIOU: That's correct. We have identified the document numbers. In fact, having gone through them, we have been slightly overinclusive in the document numbers, so they include some documents that go slightly beyond what we have said in paragraph 9.

THE CHAIR: Yes.

MS DEMETRIOU: But they are there.

THE CHAIR: Yes. As far as revenue and direct costs go, you say you have done it, it has been disclosed and here are the documents, the matter and the disclosure, and that's the answer to Mr Hoskins' point.

MS DEMETRIOU: That's the answer to the point.

THE CHAIR: Yes.

MS DEMETRIOU: There is nothing else that we can disclose. Because for the reasons that are set out in Ms Casey's affidavit, the business does not operate in that way. So they do not track -- they don't track costs and revenues on a service or

product basis.

As Ms Casey has explained, there are certainly estimates that have been produced. Insofar as those been produced, we have refer to them here and we have now given the document numbers. As I say, one of those documents is precisely the document that Mr Hoskins says, well, in an ideal world Apple would produce to us a document setting out the revenues and the costs over a number of years for the App Store. That is indeed one of the documents that we have footnoted here.

THE CHAIR: Yes.

MS DEMETRIOU: So there is a two-fold answer to the application. The first is that we've done -- so we have produced what we can. So what exists, we have produced and we have pointed out the document numbers.

The second is that the documents that are in annex A and annex B, insofar as they go beyond this, which they do, do not exist, because that's not how Apple runs its business.

THE CHAIR: Yes. So if we then get into indirect costs -- and feel free if that is part of the answer to the question, take me to that schedule -- but we have, if you think forward to how we are going to deal with this at trial --

MS DEMETRIOU: Yes.

THE CHAIR: -- what are you saying, that actually all we are ever going to get at trial is a set of unallocated costs, or are you saying there is going to be some argument about methodology at trial for allocation?

MS DEMETRIOU: No, that's all you are ever going to get at trial because Apple does not allocate those indirect costs. So there are no documents to produce. So Mr Hoskins posited a situation where they attempt to carry out a profitability analysis and we say in response, "hang on, that's no good, because we have these additional

documents". That's the position --

THE CHAIR: Ms Casey does say that there are ways you can do it. She also says they are not very satisfactory ways.

MS DEMETRIOU: Yes.

THE CHAIR: But if we could just pick up that -- I am sorry, I am taking you out of turn, I am sorry.

MS DEMETRIOU: No, no, of course, it is fine.

THE CHAIR: If you don't mind.

MS DEMETRIOU: No.

THE CHAIR: I think she talks in paragraph 22, which again is marked confidential so we wouldn't get into it, but she talks about two methods.

MS DEMETRIOU: Yes.

THE CHAIR: And says that neither of them are reliable nor accurate. But, I mean, it is clear, isn't it -- and actually another document I picked up -- and this probably illustrates having too much time on my hands -- but can I ask you to have look at page 480 in that bundle, which is again, I expect, a confidential document, but just --

MS DEMETRIOU: page 480 of core bundle?

THE CHAIR: page 480 of the core bundle, yes. Which I think is probably part of the exercise that Ms Casey says -- well, it is part of the email, isn't it? This is attached to the email she says she sent internally carrying out one of the exercises she says is inaccurate. But I think what you see there is some form of exercise of allocation at pages 480 and 481.

So it is clear that -- and you may well say, indeed Ms Casey says, that these are not the accurate ways of doing it, but I suppose the point I am trying to make is isn't it inevitable at trial we are going to be having some argument about some form of

allocation other than the position, I think you seem to be taking which is that the profit margin we have to be looking at is looked at at the enterprise level.

MS DEMETRIOU: Sir, I think we have to draw a distinction between two things, if I may put it like this. Yes, of course, the Class Representative's case is that there has to be a profitability analysis. We are not saying that they shouldn't attempt to do that. Of course, we accept that if they can identify documents and data which they can point to that we have that haven't been disclosed, and of course we can engage with them in relation to that, so we are not saying that that's not something they can do, of course they can do it.

Our position at trial will be, first of all, that that's an inappropriate way to -- as you know, our position is that that's an inappropriate way to examine excessive pricing in this context. And secondly, we say it can't meaningfully be done. That's a debate that will have to happen at trial. It's not incumbent on us to put forward proactively expert evidence analysing profitability, because our case is that that's the wrong way to go about things.

Now, a separate question, of course we understand that the Class Representative wants to do that and we also understand that insofar as -- which is the case -- Apple internally doesn't allocate indirect costs, that's something their expert will have to do. Of course, they can seek to do that. But we can't invent documents that don't exist in terms of internal allocation of indirect costs.

THE CHAIR: Yes. Perhaps we can come back to the documents in a minute, if we may. Is that your answer to my point about the sequential exchange and the use of experts? You are saying that actually if you put in an expert report on 26 April 2024 which is simply saying "this is not something that can sensibly be done", that's the position, is it?

MS DEMETRIOU: We will want to see what their expert report is --

THE CHAIR: Sorry, my fault, I am sure. What I mean is if we required you to put in an expert report simultaneously rather than sequentially, you are saying that actually there is nothing your expert is going to sensibly be able to say?

MS DEMETRIOU: Of course, sir, that is a hypothetical question. We are a defendant, we don't have to put in any evidence at all ultimately. We certainly don't have to put in -- we can't be required to put in an expert report dealing with profitability.

THE CHAIR: Yes, but if we have decided -- which I think we have -- that expert reports should be simultaneous, you would need permission to put them in sequentially. I don't think you have asked for that, and we would have to be satisfied that that was the right thing to do. I think the point that Mr Hoskins was making, which may be entirely unfair, but he was saying that we ought to be mindful that your client might find a way to say that, and obviously we would want to ensure that didn't happen. I am not suggesting for a moment that's the intention, but there is a reason I think why one decides simultaneous or sequential. It may be that sequential is the right answer here for reasons we are exploring --

MS DEMETRIOU: Yes.

THE CHAIR: What I don't think you can do is avoid the question altogether because it is plain, isn't it, that there is an argument coming about allocation down the track and the Tribunal needs to have the material to deal with that argument. It may be that the material, once available, doesn't show anything. And you are free to argue that of course.

MS DEMETRIOU: Yes. Sir, of course our case is that this can't meaningfully be done because of the nature of the business.

THE CHAIR: Yes.

MS DEMETRIOU: That's our pleaded case.

THE CHAIR: Yes. So, therefore, if we said to you if you are going to put in an expert report on this, you have to put it in simultaneously. That's what your expert would presumably say.

MS DEMETRIOU: That's our case, yes -- I am getting nods from behind me.

THE CHAIR: Yes, and then you get Mr Hoskins' class expert and of course you would reply to that if you thought there was anything to say about it.

MS DEMETRIOU: Exactly.

THE JUDGE: Yes.

MS DEMETRIOU: It is our case, if I can put it this way -- our position here is that this is a million miles away from a pharmaceutical company that has ten products and is trying to allocate indirect costs to one of the products. Our case, our pleaded case, is that this is not something that can meaningfully be done in this industry for Apple's products and services.

THE CHAIR: Yes, that's helpful. That's a very helpful clarification. If one accepts, then, that that is where you are, and Mr Hoskins wants to have a go at persuading us that there are some means of allocation --

MS DEMETRIOU: Yes.

THE CHAIR: -- I think he's saying that there is a hope that if you deliver some material that shows with more granularity how the costs are treated, that might provide some clues as to allocation. That may or may not be right and I think Mr Hoskins has fairly conceded that might not be the case, but he wants to have a go at it.

MS DEMETRIOU: Yes.

THE CHAIR: So the question is: is there material which the defendant has which could disclose that? I am thinking at the most obvious level, a general ledger would

disclose how the costs were recorded and treated.

MS DEMETRIOU: Sir, no, because they don't allocate costs -- this is the point that Ms Casey explained in her affidavit. Apple does not allocate costs on a product-by-product or service-by-service basis --

THE CHAIR: Yes.

MS DEMETRIOU: -- so it wouldn't help. It is unlike Google in *Coll*. So in the *Coll* case, Google said, "we do basically have this information, it involves re-running some of our financial data, spitting out some other form of the financial data." But the difference here is that Apple simply does not carry out that allocation exercise.

THE CHAIR: I think we are talking about something other than allocation because I think the question of allocation and how it can be done is something for trial. I think what we are talking about here is giving an indication about how the costs are recorded. Because Mr Hoskins is saying, if the costs are recorded in a particular way it might assist him to argue about an indication. Now, whether he's right or not, I don't know, we have to wait and see. But I think he's saying "I am entitled to see the way the costs are recorded".

For example, if one takes the engineering costs that I think Ms Casey refers to in her affidavit, how does one see those costs recorded in the expenditure? I don't know whether that would be in R&D or where it would be, it probably may be somewhere else. But where it is recorded and how it is recorded?

One assumes that there is some differentiation of the costs that go into some of these big buckets. If you have buckets which have costs of millions in them, presumably the way in which they are recorded in some ledger somewhere at the lowest level will show a differentiation. Maybe that is not right, but one would assume that that would be the case.

MS DEMETRIOU: Sir, not differentiation by product.

THE CHAIR: No, no, I understand. But I think Mr Hoskins is saying any clue he can get about the nature of the costs or the allocation --

MS DEMETRIOU: Sir, I am not happy to respond to "any clue that you can give on the nature of the costs of the allocation" because -- let's go back, if we could, to their actual application that we are facing in these proceedings. I am not trying to be obstructive. There is a process which is you make an application and that is responded to --

THE CHAIR: Before you do that, we are not talking about the application here, we are just talking about how we get to a point. What we are most interested in here is how we get to a point at trial where we can resolve the arguments put in front of us.

MS DEMETRIOU: Of course.

THE CHAIR: What I think is most unattractive is to find that we have Mr Hoskins turning up saying "I would like to be arguing these forms of allocation, but I do not really have enough information for you to make a rational decision about which of them is the best of them," or indeed your arguments.

What that does is, I think, lead you to ask is there any material that might assist the experts, or expert if there is only one of them, to draw some conclusions -- even if they have not been able to allocate by product because of the nature of the costs and the way they were incurred. The answer to that may be no, but I think we do need to explore what material there is that shows the recording of costs that might give rise to that. That's what we are talking about.

MS DEMETRIOU: That's what Ms Casey's affidavit is directed to and what our letter is directed to, so what we are saying is --

THE CHAIR: I am sorry to interrupt you. I don't think Ms Casey's affidavit is directed

to that at all. Ms Casey's affidavit is all about the allocation, isn't it? It is about the identification of cost to product. It is not about how they are recorded in the system, is it?

MS DEMETRIOU: Sir, what costs? What she's dealing with is the costs that at that stage Apple thought, exercising some judgment, were relevant to that product --

THE CHAIR: No, I think -- yes, but I don't think that's the question. If I may say so, I think you are jumping onto allocation.

MS DEMETRIOU: What else -- I am sorry, what else other than identifying the costs relevant to that product and how they are allocated -- what else is there, I am struggling?

THE CHAIR: If one had a sense of what the costs were incurred for, you might be able to venture some allocation, even if it hasn't been done in Apple's accounting system.

MS DEMETRIOU: Sir, I think what Ms Casey is saying is both things together. She's saying these are the costs relating to the App Store that we are identifying for -- not on a fully burdened basis, but these are the costs that we are identifying in relation to the App Store for these purposes and this is how we are allocating them.

So I don't think there is some -- it is not the case that the Class Representative has come to us saying "we have looked at what Ms Casey has done and she's taken account of these costs, but actually we think we would quite like to see this additional cost and how that is dealt with." We are not facing an application like that.

THE CHAIR: If you look at page 480, I do not think that's what I understand she's doing at all in these exercises. She's accepting that there is a very large bucket, of, for example, research and development and she's making some attempt to allocate that by reference to what might be direct, what might be shared and what might be

specific to particular, in this case, products.

MS DEMETRIOU: Yes. So this is being disclosed. The question is what -- I am not sure, sir, what you are putting. This is really the difficulty with facing an application that's not clear.

THE CHAIR: I am sure it is my fault for not explaining it properly, but I think if you just put aside the question of allocation for a minute --

MS DEMETRIOU: Yes.

THE CHAIR: -- by which I also mean whether Apple has recorded a particular cost as having a relationship with a particular product. I understand you are saying that is not what happened.

MS DEMETRIOU: Not what happened.

THE CHAIR: At least for indirect costs.

MS DEMETRIOU: Yes.

THE CHAIR: So I understand that.

MS DEMETRIOU: Yes.

THE CHAIR: But if one is trying to do an exercise which replicates what Ms Casey does -- and she explains this in her affidavit, she says it is unreliable, but nonetheless she attempts it --

MS DEMETRIOU: Yes.

THE CHAIR: -- she must presumably have had some basis to go from the number on the left-hand side attributed to research and development to the numbers on the right-hand side attributed to products. Now, we don't know how she's done that, but presumably it isn't because the costs, the R&D costs, were identified as having that connection; there must be some other basis on which she's done that.

MS DEMETRIOU: Yes. I think if we can go back to her statement, I think she does

explain that. If we can go to page 258 of the bundle.

THE CHAIR: Yes.

MS DEMETRIOU: Could you read paragraph 22, please.

THE CHAIR: Yes.

Yes, I see. So you say she's doing it by reference to --

MS DEMETRIOU: Total costs.

THE CHAIR: She's doing it by reference to a pool of total costs and then she is dividing that using particular -- I am conscious of the confidentiality of it.

MS DEMETRIOU: Yes, exactly, you see what's said.

THE CHAIR: Yes, which doesn't depend on the nature of the costs at all, yes.

MS DEMETRIOU: Sir, I am really not trying to be obstructive, but our answer to the application is that really we have provided what we have that is relevant to this exercises. If we go back to -- could we go back, please, to the application --

THE CHAIR: Yes. I am sorry, I know you want to say, but just before you do, Mr Frazer --

MR FRAZER: I just want to stick with Ms Casey for the moment. In her paragraph 14 --

MS DEMETRIOU: Yes.

MR FRAZER: -- she says -- this is not marked as confidential. She says what's tracked and what's reported. But I don't think anywhere Ms Casey talks about how a cost is recorded. In other words, as I take it, she says Apple doesn't value or review costs and revenue on a product or service basis because it likes to take a holistic approach. But I can't find anywhere in here -- I may be wrong -- detail of how individual costs are actually recorded, whether or not that record is used for tracking or review purposes. I think the question the Chairman had was: is there information about the

way in which costs are recorded -- not the way in which they are allocated by Apple or the way in which Ms Casey said it could be done -- but is there information about how they are recorded in whatever document or whatever database exists? Because I think that is what the Class Representative wants in order to be able to suggest an allocation for herself. That's the question.

MS DEMETRIOU: Let me just take instructions on that question.

Sir, I can't give you answer because we have never been asked that question. It really is illustrative of the problem that we are facing. Because I do want to go back to the application because I am addressing the application and it is, frankly, not appropriate for the application to change. This wasn't even a point put by Mr Hoskins on his feet. He suggested various options which I have responded to.

THE CHAIR: I think Mr Hoskins is justifying the -- you should take us to the application, I am sorry, I have kept you away from it.

MS DEMETRIOU: Yes.

THE CHAIR: I think Mr Hoskins is justifying his annex on the basis, at least in relation to indirect costs, on the basis that he understands they are not allocated, but he wants to see some more granular data so that he might be able to melt some arguments as to allocation. I think it is quite clear that he put his case like that.

MS DEMETRIOU: Which costs? We have not been told which costs.

THE CHAIR: All of the costs, I think.

MS DEMETRIOU: All of the costs for the entire business?

THE CHAIR: Yes, I believe so.

MS DEMETRIOU: We have never been asked. That would be an extraordinary ask, actually.

THE CHAIR: Let's look at the application.

MS DEMETRIOU: Let's look at what he says. The application we are facing, which is at core bundle 1, tab 23, page 201, annex A and B, they are very specific about what they are asking for. In request number 1, they are asking for "Financial statements (e.g. income statements, balance sheets and cash flow statements) for the App Store, AMP, and Internet Software and Services (IS&S), services setting out monthly, quarterly and annually. The financial statements should contain detailed breakdowns," et cetera, et cetera.

Then you see at request number 2:

"Chart of accounts showing all account numbers, account names and account descriptions used by the App Store, AMP and IS&S and feeding into its financial statements."

Go to request number 5:

"All management reporting regarding the performance of the App Store," et cetera.

Request number 6:

"Reconciliations between the profit and loss statements of the App Store, AMP, IS&S and Apple, including any consolidating financial statements / worksheets."

Request number 7:

"Detailed cost information (including operating expenditure) for the development and maintenance of the App Store."

Not for the entire business, for the App Store.

THE CHAIR: Just so I am clear, you are saying that the request is limited to the App Store, AMP which I can't remember precisely what it is, but I think you say it is not a term of usage at Apple.

MS DEMETRIOU: We do say that.

THE CHAIR: And Internet Software & Services which I think is an operating unit, is

that --

MS DEMETRIOU: Yes. We say that those are not divisions recognised by --

MR HOSKINS: Before we skip over it, you have to read, for example, request number 4. Some of them are so limited, but some of them aren't limited in that way.

MS DEMETRIOU: Request number 4:

"Accounting manuals or other materials that describe the structure of the general ledger and the relevant accounting policies."

That's really not at all the same as what's now being said, which is that they want granular information about costs relating to the entire business. It is a million miles away from that.

Sir, with respect, what they have done here is they have, on the basis -- we don't have any supporting expert evidence, so unlike in *Coll v Google*, where there was a supporting expert report, explaining exactly why the granular information sought was necessary -- sorry?

Yes, and why it's likely to exist. We have nothing like that in this case.

What we have is a broad statement in the application saying that we've consulted with the experts and this is what they need. What we have here is a granular and specific wish list of documents which do not exist. We have said they don't exist.

THE CHAIR: You say they don't exist because you don't record -- you can't produce an income statement for the App Store because you don't account on that basis.

That's the point.

MS DEMETRIOU: Exactly. That's right.

THE CHAIR: That is the point. I completely understand the point you are making.

I just want to take the discussion back a little.

MS DEMETRIOU: Yes.

THE CHAIR: Or up a level. Which is that in order for there to be any sensible discussion about allocation of costs, for the purposes of the exercise at trial, one has to deal with the indirect costs in some way.

MS DEMETRIOU: Yes.

THE CHAIR: I appreciate this is not your case, it is Mr Hoskins' case, but I anticipate Mr Hoskins is going to -- and the expert that supports the Class Representative -- are going to want to argue that those costs should be allocated in a particular way. You may have some views on whether that is right or wrong. You may say they shouldn't be allocated at all or they should be allocated in a different way.

So we have this problem. We have some very large lumps of aggregated costs which are indirect costs for the App Store and other parts of the business, and they are undoubtedly going to be a matter of some debate at trial.

My question is: how do we deal with that then? I appreciate not in your case, but in Mr Hoskins' case, are we just supposed to ignore the fact that there is a whole lot of costs there and not get into any further detail of how they were incurred, or what --

MS DEMETRIOU: Sir, that would be a matter -- as Mr Hoskins himself said, there are obviously cases -- and this is quintessentially one of them -- where the business does not allocate indirect costs and that will be a question for expert analysis. So there will be an expert debate about that.

THE CHAIR: How can they do an analysis if they have no information about the make-up of those costs?

MS DEMETRIOU: That's what we dispute, sir. Don't forget that in the Australian litigation and in the US litigation they did precisely that -- their experts did precisely conduct a profitability analysis. That is what they have done on the basis of these documents -- these Repositories of documents that have been disclosed. So that's

what they have done.

THE CHAIR: Obviously we are not Australian or the US ones.

MS DEMETRIOU: No.

THE CHAIR: We don't know, we have not seen that material, but as a matter of principle, how does an expert approach the question of the allocation of, for example, the research and development costs, which are a significant number, how does one do that without just employing the means identified by Ms Casey which Ms Casey says, as I understand it, are unsatisfactory.

MS DEMETRIOU: Sir, our submission is and will be at trial that it can't sensibly be done. Now, that's not to say they are not going to try and they have done in it the Australian proceedings. The question for the Tribunal is: is their application for disclosure a good application for disclosure?

What I say about that is they have done -- in the Australian proceedings the claimants have conducted a profitability analysis. They have obviously pursued disclosure requests, in the United States as well. We therefore have this very large pool of documents on which they have relied. We have now come back, given them the document ID numbers for the documents that are relevant, and the starting point must be that if the claimant's experts in those proceedings have precisely conducted a profitability analysis on the basis of the disclosed documents, that it is highly unlikely that there are going to be other documents that exist that are relevant.

Now, of course, the order -- the Tribunal's order -- does provide for permission for the Class Representative to come back once it has reviewed the documents if it discovers that there are gaps, or if it believes there are further documents that might exist that we haven't disclosed. But the starting point must be that that is highly unlikely given that these proceedings, they have conducted profitability analyses in Australia.

THE CHAIR: I think you are telling us that Apple doesn't in any way seek to allocate those research and development costs, for example, so we are not going to find anything in the documents about that, are we? So that question is not really resolved by that exercise. As I understand it, absent the exercises which Ms Casey has carried out which no doubt are in the documents, Apple's position is that this is just not something that it does and therefore there won't be any documents recording that.

MS DEMETRIOU: Sir, can I be clear about that? We are not facing an application where we have some evidence from the Class Representative saying, "we have looked at Ms Casey's exhibits and we have looked at these documents in the disclosure, and we consider on the basis of that that Apple is likely to hold some other documents which don't form part of the disclosure." We are not facing that type of application.

THE CHAIR: I think we are dealing with quite a different problem here. I appreciate it may not be framed very well by the application, but in a way that's not going to help us in resolving this, is it, because time is ticking away? One way or another, I think, whether it is by an order or by some agreement, we need to get to the bottom of whether there is going to be further information which is unlikely to be in the disclosed information because your position is it doesn't exist in that form, and whether Mr Hoskins' client should have access to further information that might help in this allocation of indirect costs question.

I appreciate that's not how the application has appeared to you. I completely understand that that puts you in a difficult position, Ms Demetriou, I apologise for putting you in it, but at the end of the day we are going to have to grapple with that point.

MS DEMETRIOU: Yes, and I understand that. But I think that the appropriate way

forward -- what's not appropriate, if I can put it this way, is on the hoof for Mr Hoskins to say "I would have quite liked X or Y, which we have not asked for in the application and you have not had the opportunity to address". I think the appropriate way forward -- it became apparent to me -- that's why I started by saying that I was bemused to listen to Mr Hoskins, because it became apparent to me that even though we had given them the document IDs, it had not been drawn to Mr Hoskins' attention that in fact the documents that were on his wish list in terms of revenues and direct cost had already been provided, including a statement by Apple covering several years.

I think the best way fashioned forward -- it seems to me the best way forward is indeed at a minimum for the Class Representative to review those documents, have look at what is in the disclosure. You can see the documents we have referred to are not numerous in the footnotes to the letter. To review the Casey exhibit and to come back with specific requests. To come back to us with specific requests which we will endeavour to engage with constructively.

I do not accept that Apple has been responsible for four weeks delay, as Mr Hoskins put it. Can I just say why, because it important to put this on the record? It is frankly staggering that we were faced with an application for documents relating to the App Store that did not mention Ms Casey's affidavit which says in terms that such documents are not produced. It is, frankly, staggering that an application was made in those terms.

Mr Hoskins said in his skeleton argument "oh, well, we were aware of the Casey affidavit". In those circumstances, it really was incumbent upon Hausfeld to grapple and to mention the Casey affidavit and to grapple with why they are proceeding with an application in circumstances where there is a sworn affidavit saying that the

documents don't exist.

It is, I regrettably say, the Class Representative that has wasted time. They have had this disclosure since August 2023. The Tribunal will recall the procedure that was insisted on by them in terms of disclosure. We offered to simply produce everything that had been produced in the US and Australian proceedings. They said that that would be too burdensome, so we very proactively cooperated with them, pursuant to the Tribunal's order, to agree a list of issues and search terms and that was a significant amount of work which we did and produced the disclosure on time. Then to be faced on the eve of Thanksgiving with a last-minute application seeking documents, which on a cursory look at the disclosure they would have known do not exist, we find staggering. So it is, I am afraid, they who have wasted time and not my clients.

You are right, sir, and Mr Hoskins is right to say that it -- I am sure it is not the Tribunal, the Tribunal is not really interested in attributing blame and the question is where do we go from here, but where we simply cannot go from here is for Mr Hoskins on the hoof to invent some kind of order which has not been put before us and on which I am unable to take instructions.

THE CHAIR: So if one asked the question, could we get better clarity about how these costs are recorded, as Mr Frazer puts it, it seems that it is unlikely the Class Representative is going to be able to add anything to that, even having reviewed the documents, isn't it? Isn't the obvious place that then one goes to is for Apple to explain how these costs are recorded, so at least we can understand whether there is anything that the Class Representative expert might extract from further information about that?

MS DEMETRIOU: Sir, at the moment we have explained that we don't have the documents -- again, I am really wanting to be co-operative and not obstructive. We

have explained that the documents which form their application, that they don't exist.

THE CHAIR: Yes, yes.

MS DEMETRIOU: We have explained what does exist in terms of the estimates that have been conducted by Apple. Those have been disclosed and we have given the document numbers.

THE CHAIR: Yes.

MS DEMETRIOU: At the moment, I am at a loss to understand what else it is that we are being asked to consider might exist.

THE CHAIR: Well, if there was -- so it must be information about -- they must be able to provide us with a description of how costs are recorded in the Apple system. I don't think we have that. It may well be that that will disclose to the Class Representative's expert that actually that isn't going to be very helpful, and that would be the end of it.

MS DEMETRIOU: Sir, can I take instructions? I don't have instructions in relation to that.

THE CHAIR: Yes, of course. It may be that that is something -- and I am conscious of the time and I appreciate that that may not be something best dealt with over your shoulder, so I am very happy to give you some time to explore that. But you see where I am coming from.

At the moment we have Mr Hoskins saying, "look, I am faced with this large amount of unallocated costs and I want to interrogate that further to see whether there might be some basis for an argument on allocation." That's the position which is being put.

MS DEMETRIOU: Yes.

THE CHAIR: And it seems to me that that is an entirely fair position for him to take unless it turns out that there is going to be nothing in the way in which those costs are recorded which is going to help him. The only way we are going to unpick that knot, I

think, is by someone explaining how the costs are recorded. Now, that may be completely wrong and I am inviting you to push back on it if it is, but at the moment that seems to be the way through this.

MS DEMETRIOU: Sir, might I suggest that over the lunchtime adjournment I try and take instructions to that point because I am unable to --

THE CHAIR: I think that is entirely fair. It may be that you can't get a clear answer on that anyway. I appreciate there is a time difference involved as well.

Without speaking for the other members of the panel at the moment, I think that's where it seems to me this goes to. If we don't deal with this today, we are going to have to deal with it some other day.

MS DEMETRIOU: Yes.

THE CHAIR: Actually it is tied into this point, isn't it, that the observation I made to Mr Hoskins, one of the reasons we wanted to get that list of expert issues identified was that we could be comfortable with the experts were dealing with the same thing and, we hope, in relation to the same sets of data and so on. Nowhere is that more important really than here. Of course, it is entirely a matter as to whether you call an expert or not, but that shouldn't get in the way of us losing access to that identifiable set of data, if there is any --

MS DEMETRIOU: Yes.

THE PRESIDENT: -- that is available for everybody to comment on, rather than there being any sense of ambush or hidden material or whatever it is.

MS DEMETRIOU: Of course we understand the point about ambush and I think, subject to the instructions I am going to take over lunch, where we are at, if I can summarise, the documents that Mr Hoskins seeks in his order do not exist. We have said that, and they don't exist because they are not recorded, there is no internal

allocation on a product or service basis. So those financial statements and records don't exist.

Such documents relating to revenues and cost estimates for the App Store as they do exist have been disclosed as far as we are aware. You are asking a separate question as to how the business generally records costs in the business, I think.

THE PRESIDENT: Yes.

MS DEMETRIOU: I am going to take that away and see if I can get instructions.

THE CHAIR: To be fair to Mr Hoskins, I think he does raise this in a way of item 4, but I can quite see why you say that in the context of a lot of other things which perhaps suggest it is not as broad. But I think item 4 is probably, at least, part of what I am putting to you. I think the question is about more clarity about the way that costs are recorded, putting aside the question of allocation.

MS DEMETRIOU: All right, let me take that --

THE CHAIR: Sorry to interrupt you. It may well be that the system is able to do that at different levels. So obviously at the general -- at the lowest level of general ledger, there would be an individual entry for every cost incurred and I hope that no one would be suggesting that you should be seeing that --

MS DEMETRIOU: No --

THE CHAIR: He should be producing that sort of information, but it may be that there is more summary material which would help with that, and it may be that there isn't. That's really, I think, what we don't understand.

MS DEMETRIOU: Yes. I think I understand the point, sir. I will take that question away with me.

THE CHAIR: I think Mr Frazer is just reminding me that there is also a reference in paragraph 7, although I think that is on the face of it begging the question of whether

it relates to the App Store or not, so we are back to the same problem.

MS DEMETRIOU: Yes: development and maintenance of the App Store.

THE CHAIR: Yes. I completely take the point you are making that there is a circularity in annex A which assumes that there has been some form of allocation that allows you to produce statements for something which has not been allocated. I completely understand that. But I think that's really not the point I am bothered about.

MS DEMETRIOU: I understand point you are making, sir. May I just say it is more than a circularity, in the sense that one is a defendant -- the position, obviously, as the Tribunal knows, is that there has been a great deal of disclosure that's been made already in these proceedings. Just going back to -- I don't think we need to turn it up -- but you will recall your order which is that the Class Representative would have liberty to come back and make, as it were, supplemental requests for things that hadn't been disclosed. So what was envisaged was really a gap-filling exercise.

So we are entitled, with respect -- this is not being obstructive, this is just what we are entitled to expect in terms of litigation and certainty -- if an application is made, and is purported to be made identifying particular documents, then that's obviously what we are grappling with. We said to them, these documents don't exist.

Now it is not just a circularity. We are not trying to be obstructive or trying to pull a fast one or anything like that. We are asked specifically for financial statements for the App Store et cetera, and the answer is those don't exist.

THE CHAIR: Yes, I understand. We certainly have that point. I understand that. I completely understand the point you are making about, perhaps absent paragraph 4 and arguably one or two other places, I understand the point you are making about the application. And I am conscious it does leave you in an awkward position which is why I think it is important you have the opportunity to take instructions.

But what I think the application has disclosed is that there is a problem that is looming which we need to deal with and the sooner we deal with it, the better.

MS DEMETRIOU: Sir, I know you have the point and it is the last thing I am going to say, but had the Class Representative actually grappled with the Casey affidavit and those documents which have been disclosed, then their experts would have given thought to what documents might actually exist, and we could have responded to such an application, rather than me having to seek instructions from the United States over lunchtime during the hearing of the application.

THE CHAIR: Yes.

MS DEMETRIOU: It is not satisfactory, with respect.

THE CHAIR: Yes. I understand the point you are making. I am conscious that we actually have hardly let you develop your submissions as you might otherwise have done so. I don't want you to feel you haven't had the opportunity to say anything --

MS DEMETRIOU: I think we have reached the nub of it. It may be we rise early for lunch --

THE CHAIR: I wouldn't do that if you felt you had anything else you wanted to say. I don't want you to feel cut short. But if that is the most helpful thing to do, then we are certainly prepared to do that.

Do take a moment if there is anything else you want to add --

MS DEMETRIOU: If you just give me a moment --

THE CHAIR: Or indeed you are welcome to pick up anything over lunch. I am conscious we have rather rushed you with some things which are probably not the sort of things you thought you were going to be dealing with.

MS DEMETRIOU: I wanted to make some further points as to why this point is different to *Coll v Google*.

THE CHAIR: Yes.

MS DEMETRIOU: I think I have made the main point, but can we just pick up that authority, please?

THE CHAIR: Yes, of course.

MS DEMETRIOU: It is in authorities bundle tab 6. If we could go to paragraph 21 on page 112.

THE CHAIR: Yes.

MS DEMETRIOU: Of course there you can see towards the end of the paragraph that what was involved was, as I say, the generation of new documents through running reports on its accounting systems. Again you have my point that in the present case that won't help.

THE CHAIR: Because they seem to have a system which did allocate costs and could generate reports and you don't.

MS DEMETRIOU: Exactly.

THE CHAIR: Yes, I understand.

MS DEMETRIOU: Then, in paragraph 23, I think I have made this point: what we have, in fact, from the same expert in those proceedings, Mr Dudney, is an expert report explaining the basis on which the application was made, so why it was expected that documents existed and why they were needed. And we don't have any report from Mr Dudney in these proceedings.

Then paragraph 24, that explains that there has been considerable engagement before the CMC in relation to questions and attempts to extract data and the information that was sought. Again, as I said, we haven't had that kind of engagement from the Class Representative at all; who instead, as I say, made the application without reference to what's been done and has just really presented an abstract wish

list of documents which don't exist.

Now, in relation to the extension of time, I think that perhaps the best thing to do is to deal with that at the end.

THE CHAIR: Yes.

MS DEMETRIOU: Because I think it may follow from the debate we are going to have after lunch if I can get instructions.

THE CHAIR: Certainly, it may have some bearing or it may not. So let us do that. We will rise early. We will return at five to two. Does that give you enough time, Ms Demetriou? Would it be helpful to have longer?

MS DEMETRIOU: I am afraid I don't know at the moment, because I will need to make inquiries as to how who is available.

THE CHAIR: If it is helpful to have longer, you can send a message to us. We can make it quarter past two or -- Mr Hoskins?

MR HOSKINS: I have to say, we would welcome any constructive proposals from Apple.

What we have seen this morning is that there is an issue. In terms of active case management, it shouldn't just be the case that it is for me to try to get guess what Apple has and then be told no, and then have another shot and then -- that doesn't help. Any cooperative proposals to break this problem, cure this problem, will be gratefully received.

THE CHAIR: Thank you, Mr Hoskins. Hopefully that is a message Ms Demetriou has from the Tribunal as well.

MS DEMETRIOU: Yes, of course I understand that. But, sir, that's not what we were faced with. We were faced with an application for specific documents not a plea for any cooperation.

THE CHAIR: That's completely understood, Ms Demetriou. It may be that when it comes to what order we actually make, maybe it goes to that.

MS DEMETRIOU: Yes.

THE CHAIR: But actually, whether that's right or wrong it doesn't take the problem away. I think Mr Hoskins is right when he says we've identified a problem.

MS DEMETRIOU: Yes. We will continue -- indeed, Apple is keen to be cooperative and has been cooperative in terms of organising the disclosure. That's taken much more time than it should have taken, precisely because Apple were being cooperative in agreeing search terms and meetings and so on. So it's certainly the case that Apple is keen to be cooperative and we will take that away and I will see what instructions I can get over the adjournment.

THE CHAIR: Yes, thank you. Let's make it 2 o'clock in any event in that case. If you need a little bit longer, then send us a message.

MS DEMETRIOU: Thank you.

(12.55 pm)

(The short adjournment)

(2.00 pm)

THE CHAIR: Ms Demetriou.

MS DEMETRIOU: Sir, we have taken instructions over the lunchtime adjournment and what we can offer, I hope, directly meets the Tribunal's points. So, we are able to offer a witness statement from somebody appropriate at Apple. We can't tell you who yet because we do have to take further instructions in relation to the identity of the person. The witness statement will explain how the costs are recorded across the business, which I think is precisely the point you were putting to me. So we will do that.

THE CHAIR: Yes.

MS DEMETRIOU: Sir, I hope that.. so in terms of timing, we are not able to that next week because it is the run up to Christmas, we still need to identify the relevant person and things are necessarily very busy at this time of year. I don't have instructions on precisely when we can do it, we anticipate it won't be later than the second week of January but we will try to expedite it as much as possible and keep the Class Representative updated.

THE CHAIR: The difficulty is I am anticipating that Mr Hoskins will say that creates a real timing difficulty. I completely understand the points you are making about the time of year, but I think that the second week of January 2024, on Mr Hoskins' timetable, would then only leave a couple of weeks before Mr Dudney has to finish his work, and that is without necessarily getting any further from you by way of disclosure. It is quite a tight timeframe, isn't it? We will see what Mr Hoskins has to say about that, but I am not sure that it going to work.

MS DEMETRIOU: Sir, I understand that and that is why I say we will do it as soon as possible. But I am just not able to give a commitment. We have not identified the relevant person. I've not, given the time available, given the time difference, given people's availability, have not been able to ascertain exactly how much work is involved, and so I can't give today -- I can't commit to a sooner deadline. Obviously, had we been faced with an application to do this, then we would have come prepared with an answer on this point, and I would have been annually to be more helpful, but I simply can't commit at the moment to a sooner deadline.

THE CHAIR: I understand.

MS DEMETRIOU: But we absolutely understand the point about timing and we will do what we can.

THE CHAIR: So maybe -- we can certainly explore with Mr Hoskins how that might

work. Just before we move on from that, I think you said explain how costs are recorded across the business.

MS DEMETRIOU: Yes.

THE CHAIR: It may be that Mr Hoskins will have something to say about precisely what that needs to cover, I think it would be quite helpful as a one-shot exercise. It may be one of the things we could do -- and I will explore with Mr Hoskins, but just to get your reaction to it -- is if we were to have something from Mr Hoskins, or indeed Mr Dudney, which sets out what information he thinks he needs, because of course I think you are saying you haven't really had that to date. In other words, what that means, what recorded across the business means, in practice what that would need to cover.

I think what we are talking about is the way in which costs are allocated to the general ledger and the codes attached to them and things like that. I am afraid I don't have enough knowledge of these processes to be able to reach a conclusion on that now. I rather suspect you might not either.

MS DEMETRIOU: No. So that's the difficulty. I took away the question that the Tribunal put to me.

THE CHAIR: Yes.

MS DEMETRIOU: I am not -- I wasn't able to take substantive instructions as to how costs are recorded.

THE CHAIR: Yes, of course. This is not a criticism at all. I appreciate the position you are in.

MS DEMETRIOU: No, I understand that.

THE CHAIR: In a way, I am trying to get round that problem, which is for you to have some real clarity about expectations of what the statement should cover. If you have

any problems with that, you push back and we will resolve those on the papers and then that way, at least, we are clear.

What I don't want to do is to find that if you do a statement and you come back, whenever it is, there is then an argument about whether you have covered what is said.

MS DEMETRIOU: No, I understand.

THE CHAIR: I will pose this to Mr Hoskins, but I think that might be one way of giving some clarity about the content.

MS DEMETRIOU: Yes, as long as we can come back after the hearing having taken some instructions --

THE CHAIR: Yes, precisely. I think that may be the opportunity to finalise the timing of it as well. Because you can find out who is available, when they can do it and come back with some further information about that.

MS DEMETRIOU: I understand that, thank you.

THE CHAIR: That's very helpful. Thank you.

Do you want to -- is that the end of it in relation to the disclosure application? I think it probably is.

MS DEMETRIOU: Yes, subject to any points Mr Hoskins about that letter. You have my point on why the application as made should be dismissed.

THE CHAIR: Yes. I understand that. Quite how we will deal with that, perhaps let's come back to that.

MS DEMETRIOU: Sir, on the extension application --

THE CHAIR: Yes.

MS DEMETRIOU: -- what we say about that is that it is, with respect, unhelpful, if I can put it that way, for the application to have been made without any supportive

evidence -- supporting evidence explaining what has and has not been done in terms of review.

Normally, you would expect somebody seeking an extension of time from a time limit laid down by an order to come to the Tribunal with some evidence explaining what's been done, what still has to be done, and why the additional time is needed. It was, in my respectful submission, surprising that Mr Hoskins was unable to update the Tribunal as to the state of play in terms of disclosure review and what more needs to be done.

So we are in a difficult position in terms of responding to that application. Having said that, what we don't want to do is say "well, we insist the Tribunal sticks to 27 December 2023 and we want the Tribunal to cut out the Class Representative from making any additional requests before 24 January 2024," which is the date Mr Hoskins was asking for. So we are not suggesting you bring down a guillotine on 17 December 2023, but we do lay down a marker that the additional time -- if they are making requests up to 24 January 2024, that may well put us in difficulty, particularly when it comes to the timetable for expert evidence.

What we propose to do is to look at any applications as and when they are made and respond then. If we think an application is too broad and will prejudice us, then we will respond in kind once it is made.

THE CHAIR: That's extremely helpful. I was going to suggest something similar to you. It's not incumbent on you to answer the request if you don't think it is proportionate.

MS DEMETRIOU: Yes.

THE CHAIR: Of course, we can always order that it not be or we can decline to order that it should be done if we agree with you. So I think we will see what Mr Hoskins

says about that. But that does sound like a very sensible thing, in which case we would set 24 January 2024 as being a reference date by which it has to be done.

MS DEMETRIOU: Yes.

THE CHAIR: But your marker is put down and understood.

MS DEMETRIOU: Thank you, sir.

Unless there is anything further I can assist you with on the application as made, I think we have covered in the course of debate the main points I wanted to make.

THE CHAIR: No, that is very helpful. Thank you very much for your efforts over lunch and those behind you. That's been very helpful indeed, thank you.

Mr Hoskins.

MR HOSKINS: I am very grateful as well. I think they have made a lot of progress and I am grateful to Apple and to the Tribunal for that.

Revenue and direct costs. Ms Demetriou took you to the letter that came in yesterday. Perhaps it is worth going back to that. That is core bundle 1, tab 26B.

What was not clear to us was whether this was Apple saying these are all the relevant documents on revenue and direct costs, or whether these were examples. Nor was it clear to us -- part of the difficulty for us is we don't have any context. You can see a document that might contain figures relating to revenues or costs, but you don't always know what level of the business it was produced at, how reliable it was, how accurate it was, what weight the business would put on it. So again we don't have that context.

If it is the case that all the documents referred to in this letter are all the ones which are relevant to direct revenue and costs, and they are ones which Apple are prepared to rely upon as being the accurate figures, then that's great. We can quite quickly, I would have thought, come to a situation where we would invite Apple just to draw up

a table for the year direct revenue costs on the basis of these documents, put it to us and we will see if we can agree it. Then we have a common document, not just bits of disclosure, but a common document putting the revenues and the costs and that gets us where we want to go to.

There is one other caveat, which is Ms Demetriou said "we have produced that sort of document already". That was one of the documents, remember, she said, but she was very careful -- it is not a criticism, she is obviously right to be so -- we provided such a document covering several years. Obviously if they were to produce the sort of document I am suggesting, that would allow us also to see where there were gaps, if there were any years where we don't have agreed figures for revenues and costs.

So I am very grateful for the indications, but perhaps Apple would have a think about whether they are saying is this all the documents, yes or no, are they happy to rely on these figures as being accurate, yes or no. If that is the case, then we've done already a lot of good this morning.

THE CHAIR: Yes. On the "all the documents" point, it may well be that there are -- indeed one would be surprised if there weren't -- other documents outside -- these come out of the Repository, don't they? It may well be there are other documents outside the Repositories that contain information like this.

MR HOSKINS: I mean, from the disclosed Repositories. I am not asking in the wider universe --

THE CHAIR: Yes. Just to be clear. In which case, I think it does seem to me, Mr Hoskins, that this does take you about as far as the application could take you, let me put it that way because effectively what they are saying is you have asked them to give you the numbers of the documents that will establish the points you want to establish. They say they have done that. I think you need to go away and have a look

at them.

MR HOSKINS: We have looked at them.

THE CHAIR: Okay.

MR HOSKINS: This has not come in yesterday and we have gone "oh my God". We have always known about these documents, we have read them, Mr Dudney knows about them. That's why I raised the context point. It is not always immediately obvious when you are going through lots of documents "aha this is the answer". That's why what was said this morning was helpful. These are not just examples, as I understand it, these are the answers.

THE CHAIR: Yes. We are moving from a disclosure point -- I am not quite sure what it is, whether it is a further evidence point or an expert meeting point or whatever it is. I quite understand the reason why you are raising it.

MR HOSKINS: I am just trying to get as far as possible --

THE CHAIR: No, obviously, I would like to get as far as possible as well. Quite how one gets to the point, which I think we all would want to get to, that we are dealing with a common set of material in relation to this, I don't necessarily want to do on the hoof, particularly if you are still trying to work out exactly what the consequence of these are.

Now, I don't know how one might -- I am not sure what the right mechanism for this is going forward, given that there is no corresponding expert to Mr Dudney. That's the sort of complication here. But I would hope that if there are questions about these documents and they were put by your instructing solicitors to Gibson Dunn, they would be answered. So maybe that's the first step. If you feel like you are not getting anywhere with that, then obviously you should come back to us.

I am reluctant really to make any orders about people producing tables and summaries

because I have not seen any of these documents, so I don't have any direct evidence. I think it is fairly put that I don't have any direct evidence.

MR HOSKINS: I am not necessarily asking for an order. We all have to do is cooperate with each other, we all have to cooperate with you.

THE CHAIR: Yes.

MR HOSKINS: I am pointing out what the ideal next stage is and if Apple would share that goal and we can work towards that.

THE CHAIR: We will see what Ms Demetriou has to say about that. Certainly the thrust of it is, we absolutely do want to be moving in the direction where there is no doubt about what the data is that we are all dealing with and that's the data we are going to be dealing with at trial. If there is anything else, it should be put in there. If there is not, that's fine.

I don't know, Ms Demetriou, if you want to say anything about that at the moment or whether you want to take some instruction. It seems to me that that's where we are going. We want to make sure that, so far as revenue and that direct costs go, we are all clear that this is the material we are working from and if they have any questions about it, then they should asking about them and one would hope you will be able to answer that.

MS DEMETRIOU: Two short points. Of course, if they have any questions they should ask the questions and of course my clients and instructing solicitors will do their very best to co-operate. That's, I hope, a helpful answer to that question.

In terms of, is this what we've got, can I make a slightly nuanced point. You will recall that what we offered at the outset were the complete Repositories of documents. The Class Representative didn't want that and sought a subset and we produced that subset by reference to list of issues and search strings.

THE CHAIR: Yes.

MS DEMETRIOU: In parallel to that -- as part of that process, rather, the Class Representative also asked us to identify the document numbers, reference -- Bates numbers -- for particular responses for data requests that had been made in the parallel proceedings. That's all been done.

THE CHAIR: Yes.

MS DEMETRIOU: What we can tell you is that the documents referred to in this letter that we are talking about now are everything within the subset that's been produced to the class.

THE CHAIR: Yes.

MS DEMETRIOU: What I can't do is absolutely exclude that there is not something else along similar lines that's in the wider set of Repositories.

THE CHAIR: There are three levels, in fact, there is the wider universe, the Repositories and then there is what's been selected by the process. I took Mr Hoskins to be more or less accepting that that's where we are; is that right, Mr Hoskins?

MR HOSKINS: Yes. I am not trying to go -- I am happy to start with the small Repository, the one that's been searched and let's just see if everything is there. If there are years missing, I might have to come back and say what can we do to fill in the gaps, if needs be, but absolutely the starting point is the documents that have been disclosed to us.

THE CHAIR: Good. That's helpful. Good.

MR HOSKINS: I would just say, we are happy to write, et cetera, but please Apple will hear this. The goal is to come up with a common table and they have to enter into this exercise with that spirit. It is difficult for us to know sometimes what the right questions are. If you just get an answer saying, "no, that is wrong," that's not always

helpful. What we would like is "if it is wrong, you can try this".

THE CHAIR: Yes, maybe one way of looking at this, Ms Demetriou, is that in the absence of an expert, Mr Dudney to have that -- if there was an expert Mr Dudney would have this conversation and pretty smartly they would sort it out and if they didn't, we would sort it out.

May be the proxy for that is Gibson Dunn need to really adopt the same approach. In the absence of an expert, somebody on your side of the court needs to take responsibility for making sure there is a proper engagement with Mr Dudney and we are getting to a sensible place with the material the experts should be looking at.

So that's just, if you like, an overlay on how -- I am not trying to impose particular professional obligations on Gibson Dunn, but I am making clear we expect Apple to engage in this as fulsomely as if they had an expert doing it, as we would expect an expert to engage.

MS DEMETRIOU: I have heard what you said. Can I just turn round?

THE CHAIR: Yes, of course.

MS DEMETRIOU: So there is no push back at all in terms of Gibson Dunn's willingness to engage, the point that is being made to me is they have had no questions from Mr Dudney at all.

THE CHAIR: Yes, of course --

MS DEMETRIOU: Once he does decide to engage, they will certainly cooperate.

THE CHAIR: Yes, of course. That's absolutely understood. The point I am making is -- no disrespect to solicitors and correspondence between them, that's not perhaps the same engaged way that a pair of experts would deal with it -- I would rather see them engaged rather than by solicitors' correspondence.

MS DEMETRIOU: I hope it is recognised as being constructive engagement that

Gibson Dunn has gone through and identified the Bates references for these documents indeed --

THE CHAIR: Absolutely, I am not criticising Gibson Dunn at all, just to be clear, or indeed anybody. We are not in the business of that.

MS DEMETRIOU: I understand.

THE CHAIR: That's very helpful, Ms Demetriou.

MR HOSKINS: Thank you for that.

So moving on to indirect costs. You have these points because it was you who raised them. Let me just go back to them, the Casey affidavit, that's core bundle 1, tab 26, 480 was the page that you picked.

THE CHAIR: Yes.

MR HOSKINS: Just two points in relation to this. It comes into where we might end up on indirect costs. There clearly are sub-buckets of costs. They exist. Also, someone at Apple, for whatever reason, however accurately, has been able to do an allocation. So we must bear in mind those two things. It's not simply a brick wall that you have the P&Ls at the absolute top level and there is nothing below it. I made the obvious point and it is confirmed by this, those P&L accounts are made up from something. There are no doubt a large number of sub-buckets out there.

THE CHAIR: Yes. I think Ms Demetriou's point about this is that if you look back at what Ms Casey says about it, the two methods she identified -- I think it is in paragraph 22 -- would not require you to know anything about the costs because they are done at a more general level of reference point, put it that way, without getting into the detail.

MR HOSKINS: Yes.

THE CHAIR: Now, I think that doesn't really take us any further down the path of,

okay, fine, but maybe there is some form of categorisation of the costs, which is not allocation, but the categorisation might be helpful. I think that is where we have driven to with the statement, isn't it?

MR HOSKINS: We don't know what it is, but there is clearly something below the surface.

THE CHAIR: One assumes that there must be something below the surface, but what it is and whether it is helpful to you, that's the point.

MR HOSKINS: That's the point. All we have seen is the big iceberg at the top and we are interested not in all of the mass underneath it, but we must see at least some of what's underneath it.

THE CHAIR: Yes.

MR HOSKINS: In relation to the annexes A and B that we put forward --

THE CHAIR: Yes.

MR HOSKINS: -- it has been said this morning that none of these documents exist.

That just seems unlikely, let me put it like that.

If you go to core bundle 1, tab 23, page 202 --

THE CHAIR: Yes.

MR HOSKINS: -- request number 4 is accounting manuals or other materials that describe the structure of the general ledger and the relevant accounting policies. It would be very surprising if nothing of that sort existed.

THE CHAIR: Yes. I think -- again, as I try to cut through this a little bit -- I think the complaint made about most of this is that it is self-defining --

MR HOSKINS: I understand.

THE CHAIR: You have that point.

MR HOSKINS: My point is not all --

THE CHAIR: And request number 4 is different. Absolutely. In a way, request number 4 is one way to put the point we were just talking about, about categorisation of costs. I think it's the point that Ms Demetriou accepts that there should be a witness statement to deal with it. Whether it is done by reference to request number 4 or something else I think is something you could help us a bit.

MR HOSKINS: We will hopefully elaborate on this.

THE CHAIR: Yes.

MR HOSKINS: I just want to make the point that it can't be the case that none of this exists.

THE CHAIR: Yes.

MR HOSKINS: Request number 5 also -- it does refer to App Store, AMP, and IS&S, but all management reporting regarding the performance of the App Store, AMP and IS&S as prepared and presented in management reporting packs or prepared for the purpose of studies or reports commissioned by Apple.

The idea that there are not any management reports about the performance of the App Store, again, it seems unlikely that there is nothing of that sort. That's not the same question as has there been an allocation of costs to the App Store. There must be discussions and reports, otherwise Apple runs itself and nobody ever looks at how the business is performing.

THE CHAIR: I thought Ms Casey dealt with this. I thought she said there weren't because they don't adopt management by business unit, it is done on a different basis. Now, if you aren't satisfied with the explanation, then I think the answer -- because you have been told they don't exist, the answer is that they are to be dealt with in a witness statement rather than a disclosure of documents. I can't see that I can make an order for something that doesn't exist.

MR HOSKINS: Again, I am just pointing out, I understand the general point about A and B, I understand the point about non-allocation. All I am pointing out to you is that it is very odd if there were no management reports about performance of the App Store. That would be extraordinary and I do make that submission. But, look, we will frame more detailed questions. That will be for another day.

THE CHAIR: Yes.

MR HOSKINS: Yes. In relation to what's been proposed, a witness statement from someone appropriate at Apple dealing with how the costs are recorded across the business, I think it's inevitable that that can only lead to further requests. If it is only a description about how costs are recorded, unless it's simply going to say "we don't record costs in any sub-buckets whatsoever", which would be disappointing and surprising. But insofar as it says "actually we record costs in this way and that way", it is almost inevitably going to lead to further questions. The reason I raise that is not necessarily to criticise this as the starting point, we would have been delighted if we had had this four weeks ago, it is the timing point which you have well in mind, sir. That's the problem.

THE CHAIR: Yes. I think it's probably -- I hope it's not quite as absolute as that.

MR HOSKINS: Yes.

THE CHAIR: Indeed, that maybe is part of the exercise that needs to happen now. But just to take an example, if the proponent of the witness statement were to say costs are organised by codes within a general ledger, you would expect them to attach a list of the codes --

MR HOSKINS: Yes.

THE CHAIR: -- as an exhibit. Maybe there is a reason why they can't or won't do that, but that would be the ordinary course.

MR HOSKINS: That sort of thing --

THE CHAIR: You would expect that. It may well be that when you have that information you are in a position to say, well, the nature of those codes would help us in an allocation, so they can have the numbers that attach to them. Of course, that is an extra step and I understand that. The whole point of this exercise is at the moment we don't really know what you should be asking for.

MR HOSKINS: Let's be honest, neither do we. We are getting a peek behind the wall.

THE CHAIR: Exactly. We are seeing what the architecture looks like and I think your point is that the greater the description of the architecture, the more helpful it is to understanding what there is there, obviously the further forward we get. But that's really partly the point of asking you -- there is a delicacy in this, isn't there, because if you put forward a list of things you want to know about that is too long, I am sure we are going to get some push back, people are going to say it is unreasonable.

There is something of an art for somebody on your side of the court to draft something which is likely to be acceptable or manageable for Apple, and obviously the more it is, the quicker it will come. I am not sure how much further we can take that. Certainly we are very happy to be the arbitrator on that and to do that quickly --

MR HOSKINS: (Overspeaking) potentially on the timing. I am very happy for us to have a go at a shopping list. You have seen the difficulties we have sometimes because we just don't know the context, but we will absolutely do our best.

If Apple say you have it wrong, that's fine. Then they need to tell us an alternative, not simply, "ha-ha, you have it wrong, you know, actually we can do it this way."

My instructions are we will get that list as soon as possible, and it will be absolutely no later than Friday 22 December 2023, but we will aim to get it done faster than that.

THE CHAIR: I think it will have to be faster than that.

MR HOSKINS: That is fine. I have asked you to hold Apple's feet to the fire, so you can hold my feet to the fire.

THE CHAIR: I think I am going to have to hold your feet to the fire, and I think earlier next week is necessary. Partly, because otherwise there is no real expectation -- I hate to be making orders for people to be doing difficult things over the holiday season, but I am afraid that is part and parcel of where we are. But that does have to be taken into account to some extent, doesn't it?

MR HOSKINS: I am very happy to have my feet held to the fire. Other people doing the work might not be, but we need to get on.

THE CHAIR: Is that one of the things you wanted to cover --

MR HOSKINS: I think on the extension, I think it's agreed, isn't it?

THE CHAIR: Yes, I think so.

MR HOSKINS: Obviously, again we have to make it work. We will --

THE CHAIR: The marker is down. I am sure you will be conscious of that.

MR HOSKINS: Of course.

THE CHAIR: Obviously, again, the Tribunal is here to arbitrate that, if there is a difficulty with that.

Just on the timetable. I am rather assuming you are going to tell me that I think Ms Demetriou was offering the end of the second week in January 2024, I think.

MR HOSKINS: You know what I am going to say.

THE CHAIR: I think that you knew what you are going to say to that as well. I don't know whether you meant by that the 12th is the end of that second week technically; is that what you meant?

MS DEMETRIOU: Yes. That's what I meant as the long stop, taking into account the

Christmas period and taking into account the fact that we don't yet know who is going to write the statement and what work is involved.

THE CHAIR: Yes, absolutely.

MS DEMETRIOU: Or the questions indeed. Just for planning, you say, sir, early next week, but it would be quite nice to have a date.

THE CHAIR: I think we are going to nail that down now. I am slightly working backwards as well.

Mr Hoskins, the 12th? There is probably only a reasonable amount we can chisel that back, isn't there, given the time of year? Realistically, do you have any view on when?

MR HOSKINS: I have made my submission that we needed the data by the end of January 2024. Something has to give here. My point is that this witness statement we are getting is going to be, you know, the first stage in the process. There will inevitably be requests flowing from it.

THE CHAIR: So all of this, as you said, is a precursor to the expert's report. The expert's report is due on 26 April 2024. The trial does not start until January 2025. Is there some flexibility in the timetable for that?

MR HOSKINS: It may well be you want to carve out an exception, a slightly longer timetable for the evidence on excessive pricing.

THE CHAIR: I hear --

MR HOSKINS: There is a need to do that.

THE CHAIR: I hesitate to alter the expert timetable at all, it is a slippery slope --

MR HOSKINS: I won't suggest it for everything, it should not be that everything moves.

For example, on excessive pricing, as you know, we have a division of labour between our two experts and there is a particular expert to deal with excessive pricing.

Mr Dudney is dealing with what is feeding into that.

Is there a possibility for some flex on that? Yes. It is probably not enormous, even with the trial so early next year, but I don't think we need to do that today.

THE CHAIR: No, I would be very reluctant to do that. I certainly would like everybody to leave thinking we are not going to do that. I am just thinking about the consequences. If I have it right, I think the reply reports are sometime in August 2024, I think.

MR HOSKINS: In August. If you want to see the trial timetable, it is supplementary bundle 2, tab 105.

THE CHAIR: That does seem like quite a long break. It may well be that we decided to do that because we thought there might be quite a lot for the parties to talk about in relation to excessive pricing, but actually there may not be so much to talk about.

MR HOSKINS: Yes, C is expert reports, D is reply reports. So there is quite a gap there.

THE CHAIR: Yes. So, that does suggest that -- I really don't think it can be a lot earlier than the 12th. If you were to push me, I might order the 10th, for the witness statement.

MR HOSKINS: Really I am not going to --

THE CHAIR: You are not going to negotiate with me.

MR HOSKINS: (Overspeaking).

THE CHAIR: No. So if we were to leave it at the 12th, I suppose it might then be easier to offer you a little bit longer. That's where you are going, I can see.

MR HOSKINS: No, I don't have to do the work.

THE CHAIR: No. What I think is important is that this is done, as I said earlier, properly once if it can be, rather than more than once.

MR HOSKINS: Exactly.

THE CHAIR: So if we were to give you -- I think -- did you say the 22nd? I think the trouble with the 22nd is that no doubt that is 4pm on the 22nd and that is just not really satisfactory. I think it would be really helpful if it could be done by midday on the 21st.

MS DEMETRIOU: That gives us no time on our end to get anyone working on this before the Christmas break.

THE CHAIR: I think that's not quite right because there is certainly a fair amount that you know you are going to need to cover.

MS DEMETRIOU: Yes, but it would be highly inefficient to then be faced with questions that means that work has to be done difficultly. Really this is an application which should have been made weeks ago in this form. For them now, the Class Representative now to say, having tried to salvage something from this application where we still don't know what it is we want us to say in this statement seems hopeless.

MR HOSKINS: With respect, we are looking forward. We have made progress. It really doesn't help to look backwards and try to throw things at each other.

MS DEMETRIOU: All I am saying is they have made an application, they know what it is they want and they should be able to just tell us now what it is they want in this statement, not say they need until next Friday.

THE CHAIR: So when would you like it by, Ms Demetriou?

MS DEMETRIOU: Well, what we need to do is we need to take instructions on the proposed scope of the evidence. That may inform indeed who gives the evidence. So we do need to understand early next week what the proposed scope of the evidence is so we can take instructions and then communicate with the appropriate person.

We can't do that unless we know from the Class Representative what they say should be in this statement. It goes to the scope of the statement. So we say it's something

they should be able to do by the end of this week.

Mr Dudney has been thinking about all of this. So if they can't do it by the end of this week then at the very beginning of next week, and that allows us some days before the Christmas break to take instructions and progress this. Otherwise we are really taking it from a standing start in January 2024, given absences over the Christmas period.

MR HOSKINS: Sir, can I say, I have just been told we can do 4 o'clock on the 19th.

THE CHAIR: I think that is extremely helpful.

MS DEMETRIOU: Thank you.

THE CHAIR: I think we will bank that. Thank you very much, Mr Hoskins.

Good, 4pm on the 19th for a statement effectively of what you think the statement should cover, what you are looking for, as proportionate as you can make that.

MR HOSKINS: Of course.

THE CHAIR: And then 12 January 2024, Ms Demetriou, for the witness statement to be served. That's very helpful, thank you both.

MR HOSKINS: That is the heat and light for today. I think there are some other agenda items we should mention if we are finished, but I had --

THE CHAIR: I had a couple of things I just wanted to touch on.

Funding we have dealt with, haven't we? There is no need for us to deal with that today at all. I think you will expect a ruling from us, Ms Demetriou, which we will try to get you as soon as we can. I notice you asked us to provide you with permission if that was needed, which we wouldn't normally do, but I think in the circumstances it does make sense if that is the situation, which I think you are probably anticipating.

MS DEMETRIOU: Thank you very much.

THE CHAIR: Thank you. The issue about communications post *McLaren*, largely,

obviously, goes away because of the Court of Appeal's ruling.

MR HOSKINS: It doesn't -- we weren't going to get into it today.

THE CHAIR: I said "largely". I mean, I think there are people in the room who know more about this than I do. It seems to me that where we are left with that is, firstly, the interesting suggestion that the Canadian process as some sort of protocol might apply if there was to be any communications.

And then also the overlay that case management, I think particularly in relation to evidence and disclosure, might be appropriate reasons for constraining communications. Now I don't particularly want to have the conversation today. Unless there is any enthusiasm, we can just park it. But I thought I would just put those markers down that we would certainly be interested in the parties engaging on those issues if they thought that was necessary to progress communications with class members.

In other words, perhaps putting it more bluntly, if there was to be something proposed I think it would be appropriate, at least as a matter of courtesy, if the Class Representative had notice of anything before it happened, beyond what has already been made apparent.

I appreciate you may have views on that. You may decide you don't want to do that. But that is, I think, consistent with what the Court of Appeal has found. If you want to discuss that, I am happy to discuss it, but I can see some --

MS DEMETRIOU: Sir, I am not sure it is for today. I am not sure, with respect, we would agree with that as being the upshot of what the Court of Appeal said, because the Court of Appeal also emphasised the importance of maintaining litigation privilege. So I think it would all depend. There may be some circumstances which, as a matter of case management, the Tribunal would want there to be discussion and cooperation

with the Class Representative. But I do not think we would accept that as a matter of course that should be the case.

THE CHAIR: I don't think I am necessarily saying as a matter of course. We can get it out and have a look at it, but I think it is very plain that the decision only deals conclusively with the question of the rules but leaves open the question of case management, and includes the quite a helpful suggestion, I think, of the protocol. Now, I entirely take the point about litigation privilege, but there is also the potentially colliding point that it is the Tribunal's responsibility to manage evidence in the proceedings.

I think the point I am making clear to you is that we would anticipate that an exercise of evidence gathering like that is something that might engage the Tribunal or indeed the Class Representative. It might not, I am just putting the marker down.

MS DEMETRIOU: Sir, we would certainly accept that there may be some issues which would engage case management considerations, but I am not sure it is helpful today to have a debate as to what those might be in the abstract.

THE CHAIR: I think that is probably right. I think we have probably said more than enough about it. It is perhaps an indication that there are some things to talk about, after that decision, that aren't fully concluded by the decision. If I can put it that way.

MS DEMETRIOU: We will await to see what those things are, sir.

THE CHAIR: If they arise. It is only if they arise that we will need no bother with them.

Good, thank you.

MR HOSKINS: I think that is everything that was on the list, unless Ms Demetriou --

THE CHAIR: Good.

MR HOSKINS: Unless you have anything, that is everything from the parties.

THE CHAIR: No, we don't.

Just in terms of things we will do, we will produce a ruling on the question of funding.

I hope that's all you need from us. There is nothing else, is there?

MR HOSKINS: You have given the directions. Will the Tribunal draw up -- are you going to draw up an order with the directions or do we --

THE CHAIR: I think it would be helpful to have a draft order, please.

MR HOSKINS: A draft order from us?

THE CHAIR: Yes, please, just confirming those dates.

If there is any difficulty with any of those processes we have talked about, then we will deal with them on the papers if we can. I am just conscious of the time running.

MR HOSKINS: I am grateful for that.

THE CHAIR: We obviously want to keep the timetable on track.

Thank you all for your help. Thank you.

(2.40 pm)

(The case management hearing concluded)