IN THE COMPETITION APPEAL TRIBUNAL

Case No:1408/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 10th November 2023

Before:

Bridget Lucas KC
Tim Frazer
Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Class Representative

Elizabeth Helen Coll

V

Defendants

Alphabet Inc. & Others

A P P E A R AN C E S

Tristan Jones & Matthew Kennedy (On behalf of Elizabeth Helen Coll)

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

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Friday, 10 November 2023

(10.30 am)

Case Management Conference

THE CHAIR: Good morning.

Before we start, I will just have to do the usual warning. Some of you are joining us livestream on our website, so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

Thank you. Mr Jones.

MR JONES: Madam, good morning. Members of the Tribunal, good morning. I appear with Mr Kennedy for Ms Coll, the Class Representative. Mr Draper appears for Google. There has been a lot of work done on both sides trying to narrow some of these issues, I am pleased to say, and you are going to hear today criticisms in both directions. But I think it's right to start by saying there's also been a lot of work.

Could I start by taking you to the agenda and giving you a brief update where we are and making a suggestion as to how we approach matters today. It's in the salient documents bundle, tab 1, page 1 --

THE CHAIR: As you are referring to this bundle, may I thank the teams involved for producing this smaller bundle at quite short notice. It was very helpful, it's helpful to have a much smaller volume in documentation to go through, especially if you are old-fashioned like me and you like hard copy.

MR JONES: Yes. Madam, for our part, we are grateful to the Tribunal for requesting that and next time I think the core bundle may resemble the salient documents bundle rather than the somewhat out of control thousands of pages it in fact is.

THE CHAIR: Thank you.

MR JONES: This is now a very helpful place to look. So, on page 1, we have the expert issues. There are some outstanding debates on that which we are going to need to canvas with you, so we are going to have to spend some time today on those issues. Then there is the heading "Disclosure", and these are the four disclosure applications made by the Class Representative. And these, certainly in terms of the time today, are going to take the majority of our time today because in different ways they are all still live.

Funding and certification, over the page, there may be some very short submissions to make on that. We have a costs application and Mr Draper may have things to say, but it's not going to take much time. That's largely gone away for today. Timetable is agreed and won't really take any time apart from showing you what we have agreed, and confidential information again is a very small topic which I think is just for Mr Draper to update you on proposals, which again is not controversial - I say proposals, progress is maybe a better way of putting it where we've got to.

THE CHAIR: Yes.

MR JONES: So that's the broad outline. I said that progress is being made. Expert issues, a lot of progress has been made in particular on those pernickety issues where we couldn't agree on wording and which we really did not want to have to trouble you with, unless we absolutely have to. We are going to have to on a few of them, I am sorry to say, but we are still discussing and producing documents, and my suggestion is that this gets put to the end of the day because by then we'll have the absolute final position and have a document which will help to go through it. If it can't be got through today, which it really should, but if it can't, some of that can be done on paper if absolutely necessary.

THE CHAIR: Yes.

MR JONES: The other one which I suggest we leave until at least after lunch and we can maybe take stock then is in disclosure number 2, which is US and Australian, and that's because again there has been some discussion in correspondence and, frankly, I think if we have lunch to consider it, that may also help. So, my suggestion would be we follow the order here, apart from put expert issues and disclosure number 2 until sometime later in the day.

THE CHAIR: Yes, that sounds sensible. Thank you.

MR JONES: On the disclosure applications, then, if I turn to those first, the Claimant as Class Representative has four disclosure applications. I propose to make some introductory comments which are common to all four and then to address each in turn, as I say parking number 2 until later. But I will address each in turn and I think the best way of doing it is to enable you to take it in bitesize pieces for me to address application number 1 and then Mr Draper to address that, for us to do it in that order because there's maybe too much to do it all together. But as I say, these introductory comments are setting the scene for all of them.

I need to start by reminding you of the Disclosure Report which is in the core bundle, so C, I'm afraid we need to open that, C at page 303.

THE CHAIR: 303?

MR JONES: Yes.

THE CHAIR: Thank you.

MR JONES: This is a document produced by Google back in February but it still sets the parameters for much of what we are discussing, so it's useful to look back at it. You will recall that Google identified 12 repositories of documents and the ones which are of particular significance today are 1, 2 and 11. Some of the others may have some relevance but those are the particular ones.

Repository 1 was documents produced by Google in the US proceedings in relation to

which they said there were around 3 million documents, Repository 2 was then additional electronic documents. An important point of contrast between 1 and 2 was the date because in broad terms Repository 1 goes up to 14 August 2020 and Repository 2 starts at 14 August 2020.

THE CHAIR: Yes.

MR JONES: Now I should mention Google have explained that 14 August 2020 is not in fact a hard cut-off date for Repository 1, there are some documents which postdate it. But broadly speaking, those are the parameters and that's why Repository 2 is broken out in the way it is.

Then also I mentioned Repository 11, that's just described as UK Google Play financial data. Attached to this was the search terms, proposed search terms at that stage, page 316 if I can ask you to look at that. Google had listed various search strings, there were 50 of them.

THE CHAIR: Yes.

MR JONES: On page 321, Google had also proposed a list of custodians, there were 13 of those.

THE CHAIR: Yes.

MR JONES: In broad terms what happened after this, both before and after the last CMC, was an enormous amount of correspondence regarding these custodians and these search terms. But unfortunately no further agreement was reached regarding what custodians or search terms should be used, subject to Google adding one further custodian and three further search strings. But broadly speaking, the parties did not reach any further agreement.

By the time you came to make your order after the last CMC - the CMC was in June and you will recall your order wasn't made until September, and unfortunately in that gap there was a lot of debate. But what was agreed and put into the Order can be

seen in the salient documents bundle at tab 4. If we pick it up at page 8, you will remember paragraph 8 was what the parties were calling Stage 1 disclosure, and in relation to Repository 1, you see at paragraph 8.1 of the order, Google was going to disclose everything from the 44 custodians.

Just pausing there, the reason for that was that the parties hadn't agreed on search terms so eventually what Google said, and the Class Representative agreed, was we will just give you everything, but we won't apply any search terms to this. That was not, I think, what was discussed at the CMC but it is what the parties agreed afterwards because of where they'd got to. What was then disclosed within Repository 1 was something over 2 million documents.

In relation to Repository 2, you see in paragraph 8.2 of the order, Google was going to apply its custodians and its search terms and then review them.

THE CHAIR: Yes.

MR JONES: So that has been done and that has led to, as I understand it, around 33,000 documents being disclosed. Then in paragraph 8.2(b) of the order, what was envisaged was that there would be discussion and agreement on supplemental custodians and search terms by 15 September and they would then be applied to Repository 2. On that front, as I have said, no agreement was in fact reached so that has not been done, and you envisaged in this order that any disputes about that would come to this CMC.

THE CHAIR: Yes.

MR JONES: Although for reasons I am going to come on to, that also has not happened in precisely the way you envisaged; in other words we are not here saying we want this custodian and these search strings, we are in a different place for reasons I am going to explain.

Back on what was envisaged, over the page, there was then - picking it up at

paragraph 8.6 of the order, a suggestion that - which is still the order - that Stage 2 disclosure was going to be done and the Class Representative is to submit requests by 5 January 2024. Then over the page, there would be another one-day case management conference some time from 12 February 2024, which I think has not yet been listed. I will be corrected if I'm wrong about that, but my understanding is it's not yet been listed.

So, the broad position, standing back, and what lies behind several of the concerns I am going to come on to on the disclosure applications is that we have on the one hand a huge number of documents, over 2 million within Repository 1, which take us up to August 2020. So, one set of problems is how do we get through that.

On the other hand, Repository 2 is a comparatively very small set of documents, 33,000, in respect of which the concerns are different. The concerns there are that the Class Representative does not think enough has been done to identify relevant documents. Layered over the top of those two concerns, there is a timetable for applications for Stage 2 disclosure which really needs to be complied with. It could in theory slip a bit, but it really needs to be complied with because obviously hot on the heels of those dates are dates for factual evidence and expert evidence, and so on and so forth.

So, in different ways, the applications we have made are intended to find a way through these various problems: is there a way of digesting the millions of R1 documents, Repository 1 documents, and is there a way of identifying gaps in the Repository 2 documents and taking requests forward?

So that was the broad background. I am now going to turn to the first of the four applications, which is intended to target the Repository 2 problem: in other words, the potential gaps in the R2 disclosure.

To explain the thinking behind this, I need to take you through some of the background

as to why we have not been able to agree, why we haven't even been able to identify sharp lines of disagreement between ourselves. There is a mass of correspondence. Within that mass of correspondence, there is, I am sorry to say, a mass of criticisms in both directions. I am going to try not to get pulled into those. The reason I say that is that this application and the way we've framed this application is intended to break the deadlock. That is how we've approached this. That said, I obviously need to take a bit of time to explain in broad terms why we are here so I can explain why we think this proposal will break the deadlock.

As you know, the broad idea from the last CMC, which is what happens in every complicated case, is that the parties would go away and discuss custodians and discuss search strings. That's always a challenging process in various respects, but including in particular where there is an information asymmetry. The Class Representative doesn't know much about the individuals working at Google who might be appropriate custodians. She doesn't know anything, she doesn't know anything about how they arrange their documents. She doesn't know anything unless they tell her about what sort of codenames they use for what might be relevant projects, and so on.

The other disadvantage the Claimant has - or here the Class Representative - is that they can't just do their own searches with different search strings to see how many documents come up. So, if you are doing the disclosure exercise, what you do is you gather together the repository of data and you then try different search strings to see how many documents come up. If you get 1 million documents, you think that's obviously disproportionate, we are not going to go through that. So, you fiddle with the search string and see what comes back and you think maybe we'll exclude a custodian. So, you exclude a custodian and you fiddle a bit more and see what comes back. You do that iteratively until you come up with something which looks sensible

and proportionate.

But if you are the Class Representative here, all you can do is suggest some search strings, wait until Google runs them and comes back and tells you what the hit rate is, decide if it's disproportionate and then make another modified proposal, all the time not knowing what the structure of the documents is, not knowing precisely what responsibilities different people have.

So, when you add those disadvantages together, it's inevitably a slow and challenging process for someone in the Class Representative's position, which is why the parties have been corresponding on these issues since the start of the year, since that Disclosure Report I showed you.

Broadly speaking, at the start of the correspondence, what happened was the Class Representative was trying to understand why Google had chosen the custodians it had and how many hits came up with Google's own proposed search strings. So, in very broad terms, there's correspondence on those sorts of issues towards the start of the year, and by the middle of the year that information had been provided, the hit reports were given in July.

But overlapping with that, although picking up a bit later in the year, but overlapping with that process, the Class Representative was also suggesting additional custodians and search strings. Now I obviously can't take you through all the correspondence, I'm not going to try to, but I do want to just trace through a few letters to show you how this comes about and show you the sort of difficulties which people in the Class Representative's position get into.

Can I start with C184, so core bundle page 184. A letter from the Class Representative, 3 August, from her solicitors, of course. Over the page, 185, you will see under the heading "Repository 2", this paragraph is raising concerns with custodians. None of them appear to have held positions which relate to financial

performance of the Play Store, they don't involve any individual more senior than a Senior Vice President. They don't contain any of the project or code names which you've identified as being relevant, and some further detailed points on things such as incidents.

So, they outline some concerns. Then if you go forward to page 189, you'll see a list of the Class Representative's own proposed custodians at that stage. The ones to just highlight for my purposes right now are number 3, Christian Cramer. He is the Financial Director of platforms and ecosystems of Google Play, and he's the one who has now been added. Then just because I said I wanted to trace through an example, if you see Ruth Porat, who's number 20, she is the Chief Financial Officer. So, they put forward a list of custodians and then on page 190, you'll see they also put forward a list of search strings and there's comments alongside each one to explain why these are being suggested.

You then see Google's response which starts on page 193, dated 17 August. On page 194, they explain that these new custodians and search strings are disproportionate and unreasonable. That's because they've run the search strings over the 13 proposed custodians and it produces this mass of documents, and then they say: well, if we had to add even more custodians, it would be even more disproportionate and unreasonable.

On page 195, at the bottom of that page, they have a table where they are responding on all the proposed custodians. Page 196 is where they accept Mr Cramer, page 197 is where they make comments about Ms Porat. They are essentially saying - they say "she is unlikely to have unique material … given that she is not involved in operational day-to-day matters." So, they have reasons for not wanting to include Ms Porat and they are set out there.

Then I should say later on in this letter, so starting at page 200, they go through the

search strings which my solicitors had suggested and tell you how many hits they lead to, and later on in this document they make some comments about the search strings. The broad theme, as you see from the letter, is that these are disproportionate because they throw up large numbers of documents. If you just pause there, you'll see the position the Class Representative is then in - she and her solicitors are not sitting in front of a computer able to refine the search strings, so you then have to ask yourself: how do you take this forward? Google has not suggested refinements of the search strings to be more targeted. Google hasn't suggested which of these potential additional custodians might be ones which are most worth targeting. So, you have to think about that and it's obviously a slow process, and it is of course dependent on Google providing helpful information.

If I pick up here the example of Ms Porat, one thing which the Class Representative decided to do after this response was to ask for more disaggregated hit rates targeted at particular custodians. So, Google haven't volunteered that, but my solicitors thought that might be a way to get through this.

I will show you that. Unfortunately, we have to go to the correspondence bundle, page 1190. This is the letter of 5 September from my solicitors and on page 1192, they have that same table but with particular custodians listed in the column on the right. The ones in bold are the existing custodians and the ones which are not in bold are the proposed new custodians.

So, if you go down that, you'll see, for example, in row 41 Ruth Porat is listed, and this continues over a few pages. But you'll see the thinking is maybe we'll see how many documents come up for this search string on Ruth Porat. That didn't find favour.

If you then go to page 1217, you'll see Google's response on 12 September, and on page 1218, paragraph 6, they essentially say that “the inclusion of material from these three individuals would only cause the number of responsive documents to increase”.

So, in relation to those proposed new custodians, they refused to give these disaggregated hit rates.

Now that's just a flavour of the difficulties. I am not here saying they must now run these searches on Ruth Porat, I am not here with an application of that nature. I am saying that the process is incredibly slow and laborious and when you have a party which doesn't want to proactively make suggestions, it's extremely difficult to make progress and it's extremely difficult to make progress especially under time pressure.

So, what the Class Representative has done is to try to come up with something as I say to break the deadlock and to help them try to move forwards in advance of the deadline for further applications.

I want to show you what we are asking for, but I am sorry, I may have the wrong reference. I will just have a ... I think I want the core bundle, page 251.

THE CHAIR: Can I have that reference again, please?

MR JONES: Core bundle, page 251.

On the next page, page 252, at paragraph 7 is what has been suggested, and this then gets reflected in the proposed order we have before you today because the proposed order is for them to answer these questions in paragraph 7 of this letter. What is said is:

"In these circumstances, and in order to try and progress this discussion as efficiently and proportionately as possible, our client has set out in the Annex to this letter the categories of documents which she considers are critical and should be captured as part of Repository 2 disclosure. Please confirm in respect of each category: a. which custodian(s) are likely to hold the documents requested; and b. which search string(s) from the Google Revised Search Strings (in addition to the 3 supplemental Search Strings proposed by our client and accepted by your clients) are likely to locate those documents."

So, note the "likely" in both. It's not sort of a request for comprehensive information. It's just which ones are likely to answer these. Then the Annex starts over the page, and I have just realised you probably have this the wrong way round on the PDF, do you? I apologise for that, maybe there's any it would be helpful for me to read out.

On that page 254 --

THE CHAIR: We have a technical person to my left who is going to tell me how to rotate it. Thank you.

MR JONES: So, this is the cover page, but there are 17 issues which are listed. As you saw from paragraph 7, these are essentially the issues which the Class Representative thinks are critical issues in the case which should be covered by Repository 2.

In relation to each, there is just a column for the likely custodian and a column for the likely search strings. The essential thinking behind this is if we can understand where Google thinks we can find this information, that will assist us in the time we have available to assess the material and to assess whether we need to make a further application.

I accept that this is a change of approach from what has gone before but I hope I have explained why my solicitors changed approach. It was to break the deadlock and to try and move things forwards.

Now at one extreme, it's possible that Google might say: well, I don't know, issue 6 - to pick one at random - there's no custodian and no search strings because we didn't think that that was something which would be disclosed by Repository 2. If that's what they say, then of course that will be very interesting because that will sharpen the line of dispute between us because we can then say: no, no, this should be covered, it's an issue in the case; or it's an issue in the case but it's not sufficiently covered by the other repositories. Beyond that of course, they might say: well, there are these two

likely custodians and these search strings, then that will enable us to go away and look in a targeted way at what has been provided from those custodians and those search strings.

I should say I of course accept this will require some work by Google. They will not have done their own disclosure exercise by reference to these categories. So, when one does disclosure, one doesn't tell ordinarily the other side what categories you've used, that would be privileged information. I don't know what categories they have used when they've searched - thought about how to structure the issues.

But they will of course have to go back to what they did and think about how that maps across to this. But realistically, that is the sort of exercise lawyers do all the time. There will be a team of lucky souls at RPC who are immersed in the detail of this and immersed in the process and this is the sort of thing that one would sit down and spend a day on.

I totally accept that in these very heavily lawyered cases where huge amounts of money are at stake, it's not just going to be a day, it's going to be someone spends a day, then there are discussions, then it pings around for a bit and in the end, it will be several days. But that is the nature of this exercise, it's not a huge exercise. It will involve some work, but it will be extremely valuable to solve the problems which we otherwise face.

Looking forward, the problem we anticipate is that if we don't have some assistance, we are going to face a deadline to make further applications and at the moment it's just very, very difficult to know how to target those. So, if we take Ruth Porat, you've seen that Google has explained why they've not included her. Of course, we could take that at face value, they have their reasons. We could simply say: yes, that sounds fine, we accept what you say, everything she's going to provide is covered by someone else.

One doesn't ordinarily take that sort of thing at face value. We don't at the moment have any real way of interrogating the proportionality of making further requests. If we don't have some way through, we are going to be back in January - well, either we won't be back with more requests because we have been hindered in making them properly or, to be frank, we are going to be back with requests which are inevitably going to be wide and miss the mark slightly, and then what will happen is, presumably in defensive evidence, they will engage and say: actually, we can't do Ruth Porat generally but here are some suggestions of making it more targeted. It's just not an efficient way to proceed and we need to move it forward in an efficient way.

My learned friend has taken in his skeleton argument some drafting points. If you go back to page 242 and look at these --

MR FRAZER: Mr Jones, before you go there, one of the points made by Google was that in relation to the term "management documents", it was extremely broad in its scope. I notice that management documents are defined in paragraph 6 prior to the start of the table. It does seem quite wide, are you saying that's still workable within the envisaged system you've just described?

MR JONES: Yes, because in broad terms these issues are asking for where in the disclosed documents will we find documents going to these 17 issues.

We didn't in a sense need to limit it to management documents at all, it could have just said documents. We had thought that limiting it to management documents might provide some assistance, they've said it doesn't. In a sense, there it is, that doesn't help them. But that isn't actually what the exercise is about, it's about thinking who is going to have documents falling into these categories. That's what the request is. If the person has management documents and other documents, then there it is, they will just answer by telling us who the custodian is.

There was no magic in management documents. If it does not help to narrow, it really

doesn't take things anywhere. We want to know where the documents are.

There are couple of other points similar to that, Sir, which were at number 1 - yes, the relevant time period. I think my learned friend says: well, 14 August 2020 would capture some documents in Repository 1; but obviously this whole thing is about Repository 2, so we are not meaning to capture any documents from Repository 1. Then in 4, if you look at the definition of communications, "Oral type", et cetera, et cetera, that's just a standard definition of communications. I mean, true it is that there's not going to be I think a sort of audio recording in the disclosure - maybe there is, but unlikely to be. But there it is, it's just asking about what's in Repository 2, it's not asking them to go away and look for other sorts of documents.

If there is - it should be clear, if there's an oral recording then we want - obviously that falls within this. My point is we're not trying to expand it out beyond what has been disclosed for Repository 2. So those sorts of --

THE CHAIR: Is basically what you are wanting is some kind of reassurance that Google accept these documents are relevant?

MR JONES: Yes.

THE CHAIR: And that they have identified the custodians likely to have them, most likely to have them?

MR JONES: Yes.

THE CHAIR: And that they've given thought to the search strings that will identify them?

MR JONES: That is it, that's certainly the first step. So, as I said, if they come back to say there's no one in these categories, then we'll know. But there is a second step, which is when they have given thought to these, and one hopes they have given thought to most of them, it will help us to know who they've identified as the most likely custodian and what they think the most likely search strings are, because that will help

us to look at what documents actually come up within those categories to decide whether it's sufficient.

So, the fact there might be a couple of custodians, say, for issue 5 doesn't mean that's the end of the analysis. We would want to look at whether the documents, which we find using those search terms on those custodians, suggest that sufficient disclosure has been given, or whether actually someone more senior is needed.

So, it will provide a helpful roadmap for that whole exercise.

THE CHAIR: So, as you see it, you are actually going one step further than the normal disclosure exercise. The normal disclosure exercise is that you try and identify categories of documents that are relevant to the case, the people likely to have them. But as you said in your submissions I think, that would normally be the extent of the exercise so far as the disclosing party is concerned. You actually want to go further and say but we want to know what searches you've run so we can check up on what you've done, is that right, or to facilitate your view and make it quicker?

MR JONES: We know broadly, but - we know what searches they've done because we know what search strings they've used. We know in broad terms what search terms they've done and we know what custodians they've looked at. We are trying to engage in the normal process of discussing those custodians and those search strings and working out whether other custodians and other search strings should be used. So, this step is out of the ordinary in the sense one wouldn't ordinarily fill in a table like this, but it's not out of the ordinary in the sense that what we want it for is to help us move forward with the ordinary process of discussing custodians and search strings.

I should show you the draft order, although it doesn't really add anything to what I have said. It's in the salient documents bundle at tab 6. If one looks at page 21, paragraph 2 is the proposed direction which I have been addressing you on.

THE CHAIR: Was it tab 21?

MR JONES: It's tab 6, page 21.

THE CHAIR: Sorry. Thank you, yes.

MR JONES: That's just to show you the direction below.

Also, I have been very helpfully reminded in relation to your question, Madam, that in this case there actually weren't issues agreed in advance of the disclosure exercise. This isn't a case where you have a sort of agreed list of issues first and the parties, here Google, goes away and discloses by reference to those agreed issues.

So again, we are slightly out of the ordinary in that sense and it's true to say that this exercise, as I say, one of the functions will be to see whether in fact they've treated these things as relevant issues for disclosure.

THE CHAIR: Is the simplest thing to identify a list of issues for disclosure and actually understand any basis for any objections on grounds of relevance to the case?

MR JONES: Can I just take instructions on that, Madam. **(Pause)**

The message I am getting is that if that had been done at the outset that would certainly have cut through some of these problems, but in a sense, we are where we are.

If I can just unpack that slightly: we are of course focusing here on Repository 2 but if there were a list of issues, that would need to be rolled out over other repositories as well and none of those have been done by reference to list of issues.

The process of reaching any agreement has been extremely difficult in this case. I think there's a real concern that we might get distracted into discussing lists of issues rather than being able to progress the disclosure applications by the deadline we have. Moreover, as I say, part of the hope is that when Google answers these issues we've listed, they'll tell us then if they think one of them isn't an issue. So, they will be able to say this is not - we haven't disclosed any of these documents, they are not likely to be within anyone's disclosure because we haven't treated it as relevant. That will flush

out disagreements that will be of most salience to the parties.

THE CHAIR: Can you explain to me why you need the search string as well as custodians? Can you explain that to me again?

MR JONES: Well, it's in order to be able to see when we are told you are likely to find these documents by looking at these custodians and these search strings - remember we have the documents so we can then apply those search strings to those custodians -

THE CHAIR: But on Repository 2 documents which have already been provided --

MR JONES: We have the 33,000 --

THE CHAIR: You have 33,000 already.

MR JONES: What we are asking them for is the information in relation to Repository 2, the 33,000 --

THE CHAIR: To apply to the 33,000.

MR JONES: Yes. We can get this information and then we can go away and run the search strings against the custodians and if five documents come up, then we know we have a problem. If 10,000 documents come up, then I accept it's going to be a difficult exercise for us because we are not going to read 10,000 documents for each individual issue. So, the helpfulness of it will depend in part on how many documents are thrown up in response to these queries. That's why we want the search strings because it will enable us to apply them to the documents we've been given, and then to decide on the basis of that exercise whether it's sensible to make further requests in particular areas.

THE CHAIR: When I was reading through the documents and correspondence, it seems that you had been asking initially for personnel charts and structures.

MR JONES: Yes.

THE CHAIR: They were ultimately provided.

MR JONES: Yes.

THE CHAIR: And some information was provided about the various projects that might be relevant to the issues in dispute in these proceedings.

MR JONES: Yes.

THE CHAIR: Is there any reason you can't formulate your search requests by reference to those pools of information?

MR JONES: Well, I think the answer to that - I will be corrected - can I just take instructions? I don't want to say something which I then have to correct so I will make sure I have this right if I may. **(Pause)**

It's absolutely right to say there were projects, code names for projects which the Class Representative thinks are relevant - I don't think that's been disputed --which were not part of Google's search strings. That was one of the things that the Class Representative was asking, so in her proposed search strings some of those words would pick up on those project names and Google refused to do that. That's one of the processes we went through to try and identify further proportionate searches.

But it ran into the same sorts of problems as the Ruth Porat example which I took you to, which is to say if you propose a search string and propose some custodians and the answer is a blanket, that's going to lead to hundreds of thousands of documents and we don't think the additional custodians are relevant or necessary, it's just very difficult to take it forward.

It's true to say I could have been here today saying: here are our search terms, these projects are obviously relevant, and we want new searches to be run by using the search string with the projects in. We are not satisfied with what's been said about these custodians so we want them run across those custodians, and we could be having that argument now.

The problem is it would be blind from our point of view because all we have at the

moment, on the basis of what Google has told us, is very high-level responses about how these search strings lead to disproportionate numbers of documents.

So, we would be making an application knowing that it's said it's going lead to hundreds of thousands of documents and not being able to refine it down to particular custodians or narrower, more sensibly refined search strings because that's an exercise which, as I say, we are not sitting in front of the computer able to do.

So that's why we hadn't gone done that route and that's why my solicitors have tried to come up with this interim step, which the hope is, it will enable us to be here next time, if we need to be, but with that sort of targeted proportionate application. So, it won't just be please go away and run search strings on these projects, it will be something much more sophisticated than that, we hope, if we can move the discussion forwards.

THE CHAIR: I mean, have you ran - so you must have an idea, your team must have an idea of what sort of documents they are looking for, if you look at your schedule in the left-hand column. Have your team run examples of what they would be looking for to see if there are any hit results and determined, rather strangely from your perspective, there aren't any and so some form of extra search has to be conducted?

MR JONES: Well, yes - and I am going to have to take instructions again - yes in the sense that certainly we are progressing through the 33,000 documents and finding documents in the categories we think are relevant, and that is an exercise which is ongoing at the moment.

Can I say that there are particular categories which have thrown up no documents? I would - shall I take instructions?

THE CHAIR: Anomalies where you think if the searches had been done correctly, I would have thought there would have been something on there.

MR JONES: I'm not sure we are at that stage of being able to stand back and ask if

we've got enough in a particular category. Part of the thinking behind the application is you can sit down and chart your own course through 33,000 documents but you won't be able to stand back and ask whether you've got the volume that you would expect in each category until you've completed it. You are doing that, as I say, blind to how Google thinks -- where Google thinks those documents might be within the mass of documents it has provided, the 33,000.

So this is intended to be a more efficient way of doing it in the short time we have available, because knowing where Google thinks the documents are likely to be in amongst what it has given us will speed that long.

MR FRAZER: There are ongoing proceedings as we are all well aware in the United States and Australia.

MR JONES: Yes.

MR FRAZER: Do those give clues as to where these things might be found, as far as you know?

MR JONES: Yes, and that's the US/Australia topic I am going to come on to.

MR FRAZER: Ah, right.

MR JONES: That's the one I think we should park until the end.

MR FRAZER: Okay.

MR JONES: The answer is they give clues - that will help on the separate problem of the 2 million documents.

MR FRAZER: Okay.

MR JONES: So, for Repository 1 where our basic problem is, we have enormous volumes to get through. Knowing what has been treated as important in other countries will help with that.

Of course, it could help to some extent with Repository 2, but the Repository 2 problem is a sort of next step problem, which is have they given us enough and have they

searched enough custodians. I can't say the Australia and US won't help with that, maybe it will, but that hasn't been precisely the way we've thought about it.

MR FRAZER: Okay.

MR JONES: Unless I can assist further, those are my submissions on that application.

THE CHAIR: Thank you. Yes, Mr Draper.

MR DRAPER: Yes, thank you.

You, Madam Chair, made a couple, if I may say so, insightful questions. The first was whether what the Class Representative really wants is to know whether we consider we've given appropriate disclosure as against these categories in the letter. They are obviously not our categories; we didn't draft them. They didn't exist at the time the disclosure was scoped and provided from Repository 2. But in broad terms, yes, we think the disclosure we've given would meet many, if not perfectly, all of the categories. As I say, they have been drafted by the Class Representative, so they didn't guide the disclosure process.

That's the first question. That gives rise to one curiosity which is that in a way, we could answer that table by saying: well, if you put all the custodians in and if you put all the search strings in, you'll get documents that satisfy all of your categories and concerns.

The second question from the panel was: well, have you, the Class Representative, run any search strings or limited by custodian on this 33,000 as an experiment to see whether you think there are ample and adequate documents under each of these categories? The answer again is no. So, it does seem a rather strange application.

With those introductory remarks, if I could sort of take a step back and take you back by way of starting point to the Order that has in fact been made in relation to disclosure because in my respectful submission, my learned friend is right to accept as he does that they are to some extent departing from the structure anticipated by that Order.

My submission is going to be they are departing very dramatically and in very important ways.

If I could ask you to turn up the disclosure order at salient documents page 8, please.

THE CHAIR: Yes.

MR DRAPER: As my learned friend described it this morning, the sort of thrust of the application is that they want to be able to obtain information that will help them ascertain whether our Repository 2 disclosure is adequate.

Now, just pausing there, the first answer is: have a look at it. You've now got it. It's only 33,000 documents. It's well capable of being interrogated using technology and it's sufficiently small that a good deal of manual review could be done once there's been some initial filtering. But put that point to one side for now.

If that's what the application amounts to, then we need to look as to how that fits in the structure the Tribunal has ordered. So, if we look at paragraph 8, we see the main structural aspect of this order is to provide for disclosure in two stages. You see Stage 1 Disclosure set out at paragraph 8, and then over the page, paragraph 8.6, Stage 2 Disclosure. Focusing first on Stage 1, we see paragraph 8.1 concerns Repository 1 which as you've heard is the discovery documents from the US proceedings. In the event, that was subject to no custodial restriction, as you see from the text of the Order, so this order postdates the agreement reached that, as you see there, all 44 custodians would be used without the application of search terms or prior relevance review. So, all of the custodial documents. That disclosure was provided in accordance with these directions; in fact, it was provided by the time this Order was ultimately sealed. But I am not sure that matters.

Paragraph 8.2 then deals with Repository 2. You see there is a two-round process within the first stage for Repository 2. The first is that Google apply the 13 custodians set out in Google's EDQ, which you've looked at briefly, and the search terms set out

in RPC's letter. You were taken briefly to the search strings in the EDQ, those are obviously complex search strings reflecting a lot of trial and error, and attempt. There's a sophisticated approach to disclosure being adopted, so it's certainly not the position that disclosure has been provided without a great deal of thought being given to how it should be - how the universe of documents should be filtered in order to identify those likely to be most salient for the purposes of the issues in these proceedings. That's what's ordered at paragraph 8.2(a): the custodians that you saw in the Disclosure Report and the application of those very sophisticated 50 search strings. So that's the first step. We can't revisit that now and seek to suggest, as my learned friend flirts with, that those were somehow inappropriate.

What we then have is an opportunity in (b) for supplemental custodial collections and supplemental search strings to be agreed by 15 September. Just pausing there, it's important of course to distinguish between custodians and search terms in this respect because it's very relevant to how one comes to agree them. Search terms are capable of a process, a sort of iterative process of testing some new search terms. You run them cross the universe and see how many unique hits there are and that provides an indication as to whether it would be proportionate to add those further search terms.

So, pausing there and thinking about search strings, what in fact happened here was that there were further search strings proposed but they tended to return a great many hits and so make the situation very difficult. That was of course the situation which happened with Repository 1. What happened there really was the

Class Representative kept proposing search strings that kept coming back with, in one example, over 1 million hits collectively and the parties ultimately reached the view that it would be better just to provide all of the documents.

So that is search strings and there has been discussions in relation to them, and supplemental search strings have been added, three of them, and they do capture

project names. Just so there's no misapprehension there, that cooperative process has resulted in additional search strings.

As regards custodians, the position is somewhat different, of course, because in order to see how many documents a custodian has responsive to search strings, you would need to collect those documents. So, the usual process is to say: well, are the existing custodians adequate, and you can best assess that after the disclosure from those custodians has been given as that's when you are in a position to run all sort of searches and reviews over the disclosure provided.

But focusing in on - that's the process. Focusing in on the dates agreed between the parties for this process to take place, any supplemental custodial collections and supplemental search terms were to be agreed by 15 September. Well, the letter we've been looking at with the Annex with the categories in it didn't come until two weeks after that, so the Class Representative really has stepped outside the process of this order.

The reason for that is apparent from my learned friend's submissions. It's because this isn't so much really about agreeing or assessing the adequacy of custodians for the purposes of giving this round of disclosure. That's not what this is about. This is about the Class Representative inspecting the disclosure thus far provided. What she really wants is for us to assist in that process, and I'll come on to why it shouldn't be us, it should be them if they want to do this process, but also why we don't think it's a very effective or useful process. But if that is the purpose, if the purpose is to interrogate the disclosure thus far provided and see whether there are gaps or perceived inadequacies, well, that's what we have in paragraph 8.6 if you turn over the page.

This is the Stage 2 Disclosure process, and the logic obviously of this Order is that the Class Representative will be in a very good position to identify adequacies or failings

in our disclosure once she has reviewed Stage 1. As regards Repository 1, there is a job of work to be done there because it's a very substantial universe of disclosure. But of course, it's a very substantial universe of disclosure that the Class Representative accepted and agreed ought to be provided expressly on the basis that she would then be in a position to interrogate it using all of the - I think technology-assisted review was the phrase used in correspondence. That's what's anticipated for Repository 1. Obviously, the same tools exist for Repository 2 and they're dealing with a much smaller universe of documents.

So that's the process. Paragraph 8.6 is the process whereby the Class Representative comes back, having looked at our disclosure and assessed whether there are any perceived gaps in it. What the Class Representative is doing is trying to do something that's between the process that was supposed to be done by 15 September and Stage 2 Disclosure. In our respectful submission, it's just not a principled or useful kind of hotchpotch of those two processes.

So, focusing for a second on the suggestion that filling in this table would somehow assist the Class Representative, there are two points on that. One as I have said is: is that a worthwhile and useful process? We'll park that for the moment.

The first point is that it seems to be being proffered in the alternative to the Class Representative just getting on with the inspection process. In relation to that, I can show you Hausfeld's letter of 3 August. This is correspondence, tab 49, page 1089.

THE CHAIR: Did you say tab 10?

MR DRAPER: No, sorry, it's correspondence, tab 49, page 1089.

THE CHAIR: 1089, there we are. Sorry.

MR DRAPER: I have already referred in passing to this letter because as you see, this is dealing at paragraphs 6 and 7 with Repository 1, but obviously what's said there has relevance also to the inspection of Repository 2. So, this is the basis on which we

reach the agreement you see reflected in the order.

So, the Class Representative says here:

"We are cognisant of the deadline for Google to provide disclosure for Repository 1 documents [the context of that is this letter is dated 3 August and that disclosure was due beginning on the 25th running to 13 September in the event]. As a result, we are instructed to accept disclosure of the entire set of custodial documents from the 44 US Custodians in the US Proceedings."

And then paragraph 7:

"Our client intends to use available technologies and document filtering tools in order to manage the costs of reviewing those documents, which may result in requiring additional information from your clients, in which regard we would be grateful for your clients' prompt cooperation."

But what this reflects is entirely unsurprising, consistent with what's now the well-established position in litigation of this scale with well-resourced parties and sophisticated legal teams, is that the burden of inspection has reduced dramatically. It's been reduced through the application of targeted search terms, which has been used as an electronic mechanism for reducing the burden of inspection for a very long time, but also more recently technology-assisted review which effectively is a form of AI that learns on the job. If you put through a bunch of disclosure parameters aimed at identifying documents of particular interest to you, the system spits out what it thinks are the documents you want and you mark its homework, and it learns from that marking of its homework.

So, these are now very sophisticated tools and we've seen that that has changed the landscape, most notably the *Genius* case in the Tribunal where the President determined that there should be what he described as effectively deliberate over-disclosure on the basis it can be inspected. In *Kent v Apple*, the Apple case,

there was no re-review of US disclosure. The same thing happened here, and this panel gave its reasons for that in the ruling on expert evidence and disclosure - I will give you the reference. Paragraph 57 of your ruling on those issues, you referred in that paragraph specifically to technology-assisted review and targeted searches as reasons for considering that RPC, my solicitors, ought not to be required to do a manual review. They should simply provide the documents after the application of search terms because the Class Representative would then be in a position to make use of these powerful technologies.

I am telling the Tribunal things you already know but it's important to bring a degree of realism to this. There are only 33,000 documents, this technology can be deployed. To take, for example, stepping back even from the intelligent technology we now have, in the good old days even, a party inspecting documents would locate documents that they find interesting, they would then mine that document for search terms that they could use to find similar documents. If they then find - just take a practical example --they've located a management report from March, they search it for terms they would expect also to appear in all other versions of those management reports, they find it for April, they find it for May, July, et cetera, but June is missing. Then they make a request, specifically, "What has happened to the June management report? We'd like it, please". Or they go down a train of enquiry in relation to a particular topic or issue within the disclosed documents and identify there's a dead end at some point, and that triggers a process of making further requests.

So that's how a party who has received disclosure, and despite the fact of the disclosure statement attaching to it - which of course we have here in relation to Repository 2 - if they think there might be inadequacies then they review it, they inspect it, and they form a view as to what those perceived inadequacies are, they make requests. If those requests are denied, they push them in front of a decision

maker.

So that is what I say ought to be happening here. There ought to be a process of inspection leading to Stage 2 requests and Stage 2 Disclosure. But focusing on then the second element, why I say this is not an appropriate mechanism, the table you've seen, is not an appropriate mechanism for effectively interrogating the Repository 2 disclosure that's been provided for whether or not it's any good. If I could ask you to turn up the table again, it's at correspondence tab 120, page 1282.

THE CHAIR: Yes. Yes, I have it.

MR DRAPER: Some of the points I am about to make, my learned friend has accepted and very fairly accepted in the course of his submissions.

Disclosure in these proceedings was not ordered to take place by way of issue. In the usual way, there are search strings and there are custodians and then there is a disclosure statement confirming that the disclosure is appropriate. If you want to look behind that, you do the inspection - I'm risking repeating myself, I am just trying to get to this document, forgive me.

One consequence of disclosure not having been ordered by issue, and certainly not by reference to these categories that you see set out in the second column of the table, is that obviously disclosure has not been tagged when provided by reference to these categories, they didn't exist - obviously they haven't guided the review process conducted, whether electronically or following that, by my solicitors. So there doesn't exist if you like metadata or some other source of information that can be used to plug into this table, whether automatically or entirely manually, and the suggestion that this might just take one day to apply each of the 50 search strings and do an iterative process of putting in a custodian, applying some search strings, seeing how many documents are turned up - the idea that that might take a day I suggest is just fanciful. This would be a very substantial task. And just to work it through, it's necessary to run

these strings through - practically thinking how it would in fact be done.

So, it's being said that this would help to identify whether or not the disclosure is effectively any good. But if my solicitors are invited to do this, what they would have to do is take category 1, we'd take the pool of disclosure - which of course the Class Representative also has - we would filter it by custodian, start with those that look most promisingly to be the best for category 1, then run search strings across them, see how many documents are returned, look at those documents to see how well they meet the category. And obviously many of them will be effectively false positives for this purpose because although things like management documents concerning the commission will be captured, there will also be other documents concerning the commission which are caught by the same search strings.

So, the process would then be an iterative one. You would say: well, we have quite a few management documents here, but should we add another custodian? Well, why not err on the side of over-inclusion. So, you add a custodian, you run it through again, you look at the rate of positive returns, management documents concerning the commission, and you look also at the rate of effectively false positives: how much chaff are we identifying along with the wheat? This iterative process would involve a whole series of judgment calls that could then trigger satellite disputes.

It would be said: well, why didn't you identify - use this search string in the table? You would have an argument to the effect of, well, it produced some management documents concerning the commission but it also produced a lot of documents that didn't.

So, as I say, there would be all sorts of judgment calls required, an extensive iterative process and two points on that. It is entirely unclear why it's RPC that should be required to do this on behalf of Google. If this is a step in the inspection process, the inspecting party should do it. They should bear the costs. They should bear the

burden. One reason for that is they are not going do it unless the light is worth the candle. They won't do it if it seems onerous and it takes resources and time away from other activities, if it doesn't end up being - seem like it's going to be very useful. But obviously that constraint on their decision making doesn't apply if they can just get my solicitors to do it because they won't be bearing the costs, at least in the first instance, and they won't be bearing the practical burden of running through this lengthy iterative process.

As I say, this is not a remotely useful exercise. One further reason it's not a remotely useful exercise is it's taking, as regards the search strings at least, a tool designed for one purpose and applying it for another. So, these search strings were designed, and you've seen how sophisticated they are, for the purposes of capturing documents that could then be reviewed to see whether they were relevant. That is not the same task as drilling down into the disclosure that's been provided and seeking to identify gaps. So, when I explained to the Tribunal exactly how one puts an egg in one's mouth and then sucks it for the purpose of the inspection process, that's the kind of thing I have in mind here. These search strings are not an inspection tool, they are a tool for getting together a universe of documents to then, in this instance, be manually reviewed. So, it is simply not the right tool for the job.

Wrapping up on that, in my respectful submission the correct thing for the Class Representative to do is to follow the structure that was agreed and ordered in the directions resulting from the last CMC and that means to conduct an inspection of the first round of disclosure and to then make targeted requests informed by that inspection.

That deals with my learned friend's point about asymmetry of information of course. He says, well, you know your documents better than us. The Class Representative is supposed to be currently putting herself in the position of knowing the documents

really quite well, both what's there and, by implication, what is not there.

As to timing then, well, the only complaint that is really made is we have to get on with it in making our Stage 2 requests because those will be due by 5 January. Well, they had this Repository 2 disclosure, most of it, already on I think it was the 3rd of this month. No, forgive me, it was the end of last month. There is going to be supplemental disclosure from Mr Cramer, in particular, who is a financial director so obviously that will be least very much focused on the financial issues, on 30 November.

So, given the small number of documents, the idea that they can't frame focused requests between the end of October, with some top-up process at the end of November, using all the tools that I have described, in litigation of this type, with parties resourced as they are, it really ought not to take more than a month or two in order to make focused requests in relation to what is, as I have said, a relatively small pool of documents.

Unless I can assist you further.

THE CHAIR: I was considering if the Class Representative's concern is to ensure that Google accept that these categories of documents are relevant and that the custodians have been identified --

MR DRAPER: Yes.

THE CHAIR: -- that are likely to disclose these sorts of documents, and that the search terms are likely to identify these sorts of documents, is the answer for a short witness statement confirming that?

MR DRAPER: Certainly, it sort of flows from the submission that I made, so I am certainly not pushing against it as a matter of principle for this reason. The submission I made was that, on one view, you could just put all the custodians and all of the search terms in. It would obviously be extremely over-inclusive, as judged against each category, but it would at least provide a confirmation that you think they are in there.

If you don't mind ... **(Pause)**

I mean I think the - I can well see why you are attracted to that idea.

THE CHAIR: I think you are going to give me a but.

MR DRAPER: I am going to give you - I am very conscious of the idea that you ignore everything before the "but". But the point is that we of course have given this disclosure on the basis that we identified appropriate search terms and custodians for the issues in these proceedings and we have signed a disclosure statement to that effect.

So, whether that lines up perfectly with categories drafted after the event by the Class Representative is a distinct question and it's not in fact as good a question as: have we given disclosure relevant to the issues in these proceedings, proportionate, et cetera? Which is what we have already confirmed.

So --

THE CHAIR: Well, I think Mr Holmes' concern might be: does Google accept that these are the sorts of documents that would be relevant to those issues? I can see there may be something to be said for wanting some confirmation that the searches have been done with that in mind.

MR DRAPER: Yes, in a way obviously I have indirect evidence of that because, through the inspection process, they will be able to see whether they have things hitting these categories. So effectively there is a sort of air of unreality to the ClassRepresentative's approach because we are talking about how the process of disclosure should be scoped at the outset, what sort of documents ought we to be aiming for, et cetera.

We did that process in February, and we produced the Disclosure Report, and there were discussions, and it led to the disclosure order. So, in a way the Class Representative is trying to turn back time and say: well, pretend that this were

presented to Google back in February and they had somehow ignored it.

If they want to know how these categories, which they've come up with after the event, and it's wholly unclear why they weren't presented much earlier, how well they line up with our disclosure, they can inspect our disclosure and see how well it lines up against these categories.

So those are the reasons for which, although I well understand where you are coming from, Madam Chair, I suggest it would not be additive to the disclosure statement that they've received.

THE CHAIR: Thank you.

MR JONES: Madam, there is literally no one at the bar I would prefer to be confused with than Mr Holmes but -

THE CHAIR: I am sorry.

MR JONES: -- it is Mr Jones.

THE CHAIR: Gosh, sorry, yes.

MR JONES: But I can say that hand on heart and so it goes on the transcript.

Madam, can I just start with this point, which is I think there's a complete misapprehension about what we are asking Google to do because, just to be clear, we are not asking Google to itself go back and apply search terms to custodians. That's what I described we will do once they've told us the answers.

What we are asking them to do is to look at the issues that we've identified and sit down and have a think: issue one, who is the custodian who is likely to have these documents? And then tell us.

It's only likely. We are not going to come back at some later stage and say: you told us X was likely to have these documents and it now turns out that Y also had them, therefore you got it wrong, and we are going to raise it with the Tribunal and complain.

We just want something practical to move forwards. So, you sit down, and you

think: who is likely to have them?

Now, true it is that you won't have thought about it through precisely this lens, but we are only talking about 17 issues, and they will have thought about it through some similar lens because they will have had to think about the issues in the case. That's really all it is, and then the same for the search strings.

My learned friend started by saying that of course they've looked at what is relevant, but he also said, if you listened very carefully, that they are confident that all of these -- that most of these issues, he said, most of these issues will have been searched for. So not all. So, we actually don't even know whether all of them have been searched for, and that is concerning in a situation where we haven't got a list of issues. It wouldn't be sensible in my submission to proceed on the basis that everything relevant has been searched for because that stores up problems for later.

So, Madam, that brings me to your suggestion. Could they simply confirm? That would clearly be a really helpful starting point so that we could know whether there are any issues that have not been searched for because Google doesn't think they are relevant, or Google doesn't think they are going to be in Repository 2. So that would obviously be very valuable.

But the next step which is custodians really should be easy. It really, really should be easy for Google just to say: who do we think are likely - of the custodians we've identified, who do we think are likely to have these documents?

Search strings, one can see might be a more complicated undertaking. I can see that. I maintain the application for the search strings as well. But, madam, on the suggestion of dropping any of it, it's very, very difficult to see why just telling us which custodians are likely to have the documents would be a problem.

Can I very quickly make a few other points in reply. My learned friend took you through the Order again and was essentially saying: this is what has been agreed, this is what

should be followed. But can I just remind you that the reason I am here is that the process has not been working. So when my learned friend took you back to Stage 1 and said: look, we all agreed that we would disclose everything and he showed you my solicitor's letter in which they said they were instructed to accept that, remember that's because they couldn't agree search terms, which is what everyone had been trying to do and said they would do at the last CMC.

So, it actually didn't work there. Then my learned friend said on Repository 2 the Class Representative was meant to identify search strings and custodians by 15 September and she's not done that and instead she's come up with this different idea. But I just remind you, that's right, we didn't do it because the process hasn't been working. And it's right we came up with this different suggestion and, again, that's because we are trying to break the deadlock.

The real problem we are trying to focus on is gaps. I just want to remind you of the kinds of gaps that my solicitors are concerned about. It's in the application letter in tab 5, page 14. These are the sorts of concerns.

THE CHAIR: I am sorry, could you just give me that reference again.

MR JONES: Yes, salient documents, SD, page 14, which is tab 5.

THE CHAIR: Yes.

MR JONES: So, in paragraph 10(a) there is the concern about custodians not holding positions which relate to the financial performance of the Play Store. Of course, we now have Mr Cramer, but we don't have the other people listed there, the financial director, the CFO.

In 10 (b) there's a concern about the seniority of the custodians. In 10 (c) there is the project names point, Madam, which you picked me up on. I heard my learned friend say that these have been searched for, but you'll see that what is explained here is, at the bottom of the page:

"Based on the explanation provided by Google, there are project names that appear to be relevant to the issues", and then there are some examples given at the bottom: "however, Google has not included any of these project names in its Revised Search Terms."

So, I think my learned friend may have been meaning to say that some project names have been searched for, but the point is that these ones haven't.

THE CHAIR: Yes.

MR JONES: Madam, those are the sorts of problems. We do want to move forwards in a sensible way. We don't have much time. Google, remember, searched all of these for relevance so they are familiar with these documents.

Madam, unless I can assist any further, those are my submissions.

MR DRAPER: It's not strictly by way of rejoinder, in responding to my learned friend, but to deal with your suggestion.

THE CHAIR: Yes.

MR DRAPER: Because it was novel, and I have just been --

THE CHAIR: Thank you.

MR DRAPER: Madam, not novel in a bad sense, simply it's not something we had considered before.

I have just been scanning down these categories to see the extent to which they would, at least in principle, line up so that it could be confirmed. Just one problem jumps out, taking number 12, for example, in CR tab 120, on page 1285. Number 12 relates to final executed copies of all contracts or agreements. This is supposed to be in relation to Repository 2, but contracts and agreements have actually been dealt with by way of disclosure under Repository 9 on the basis they are not custodial documents, they are not documents you would look for in people's emails, et cetera. They are contracts held by Google effectively in a non-custodial basis because they are documents of the

enterprise itself, rather than having sort of custodial ownership of an individual.

That's just one example of how - that's why I was reluctant to just give an easy: yes, this is covered by our repository due disclosure, because some of these categories are not even framed in a way that relates clearly to the kind of disclosure that Repository 2 is intended to provide.

THE CHAIR: But, Mr Draper, are you saying that final executed copies of all contracts and all agreements Google has entered into since 14 August 2020 have or haven't been - are considered relevant and have or haven't been searched for?

MR DRAPER: Yes, but not part of Repository 2. There is a separate repository for our contracts. Repository 9 is for the contracts.

THE CHAIR: Right. Sorry.

MR DRAPER: So, they have received disclosure of it, but it's not custodial. It's not something where you look in an email inbox and say: oh, that's great, by chance the agreement is attached to an email. I mean I would very much hesitate to say you won't get some contracts or agreements, sort of by accident, caught up in the custodial disclosure, but that's not the purpose of this disclosure.

THE CHAIR: Yes.

MR JONES: Just very, very quickly.

THE CHAIR: Yes.

MR JONES: It's really interesting and that's the sort of thing they could tell us in their responses. So, if you take this - I hear the laughter, but actually on a lot of other points where you have repositories which are directed at topics, so take financial information, there are other repositories dealing with that. But in the correspondence we are also told there will be information about that in Repository 2.

So, they are not actually self-contained repositories, they do overlap in some respects, and in some of those cases Google itself has said: we are giving you that disclosure

within Repository 2 as well. So, even on that specific example, that would be helpful to have answered in that way.

THE CHAIR: Thank you. I think it's a good time for the transcript writer anyway so we will take 10 minutes.

(11.58 am)

(A short break)

(12.12 pm)

MR JONES: Madam -- oh, I apologise.

THE CHAIR: We have actually decided what we were going to do on your last application. What we are minded to order is that a witness statement be provided by somebody suitably senior at Google, and I will have to be guided by you as to who that might be, confirming that the Defendants have considered and satisfied themselves that they have identified the custodians most likely to have documents within the form of the categories outlined in Annex A - I will come to what that means in a moment - and that they have applied appropriate search terms to those persons, those custodians, to identify those documents and which also addresses the issues in paragraph 10 of the letter of 23 October.

Nothing I have said in relation to that is meant to inhibit Google from saying that they haven't done so because they consider it to be disproportionate or duplicative or give another reason.

Google is also to complete something along the lines of Annex A. When I say something along the lines of Annex A, that means the Class Representative is going to have to, I think, have another look at Annex A and make it as specific as possible. At the moment, for example, the term "management documents" is very broad and Mr Draper referred to category 12, and it seems that there may be issues with that being maintained. So there needs to be a little bit more work done on Annex A and

I am very happy to be on call to assist with that, but that will be the Annex A the witness statement will address.

On that Annex A, Google will also complete the likely custodians but not the search column.

MR JONES: I am very grateful.

THE CHAIR: I hope that makes sense. If it doesn't, please don't hesitate to get in touch with the Tribunal and I'll try and clarify it.

MR JONES: We will see if we can get something down in writing at the lunch break.

THE CHAIR: Thank you.

MR JONES: I spent too long on that first one, given what we have to get through today, so I'm afraid I'm going to speed up slightly. I was going to jump, if I may, to the biggest and possibly most time-consuming application, which is our fourth application. So, I am going to skip over the other disclosure ones for now just because this is by far the most important one for us to focus on.

It's the one for financial information. Financial information broadly means data and documents which are needed to understand that data and to interpret it and produce a report here by the forensic accountant. Just to put this in context, what this goes to is the excessive pricing case and as I am sure you will all know but I will just say it quickly, the basic framework for abusive pricing is that you start by asking whether a price is excessive, and you go on to ask whether it's unfair. That first step of asking is it excessive broadly speaking involves looking at what the costs are which are attributable to that product or service, and what are the revenues attributable to that product or service. There is an enormous amount of scope, as you will see, for disagreement and complexity in that exercise. That's what the forensic accountants are concerned with.

Can I start by showing you very quickly what's actually been provided from

Repository 11. It's core bundle, tab 9.1, page 535, all the numbers are confidential and some of the descriptions of this are also confidential. But just to show you what we are actually talking about here --

PROFESSOR WATERSON: Page?

MR JONES: 535 in the core bundle. What has been provided can be printed out in 15 pages. So, this is the first - I am not going to go through them, but just to show you what it actually looks like. A couple of them have the pages full so they don't all look like this, but a lot of them do look like this.

There is a section in my skeleton argument which you've read which takes a bit of time explaining why this is completely inadequate and points to the recent cases just to give illustrations of the kind of extraordinarily detailed information which is needed. It was a bit of an odd experience drafting that because as I was doing it, I was thinking surely Google must realise this isn't how these cases proceed. The two most recent cases I discuss in the skeleton were cases I was in, funnily enough with Mr Holmes, and the data that's crunched to look at costs and revenues, no sensible person would print it out, let alone fit it into 15 pages.

So, I am not going to take you to those cases now because you've seen it in my skeleton, and I don't really apprehend Mr Draper to disagree with the proposition that much more detailed information is required.

The application which has been made, can I show you. It's in the salient documents bundle. If we look at tab 6, page 20, paragraph 1 - this is just to situate it in the actual draft order the Class Representative has put in - is asking for the Defendants to disclose the material set out in Annex A to Mr Dudney's witness statement and provide the information in Annex B. So, then we need to look at Annexes A and B of Mr Dudney's statement, which is in tab 8 of this same volume, page 39. That's the start of it.

THE CHAIR: Yes.

MR JONES: You will see there is a description in each of the first column of what is required and then an explanation in the next column of why it is required. You will also have seen Mr Dudney's own witness statement goes into this in some detail explaining why this material is required.

Now I am clearly not going to have time to take you through all the details of this today, I will address any particular queries as they arise. But just to pick up, for example, number 1, which I will come back to a few times, financial statements such as income statements, balance sheets and cash flow statements for the Play Store, and income statements for Android set out monthly, quarterly and annually:

"The financial statements should be fully detailed (i.e., showing all rows [...] (Reading to the words)...and with account numbers alongside each row. To the extent that Google's accounting systems changed over time, the financial statements should be presented in a unified way so they are comparable from one year to the next."

In one sense, that goes along, actually - that's the sort of data and it really goes along with rows 7 and 8, if you look forward to those, because 7 is detailed cost information and 8 similarly one is for the Play Store and one is for Android.

Then as I said at the outset, there are other things which need to be provided to make this stuff digestible. So, row 2 back there is a chart for accounts showing all account numbers, names, and descriptions used by the Play Store and feeding into its financial statements. As I say, I may have occasion to come back to some of the details, but broadly speaking this is what's being asked for: the data for him to do the analysis and supporting documents to actually crunch that data.

As I have said, I don't understand there really to be an argument about whether highly detailed information is required. Instead, the main argument against me today is essentially that this is not the time to provide it. I will show you that in Mr Draper's

skeleton argument, if you stay in this bundle and go to tab 3, page 4.18.

THE CHAIR: Yes.

MR JONES: This is the proposal which is made today. Paragraph 73, "Google will provide … disclosure from Mr Cramer" - that's the person who they've added, so his disclosure is coming later on 30 November. Then they say in B that Google will provide a witness statement outlining its approach to accounting. This will address the matters raised by the CR in the reply. Then in C, that there should be an expert meeting in which they discuss what documents and information may be required in light of (1) Repository 11 - that's the 15 pages I just showed you - (2) the completed custodial disclosure, and (3) the witness statement referred to above.

THE CHAIR: That reference, is that to Mr Cramer's --

MR JONES: I think they would say Mr Cramer and the other custodial disclosure because one point they are making is that the custodial disclosure which has already been given will include some relevant financial information. I think their position is that Mr Cramer's will be particularly relevant but there's already some stuff which will be relevant.

That all looks optimistic and of course one does generally look for solutions at these CMCs, which often involve parties going away and working together. But there are four reasons why we don't agree to this and why this application is maintained today. The first, as I am going to show you, is the Class Representative has tried several different ways of getting information out of Google about its financial data and on each occasion she's come up against roadblocks - and I'm afraid this is an occasion where I am going to have to show you what our criticisms are because it's really striking that she has tried in all sorts of different ways to move this forwards.

Secondly, we can already see one reason why this process in Mr Draper's skeleton argument is not designed in a way which will work, and that's because it's built on the

premise that the experts should first work out what is in the custodial disclosure. That's there in 73(c) and it's a big theme of my learned friend's skeleton. And that's the central point of contention between the parties because if you approve Mr Draper's proposal, what will then be said is you've approved the idea that the class representative needs to do the search for the needle in a haystack job that is being suggested by Google of looking through what has been disclosed before coming back with suggestions. For reasons I'm going to explain in some detail, that's just not practical.

The third reason why we don't agree to this is we already know what's needed, Mr Dudney has set it all out in detail. Of course, I accept that if some of what he's asked for doesn't exist, then there will need to be some further discussion, but the parties should not be sent away now to engage in yet more correspondence. And fourth, there is a timing point. We don't have the luxury of time, and if you still have the skeleton open, you'll see in paragraph 74 it's said there's ample time because basically the expert reports aren't due until at the moment April, but we've all agreed that should be pushed back to June.

But it's important to keep in mind how this fits together: the forensic accounting is the first step in the abusive pricing analysis, but that actually firstly is a big exercise, but secondly has to be done before the competition economists can build on it to look at excessive and abusive pricing questions.

Can I go then to the correspondence I want to show you to make good my point that the Class Representative has tried all sorts of ways to progress this.

THE CHAIR: Yes.

MR JONES: If we start, please in the core bundle at tab 8, page 322.

THE CHAIR: Yes.

MR JONES: We are here going back to March and just to remind you of the

chronology, there was the Disclosure Report I showed you at the start which describes Repository 11. That was February. So, this is a piece of correspondence which is shortly after that. On page 324 at paragraph 15, the Class Representative said:

"The information provided in rows 7 -11 … is insufficient. By way of example, your clients refer to "*UK Google Play financial data*" [in other words Repository 11] without explaining what the financial data may comprise, including categories of financial data, the date ranges for the financial data and the sources or custodians from which/whom the financial data has been collected."

So, at this stage, they are completely blind about what sort of information is being suggested.

Now there are various further letters and chasers - again, this is a topic on which there has been a mass of correspondence - but Google's basic answer to this particular point can be seen in a letter of 15 June, which is the same bundle, tab 8, page 359. You will see at 3 where it gets to, so keep in mind the Class Representative has been saying: what are you going to provide us with? The answer at paragraph 3:

"As to Repository 11, your client should let us know what information she believes she requires and Google will consider that."

So, there's a request for Google to say what it has. They don't do that. They come back and say: you tell us what you want. Next in the chronology, there was the CMC. At the CMC, which was at the end of June, Google were saying it was going to disclose what it calls P&Ls, and you will see those on page 366, you'll see their description. This is a letter of 19 June we are going to on page 366. They criticise the class representative's skeleton argument and they say:

"[It] proceeds on the assumption that Repository 11 is a body of documents that can be reviewed for relevance."

That's not the case. It's a database of financial information which can be interrogated

and from which certain reports can be produced. If we just pause there, as far as I can work out, the expression "Repository 11" basically means Google's accounting systems.

THE CHAIR: Mm-hmm.

MR JONES: They've never said that, but it must be that and here they are just saying it's a database that can be interrogated. Then they say: we are content to generate and disclose profit and loss statements. So just pausing there: they are generating them and disclosing them - they don't pull it off the shelf, it's not existing document - they are generating it from the existing database, and they explain the date range.

They then say - I am conscious this is not highlighted as confidential, but I also know, for some reason which is a little difficult to understand, but in other documents it's highlighted as confidential, so I am not going to read out. But if you read yourselves, "From such P&Ls will be produced", that sentence ...

THE CHAIR: Yes.

MR JONES: Of course, you will have the point that that really is beside the point, that's nothing to do with what the experts need. They need really granular data, not what's described in that sentence.

But that is a very interesting paragraph because it tells you about the database, it tells you what they are proposing to provide, and that is what they've provided. So, when I showed you at the start those 15 pages, that's what they are, that's what Google has in fact done.

My solicitors continued then to press Google to say what information it actually holds because at the moment all we know is there is a database and Google is going to give us what we say is inadequate information from the database. If you go forward to page 377, we are here on the second page of a letter dated 17 July from Hausfeld.

THE CHAIR: Sorry, could you give me the reference again?

MR JONES: 377.

THE CHAIR: 377. Thank you.

MR JONES: At paragraph 5:

"Your clients are under an obligation to identify what data they hold that might be relevant … Indeed your clients' counsel at the Second CMC confirmed that: "Google is a company which holds, of course, data about its financial performance … and ...(Reading to the words)... the costs that are incurred. As such, your clients' offer … only to provide "profit and loss statements" is clearly inadequate."

Confirm what you have is what is being asked.

THE CHAIR: Yes.

MR JONES: And Google's response to that just remained static. It remained: no, no, we are going to give you the P&Ls we've described. They never explained anything more about the information that they actually have, must have.

So, my solicitors then try a different tack, which is they did do what they had been asked to do, which was to identify what we think must exist and needs to be provided. You see that if you turn forward to page 406 where at paragraph 6 there is a complaint which goes over the page about how Google hasn't helped. But then at paragraph 8, it says:

"To assist your clients, we **enclose** a list of example financial data requests our client currently anticipates will be required by her experts to conduct their analysis … these are illustrative only and are not exhaustive."

They are asking Google to say whether they hold data responsive to the requests and, if so, the type of data.

Then there is I think 15 categories which start on the next page, 408, which map in some respects what Mr Dudney has now put in his witness statement. But the point

is we are trying to say: this is what we think we are going to need; can you at least tell us whether you have this? So, what is the answer to this, I ask rhetorically? Does Google say: yes, thank you we can now take it forwards now you've told us what you need. No, they don't.

If you go to the next letter at page 411, a letter of 31 July, turn forwards in that to page 414, you will see at paragraph 19 they are now saying that the Class Representative is seeking early disclosure. So, because they've asked whether Google holds this information, they are seeking early disclosure is what is said. Then they say at paragraph 20:

"In order that the parties resolve this issue constructively, Google is prepared to indicate the broad category of documents it intends to provide … by 18 August 2023."

Just pausing there, when they say we'll tell you the broad categories, what do they mean? You see they are only talking about telling us what they intend to provide. So don't read into that that they are going to give any more information because they've already told us what they are going to provide, and in fact that is what they do.

On page 503, they follow up on this and say: as we said, we can now confirm what we are providing -- that's where the letter starts, page 503, dated 18 August. If you go to the end, page 505, you'll see Repository 11 and they just tell us what they've already told us.

So, it has been an exhausting process and simply it's very, very difficult to think how else you could take this forward. They have to either tell us what they have, or when we tell them what we need, provide it and engage with us. It's against that background Mr Dudney has identified precisely what he needs and we've made this application.

Can I turn to the suggestion that we should wait until we've reviewed the disclosed documents, which is what's now said, including what is coming from Mr Cramer, and then take stock.

THE CHAIR: Yes.

MR JONES: It's totally unreal as a suggestion. It's totally unreal. If you think first of all about the data, Google must have one of the worlds, if not the world's, most sophisticated accounting system. They will be able to locate the most detailed available costs information on that system. They are literally the world's major data management company. That's literally who they are.

Can I just show you what Mr Dudney said about this in his second statement. It's in the salient documents bundle, tab 11, this is his second statement. If you turn forwards then to page 65, he has 30 years of experience of forensic accounting in these sorts of cases. Page 65:

"In my experience, information at this level of detail [and he is talking about what he's asked for in requests 1, 7 and 8, those were the ones I picked out at the start, disaggregated costs data and profits, and so on and so forth] is likely to be available within Google's accounting systems. This is because, in my experience, accounting systems' general ledgers contain a larger number of accounts in which revenues, expenses, assets, liabilities and equity are recorded and are presented on face of financial statements such as P&Ls."

Then over the page:

"Typically, management will determine the level of aggregation at which it wishes to review financial information and the various detailed accounts will be summarised accordingly. For example, while a company may present a single "Salaries" P&L expense line, the total presented may then be the aggregated sum of accounts used to record salaries, payroll taxes, pension contributions and benefits-in-kind expenses, etc."

So, he's talking about the need to disaggregate from high level summaries given to management:

If “the aggregation of accounts from the general ledger into financial statement summaries is a key feature of modern accounting systems, in my experience, even the smallest companies are able to provide financial statements at multiple levels of disaggregation very easily. It is therefore inconceivable that Google would not be able to produce a completely disaggregated set of financial statements (that is financial statements ...(Reading to the words)... and general ledger in short order."

The idea -- and just to be clear, what I am about to say is in fact part of what is being suggested -- the idea that my solicitors should go through the millions of disclosed documents looking for data which might be attached to an email or something like that -- to pick up what my learned friend said earlier about contracts where he said you wouldn't look through emails to see what contract happens to be appended to it, that's apparently what we should do for data -- the idea that they should do that and try and knit together whatever comes out into something coherent and only then go back to Google and ask for more data really is frankly ridiculous.

We referred in our skeleton to a judgment just a fortnight ago, which is really important on this point. Can show it to you, it's a judgment of the President, it's in authorities bundle, tab 7, page 1855.

THE CHAIR: Do you mean tab 8, the *Boyle* case?

MR JONES: I do mean the *Boyle* case, so it's another collective, on page 1848. It's page 1855 -- yes, if we pick it up at 1855.

THE CHAIR: Yes.

MR JONES: The Tribunal here is talking about information that an expert economist needs. You'll see it's expressed generally. Subparagraph 7:

"It follows from this [and "from this" is the precise test and the fact that these proceedings are driven by having a workable methodology which experts opine on] [that] since the author of the blueprint is the expert economist, it is the expert

economist who is likely to be the best placed to explain how it is envisaged the evidence will be developed [at] trial ...(Reading to the words)...[…] the expert economist generally needs data and information, not reams of documents (whether paper or electronic) which then must be sifted and analysed and turned into usable data and information."

The Tribunal goes on to give example about widgets. Picking it upwards to the end: "What should happen is for the expert on the claimant's side to articulate ...(Reading to the words)... and for that ... information to be produced (in schedule form) by the expert on the defendant's side."

Now if that's true for those train companies, not -- well, let me put it this way: if that's true for the train companies, it's true in spades for the world's leading technology and data company. We really should not be trawling through documents looking for this. We know anyway the data is not going to be complete in the custodial disclosure because that's not what it's been organised around. So even if we did spend time doing all of that, we would be absolutely bound to be back here.

I have been talking about data. The same is true, maybe not quite as obviously, but the same is true of the documents that Mr Dudney is after. Why is that? It's because they are standard accounting documents. If this was an old-fashioned company, a very old-fashioned company, they would be in a filing cabinet in the account's office.

THE CHAIR: Yes.

MR JONES: You would look for them there, you wouldn't look for them by searching through every letter that had ever been sent to the managers of the company. Again, I repeat: we don't even know whether those documents will be within the 2 million-plus we've been given. Of course, some of them will - we know some of them are, of course some of them will. But it seems unlikely that they all will, and it also would be a massive hunt the thimble exercise to try to find them. We would be back here saying

to you now is the time to just ask someone to wander into the accounts office and open the filing cabinet and give us the documents.

Now finally I want to touch on Google's response to the requests. We can pick this up in the salient documents bundle, please, tab 10, page 54.

THE CHAIR: Yes.

MR JONES: What I have jumped into here is actually the Class Representative's reply. So, in the reply on this application, Hausfeld has for each request set out the request in italics and then summarised Google's response and then made, as it were, responsive submissions. There is also, just to reiterate, Dudney 2 which is in the next tab, which also addresses a lot of these points.

If we start with request 1 -- I have already read out request 1 so you will remember what this is about, financial statements, income statements, balance sheets and cash flow statements. Then in that highlighted confidential bit at the bottom, you'll see what Google has said in answer to request 1.

THE CHAIR: Yes.

MR JONES: I am not going to go over each of these requests, but I am just going to make a point about this, which is a generic point, which is: it really doesn't actually engage with the request, in my submission, because Mr Dudney has said, "What you have given me is not good enough. This is what I need". And all they've come back with is, "This is what we've given you". But so what? That's not what we are asking. We are asking for more information and Mr Dudney has explained in detail why he needs more information. Nothing is said about why more detailed information can't be given. Nothing at all is said about balance sheets or cash flow statements which have been asked for and which have not been provided in any form.

So, I did make the point -- we made the point in our skeleton argument and I do repeat it: if you pick through the response and compared it to what was actually being sought,

you really get a flavour of the problems that the class representative has faced in this process.

Google did not take the opportunity in responding to the application to provide any statement at all -- so not only is there nothing from them answering the precise questions, but there's no witness statement at all. But there's nothing from their own accountant explaining how he or she is going to approach these things. There is nothing explaining what data they actually have.

One can well understand against all of that background why Mr Draper has come to this in advance of the CMC and said: well, obviously we are going to have to engage with some of the details, let's suggest a process to do that, and that's what he's put in his skeleton argument. We've all been there, you can all see why it make sense. But it's not going to be Mr Draper taking this forward and as I've shown you, it simply isn't good enough now to rely on Google saying we will be cooperative.

My solicitors have tried in every way possible to take it forwards. They've clearly identified what's needed. There isn't, in my submission, any good answer to the actual points which are made about why this information is needed. If Mr Draper goes to particular requests and says why that's not needed, then I'll respond in reply. But Madam, unless I can assist further at this point, those are my submissions on this application.

THE CHAIR: Thank you.

Yes, Mr Draper.

MR DRAPER: I am very pleased to hear that at least I'm trusted to be cooperative. The first point to make is this application has morphed substantially since the time at which it was made and what has been presented now, and indeed what was set out in the reply. So, we started with an application for disclosure and you were shown briefly the draft order. It's at the salient documents, page 20.

THE CHAIR: Yes.

MR DRAPER: What you see there is that it's done by reference to Mr Dudney's witness statement, but it's clear that at least as regards Annex A, it's a proposed requirement to disclose material.

I say all this without wanting cut across the point we sought to be cooperative and make a proposal in the way you've seen, but what this has changed into is a request for us to generate new reports from our accounting systems so they can be provided to Mr Dudney. That's obviously a very different thing from disclosure. That's not a technical procedural point we are taking, as you see we do propose how this can be taken forward. But it does answer my learned friend's complaint that we've not responded properly to the application. We responded to the application in our response, we didn't respond to what the application has since become.

So, when you saw responses saying things like, "this document doesn't exist", that's because we were faced at that time with a request for a document as opposed to a request to interrogate our systems and see whether we could generate such a document.

So, when Mr Dudney in his reply witness statement, Mr Dudney's second statement, says he expects Google would have or would be able to generate certain reports, that's evidence we've obviously had no opportunity to respond to at all. That not to cut across the obvious likelihood that we have very sophisticated accounting systems.

The further point is that the application at least when it started out focused on accounting documents in relation to Google Play and Google Play Billing -- the Class Representative likes to treat Google Play Billing as something separate, we say it's an aspect of the service and certainly not a distinct business unit. But it seems that actually it goes far beyond that, and this is a point I am going to elaborate on. Mr Dudney is to some extent, and this isn't a criticism of him, he is guessing as to what

there is likely to be and saying: well, it might be at this level of generality, it might be at a lower level, and here's what I think would help me.

But if we look, for example, at some of the requests, request 1, salient documents page 54, you see there that this request -- and this to be fair to my learned friend is one that has always been put forward -- this request related not just to Google Play but to Android, which is obviously a very different aspect of Google's business and offering. So right from the start, there has been a degree to which Mr Dudney is casting the net very broad and he's doing that because he doesn't have great insight into what there is and how relevant what there is might be to his analysis.

So to go then to Mr Dudney's second statement -- and obviously the Tribunal will be more concerned with what Mr Dudney wants than with submissions from the legal teams or looking at the correspondence -- if we go to salient documents page 67, you see at paragraph 15 there is a clarification or refinement, it doesn't matter which, as to what request 2 is intended to encompass. You'll see Mr Dudney then says:

"I anticipated that Google would maintain a ...(Reading to the words)...[…] for the company as a whole."

So again, not Google Play, it's being made clear he's not only interested in Google Play, he wants the chartered accounts for the whole company.

Then if you look at paragraph 17, we see again he's referring to confidential material as to what Google does or doesn't have or do. But then he says he anticipates “that Google could be able to provide a data dictionary together with any financial data it disclosed” that would be essentially at a higher level of generality, so the whole business or some greater unit anyway. Similarly at paragraph 22, this is talking about a request for a reconciliation, and you'll see again he refers to confidential information as to what reconciliations there are or are not.

But then he goes on to - I don't use the word as a criticism, but to speculate as to what

level of reconciliation he thinks will have been conducted from time to time. At paragraph 24, he asks for WACC and similar information at whatever level within the business that's retained.

One last reference, paragraph 28, the whole of which is confidential. You'll see the extent to which we are now really very far from a disclosure application and Mr Dudney is effectively making what used to be called interrogatories. Paragraph 29 is the same.

I am not saying all this to suggest that Mr Dudney's requests for the documents he considers may exist and which may assist him and the data is not to be accommodated. I am dealing with the suggestion that this is -- I am making the submission that this has moved very far from the application that we were facing and responded to.

You will have seen from my skeleton argument that Google has not objected to the idea of an expert-led process in relation to these data questions. My learned friend says, and there's obviously some force to this, that the custodial disclosure is not going to be the best source of information for the things that Mr Dudney and our expert will want.

But one caveat to that, the disclosure to come from Mr Cramer is likely to be disclosure they will want to have a look at in formulating requests, if it's going to be done on a cooperative basis, but obviously it's not going to provide all the answers to all the questions they might have.

So, where the debate has come to, as the application against us has morphed, is not so much about whether the experts should be assisted in obtaining data, it's about how that's done, and we say that the process adopted so far isn't the right one.

If I could then -- I suggest that my learned friend's skeleton argument actually, obviously before sight of our skeleton argument, hinted at a similar process. If you can turn up, please, his skeleton argument at paragraph 11 (c).

THE CHAIR: Yes.

MR DRAPER: You'll see paragraph 11 is where my learned friend sets out, with all the implicit pain of his having been involved in at least one of these cases I think he said, processes that have been gone through in other cases.

At 11(c) specific reference is made to the *Le Patourel v BT* case and my learned friend notes that it appears there was a process of discussion and agreement regarding the need for data disclosure and then a dispute resolved by the court as to precisely what was required. You'll see reference to questions as to what level of disaggregation was appropriate.

My learned friend also took you to the recent remarks of the President as to essentially an expert-led process, and that's the common characteristic between what my learned friend refers to there, the President's remarks and the proposal that's made in my skeleton argument.

I will deal now, and lastly, with the objections made to that proposal. The first objection my learned friend raised was to say that this is all premised on them having to review the custodial disclosure. It's not. This is dealing with the situation we now find ourselves in. They haven't done much of a review for the custodial disclosure. We say that would have been of some assistance to Mr Dudney and to the experts taken together, but it hasn't happened.

What we suggest is that they certainly ought to review the custodial documents from Mr Cramer because those are very likely to be useful documents for them and that the experts essentially ought to be put in the position of not shooting in the dark. The mechanism we propose for that is that there be a witness statement outlining Google's approach to accounting in respect of Google Play and Google Play Billing, which, as I say, is essentially a component of the service.

What that would do is it would strip out the real problem you can see in Mr Dudney's

evidence that he isn't in a position to understand how the accounting was done and therefore what level he is asking for new things as opposed to just asking to see what was produced.

An obvious way to approach these questions when assessing profitability is, well, let's start with what the company produced at the time. So, let's look at the profitability figures as they appear from the management documents. Then there are two ways in which you might want to look beyond those, or look further into them. One is to say, for example, these aren't granular enough, so I am going to need data at a higher level of granularity. The other is to say, well, these necessarily make assumptions as to appropriate attributions, say. So, you have the accounts for Google Play, you see a figure for employee costs and you obviously want to know how Google has decided which employees have their salaries attributed to that line which go into another business unit.

The experts will be in a much better position to know how and to what extent they need to go beyond the management accounts, management accounting documents essentially, once they've seen this witness statement, once they've looked, to the extent Mr Dudney wants to, certainly our expert will be, looking at Mr Cramer's custodial documents, then they can take an informed view on what they think they need for their analysis. Some of that may be agreed, some of that may be not agreed, but the likelihood is that there will at least be a substantial corpus of agreed requests where each expert says it would really help me to have, for example, an explanation of the attribution policies behind lines 1 to 15 in this table, say, or it would assist me to understand whether there are revenues attributable to Google Play Billing, as distinct from Google Play, that I can't see in these accounts and, if so, where are these recorded.

THE CHAIR: But the points you are making are premised on the fact that there is a

more granular level of information in front of the experts when they are doing this. That's the premise behind your comments, isn't it? When you referred, for example, to I would like to understand more about the attribution policy behind lines 11 to 15, that's assuming there is lines 11 to 15.

MR DRAPER: Yes, I see your point.

THE CHAIR: So there has to be something more than these management accounts before they have that meeting, hasn't there?

MR DRAPER: Yes, they will have the P&Ls. They will have Mr Cramer's disclosure. I can well see the point that there might be a sort of -- one could insert a fast intermediate stage where you say, well, there is an obvious further level, so, say, one more, take it up or down, in terms of which accounts you see if that would assist them in formulating requests.

But in my respectful submission the first point is to get the experts in a position where they know something about Google's accounting. It's been done in the back-and-forth way through this application, but that's an imperfect mechanism, in part because we are ships in the night: we were responding to a disclosure application and they really had in mind data.

THE CHAIR: I think what will be pretty determinative of this is what the witness statement is envisaging dealing with. Will it outline the various levels of data that are maintained? So, will it have a list of, for example, all of the - the level of granularity you can go to or not?

MR DRAPER: Can I take instructions on that second point? Because there are two distinct issues. One is how has Google accounted for this, so what documents are generated. You've seen that the Repository 11 documents were in fact taken from our accounting systems, but they were done so, so that they are the same as the reporting at the time. So essentially we've replicated what would have gone to the management

at the time.

So, question one: what approach to accounting is in fact taken, so what reports are produced in the course of business? The second question: what could you produce if you ran reports on your accounting systems? And that really turns on, well, at what level is the data first captured? So, for example, are there enough accounts, distinct accounts, that one can say, well, these accounts relate to this business unit and these accounts relate to the other. But on that basis, I should take instructions.

THE CHAIR: Yes. **(Pause)**

MR DRAPER: It probably ought to have been unpacked, but what we propose would cover both what Google has done, in terms of its approach to accounting and reporting to its management, and what you can get from its systems. Obviously that second part effectively the content of the answer -- you can get quite a lot. It depends on what reports you run. But in answering that second question obviously we'll need to say, to some extent, what data we capture in the first place.

But my learned friend certainly isn't wrong to think we have sophisticated accounting systems and there can be an explanation of that.

MR FRAZER: Mr Dudney has already articulated what he needs to run his analysis. To what extent is this simply delaying providing that information, in the sense that you are asking the experts to wait until this witness statement is available? I am not sure what the Cramer disclosure will add to that. But, in effect, what you are likely to get, I imagine, is just a repeat from Mr Dudney as to what he requires, which you've already got.

MR DRAPER: I understand the point being made. The thing about Mr Dudney's requests is, one, we say they changed somewhat through this process in response to Google's responses. The second is he has made them in the absence of information. So, he has used his judgment as to what might exist. Sometimes he's got it right.

Sometimes he's got it wrong. But with the benefit of this witness statement, in my respectful submission, it would be somewhat surprising if at least some of his requests didn't fall away, maybe to be replaced by others, particularly in collaboration with our expert. They might form a tighter set of requests that can be agreed. But I perfectly accept that we might see some of these requests reappearing, on an agreed or not agreed basis. One reason for that is the experts of course might be proposing to take slightly different approaches and they will know that once they've had a discussion.

It would be helpful in my submission for the Tribunal to have from the experts essentially: here are the bits we both say are essential. Because even if you approach it on this basis or you approach it on a slightly more granular basis, you'll always need these documents or these sources of information or this data, and then the Tribunal will have any non-agreed requests and the experts will be able to articulate why one of them says they are necessary and why one of them says they are unnecessary. The Tribunal will then be in a position to decide whether it's proportionate to go further. So, you might find that -- let's assume for the sake of argument, Mr Dudney wants more and our expert says you don't need some of that. Well, the Tribunal will then be in a position to have an articulation from both experts as to what they say about that further data, the extent to which it's likely to inform an analysis of profitability, and the Tribunal can make a decision as to whether the parties ought to be put to that expense. In my respectful submission, that cooperative process between the experts is likely to lead to a much more focused and proportionate way forward.

As my learned friend has indicated, you can spend months and months and months and millions of pounds going through the process we've seen in some of those decisions, and obviously regulatory processes are even more granular. The question is what is reasonably required from these experts for the purposes of these proceedings, and the best way to get to that is to have the experts meet and, as I say,

produce agreed and non-agreed requests and then the Tribunal can form a view as to precisely how small, medium or large this exercise ought to be in these proceedings. Sorry, forgive me. (Pause)

Just to give an example, I showed some of the requests relate to documents or information outwith Google Play, so for example there's reference to Android. One of the issues the Tribunal might wish to have the experts discuss and have a view on is: if we are interested in the profitability of Google Play, I can well see you might say, "I want more granular data in relation to Google Play", or "I want to understand the attribution decisions that have been made when it comes to costs for Google Play". It might be a very different question to ask: do we need to expand this process to look at Google Android or other elements of the business that aren't covered by the pleadings and don't seem to be directly at least relevant to the profitability of the services with which we are concerned in these proceedings? That's just one example of how the Tribunal might well, in my respectful submission, be able to put constraints on this process and keep it within sensible bounds, but only if the experts have that opportunity.

Thank you.

THE CHAIR: Is it intended that the witness statement you are proposing will address specific points that we already know are going to be on the table for Mr Dudney about whether or not certain information is available? I think your clients' case is that it's not -- it doesn't exist or certainly not in that form.

MR DRAPER: Yes.

THE CHAIR: Is the witness statement going to be meaningful? Is it going to say we don't hold it in this form, there's no dictionary or glossary, or whatever it happens to be.

MR DRAPER: Yes.

THE CHAIR: But if there is something else; we call it something else.

MR DRAPER: There is a related point, which is in the reply -- obviously picking up on Mr Dudney's evidence -- there are several places where it says we'd like this confirmed. Where it says we'd like this confirmed, we will confirm it. So that's the first point.

The second point is we will not give unhelpful answers where we say, "We don't have X". If the real answer is, "We don't have X but we do have Y and it's pretty similar or may be as helpful", certainly that would be the intention.

PROFESSOR WATERSON: If your witness was to produce a witness statement, what sort of timescale do you envisage that could be produced within?

MR DRAPER: The proposal we've made in our skeleton argument is by 8 December, so it's really quite expedited. Jumping off from your question dealing with the question of timing more generally, my learned friend said the forensic accounting reports are in some respects an input to the competition economists and it's well understood. But there is still time within the schedule. It's obviously possible one could move the schedule around and have the competition economists come a sufficient time after the forensic accountants to have regard for that. But at the moment, we don't anticipate this would require the forensic accounting reports to be put back. If anything, the bringing of focus is likely to mean it can be done in good time rather than requiring more time.

On that, in the context of what at least on Mr Dudney's side seems to be anticipated to be a fairly large process, we're not talking about much delay here to get him material from which he can build a more sensible set of requests.

THE CHAIR: I am slightly concerned we are building in an element of delay in a way because there must be a level of granularity below those profit and loss accounts, we've looked at that it's able to give now.

MR DRAPER: Yes.

THE CHAIR: I actually see some benefit in a witness statement, putting some fabric around how the accounting systems work and what is and isn't available and how things are done, I completely get that. But is there any particular reason why Mr Dudney should have to wait for what we can almost see in our mind's eye is a particular type of spreadsheet with more levels of granularity under those management accounts.

MR DRAPER: I will just take instructions on that. I may have a proposal. **(Pause)**. We are dealing -- just to make sure we are talking about the same kind of documents, where Google's witness statement will say: we have the P&Ls, we have at a greater level of granularity these other P&Ls -- taking the P&Ls as an example, but there are other classes of accounting documents that may be covered by the same point. Where the witness statement says, yes, we have those more granular accounts, those can be provided -- I am unable to commit immediately to say 8 December 2023, but if not with the witness statement, then expeditiously thereafter. I'm only unable to commit because I don't know how long it would take to run them off, presumably not long, but I --

THE CHAIR: It sort of makes we wonder why it can't be done now, at least something with more granularity than is currently provided. Why can't that be done pretty sharpish?

MR DRAPER: At least so it's there before the witness statement. Okay --

THE CHAIR: I am conscious of the time, actually. Would it help if you had an opportunity to take instructions or do we want to get this issue dealt with before lunch? I am very much in your hands, Mr Jones, whether you have --

MR JONES: Madam, I do have points in reply and I was going to suggest I do it before lunch only because I am conscious you might want to think about it over lunch. I see

the time, it may be I could bounce into these and spend five minutes on it now, but then you would have to wait to hear the answer if it hasn't come yet from my learned friend after lunch. Maybe we could do it that way round.

THE CHAIR: It might be helpful, Mr Draper, if you could come back with some idea about what more could be provided with a bit more level of granularity, if you take instructions over lunch. I don't know how long you want for lunch, I'm conscious we have quite a lot to do yet.

MR JONES: Yes. I may go until 20 past, I will try not to, but that might mean we then have a shorter lunch and back at --

THE CHAIR: I was going to suggest we rise now for lunch; Mr Draper takes his instructions as to what they are able to provide now without waiting for the witness statement --

MR JONES: I see.

THE CHAIR: -- and then you make your reply.

MR JONES: Right.

THE CHAIR: Does that --

MR JONES: Perhaps we could do it that way, Madam. All I would say - in a sense, what I am going to say in reply is not going to be affected by his answer because we, in any event, maintain the application. I'm not sure it's going to help but just to say I could make my submissions now if you'd rather hear them before lunch, but I'm entirely in your hands.

THE CHAIR: Sorry, I misunderstood. Mr Draper, did you have instructions, did you want to take instructions over lunch and, other than that, have you finished your submissions?

MR DRAPER: I think it would help because directionally I think I can give you the answer, which is we well understand what you are getting at and we can see why we

ought to do that quickly. It's just the specificity of precisely what it is we're talking about and by when, that's what I need instructions on.

THE CHAIR: Shall we rise now and come back at -- sorry, Mr Jones. Are you all happy to come back at 2.00, or a little earlier given the amount we have to do?

MR JONES: Perhaps a little earlier.

THE CHAIR: 1.50.

(1.12 pm)

(The luncheon adjournment)

(1.50 pm)

THE CHAIR: Was Mr Draper going to finish his submissions by telling me what he has managed to find out?

MR DRAPER: Yes. So, dealing separately with revenue and costs, so the panel is interested to know what more granular level of data there is to be provided. With regards first revenue, in fact we provided on 3 May the revenue data at the level of individual transactions. So that has already been provided at the most granular level imaginable.

Costs, what we can provide is -- if you have in mind the profit and loss as it exists and the question is can we break out those line items to give more granular information, we can, and we can do that to the level of the general ledger accounts. So again, a high level of granularity in relation to the costs as well. Those can be expanded out of the P&L.

THE CHAIR: Thank you. Thank you very much.

MR DRAPER: Sorry, I ought to have indicated on timing, we can do that quite quickly. We will be able to provide that within two weeks.

THE CHAIR: Two weeks? Will it really take two weeks?

MR DRAPER: We don't have the accounting people here to tell us, so two weeks has

the attraction of being before people disappear in the US for Thanksgiving and so that's a sort of effective hard stop practically for us. I'm not able to tell you how long it would in fact take to produce, but two weeks is proposed on the basis it's quite quick.

THE CHAIR: Thank you.

PROFESSOR WATERSON: When you say transactions level, could you indicate the sort of volumes of transactions there are?

MR DRAPER: I don't have that to hand, it may be that someone behind me has a rough idea.

I can give an indication. It's huge, it's all transactions at an individual level from 2015 onwards.

PROFESSOR WATERSON: I'm just wondering whether that's in fact too detailed.

MR JONES: I had not heard those comments on revenues until just now. We've not seen that May transaction data as relevant except for the purposes of quantum because what it is, I think it's millions, maybe hundreds of millions, it's literally every time you bought something, there it is. So, as I - I'm just taking instructions quickly on that - as I understand it, that's different to the sort of revenue data that Mr Dudney is asking for, which is to see how you attribute the revenue which comes in to particular services. But I am taking instructions on the hoof on that, to be frank, because it's only just then I heard that suggestion.

PROFESSOR WATERSON: That's what's inferred, actually, from the fact that it's individual transactions it's not going to be what he wants.

MR DRAPER: Just because my learned friend is thinking on his feet, we understand that objection. This all Google Play revenues, so this in-app purchases, purchases of apps. It's not other aspects of Google's business, these are the transactions that take place and are at issue here. We are talking about the commission, essentially, and also -- so that's covered.

THE CHAIR: I think the point is that if you just have a list of all the revenues coming in, it's too detailed to have that --

MR DRAPER: Yes, but the question was: are these the right revenues? Answer: yes, they clearly are, they are the revenues through Google Play, so they're in-app purchases and the purchases of apps. Separate question: can you take these data and put it into useful buckets? So, for example, is that in-app purchase revenue, is that purchase of an app revenue? When we provided the data, we said if you have any questions about it, please let us know, and it's hard to see why it can't be processed.

But obviously if they have questions about -- we have all the transaction data, we'd like you to explain to us what buckets it can be put into to the extent it's not clear from the data itself, then we'll do that on an expedited basis as well.

THE CHAIR: All right.

MR JONES: We may need to park that.

THE CHAIR: Yes.

MR JONES: What is being said to me is the transactions are as I said for quantum and it's if I buy an app, then my understanding is that the amount of money I spend on that app is going to appear in the transactions spreadsheet.

THE CHAIR: Mm-hmm.

MR JONES: But how much of that actually goes to Google as opposed to the developer is a different question. What the overall revenues for Google for providing the services are is different.

THE CHAIR: Yes.

MR JONES: So, it seems to us -- I don't want to make stuff up, I am being told it's absolutely different and that's my understanding of it at the moment. Maybe we'll come back on that if there's time at the end of the day.

THE CHAIR: Yes. I think it may be a diversion, we have quite a lot --

MR JONES: It may be a diversion. Can I make some quick submissions, then, by way of general reply.

THE CHAIR: Yes.

MR JONES: My learned friend explained to you that there should be a process he said of discussion in which the experts would be asking questions and discussing things like: is this sufficiently granular was one example, is what you've been given sufficiently granular? What assumptions lie behind this? What are Google's attribution policies? Is there a further level that it would be interesting to disclose?

That's literally what we've been asking, that's literally what this application is about. If you do have time, I would urge you to reread Mr Dudney's two witness statements because he is literally going through those points and other similar ones and saying: this is the level of granularity, this is what I need to know about assumptions, this is what I need to know about attribution policies.

My learned friend then said that following that process of discussion he's recommending, there'd be a discussion about these issues, and then following that -- to explain why that would be helpful, he said you would know where they agree and where they disagree. And then we have come back before you potentially saying this is agreed but here is a disagreed area where Mr Jones wants some data, but we don't agree that it's necessary and it's not proportionate was what he was envisaging.

First thing to say is we have identified the data that is needed, and we have identified the information that's needed to explain that data. If they had wanted to say -- as they have on some of them, they are just not very good points -- but if they had any good points about why some of that should not be provided, today is the day to do that. That's the first thing.

The second point is proportionality: today is absolutely the day to say that this is

disproportionate. They have not said on any of these matters that it would be disproportionate. There's not even a hint of a suggestion that it would be disproportionate and that's not surprising when you remember that really this just involves pulling data and documents from pre-existing systems. So, the idea that we'll be back arguing over proportionality, in my submission, does not wash.

And that's before -- you remember what the Tribunal said in the case I just took you to about how you have to be led by what the claimant's expert says he needs. So, it would be not impossible, of course, but even the idea that you might look at what he wants after a discussion and say, we are not going to let you have it because it's disproportionate to ask Google to run this search on their own financial database is far-fetched. And as I say, today would have been the day to make those points, with evidence about the costs and about why these things are not needed.

To get around that problem, what my learned friend sought to do was to say that my application has morphed. I say that's to get round it because he sees that he can't just come and say, oh, I don't have any evidence saying this is disproportionate, so it's morphed into something different. It has not morphed. We are seeking exactly what it says in the application, exactly what it says in the order. I think my learned friend's main point is oh, well, we now understand that when you said disclose data, you meant data rather than a pre-existing document which might contain data. So, he was professing to be surprised by the idea that they might have to interrogate their system to generate some of this data.

Can I just remind you that they themselves in the disclosure report in Repository 11 under the heading "Documents" identify their file hosting system and what they call -- well, actually under the heading "Documents", we don't need to turn it up, it's in core 304, heading "Documents", item 11 "UK Google Play financial data".

Why is data under the heading "Documents"? Because of course we live in a world

where we are interested in data, and we are interested in things which are stored electronically even if they have not been put into PDF or an Excel spreadsheet or printed out. Obviously, we've been talking about data, they themselves told us they were generating disclosure from their data.

Another particular point which was made was about Android and why we're asking for information about Android. Well, there's several answers to this. The first point is it's addressed in Mr Dudney's evidence. That's Dudney 1 -- I will just give you the reference -- tab 8, page 35, paragraph 12(c) -- in which he explains that there appears to be a crossover in costs, essentially, so to understand Google Play's costs, he needs to understand Android's.

The second answer is there are a lot of pleaded points about Android costs and the extent to which they overlap with Google Play, and I will give you the references in the Defence: 138(a), 139(b) and 190.

The third point, and this really comes back to my main theme, they said nothing about this in their response to this application. They had an opportunity to say things like, Android isn't relevant, and then we'd be here arguing about that. But they didn't, they didn't.

There were then some other points which were about whether we've moved on in various respects, and my learned friend took you to Dudney 2 in which on a couple of occasions he says things like, if it's true they haven't got this information, then I would want something different. But I haven't shifted the application to catch something different. The reason for that is what you do in disclosure exercises is you get an order, which is the order we are seeking.

Obviously if they actually don't have some of it, they will do what you always do, which is put in something signed by a statement of truth -- here most likely a witness statement -- explaining they don't have it and why, and there will then of course be

discussions about that particular thing. So Dudney 2 is, it's true on couple of occasions looking forwards, but he is not changing the application in any way.

Can I also just remind you that the idea we wait for Mr Cramer, that's because his materials are coming on 30 November. So, the idea is we wait until 30 November, then we have a discussion -- goodness knows how long that might take -- and then eventually we get to a point where we might come back with applications, at a CMC possibly next February. But you can see the point, Madam.

THE CHAIR: Yes.

MR JONES: Unless I can assist further, those are my submissions on that.

THE CHAIR: What do you say about the proposal for a witness statement? Will that deal with the witness statement you were just referring to in your submissions about if they don't have it --

MR JONES: It's very sensible to do that as well is what we are asking, for that reason.

THE CHAIR: If you could get the data in spreadsheets down to the line of the general ledger, would that be something to at least start with?

MR JONES: That would certainly be something to start with. That would certainly be something to start with, Madam, yes.

THE CHAIR: What do you say about the appropriateness of the experts actually meeting to discuss the witness statement which they will be provided, and the level of data down to the general ledger level on the spreadsheets -- them meeting to discuss what else is required and the best way of producing it?

MR JONES: Yes. They are going to have to meet at some point and have discussions about what needs to be disclosed.

THE CHAIR: Yes.

MR JONES: However, that can be done alongside or after the disclosure which we've actually requested. Because as I've just said, it's clear that on some of those topics,

the discussion is going to have to move forward -- those are the points in Dudney 2 where he comes back and says if they don't have exactly what I've asked for, it might be something different that's needed.

So, it's very sensible to have a process of discussion like that but it shouldn't replace the application which has now been made for the documents that we've identified as being necessary. They can go along in tandem. So, you start with what we've asked for. They can put in a witness statement, which will include in respect of those which they genuinely don't have, a proper explanation of why they don't have it and what they do have. There could then be an expert discussion and then there might be further refined requests at that stage. But for all the reasons I have given, it shouldn't displace this first stage of disclosure which has been applied for.

THE CHAIR: Thank you.

MR DRAPER: Before we move on, can I just give a reference on this question which my learned friend and I have been discussing, which is how much information there is in the individual transaction data.

THE CHAIR: Yes.

MR DRAPER: There is in the bundle at core page 4993, paragraph A3.2, a description of the transaction data provided by Oxera and they explain there essentially what information is provided for each transaction. It's things like split of revenue between developer and Google, so it really is quite powerful information. I just wanted to provide that reference for your benefit.

THE CHAIR: Thank you. **(Pause)** Yes, no carry on. I am conscious of the time.

MR JONES: Yes.

THE CHAIR: We could rise, and we could consider our view on that for a few minutes, or we could carry on and listen to --

MR JONES: Can I make a suggestion? There's two other disclosure applications and

they should actually be fairly short. So, it may be sensible for me to get through those and then there will be a moment.

THE CHAIR: Perfect.

MR JONES: If I go next to the second disclosure application -- I say second because it appears second in the list on the agenda, which is the US and Australian documents -- I can take this very quickly because a suggestion has been made by Google which we are content for the time being to accept. I will just show you that.

In the correspondence bundle, please, page 1357, that's the letter, and the proposal is at 1360. You'll see the proposal is that:

"[By] 8 December 2023, the Defendants shall (subject to any collateral use, restrictions, or any third-party confidentiality and/or protective orders … give disclosure of copies of relevant expert reports filed and/or served on behalf of Google entities in the US proceedings."

I don't really want to spend a long time on it at all, but I should give you a little bit of context so you know where this going because it may well come back to you. We already have some documents from the US proceedings, some publicly available documents. They are helpful in trying to navigate the disclosure. They are obviously helpful more generally to get a grip on the issues in the case, but particularly with regard to disclosure and they are helpful.

We think getting more documents is going to be extremely helpful. An order was made in the *Kent v Apple* case essentially along the lines of the Order we had sought here, which was for large numbers of documents to be disclosed from the US proceedings. So, we had essentially rolled that out here. Various objections were taken as you've seen there are objections about the scope of the protective orders in the US and the implied undertaking in Australia.

THE CHAIR: Mm-hmm.

MR JONES: Realistically, we can see those issues can't be resolved today, and that is why we are prepared today to accept what Google has suggested. The reason I am telling you that background is it seems to us to be quite likely that if we engage in further discussions which have been suggested, and if Google maintains its current stance, which is broadly that it is not sure it can give anything else, but we'll see where we get to in discussions. But if they find it difficult to provide anything else, we think it's quite likely we'll be back here with another application, and that would have to happen really quickly for this to be useful.

That's just the context. I don't mean to grandstand about that sort of complaint, but just to let you know we might be back soon. But for now, we're happy to go forward on the basis that's been suggested.

THE CHAIR: Yes, thank you.

MR JONES: Sorry, did you want to say something about that?

MR DRAPER: No, nothing further to say. I would just indicate that there are essentially two problems with the application as formulated. One is collateral use and similar restrictions, but the second is also just a lack of focus and proportionality.

Just to give a flavour of it, in the US proceedings, there are around 150 depositions. Many of those one can anticipate will relate to interim matters -- forgive me, not interim matters, but issues that don't arise in these proceedings. So, say for example, things to do with Epic's complaints about the way it's been treated by Google. What we'd invite in the correspondence that has started and going to continue is some effort to focus these requests on the documents they are really interested in. Because even putting to one side whether we need relief from the restrictions, there is going to have to be a process of redaction, and that process should be targeted where these are actually documents likely to be of relevance. So that's all I would provide by way of indication now.

THE CHAIR: Yes, thank you.

MR JONES: Then I turn to the final disclosure application and it's the third one. It's in the salient document bundle at tab 6 again, page 21, paragraph 4. It's quite a short point.

THE CHAIR: Yes.

MR JONES: Paragraph 4, what we've suggested is:

"The Defendants shall disclose to the Class Representative any relevant document which the Defendants (or any of them) have provided or shown to their solicitors in the Play Store Proceedings and which they are not already required to disclose in the Play Store Proceedings and which has not already been disclosed to the Class Representative within 10 working days of the Defendants' solicitors first being provided or shown the document in question."

The broad framework is this: you obviously made various disclosure orders and will make more. When you make an order, that gives rise to an ongoing duty of disclosure in this Tribunal. That's rule 60(6). So, there is an ongoing duty of disclosure in relation to documents which your orders cover. That's normal.

THE CHAIR: Yes.

MR JONES: So, if in the course of, say, preparing a witness statement or liaising with their client, a document comes to light which falls within an ordered category but which has not been disclosed, it would need to be disclosed.

THE CHAIR: You don't need a separate order for that.

MR JONES: No, we don't for that. That's just context, so you don't need anything for that. What we are concerned about is what will happen if in the course of preparing a witness statement, for example, the witness produces a document to RPC which is relevant, but which doesn't fall within the scope of the existing orders. The risk of that happening here is particularly high because of the way the disclosure has progressed,

particularly in relation to Repository 2 which we spent some time on earlier this morning, where as I explained the Class Representative has concerns about the scope of that disclosure.

You can take the concern a step further because what often happens when additional documents come to light is that they are then disclosed, sometimes very late, sometimes as you will know even with a witness statement where witness statements are provided. But that, firstly, would be extremely late, and secondly, if there's no order for that to be done, then there would be a risk of Google only disclosing those documents which it has found which are helpful to Google. There would be nothing requiring them to disclose documents that they have uncovered that are helpful to the class representative.

So, the thinking behind this is to fill that gap and to say if a relevant document comes to light, they will disclose it. It's not onerous because of course if you have an order for standard disclosure, this is normal, you would have an ongoing duty, and all documents which come to light would need to be continually considered for disclosure. Even if in this case, there is already an ongoing duty, as I have said, so when new documents come to light, they're going to need to think, does this fall within our existing duty of disclosure?

To be clear, this isn't about imposing a sort of standard duty of disclosure by the back door, it's only about documents that come to RPC. So, it's not about asking Google to go away and do more investigation or more disclosure or anything like that. It's only about saying when documents come to RPC's attention -- they are involved in the litigation -- there will be an ongoing duty of disclosure if they are relevant.

Madam, you will have seen in the documents that what has motivated this in part, on behalf of the Class Representative, is reports in other cases of Google not properly complying with its disclosure obligations. I am not going to try to persuade you to

place weight on those reports, Madam.

THE CHAIR: No.

MR JONES: We've been frank about the Class Representative's perspective. You will see that she apprehends that there have been problems.

But my point to you today is a much simpler one: it's just that in these proceedings this would be a sensible and small additional step to catch any relevant documents which come to RPC's attention.

Could I just, one final point just to make it absolutely clear, this is absolutely not about doubting RPC's integrity, which is something which is I think touched on in my learned friend's skeleton argument. There is absolutely no suggestion here on my part that RPC might not comply with their obligations.

The point is the opposite one, in a sense: it's that at the moment there isn't actually an obligation on Google to disclose relevant documents that don't fall within existing disclosure orders. So, if Google provides such documents to RPC, RPC isn't under any obligation, Google isn't under any obligation. So, there's no suggestion they would be doing something wrong. The whole point is there should be an order so that the right thing to do when they see relevant documents is to disclose them.

THE CHAIR: But isn't there a problem with how that order would work? Because relevant documents - in a case like this, and in a lot of cases in the CAT, we have targeted disclosure and the requests - the whole point about the various categories and the orders that are to be made is the focus is on particular areas that the Class Representative thinks will be relevant.

Now not every relevant document is disclosable because it might be disproportionate, for example. I am not quite sure how it's going to work because you are asking RPC to consider what you will consider, your client will consider, is relevant. You are asking RPC to sit in your client's shoes, and you may have very different ideas about

relevance. At the moment the categories of disclosure are agreed between you and target what you've agreed is relevant.

MR JONES: Although of course they haven't been targeted by reference to lists of issues.

THE CHAIR: No.

MR JONES: So, they have been done on a slightly different basis to that.

But to be clear, we are not suggesting that they need to second-guess what the Class Representative would think is relevant. They would just apply their own judgment to whether or not it's a relevant document, if it comes to them.

THE CHAIR: I struggle with how that's actually going to work in practice and the obligation you are putting on RPC to make that work.

MR JONES: Well, they have clearly taken -- they have a framework for deciding what's relevant because that's what has framed their own approach to the disclosure categories.

THE CHAIR: Yes.

MR JONES: So --

THE CHAIR: So, if they see a document that falls within what they have formulated as covering, relevance, then they will disclose it because --

MR JONES: No, but, sorry, that's maybe the missing point so maybe I could explain that. That would be right if your orders were by reference to a list of relevant issues, for example, because then you would say: this is what's relevant and we know what the issue is and if the document within this issue comes to RPC's attention, then either it's within it or it's not -- it's relevant or it's not.

But when you then remember actually the way the orders have been framed, here they are not like that, they are by reference to certain repositories of information or certain custodians and search strings. A document may well come to their attention which

doesn't fall within this custodian or this search string, but which is just clearly relevant to the issues when you look at it. So, it's a document which wouldn't have been disclosed under your orders but is obviously relevant to the issues.

In practical terms, you are speaking to a witness, and you are talking about, I don't know, uninstalling apps, for example, that's one of the issues which is live, so how easy is it for users to uninstall apps. In the course of that discussion, the witness says, actually, we did a bit of research on that, and I think I have it on my computer. Yes, here it is, here is the document, that at the moment wouldn't -- or at least might not be within what you've ordered to be disclosed because it wouldn't be something which would necessarily be within one of the custodians' controls, or it wouldn't be something thrown up by search strings. But it would obviously be relevant, and it would come to their attention, and at the moment there wouldn't be any obligation on them to disclose that, it would just be a document which you can look at and say: here is an interesting document about, you know, uninstalling apps, maybe we'll attach it to the witness statement. Well, actually no, let's not because it's not very helpful and we haven't been ordered to disclose it.

In normal proceedings, that wouldn't happen because you would have had either a standard disclosure order, or you would have specific disclosure orders which are by lists of issues. So, in a normal case, you wouldn't find yourself in that situation because when an obviously relevant document like that comes up, you would, Madam, as you are suggesting to me say: oh, this is within what we've been ordered to disclose. But I think that's what has driven this application, so that isn't the situation here. You can imagine all sorts of situations where people you speak to say, you know, we did some research on this, we have a report on that, whatever it is, but which actually wouldn't fall within the orders you've made.

THE CHAIR: I can see the problem, but I am not sure the wording in the general and

quite broad terms that's reflected in your draft order would necessarily be appropriate. I can see the issue, you are basically talking about the scenario where a witness comes in and says oh -- for example, Ruth Porat, to take a name who isn't one of the present custodians, and she has sent me an email which attaches one of the -- at the moment the project names that wasn't searched.

MR JONES: Exactly.

THE CHAIR: Then you are saying that wouldn't necessarily fall within the Order. So, I can see the problem, but I am not sure this is the appropriate way of answering it, because I am concerned about the relevance exercise you are imposing on RPC. So, it may be a case of putting thinking hats on to try and target what -- I can see the problem you are targeting, but --

MR JONES: Yes, I understand. So it might be that we target the particular areas we are concerned might not be caught.

THE CHAIR: It could be that. You could -- I don't want to draft from the bench, but it may be something like if a document comes into their hands that might have responded to the search string had it been applied to that custodian --

MR JONES: I understand.

THE CHAIR: -- something that -- it may not be very practical, but --

MR JONES: No. Madam, can I suggest this - actually, can I take instructions. I was going to make a suggestion, but I should just take instructions first, if I could do that.

THE CHAIR: Yes. **(Pause)**

MR JONES: I do have a suggestion, Madam, which is in light of what you've just said, which strikes us as very sensible. We are not going to be able to come up with something today, why don't I take this off the table for today, we will take it away. We are going to be coming back anyway with more disclosure requests next time and we'll see if we can reformulate this into something which does the job better as you've

envisaged. But maybe we will, so if it's all right for us to park the application and take it forwards that way.

THE CHAIR: Yes. Thank you.

MR DRAPER: I don't have anything to say about that.

THE CHAIR: No.

MR JONES: I am sure if you tried hard enough.

That's the disclosure applications complete. I said I think I would pause there, so in fact the only one which you need to think about is the financial one, as it turns out.

THE CHAIR: Yes.

MR JONES: But should we take a break now?

THE CHAIR: Yes, we'll do that. We'll take a 10-minute break.

(2.24 pm)

(A short break)

(2.34 pm)

Ruling

THE CHAIR: What we are going to order is that Google will provide within two weeks a witness statement explaining their accounting policy and practice and replying to Mr Dudney's points. Google will also provide within one week the data we've been discussing down to the general ledger level and if Google need a second week to do that, then they can write to the tribunal and ask for it.

Then the forensic accounting experts are to meet at least by two weeks after the witness statement and the data being provided. The experts are to discuss and agree as far as they are able to do so, which I hope is 100 per cent, what data is required and the form in which it should be provided.

MR JONES: I am very grateful for that. Just on timing on your point --

THE CHAIR: Yes.

MR JONES: -- you said experts were to meet at least two weeks after the witness statements.

THE CHAIR: I mean by two weeks, sorry. And did I mention the Tribunal would like to be notified that they've met?

MR JONES: Madam, I am very grateful.

THE CHAIR: Thank you. And when they've met, and also whether or not they've agreed an outcome, and what is proposed to happen if they haven't.

MR JONES: Yes, of course.

THE CHAIR: I don't know if that involves amending any of the other dates in the existing order, but I am sure you will be able to work through that and let me know.

MR JONES: Yes. Off the top of my head, I don't think it would, but we'll certainly have a look and let you know.

We move on next to a few short points in keeping with the agenda, so I am planning to come to the expert issues at the very end just to be clear, but otherwise I'm going to be doing them in order. The next one on the list is funding and certification documents.

THE CHAIR: Yes.

MR JONES: I will sit down - and Mr Draper may have things to say about this, I'm not sure - but in any event, I'll hand over to Mr Kennedy on our side and, among other things, he needs to make a cost application. So that's the next item.

THE CHAIR: Yes.

MR DRAPER: Can I just say in relation to the substance first. The position, as you know, is that we applied to accelerate the disclosure of those documents in the hope that they would be available in good time that we could raise with the tribunal and address any concerns in relation to the funding arrangements.

The Tribunal was satisfied by the witness statement provided on behalf of the Class Representative that it was in hand, and obviously you can't order documents be disclosed if they don't yet exist. In the event, we've had the new funding agreement and we had last night the final but unexecuted priorities deed, which we also requested in the application. We have not yet had a chance to review those, but unfortunately, I can't yet tell you whether there are any issues arising.

THE CHAIR: No.

MR DRAPER: But I can say that we'll pursue in correspondence first and if we do need to come back to the Tribunal, we will. I just flag that we might at that stage make a request that that be dealt with in fairly short order on the basis that this has dragged on for a very long time already and it's important for the Tribunal's oversight as well as for the parties.

THE CHAIR: Yes, thank you.

MR KENNEDY: Madam, as Mr Jones indicated, I am making a short application for costs in respect of the application made by Mr Draper. Can I just briefly look at the application, which is the salient documents bundle, tab 12, page 72.

THE CHAIR: Yes.

MR KENNEDY: Over the page, paragraph 7, we see what was sought was an order for disclosure by -- it's about halfway down the paragraph -- midday on Tuesday, 31 October.

THE CHAIR: Yes.

MR KENNEDY: If we just go over the page again to paragraph 16, that's page 75, we see what was sought is the amended LFA, any associated documents including but not limited to an unredacted copy of the priorities deed, revised Litigation Plan and budget, revised ATE policy, including an explanation on the basis which is said to be unaffected by the judgment -- the judgment of course is *PACCAR*, Supreme Court.

So those were the documents sought.

If you turn over next tab, tab 13, I want to show you very briefly the draft order which accompanied the application, final page, page 81. We see paragraph 4:

"The Class Representative shall pay the Defendants' costs of and occasioned by the application."

So, an application made for the costs of the application by Mr Draper at the time.

THE CHAIR: Yes.

MR KENNEDY: The following day, and we don't need to turn to it, the Tribunal wrote asking for a response from my client by the following day, so that was the 25th.

THE CHAIR: Yes.

MR KENNEDY: That was provided. If we can have a quick look at that response, tab 14, starting at page 83. What we see at paragraph 4 is that the documents requested at paragraph 16 don't exist and we explain that the Defendants were aware of that. I'll show you why the Defendants were aware of it. At the time of the application, the documents requested didn't exist. Mr Draper rightly accepted just then on his feet that he couldn't make an application for documents which didn't exist, which as you'll anticipate, Madam, my submission is that the application shouldn't be brought in that knowledge. But it's explained in the second sentence that:

"The CR expect(s) to be able to share the Amended LFA with the Defendants and the Tribunal shortly."

Next paragraph:

"The CR intends to amend and restate the Priorities Deed."

As Mr Draper said, that went across last night, and they now have unredacted copy. Paragraph 6, as explained in a prior letter, the CR's position was that the ATE policy is not affected by the judgment and there's explanation given there as to why that's the case. That is that the contingent premium is not calculated by reference to the

award of damages and therefore falls outside the statutory regime.

Paragraph 7, we explain that we didn't understand the basis on which the Litigation Plan was required, and paragraph 8 we repeated what we've said in earlier correspondence, which was that we were considering the budget position and we'd update them as soon as possible.

And at paragraph 9, the second sentence over the page, it sets out the fact that all of this information had been previously provided, as I say. So, they knew the documents didn't exist at the time of the application.

Madam, as you know, since it was your own order, on the 27th you refused the application. The reason given was you considered it inappropriate to order the Class Representative to provide documents the tribunal has been informed do not currently exist, in particular in circumstances where the CR has confirmed her intention to provide the amended LFA as soon as it has been executed, and so on and so forth.

On 30 October, which was the deadline for responsive evidence, in the cover letter accompanying Hannah 2, which provided the fuller explanation which had been foreshadowed in Hausfeld's letter of the 25th, we made the present application for costs. Madam, I hope you have a copy of a schedule that has been provided by my solicitors which shows what the costs are.

THE CHAIR: Yes.

MR KENNEDY: I propose to address you on principle first, Madam, and then on amount. But just so you have the amount in mind, it's a very modest amount, it's £4,096.

THE CHAIR: Yes.

MR KENNEDY: Just to explain very briefly what those are comprised of -- and this is in the cover letter which I don't believe you have, Madam, but I'll just quickly let you know what it is. It's considering the disclosure application but it's only a proportion of

those costs. It's considering the Tribunal's letter of the 24th, seeking our immediate response the following day.

THE CHAIR: Yes.

MR KENNEDY: Any costs exclusively associated with the 25 October letter, considering RPC's letter of the following day -- which was their reply -- considering your letter of the 27th, liaising with the relevant stakeholders, taking instructions, and finally preparing the enclosed schedule.

So, what we've sought to do is to isolate the costs occasioned by what we say was the unnecessary alternatively premature application and just seek those, and we believe those were reasonably incurred and proportionate in amount.

So, it's a very modest amount of just over £4,000 including VAT.

THE CHAIR: Just so I can be clear, does that include any costs relating to Ms Hannah's witness statement?

MR KENNEDY: It excludes any costs associated with that.

THE CHAIR: It excludes that.

MR KENNEDY: Yes, sorry, I should have made that clear.

THE CHAIR: No, that's fine.

MR KENNEDY: And that's explained at paragraph 6 that it doesn't include any costs associated with Hannah 2 because we said we'd provide that, and we were happy to do so.

As I said, Madam, I don't propose to take you through all the correspondence, you'll be glad to hear, but just to make two points. The first is that the Class Representative has been extremely conscientious about the issue raised by *PACCAR*. As you know, Madam, the judgment was handed down on 26 July this year; the following day my solicitors wrote to RPC and said we are conscious that this may have implications for our case, we are considering it and we'll get back to you. That's set out in the

correspondence bundle, tab 40, page 1026.

We followed up on 15 August, I will ask you to have a very quick look at - I'm afraid I'm hybrid, digital and physical, so it may just take a second to get that up. It's the correspondence bundle, tab 57, page 1117. You see in paragraph 1, Madam, we say: "We refer to our letter dated the 27th July 2023..."

So that was our initial letter saying it's on our radar. Paragraph 2:

"Our client has been considering the impact of the Judgment […] and will provide an update to any amendments deemed necessary to the funding or associated documents."

Associated documents is a reference to the priorities deed.

THE CHAIR: Yes.

MR KENNEDY: Then we followed up just a couple of weeks later on 1 September, that's tab 75, page 1184, and we say:

"We refer to our [previous letter and the one I have just shown you] and your letter dated 8 August 2023 [concerning *PACCAR*]."

And we see paragraph 2:

"Our client is continuing to consider the impact of the Judgement on her funding arrangements."

Paragraph 3:

"Notwithstanding [a point about severance which now falls away in light of restatement], our client is in discussions with her funder regarding potential amendments to the LFA and associated agreements."

Again, that's a reference to the priorities deed. And the final sentence:

"Our client will provide a further update … as soon as any such amendments have been agreed."

That takes us to 13 October 2023, Madam, which is at page 1326 in the same bundle,

if my Adobe will comply. 13 October, again we refer to *PACCAR*. Paragraph 2:

"Our client has reached an agreement in principle with her Funder ...(Reading to the words)... we expect to be able to share the executed version … with your clients and Tribunal prior to the deadline for the parties to exchange skeleton arguments."

So not only prior to the hearing, but prior to the deadline for skeleton arguments.

Then paragraph 3 addresses a query raised in RPC's letter of 8 August, and we say:

"We confirm that our client's ATE policy is not impacted."

With the obvious implication that there was no revised version in existence or going to be in existence.

Finally, paragraph 4:

"Negotiations between our client and her Funder regarding an increase to the Budget are progressing and further updates will be provided."

Again, the necessary implication is there is no updated budget that could be provided at the time.

So that's where matters stood on 13 October, Madam. As you know, Google's application was made ten days later, there's no intervening correspondence updating the position. So, we say in those circumstances, Google knew the documents it was seeking in the application didn't exist and so ought not to have made the application at all. In any event, there was no reason to make the application outside the timetable that had been ordered by the Tribunal, directed by the Tribunal, which was for applications on the 23rd, responsive evidence to be on the 30th. It wasn't urgent. We'd explained the position in correspondence, and it was very clear from the repeated letters sent by Hausfeld that we were taking it very, very seriously and progressing it as quickly as we could. So, we say that on either basis, there was no basis for the application and so it follows we should have our costs.

Madam, of course we recognise that CMC business will ordinarily be costs in the case,

but we say in these circumstances where the application clearly ought not to have been made, it's appropriate for an order for costs to reflect that.

Just to address or anticipate some points Mr Draper has set out in his skeleton argument, he says firstly the disclosure was always required. However, disclosure, if we can call it that, had already been agreed to, we'd already indicated that we were providing any documents we were going to update. So, the application wasn't necessary, even if he's right regarding the disclosure, albeit that has a connotation of compulsion rather than a voluntary provision, and likewise he says that information and explanations were always required, but information and explanations had been provided in correspondence. Again, no application was necessary.

THE CHAIR: Yes.

MR KENNEDY: Finally, Madam, I showed you Mr Draper's draft order. He says he sees no reason for Google's application to be singled out for an order not for costs in the case, but he thought his application was appropriate to be singled out on the basis that it wasn't ordinary CMC business.

So, for all those reasons, we say we should have the order and, as I say, I will address you on the question of amount if necessary in due course. But unless I can assist, madam, those are my submissions.

THE CHAIR: Thank you very much.

MR DRAPER: I will be short, but my learned friend has helpfully anticipated the main point, which is that this is effectively part of the CMC business today. We are of course not seeking our costs of applications that have fallen away, so for example, the US and Australia documents disclosure, and we were faced with a very substantial application there and we've incurred substantial costs responding to it. That's gone. My learned friend withdrew on his feet the application for the ongoing disclosure order. So, there would be a great degree of injustice if we were to end up paying costs in

circumstances like that because of this specific application. So, the question is: what makes it different from the others? The reason it's different from the others is it was made expressly in order that this CMC could be effective, at least to some extent, to deal with issues arising from the new funding arrangements. So, it necessarily came before the CMC because the whole purpose was, to the extent we could, get these documents in time for them to be considered at this CMC.

My learned friend says you didn't need to rush us along because we were already doing it, but the context not to forget there is that we had been promised this at least once. If I could show you a letter in the correspondence bundle at tab 57, page 1117 - this is important context I refer to it in the skeleton argument. This is a letter from Hausfeld dated 15 August and so you'll see at paragraph 2:

"As confirmed in the letter, [referred to above], our client has been considering the impact of the Judgment with her litigation funder and she will provide an update as to any amendments [and so on] … as soon as possible and prior to the first week of September."

The first week of September was at that time considered a hard end date, but we'd obviously get it before then.

So, the real question for the Tribunal is whether Google acted unreasonably by bringing the matter before the Tribunal to try to make sure that these documents were in place before the CMC so they could be dealt with. Being dealt with might have involved either us actually resolving points, or it might have involved directions, depending on how late we got the documents and how much was in them.

But in my respectful submission, it was certainly reasonable for Google to seek to ensure that these documents were provided on time for the CMC. That in fact hasn't happened because as I say the priorities deed was only received last night, and the amended funding agreement itself only very recently. But the circumstances certainly

aren't sufficiently strong to mean that this application should be treated differently from all those others.

Those are my submissions.

THE CHAIR: Thank you.

MR KENNEDY: Madam, I will be very brief. Mr Draper asks what makes it different. Well, I think you have the point, but Mr Draper took it outside the course of the timetable for the CMC, and that is what makes it different from the applications that have fallen away today on either side. He took you back to the 15 October letter and he read out the relevant sentence, which was the Class Representative will provide an update as to any amendments, and there was a suggestion, an elision, a suggestion that this was a hard stop to provide the documents. That was not the case, Madam, and I have taken you to the letter sent on 1 September which provided -- that which was said to be provided, which was an update.

And finally, the suggestion that had disclosure been provided by 31 October as sought would have allowed this all to be resolved at this CMC, we submit is slightly fanciful, given the complexity of some of the issues that are raised in connection with these funding arrangements. Another hearing or dealing with it at a fourth CMC, madam, would have always been required.

So, unless I can assist further, those are my submissions in reply.

Ruling on costs

THE CHAIR: Thank you. I think logically (audio distortion) as I had dealt with the application in the first place in the circumstance that gave rise to this application, I will grant the Class Representative their costs and I will give a short reasoned order after today explaining why.

MR KENNEDY: Madam, do you wish me to address you on the question of amount?

THE CHAIR: Yes.

MR KENNEDY: I think I have probably said most of what I need to say. We have sought to isolate those costs which are attributable solely to having to respond out of sequence, as it were. We are not claiming for Hannah 2, we are claiming essentially for the proportion of costs which are otherwise costs in the case, considering the application, that are directly referable to having to consider on an expedited basis, if we can put it that way, and we're claiming for costs of 25 October letter. So, in the circumstances and given the modest amount, almost exactly £4,000, we say we should have the whole amount as a starting point.

THE CHAIR: Thank you.

MR DRAPER: The schedule to which my learned friend refers was received shortly before the hearing commenced today, we haven't had a real opportunity to consider it. In those circumstances, may I request we have a chance to make any comments on it in writing by Tuesday. Just to indicate, there's one concern, it looks as though the hourly rates claimed here might not be taking into account that there is a CFA but that's a point we can ask them about, obviously.

THE CHAIR: Yes. So written submissions by -- what date did you say?

MR DRAPER: Tuesday I said.

THE CHAIR: Yes, by 4 o'clock. And then written submissions by, I don't know how long you'll need to deal with that, but --

MR KENNEDY: Madam, I didn't actually hear what you said. Tuesday by what time?

THE CHAIR: Tuesday, 4 o'clock.

MR KENNEDY: 24 hours, madam, thank you.

THE CHAIR: Then you'll have my reasoned order, and it will have an amount in it. Right.

MR JONES: Timetable. This is agreed. It's --

THE CHAIR: Expert.

MR JONES: I am leaving that to the very end.

THE CHAIR: Yes, of course you are. Saving the delights to the last, yes.

MR JONES: I'm afraid that's pretty much it. In the salient documents bundle, tab 6, page 21, paragraph 6, this is all just varying the timetable to trial. It's all agreed. Broadly speaking, what has happened is the trial has actually been listed now for 6 October 2025, as you'll know, whereas when the December 22 Order was made, that said it was listed for September, I think. So, it can shift back a month anyway because of that, but it's shifting back more than a month. In fact, that first date is shifting back four months because in the December 22 Order, it's December 2023 I think for witness statements. But the parties have liaised on all of this and agree that this is workable.

THE CHAIR: I can't immediately see any issue with it, so I think -- it basically affects the dates you are required to do things between the two of you, doesn't it?

MR JONES: That's right, that's right.

THE CHAIR: Just the skeleton arguments are in in good time before trial, yes. I don't see any reason not to make that order.

MR JONES: I am grateful. The next heading is "Confidential information", where I confess I have not asked Mr Draper whether he actually wants to say anything. But if he does, now would be the opportunity, so I will sit down.

MR DRAPER: I'll say very little. There were concerns raised at the last CMC about the approach taken to designating confidentiality. The debate was essentially between a process whereby the specific confidential passage has to be identified in every document at the time of disclosure, which would obviously impose a very substantial burden; or whether as Google said at that time, it can do that when it becomes necessary because the documents are going to be referred to, so one needs to then

make provision for that.

The Tribunal said this point should come back at the present CMC and it should come back again at the PTR to make sure that whatever parties are agreeing between themselves is acceptable to the tribunal. For the interim hearings, we have an arrangement, which is that specific identification of the material takes place once it's been agreed the document is going into the bundle.

THE CHAIR: Yes.

MR DRAPER: So, it's only the pertinent documents for which that's done. We will obviously discuss trial arrangements closer to the time and provide an update then.

THE CHAIR: Yes, that sounds all very sensible. Thank you.

MR JONES: That brings us to the highlight, the expert issues. You should have been given a new document which says Annex A on it.

THE CHAIR: Yes.

MR JONES: This is the result of a lot of effort between the parties to narrow down the differences. You will see that where it's not agreed, the Class Representative's proposed drafting is in blue and Google's is in green. I'm afraid we simply need to go through them and tell you about our position on each of them.

Now I propose to start --

THE CHAIR: Are there some points of principle?

MR JONES: Yes, I suppose there is a point of principle and that catches. If you look at page 4 --

THE CHAIR: Yes.

MR JONES: "Behavioural issues" on the left-hand side.

THE CHAIR: Yes.

MR JONES: You will have 15, 16 and 17 and over the page 18.

THE CHAIR: Yes.

MR JONES: Those behavioural issues all go together as essentially one point of principle. So, what I am proposing to do is to address you on those first because that needs a bit of attention, and then after that to go through the granular issues which arise in relation to the other ten or so points of dispute.

THE CHAIR: Yes.

MR JONES: Madam, as I trailed a bit at the start of the day, it strikes us that it would be ideal for us to get through all of those other issues today but if we absolutely can't, then those at least could be dealt with on paper. This point of principle you really need to hear us on so that's why I am doing it that way round.

THE CHAIR: Yes.

MR JONES: This point of principle, if I could ask you to turn back to the first page to see how it arises, you'll see there is a heading "Competition Economics". We've broken down all of the issues into the headings and then fast forward again to page 4, these behavioural issues at the moment are under the heading "Competition Economics".

THE CHAIR: Yes.

MR JONES: Moreover, if you look over on the left-hand column, at the last CMC there was a discussion about how we were going to divide up the competition economics points between the two competition economists, and that's done by identifying in brackets which expert will deal with it at least for the Claimant's side, the Class Representative's side.

THE CHAIR: Yes.

MR JONES: So back on issue 15, you'll see this is allocated to CR expert one, that is Mr Holt. So, the proposal, which is consolidated here in this list of issues, is that Mr Holt would be addressing these points.

Now there is a major caveat to that which you will have picked up from my skeleton.

The caveat is this: you heard submissions at the last CMC broadly on the question of whether Mr Holt would be able to address these behavioural issues.

THE CHAIR: Yes.

MR JONES: There was a discussion between you, Madam, and Mr Hoskins about that where we were asking for a behavioural scientist.

Now that has been considered further and the position broadly is that Mr Holt feels he may be able to address these points, depending on what comes out of disclosure. Again, that goes back to a point that was discussed at the last CMC where what was being said was: these on one level just look like factual points about how consumers will behave and so factually won't you get some data to be able to answer these points, and broadly speaking couldn't a competition economist use that data to answer them?

THE CHAIR: Yes.

MR JONES: So, we've given that more thought and the answer is it's possible that the data will be sufficient - I have been handed a note, I have it wrong. It's Mr Singer, not Mr Holt, so the experts are the other way round to what I have said, so CR1 is Mr Singer. It may be the competition economist can answer these questions, as was discussed last time. It will depend on what comes out in the disclosure which has been given, and it will depend in particular on whether there is data which can be used and which he will be able to comment upon.

We have not seen such data yet. That is why we have been frank, including in the skeleton argument, that we do think it's likely we will be back with an application to adduce evidence from the behavioural scientist. We will simply have to see whether that eventuality arises or not.

But in those circumstances, we say the sensible approach is to approve these issues now on the basis that they are within the competition economic issues, and on the basis that if possible Mr Singer is going to be addressing them, and then if we want to

apply later for a behavioural scientist, we will do that, and any questions which would then arise about the behavioural scientist would be addressed then, all the points which were discussed last time around, what expertise will this person bring, how will it feed into the competition economics analysis, and so on.

On the other hand, it would be most undesirable to leave these issues hanging and undecided, and as I say we know there are issues we want an expert to address. If they are pushed off to another date, one way or another we would be back here arguing over them, either saying we now confirm Mr Singer is going to address them, or somebody else is going to address them. But in the interim, there would been uncertainty because we would still not have any resolution over whether these issues are recognised to be issues in the case. And that last point is really important because as I am about to show you, the Class Representative says these are critical issues in the case, whereas Google says they are not pleaded issues.

THE CHAIR: Yes.

MR JONES: So it's actually really important to grasp the nettle now and say one way or another whether you agree they are issues in the case.

So, for that reason, I need then to go to relevance. In broad terms -- I am going to the pleadings in a moment - but in broad terms, as you know what's said in this case is that Google imposed various restrictions on the manufacturers, the OEMs, which made it difficult for alternative app stores to take off and difficult for app providers to avoid the Google Play store. In essence that is what is being argued.

One important theme of Google's response to that is to say broadly none of this is a problem because users are free to uninstall Google Play, they are free to sideload apps, so they could avoid Google Play altogether. And you can see at least in theory that those sorts of arguments could be an answer to the claim because in essence it amounts to saying, don't worry about Google Play, there are all these other channels

which are equally easy and accessible. If that were right, then it would be a very important consideration.

So that's the battleground. The Class Representative says there's a whole host of reasons why users find it hard to access other channels, their knowledge of them, their technical abilities, the warning messages which they get sent, and so on.

It's so central to the case, I don't want to spend too long on the pleadings, but I am going to have to show you the pleadings because Google has said on these behavioural issues that they're not pleaded issues, so I am going to have to show you the main points. If we can go in the core bundle, I want to go to the Claim Form first, page 2013.

THE CHAIR: Yes.

MR JONES: This is the description of the various technical restrictions on GMS device users. If you pick that up at the bottom of the page, paragraph 63:

"As a result of its inclusion in the GMS bundle … the Play Store is the only app store pre-installed on all GMS devices."

Then over the page:

"Further, it is technically extremely difficult for GMS device users to uninstall."

So, it's a pleaded issue, that it's technically extremely difficult to uninstall. Then in the next paragraph:

"Google ensures downloading other app stores directly from ... (Reading to the words) is only possible only through a process known as “sideloading”."

Then I emphasise this:

"This process requires technical knowledge and a willingness on the part of the GMS device user to change their Android device settings and bypass a number of security warnings."

Then paragraph 65:

"As an example of the steps taken by Google to restrict sideloading, when a user attempts to sideload Aptoide, … Google presents them with a warning that it is “unsafe”."

Over the page at 66:

"Even if a GMS Device user successfully sideloads an Android app [or rather an Android app store], Google blocks the auto-update functionality of apps and app stores that are sideloaded (requiring manual updates to trigger the same security warnings at each stage)."

67:

"Google unilaterally blocks the sideloading of apps."

68:

“[It] unilaterally blocks the sideloading of apps it deems to be harmful."

If we then go forward to 2035, please, we are talking here about the competitive effects of bundling at paragraph 124.

THE CHAIR: Yes.

MR JONES: "The bundling … is capable of restricting competition in that ..."

And down at (iii), they are talking about OEMs not being able to uninstall. But if you go to the bottom of that paragraph on that page:

"Moreover, while GMS Device users can technically “sideload” a competing app (or specific apps) onto their GMS devices without ...(Reading to the words)... a significant number [just underline that because I am going to come back to it] of GMS Device users will not do so and will instead use the app store that is pre-installed and prominently displayed [that's another aspect of the complaint] on their device … either because they do not know that sideloading is possible or because they are unable/unwilling to go through the process of doing so."

Then further down at the bottom of that page, b(ii), it's talking about barriers to entry:

"Shielding Google from competition that could challenge its dominant position ...(Reading to the words)... since potential competitors (i) must spend resources to overcome the “status quo” advantage conferred by the pre-installation (and prominent display) of the Play Store on GMS devices."

Which is essentially the same point, which is users already have this on their device, so uninstalling and moving to something else is going to be difficult and there will be barriers to that.

Then over on paragraph 129, this is the last reference in the Claim Form, page 2038, again:

"The App Distribution Restrictions as described at paragraphs 63 -72 above not only have the effect that ...(Reading to the words)... but also that “sideloading” other app stores … is technically complex and does not constitute a satisfactory alternative distribution channel … (if GMS device users are even aware that it is a technical possibility)."

So, all those points are canvassed and they are all then taken issue with. If you go to the Defence, starting at page 4562, please, paragraph 54.

THE CHAIR: Yes.

MR JONES: They are addressing here the technical restrictions. You'll see the last sentence; this is talking about uninstalling:

"It is straightforward for a user to delete the Google Play Store icon and disable the ...(Reading to the words)... user's home screen and app drawer."

So, an obvious dispute there about whether it's easy to uninstall. Further down at 56, you'll see:

"It is denied that sideloading requires technical knowledge or that users must, on each occasion, change their settings or bypass a number of security warnings."

So, debates around how easy or difficult it is for users to sideload. Then if we go

forwards, please, to page 4581, You'll see at 102(e):

"Users can and do ignore pre-installed apps and can obtain alternative apps quickly and easily through other distribution channels. There is also no obligation on them ...(Reading to the words)... on each occasion users wish to obtain an app, users have the choice as to which app store they use. … [They] can also obtain rival app stores directly and easily by use of many alternative, non-Google Play Store distribution channels."

So, it's all very easy and quick and there's no barriers to action on the part of the users is what they're saying.

Then on the next page 4582, the same thing at 103(f):

"Users can and do ignore pre-installed apps ...(Reading to the words)... they can disable it [and so on and so forth]."

Page 4584, so two pages further on, at 104(f) at the top, they say:

"It is not admitted that a significant number of GMS Device users will not sideload alternative app stores, or that they do not know that sideloading is possible or that they are unable/unwilling to do so."

So that's not admitted, so we have to prove that.

Then at 104(h):

"Insofar as users prefer to use the Google Play Store, that reflects their choice ...(Reading to the words)... and is the product of competition on the merits."

And that point is really why I said earlier on that if they are right about all of this, it creates a real problem for the case because what they are basically saying is users have complete choice. None of what we, Google, have done has put any barriers in anyone's way, whenever a user decides they want to download an app, it's equally easy is essentially what they are saying to do it through Google Play as any other distribution channel, ergo there's no problem. So, it really is a central battleground in

this case, how easy these various things are and how users behave faced with the warning and faced with the technical difficulties.

Now there are of course different ways of getting to the points in terms of the evidence that might be adduced. It may be that there is data from Google which will elucidate the issues. As I have said, if so, we will want the economist to look at that data and comment on it.

But if that isn't possible and if that doesn't do the job, there will clearly need to be some other way of getting evidence on those issues. They are at the heart of the case; they are going to have to be unpacked. You eventually are going to have to make a decision on these points: how easy do users find these things, is it easy to uninstall, easy to sideload, or are there barriers? As I have said, our current thinking is that if the competition economist does not do it, we'll be back asking for a behavioural scientist.

Now can I show you on the list of issues what has actually been said about relevance, so back on page 4 of that document. The issue is where Google Play, the Play Store and/or an alternative app store is pre-installed on an Android Device, how likely is it that a user will sideload an alternative app store? What is said is this: this is not a pleaded issue and so it's inappropriate as an expert issue:

"Paragraphs 119 to 123 of the Claim Form concern ...(Reading to the words)... on OEMs. At most, the Class Representative puts Google to proof that users can and do use alternative distribution channels."

Just pausing there, that is just wrong. I mean, I have shown you the pleadings, the question obviously is not whether users can and do use alternative distribution channels, obviously some can and some do. The issue, if I can put it the other way round in simplistic terms but using that language, the actual issue is whether enough of them can't and don't to affect the competitive dynamic. That's what we are actually

trying to get at here. We need to look at the market dynamics. The Claim Form, paragraph 124(a)(iii), referred to a significant number of users not doing so.

Then we carry on in what's said. They say there is no pleading concerning the "likelihood" of a user sideloading an alternative app store. Again, it's a very odd point. You've seen what's pleaded. We need evidence on how easy it is and on the prevalence of the phenomenon, and "likelihood" captures that. That's all it's trying to do. So, there it is, we've tried to capture what the issue is. Maybe they could have given us a different formulation. They haven't, but it seems to us to capture the point.

Then Google says this:

"There is no explanation of who such a user would be, their characteristics, how they would be representative of the Class, or how an expert would be able to provide such an opinion."

This really is so far removed from what the parties actually need to be considering that it serves to emphasise how important it is that these issues are baked in now. Because there is absolutely no sense in trying to identify the user, Joe Bloggs, aged 39, in Balham, give him some more characteristics and ask what he would do. That's not a sensible exercise and not what anyone is suggesting.

As I have said, we need to be thinking about competitive dynamics. We need to be thinking about users as a whole and whether sufficient numbers of them behave in certain ways to impact on the competitive dynamics. That's what we are concerned with.

Essentially the same points are made across the other issues, and I will show you quickly. 16 is about uninstalling apps, 17 is about prominent display, 18 is about trying to isolate out different factors to see whether and, if so, how they affect - they contribute to decisions whether to sideload.

In summary, they are vital issues in the case. One way or another, they need to be

addressed by an expert on the Class Representative's side. For that reason, they should be in this list of issues for now under the "Competition Economics" heading and if we want to change that, we'll do so at a later date.

PROFESSOR WATERSON: Can I make some suggestions on this.

MR JONES: Yes.

PROFESSOR WATERSON: Firstly, some aspects of these issues I think can be dealt with if Google itself has information on; unsuccessful attempts, or partial attempts to move to another app. In other words, if they notice attempts that are made that are not followed through to completion, and they may or may not have that information, but if they do have that information, that is something that can be cross-examined with the technical expert from Google. If they don't, the problems are more difficult. But if they do, that's the ...

So that's my first point. My second point is that in a sense - different context, but in a sense a related context, we've been there before. We've seen it with Netscape years ago and various Microsoft attempts, or alleged attempts, to keep the market to itself by trying to avoid people downloading alternative browsers. I think the competition economists could speak to those issues which would bring some light to the general sorts of issues here.

In other words, once a court ruling was made that removed some of the restrictions Microsoft had imposed, what was the response?

MR JONES: Yes.

PROFESSOR WATERSON: Now it wouldn't be a perfect answer, but it would give you at least an answer based on objective evidence that the competition economist could speak to and be challenged on, which would give you a useful handle on this, rather than a somewhat vaguer, if you like, answer.

MR JONES: If I may say, they are extremely useful suggestions and that

unsuccessful attempts point we will certainly pick up with Google, if it has not already been done because that would be very, very interesting, of course, if we can trace that through.

I mean, just to say of course at the moment they are just listed as issues and the question of what data you get and how you answer them is a separate follow-on question.

PROFESSOR WATERSON: Exactly.

MR JONES: But we will certainly take those points away.

THE CHAIR: I do have still - funnily enough I have some concerns about this concept of the user and what a competition economics expert is meant to make of this. I mean, if you were asked the question at, I don't know, question 15, how likely is it that a user will sideload an alternative app store, what's the real thrust of that question? Is it -- where is the objective evidence that they are going to be able to answer that question? There is something in the what sort of user is it that you are looking at, isn't there?

MR JONES: Well, obviously their ability to answer the question depends on the data available, which is why we think it may not be something for a competition economist. But if there is data which illuminates this question about the extent to which users with pre-installed app stores will sideload alternative app stores, there may well be data on that question, then the competition economist will be able to look at it and say: well, I can see that -- this is completely hypothetical, but let me give you an example.

They might be able to say I can see we have data where when users had a pre-installed app store, let's say 1 per cent of them went and sideloaded an alternative, and perhaps there's some other data or some other comparison which would enable one to draw a contrast between a situation where there isn't a pre-installed app store. So, you would be looking for that sort of aggregate data

which helps you answer the question of how likely people are to move.

Now that's not to say that -- I mean, characteristics are relevant in the sense that obviously some users are more likely to do that than others, so technically skilled and experienced users are more likely to do it than people like me. But in a sense, that comes out in the wash because what we want to know is not how do you break the user base down into different levels of expertise, but overall, how many are able to do this and how many are likely to do this. Ideally, you would have data, as I have said, and ideally you then can have a competition economist to comment on it. Short of that, you can look for other sources of evidence, maybe in comparable markets, those sorts of things. But if we don't get there on the data front, we will be back to you on the behavioural scientist front because there's another way of answering this question which is, in a sense, a common-sense point, at least for someone like me who is not very tech-savvy, but it's not common sense in the sense that it's an issue in these proceedings. But to say when you have something pre-installed and when if you try to sideload a different app store you are faced with these sorts of warnings, we know from behavioural science that consumers would tend not to proceed with their attempts to download an alternative.

So that would be a different kind of evidence and we'll be there if we are not going to get there on the data.

THE CHAIR: Maybe I have focused on the wrong bit of the issues. I am struggling with when it says how likely it is that a user will sideload an alternative, we sort of know the answer to that question, don't we, because we have objective data about the number of people who do or don't?

MR JONES: I think that's the question. We don't at the moment have the data that would enable you to answer that straightforwardly, actually, so that's in a sense the first question: can we get the data in order to be able to answer that kind of question?

MR FRAZER: So, if you have data on incidents, that's for the competition economist, and if you are concentrating on likelihood, that's where you say you go to the behavioural scientist; is that correct? So, if you have data, it's how many have --

MR JONES: I think that's broadly right, sir.

MR FRAZER: And if you don't have data on how many have, you want to rely on some sort of characteristic of a group of users and then apply that learning somehow to the group of relevant users.

MR JONES: Yes.

MR FRAZER: Okay.

THE CHAIR: Thank you.

MR DRAPER: Unlike Mr Jones, I had the pleasure of being here at the last CMC and some of this does feel a bit like Groundhog Day. The problem the Tribunal faced with the submissions made at that time by Mr Hoskins was that every time he promised to show you in the pleadings where it was these behavioural issues arose, what he was able to show you were actually objective questions. They were questions focused on what happens, not why might a person act in a particular way. And we have seen that again with the references today.

So, the context of course is important because the Tribunal will want to know why it should reach a different decision on behavioural issues today than it did last time this came up. What the Tribunal essentially concluded last time was that they hadn't been persuaded, you hadn't been persuaded by reference to the pleadings that there were behavioural issues as opposed to objective questions as to the extent and degree that this conduct occurs in practice.

The Tribunal, if I may respectfully say so, really identified that distinction with some precision, which the question is: does it happen and to what extent? The question is not: why might a particular user - category of user would be more helpful - behave in

a particular way? If you are answering that second kind of question, what you need, and the *Le Patourel* case we looked at at the last CMC tells you this is what you need, is you need a pleading as to the objective characteristics of this decision maker said to be relevant to their decision taking, and you would unsurprisingly then get a response from the defendant.

So say in this case if the Class Representative had really wanted to suggest that there is some kind of aspect or characteristic or attribute of users of GMS devices that means - say, for example, they are risk averse, they just really hate doing anything where there is a warning; or say they are technologically unsophisticated, so as soon as they have to do more than two clicks on their phone, they become intimidated. If they had that pleading, we would have responded to it, and you would have questions as to the characteristics of the relevant user group and how those affect decision making.

That's not what we have. When you were shown the pleading, you were shown questions like: to what extent does sideloading occur. Unsurprisingly, Google is quite interested in questions as to where people get their apps, so that would be addressed through disclosure and witness evidence.

So why I'm focusing on these points is I really do say we are back where we were at the last CMC and one important aspect that hasn't changed is we are not really objecting on the basis of who gives this evidence. It's been put in under the expert economist and as Professor Waterson said at the last hearing, well, you don't have two discrete silos of economists and behavioural scientists or even behavioural economists, obviously there are people who more than dabble. Our problem is not who is supposed to be giving this evidence, it's whether these are issues that have been articulated on the pleadings and arise for resolution. As I have said, the issues that arise for resolution are objective questions to be answered by reference to data.

I am not going to turn up more pleading references in the interests of time but for your note, where this all eventually comes out is in the Reply at paragraph 47(c). I should take you to that one reference and then I can deal more briefly with what it's referring back to because we've seen most of them. That's at core bundle tab 38, page 4663. Sorry, I'm getting there slower than you are, forgive me.

This is where it all eventually ends up is the pleading references there, many of which you have been shown from Google's Defence, Google has put to proof as to both the ability of OEMs and/or developers and/or users - and it's users we are interested in here presumably - to exercise the options set out therein and the extent to which they do exercise those options.

But this is the high watermark on their case. They've seen Google plead, they can and do do it, and obviously from Google's perspective the fact that these things are well possible is evidenced by the fact they happen. So, you look at the degree to which these things happen and then you say ability is inferred from the fact of it happening.

All we get is that we are put to proof on the extent to which these things do in fact happen so that sideloading happens. That's where we've ended up. There's no dispute between us turning on things like degree of risk adversity or degree to which people have the technological expertise to do these things.

Stopping there, if we did have questions about technological difficulty or sophistication required to do these things, you'd see those arising under issues for the other experts and that's where you'd get useful evidence. You've be told whether or not it's easy to go through these steps on a mobile device.

As I've said, those pleading references to which the reply refers, I will just give you a brief summary of them. 103(f) to (g) in the Defence are about actual conduct. Google uses the formulation can and do but as I have said, you know they can

because they do. So, the real question is one of extent and degree of actual conduct. It's an objective question, data will answer that.

Then 104(a) to (c) referred to in the Reply is not actually about consumer behaviour at all, it's about other app stores. Then (e) to (f) app stores can be obtained via sideloading, that's our pleading there, that's not in dispute. (e) is about the fact of it being possible to sideload, and then (f) raises the question of the extent to which it happens. So again, objective evidence, data.

We are talking about prevalence of sideloading and in my learned friend's submissions, he kept saying how many was the point. Well, how many is an empirical question, it's not a question to be answered by engaging in what would have to be speculation as to the characteristics of these users and how that might affect their conduct, and therefore in some abstract sense how likely they would be to behave in a particular way. We don't have pleadings on that and if we did, one can imagine we might have a substantial dispute as to the characteristics of these users. But it's just never happened.

So, all the references my learned friend took you to were about actual conduct and the extent of that conduct. And Madam Chair, if I may say so, you entirely put your finger on the point on the user point. My learned friend scoffed at it but it's a point we made in writing and it's actually quite powerfully illustrated for this reason: when the Class Representative first put forward these behavioural issues in the table, they didn't use the word "user", they used the word "typical GMS Device user" and we objected on the basis that there is no pleading as to the objective characteristics that would make someone qualify as typical. So effectively there's no grist for this mill and we objected on that basis.

Just by deleting those words "typical GMS Device" and sticking with "user", they don't obscure that problem, which is there is no pleading and no dispute between us as to

the characteristics of these people that might be relevant to a theoretical assessment as to their likely conduct, which is what they are getting at with this behavioural science. They say let's ask what they might be expected to do, and we say on the pleadings the question is what do they do.

At the last CMC, the panel captured it, and I can't recall whether it ended up in the ruling or it was just in observations, that these aren't *why* questions which rise on the pleadings, they are *what* questions: what conduct, not why has it engaged in it?

So, I come now - those are my submissions on the issues themselves. Now as to who addresses them, in a way a bit of a spanner has been thrown in the works because my learned friend says we are planning to make an application for behavioural scientist again or we might, it depends. But the Tribunal has to deal with this on the basis presently before you, and the proposal presently before you are that these issues go in for the expert economist.

I've explained why they are inappropriate. If my learned friend does make an application for a behavioural scientist, they will have to explain why the position is different on that basis. But in my respectful submission, it's very hard to see how it possibly could be because as I have said, the objection isn't the person giving this evidence or their qualifications or experience, the problem is these issues don't arise in this case. They have not been articulated on the pleadings and those issues that have been articulated are objective questions.

So really my learned friend can obviously make his application, but it's destined to fail because this isn't a question of which expert, it's a question of whether the issues are issues reasonably required to be the subject of expert evidence. Going back to the test we discussed at the last CMC, one doesn't just have to show it might be nice or interesting, one has to show that expert evidence on these issues is reasonably required.

In a way, my learned friend gives that point away by saying: well, we'll wait and see whether it's covered in the disclosure and in the data in particular that's apparent from that disclosure. That means he doesn't have a basis for his application. He can't tell you it's reasonably required because he says he'll have to wait and see. So, on that basis, we say those issues can't be in the list of issues and you have my submissions as to whether it would be a good idea for my learned friend to make his further application or not, but of course they can.

MR FRAZER: Do I understand you correctly to say that if these questions had been phrased in terms of prevalence rather than likelihood, you wouldn't have objected to them?

MR DRAPER: We wouldn't have said they don't arise on the pleadings; we have said they very much do arise on the pleadings, but they are not questions for an expert to determine by asking him or herself in the abstract how likely it is, they are just objective questions. So, they're not behavioural questions and not questions requiring expert evidence. They do arise on the pleadings, but they don't arise as matters for expert evidence as to behavioural issues, whether from an economist or from a behavioural scientist.

MR FRAZER: Yes, thank you.

PROFESSOR WATERSON: So, if it was what proportion of people do this, then you would have no objection?

MR DRAPER: No, certainly I have no objection to the idea that it's an issue in the proceedings --

PROFESSOR WATERSON: Yes, exactly.

MR DRAPER: I suppose -- put it this way: if they'd put that in the list of issues for the economist, we would have probably said it's caught by one of the issues of analysis above it because it's essentially a data input to the economist's consideration, rather

than an issue for them specifically. But we certainly wouldn't be able to object on the basis that it doesn't arise on the pleadings. That is the issue on the pleadings. The issue on the pleadings is how many or to what extent, so quite - yes, I entirely agree.

THE CHAIR: I think my colleagues here on the panel have hit the nail on the head from my perspective. If you took out the issue subcategory behavioural issues, do you accept that data relating to incidents is relevant to issues the economic expert is going to be addressing?

MR DRAPER: Yes, very much so. Essentially to the extent the economist is carrying out the kind of analysis which Professor Waterson referred to and saying there are, to a greater or lesser degree - they say greater, we say much lesser - some impediments to pursuing alternative app stores and sideloading, the economists are going to have to reach a view on the degree of that for the purposes of all sorts of elements of their analysis. I would cavil slightly at the idea that it's a distinct issue, but I would accept it's a factual matter falling within the scope of the experts' consideration. Yes, just to give some comfort perhaps to my learned friend and those behind him, Google does anticipate disclosing a lot of data that goes to these issues. As I said earlier, unsurprisingly we care about these matters, and we keep a close eye on them. We say for good reasons, they'll say for bad, but the point is we are not unaware of what's happening in relation to apps.

THE CHAIR: So, if we looked at the list of issues above issue 15, so 1 to 14, which issue that the expert economists are going to be addressing do you say your data falls under, if you see what I mean?

MR DRAPER: Yes.

THE CHAIR: I just had a quick look and I --

MR DRAPER: Yes. The most obvious place is issue 7, 9 probably as well. Because the question really here is if you take the conduct at the highest level of generality, the

conduct alleged is essentially we put in place impediments to the pursuit of different means of obtaining apps, different means of paying for content on apps. That's the case really against us.

So, when the experts come to consider the effects of the conduct -- just take an extreme example: if sideloading were occurring in relation to 99 per cent of users, my learned friend would be withdrawing the bulk of their claim upon that disclosure. If it's 2 per cent, we'd be in trouble as regards the effects of these supposed restrictions.

Just to give a crude example, that's the kind of thing, that's the reason why it's material to the expert economist analysis is they are asking what is the effect of these measures, and they are going to judge that by the effective data.

THE CHAIR: Thank you.

MR DRAPER: Those are my submissions.

MR JONES: When one asks what are the effects of the restrictions, there are going to be two stages. There is going to be the objective numbers stage, if you want to call it that, and let's take 2 per cent as an example. Let's say that we see on the data 2 per cent of users sideload, so we have that data. What will the argument then be? Well, Google is going to say - and we know that because they showed you this in the pleading - Google is going to say, yes, those 2 per cent have freely chosen to sideload and the other 98 per cent have freely chosen not to sideload and to use Google Play. They will say it's nothing to do with the so-called restrictions that 98 per cent of people are using Google Play, it's just because it's a much better competitive offering.

That is the paragraph I showed you when I said this is really critical because this is all it comes down to.

THE CHAIR: Remind me of the paragraph number.

MR JONES: Was it 104(h).

THE CHAIR: Thank you.

MR JONES: So you'll have 2 per cent moving or sideloading and Google will be saying everyone is making their free competitive choice and we are just much better than everyone else, and the Class Representative will be saying no, no the reason 98 per cent are not moving across is because there are all these restrictions and they would need technical expertise and they would need to overcome all these warnings they face, et cetera, et cetera.

So, the question then is going to be: just faced with that number, 2 per cent, how would you decide who is right? Is it because of all of those people making a free competitive choice, or is it because of the restrictions that 98 per cent are not sideloading?

I simply don't understand the submission that that is not a pleaded issue and the only thing that's pleaded is something about proportions because - can I just show you again because it really is extraordinary to hear it put that way because it's so central to the case. Can I just remind you back in page 2013, I am in - where am I? - in the core bundle, yes. Core bundle page 2013, I took you through these paragraphs which are all about saying it's extremely difficult - 63 - it's extremely difficult to uninstall; 64 it requires technical knowledge; 65 telling them about the warnings; 66 blocking auto updates and problems with not having the ability to switch or to update. Then I showed you forward in page 2036 - actually this passage starts at the previous page 2035, bottom of the page:

"Moreover, while GMS device users can technically “sideload” a competing app store [I think my learned friend would say can and do] they can and do technically sideload a competing app store on to their GMS devices without using a Play Store, a significant number will not do so and ...(Reading to the words)... […] either because they do not know that sideloading is possible or because they are unable/unwilling to go through the process of doing so."

I took you through all the various references to these matters in the pleadings and they

are extensive, and it really isn't going to be enough to just know the numbers of people who sideload or the numbers of people who uninstall. That was why I was quite careful when I was saying the competition economist might be able to do this, I was quite careful to try and give an example of getting data which shows -- I think I was talking about the situation where you have a pre-installed app store and you want to know how many sideload a different app store, and I said yes, it would be very helpful obviously for the competition economist to know the data, how many do sideload. But I was very careful to go on to say he'd then need to be able to contrast to some sort of alternative world, essentially, because you do have to get to the why, it's not just going to be enough to say it's 2 per cent or it's 5 per cent or whatever. You are going to have to then somehow get to the next step in order to answer the effects question, because the effects question is what is the effect of the restrictions? Simply knowing the numbers doesn't tell you whether that's the effect of the restrictions, or whether that's the effect of Google having a world beating offering which no one else in this competitive marketplace can match, which is what their case is. So, you actually are going to have to go beyond it.

Now in the issues we've listed, the kind of *why* question to a certain extent is implicit in - sorry, in the first three issues, 15, 16 and 17, but it's then drawn out even more strongly in 18, which is framed by reference to the effects. What's the effect on the likelihood of sideloading of all of these different features, which as I showed you in the pleadings, they are the features we are talking about.

So these are central issues and what you - I appreciate there were lots of different aspects to the discussion at the last hearing and I have said to the extent there were concerns about how having two experts who would interrelate to each other and what expertise the behavioural scientist would have and those sorts of points, we will pick them up when, if, we resurrect that application.

But what was also said in the discussion, which I was very, very careful about was that these might be issues which if there's sufficient data a competition economist can deal with them, and we agree with that. And it was said, and this is the point which was actually made in your ruling on the application, that the real problem from the Class Representative's point of view was they hadn't defined the issues with sufficient precision. And true it is that Mr Hoskins was doing his best on his feet to find the anchors in the pleadings, but that's why when we then had the issues process, we have actually defined them with precision - I have shown you where they are in the pleadings. It's not the case that I have come to you saying, wait and see whether these issues are live, which I think is how it was characterised.

If one wanted to characterise my position unfairly, one could say, wait and see which expert we want to have address them. That would be a sort of unfair but broadly accurate characterisation. But as I have said, we do need an expert to address them. They are expert issues for that reason and at the moment, we are going to put them on Mr Singer's plate, but we'll have to see where we get to.

THE CHAIR: Has this formulation of the issues been run past Mr Singer?

MR JONES: Yes.

THE CHAIR: So, he considers if this issue was put in that form, he could answer it?

MR JONES: Yes. Subject to the data point, but yes.

THE CHAIR: Yes.

PROFESSOR WATERSON: Yes, and if -- I repeat the point that if, I am assuming they will, if Google has information on partial attempts or failed attempts, I think that would be very useful for your expert.

MR JONES: Yes, sir, I entirely agree with that.

Madam, that is that point of principle.

THE CHAIR: Yes.

MR JONES: Now we have the other issues on the table for which I need to hand over to Mr Kennedy.

MR KENNEDY: Madam, by my count, there are eight issues which are not agreed. Mr Draper may have nine, but he'll be delighted hear there's one more that we can agree --

THE CHAIR: Excellent.

MR KENNEDY: -- which is IT security expert issue - I am going to get it wrong now - issue 4, I believe, which is on page 13. If you see column A, you see, "as to app stores" and then you'll see some blue text and some green text and then at B some more blue text. We can now agree the green text and do away with the blue text. We'd almost got there just before we restarted, but just so Mr Draper knows we have got there, we can agree Google's text there. So, there'll be an A, B and C, with the A being comprised of green text you can see there.

That brings us down to issue 8, madam. I am conscious of the time and somewhat in your hands as to how you wish to take it. We could go issue by issue with me going first and Mr Draper going second, or I could try and canter through all eight and then Mr Draper doing likewise, really whatever is most convenient for you, madam.

THE CHAIR: I am also slightly conscious. As soon as you mentioned time, someone might look at me rather urgently and tell me the transcriber might need a break.

MR KENNEDY: It occurred to me as well. I don't know what the position is. I think we are happy to carry on, but obviously if that doesn't cause discomfort to anyone else.

THE CHAIR: I wonder if we should take a five-minute break now for the transcriber. We are able to sit a bit later if that suits the parties.

MR KENNEDY: If we came back at 4.00, that's eight minutes by my time, would that be --

THE CHAIR: Yes. We'll come back at 4.00 and then we'll run through,- I think your suggestion is you go through all of your points in one go will be more time efficient, and then Mr Draper follows.

MR KENNEDY: I am grateful.

THE CHAIR: So, we'll come back at 4.00.

(3.53 pm)

(A short break)

(4.00 pm)

THE CHAIR: Yes, Mr Kennedy.

MR KENNEDY: Madam, as I said, there are eight issues and if I could ask you to take up again Annex A. I want to look just for context quickly at competition economist issue 7, so it's page 2 on the lefthand side, you see exclusionary abuses. Then you see issue 7 is, "[w]hat is the effect of the conduct pleaded at paragraphs 106 to 150 of the claim form?" That's the various exclusionary abuses. If you look down to the second paragraph, the second part of the issue, you see:

"[f]or the avoidance of doubt, the experts may consider issues of ...(Reading to the words)... in terms of efficiencies (issue [12] as part of this issue [7])."

That provides some context for where I am going next which is issue 12. That is agreed and this language "for the avoidance of doubt" was added and we reached agreement. Turning then to issue 12, again a competition economist issue, and it goes to the issue of objective justification. At the bottom of page 3, you'll see some blue text, which is the Class Representative's suggested language. Then over the page, you'll see some green text. If we just ask you very quickly to read it to yourselves rather than me going through it.

THE CHAIR: Yes. **(Pause)**.

Yes.

MR KENNEDY: Madam, we say our text is to be preferred for two reasons. The first is as you can see from the comparative length, our text considers each of the limbs of the legal test that's relevant to the question of objective justification or efficiencies. It tracks the language used at paragraph 30 of the Commission's 2008 Guidelines, it's copied and pasted out from there and ought not to be controversial for that reason. We say that the competition economists may well have evidence that goes to each of the limbs, and it will help the experts structure their reports and in due course will help the Tribunal because they will be able to find the relevant evidence on each of the sub issues more quickly.

The second issue, Madam, and the second reason we say our formulation is to be preferred is we say it tracks the pleadings more closely, or rather, it's tied back to the pleadings more closely. We say it's an issue that arises in a number of places and is actually of fundamental importance. If I can ask you to turn over to the top of page 4 and look at the green text.

THE CHAIR: Yes.

MR KENNEDY: What we see is:

"Is the conduct referred to [in Issue [7]] objectively justified; [and /] or does it give rise to efficiencies …, in particular as alleged" in the following paragraphs of the defence.

It seems minor, madam, but it's the words "in particular" that we object to. If you contrast our formulation -- apologies for jumping back and forth - -you see that our formulation is articulated by reference to does the "conduct", the impugned conduct, give rise to the efficiencies that are alleged or are pleaded in the following paragraphs. We say there are two reasons why the issue needs to be articulated only and narrowly by reference to the pleadings. The first is that we say it's obviously correct as a matter of principle the list of issues is necessarily determined by reference to the parties' pleaded cases. We just heard Mr Draper objecting to the proposed behavioural

science issues on the basis that they don't arise, on his view, on the pleaded case. We say,- let me put it this way: what's good for the goose is good for the gander and if there's not something identified in the pleadings as efficiency, then it ought not to be in the list of issues, either expressly or impliedly through the use of the words "like", "including", or "in particular".

And setting aside the question of principle, we say it's obviously required by fairness. The class representative has to put her expert reports in first, it's sequential in this case Madam, and as the list of issues demonstrates, our expert may well address the question of objective justification in their first-round report, they'll obviously take a view on that in due course. -But if we don't know what case that evidence is required to meet because there's a threat or suggestion that matters outside the pleaded case will be included in Google's expert report - which we won't see at the moment until September of next year, possibly November of next year, depending where we get to on the timetable - then we obviously don't know what target we're shooting at and that's clearly not fair to my client.

Late notice of precisely what the case is we are meeting may also create issues regarding disclosure which we can't anticipate, and which if they arose for the first time in November 2024 could well derail the whole trial timetable. We say if there are issues that go to objective justification or efficiencies that Google knows now don't appear on the face of the pleading but they do want to lead evidence on, the proper course is for them to do a draft amended defence, provide that us to in the ordinary way - either we'll agree or if we don't agree we'll come to the Tribunal - and then the list of issues can be amended to refer to paragraph 108A, B or C or D and so forth. But we say at the moment on this issue, and there will be others that I will come to in due course, we say it has to be defined expressly by reference to only those paragraphs of the defence and only those efficiencies or advantages/benefits

identified therein-.

THE CHAIR: Is there another more fundamental issue of fairness, which is that any expert looking at the question they are being asked needs to know exactly what they're to have regard to in answering the question. So, for example, you've suggested it might be unfair because Google's expert may say something further that's not referred to in the pleading in their report which is sequential to yours, but actually your expert needs to know exactly what aspects they are meant to be looking at from the --

MR KENNEDY: Precisely, Madam, and that's why we agree and that's why our formulation is: does the conduct referred to give rise to those efficiencies, then there's no ambiguity about either what conduct refers back to paragraph 7 which identifies the relevant paragraphs of our claim, so that circumscribes the impugned conduct they have to consider, and then to consider whether or not that particular set of circumstances gives rise to anything not only to any efficiencies, which is what Google's formulation allowed them to do: it allowed them to do some blue sky thinking, come up with better or different examples to what Google's counsel came up with when pleading the defence and chuck them in.

THE CHAIR: Or trawl through the pleading and see if there is anything else that might amount to --

MR KENNEDY: Precisely. So, we say for all those reasons, it has to be tied back to the pleadings. We don't say Google is shut out from introducing new matters, but it has to go pleadings, issues, evidence, in the ordinary way and we say that's clearly correct. Madam, hopefully that will allow me to take some of the later issues more quickly because the same issue arises, and I don't necessarily need to turn up the pleadings in order to show you that.

The next issue that arises is forensic accountancy, issues 1 and 2. It's at the bottom of page 6, you'll see the green text. Again, if I could ask you to read the green text at

the bottom of page 6 and the green text at the middle of page 7, and actually, in any event, the text in issue 3, -so bottom of page 7 and over on page 8, if I could ask you to just quickly read those-. **(Pause)**

THE CHAIR: Yes.

MR KENNEDY: Madam, you see we object to issues 1 and 2 which essentially ask the experts to address the question of methodology as a discrete issue:

"What is the appropriate methodology (or methodologies), if any, for assessing the profitability" of the Play Store and what are the limitations?

Our position is quite simple: we say that questions of methodology are simply not discrete issues of the type that go into a list of issues of this kind. We accept of course that questions of methodology will arise in the context of the expert reports, but that's true of many of the expert issues. I won't take you to it, but if we look at competition expert issue that goes to the question of incidence or pass on, obviously there will be considerations of what methodology is the appropriate methodology to establish the extent to which any overcharge has been passed on to members of this class. But we don't have a discrete issue that says what is the correct methodology to identify or quantify pass on, so we say there's no reason to do anything differently here.

Madam, you might say: well, if you accept that methodology is going to arise, what's the harm in having spelt it out, if you like. We say the harm is this: if you just look briefly, there are only three issues for the forensic accounting expert, and at the moment two of them are on Google's proposed methodology and the third is the only one that actually gets into the heart of the matter, which is: what are the costs, what are the revenues, what's the profitability, which as Mr Jones was submitting earlier is at the heart of the excessive pricing analysis in this case. It's that analysis and response to issue 3 that will help this Tribunal reach its determination, and questions of methodology are incidental to that determination.

We say if the experts have 66 per cent of the issues going to questions of methodology, you may well end up in a situation where you have hundreds of pages of reports arguing about methodology, much of which might not be particularly relevant or particularly helpful, and you'll end up with not enough on the meat of the matter, if I can put it that way.

THE CHAIR: Yes.

MR KENNEDY: So, we say the presentation, it gives the wrong idea to the experts. Of course, the solicitor's teams and the counsel's teams can instruct the experts as to how they ought to be approaching these matters and give them guidance, but we say there is an obvious risk that the methodology piece starts to predominate in a way that's not appropriate.

The issue with accountancy - -so that's forensic accountancy issues 1 and 2 - and we say essentially, it's not necessarily they can go completely. You'll see in blue our proposed issue 3. There's only a very small- difference between the parties on issue 3 and it flows from the outcome of your decision on issues 1 and 2.

THE CHAIR: Yes.

MR KENNEDY: You'll see it's the addition of the words "if there is an appropriate methodology" in Google's formulation, and I think the position is, and Mr Draper will correct me, that if they get issues 1 and 2 in, they don't require those words, but if they don't they do want those words.

THE CHAIR: Right.

MR KENNEDY: A minor dispute on that, but as I say it stands and falls with the prior question.

THE CHAIR: Yes.

MR KENNEDY: The next issue is payments issue 8, madam. It's page 10. You'll see blue text in column A:

“For transactions carried out through Google Play/ the Play Store which cannot use Google Play's billing system ...(Reading to the words)... what service or services are used by Android App developers and GMS Device users instead of Google [Play’s billing] system?"

If I can very quickly take you to the pleadings to show you how the issue arises. You'll see from column C that Google's position is that this is not a pleaded issue, as is clear from the references provided, and the reason given is that transactions that are not relevant transactions fall outside the claim for damages.

But if we can just quickly look at the pleading. It's Claim Forrm -in the core bundle, section B, tab 35, starting on page 1990. If we turn to paragraph 77, which is on page 2019 of the core bundle, we see there“

"Accordingly, under the terms of the DPP, Android App developers must exclusively use the ...(Reading to the words)... for processing payments for Relevant Purchases”"

That identifies the class of transactions for which use of the PSPPS, or the billing system in Google's terminology, is compulsory. If we go across the page to internal page 31, paragraph 81, we see:

"For the avoidance of doubt, para 2(b) of the Payments section of the DPP identifies certain types of transactions relating to Android Apps that must use … methods other than the PSPPS."

Then you see in the subparagraphs that the characteristics of those transactions are identified.

Then further down at paragraph 82:

"Accordingly, those purchases made within an Android App” asset out above [so the exceptions] “do not constitute ...(Reading to the words)... Purchases and are not covered by these Claims."

So, it's correct to say that those transactions fall outside of the claim for damages and

we don't cavil at that. But it doesn't follow in my submission, madam, that evidence about how these transactions are carried out is not relevant to the determination of the question of abuse and the question of anti-competitive effects.

We say this evidence will be relevant to two matters. The first is you will see that Google says the requirement to use the PSPPS or the billing system for Relevant Purchases is objectively justified. I don't think we need to turn it up, but that's defence, paragraph 122. Just for your note, that's in the core bundle, tab 38, page 4593.

We say that it will obviously be relevant to look at, amongst other things, transactions that are not subject to the requirement to use the billing system, the PSPPS, in order to test Google's case on that, and a good candidate for looking at transactions that don't use the PSPPS is of course non-relevant transactions, and that's what we say this evidence goes to. It looks at when the restriction - or what we term as a restriction - is taken away, what can people do and what do people do?

That's the first matter on the pleadings we say it's relevant to.

Second, madam, you will have also seen the CR's case is that absent the payment systems restriction, which is the requirement to use the billing system, Android App developers would have had the freedom to use different payment processing providers in relation to Relevant Purchases, and that's at Claim Form paragraph 150(b), which is core bundle page 2044 again, no need to turn it up.

Again, we say evidence about what's done in respect of non-Relevant Purchases in the actual world sheds some light on what might have happened with Relevant Purchases in the counterfactual world. So, we say although it's common ground that we don't claim damages in respect of things that were not subject to the rule, it's nonetheless the case that evidence about how those transactions are structured is clearly relevant.

As I say, Madam, column C, Google says it's not a pleaded issue, I have dealt with

that point. The second point made is this, as in this issue is also reflected in the formulation of issues 2 and 3. If we go back up to page 8, and we'll see these issues 2 and 3, and issue 2 is:

"How do billing/payment systems operate in the context of the purchase of an app or additional functionalities, digital content or other benefits within apps [so these are all digital transactions]" and "what (if any) are the features … of [certain] digital … transactions … that are relevant to [designing a payment system]?"

Some of those categories of purchase that are not Relevant Purchases are non-digital transactions, so we say that evidence wouldn't clearly fall within the scope of issues 2 and 3 and we don't want to run into an issue where it's said that evidence on these nondigital transactions is not admissible because it doesn't fall squarely within issues 2 and 3.

Madam, that's payments, issue 8. The next one on our list was IT security issue 4.

THE CHAIR: That's the only issue in dispute on the payments expert?

MR KENNEDY: Let me just check, Madam. I think that's correct, though, it's the only one on my list. Yes, that is correct.

THE CHAIR: Right.

MR KENNEDY: So, then we are into IT and mobile security. As I said, a late dropout at 4, which was marked in green but now the green can become black. Over the page to page 14, this is sort of a reprise of competition issue 12. We are back to objective justification. If I could just ask you to read bottom of 14, the blue and the green, and over on to 15. **(Pause)**

THE CHAIR: Yes.

MR KENNEDY: Two issues. As to the introductory wording, the objection from Google is that essentially the blue text presupposes that the conduct described at those paragraphs of the Claim Form does exist, whereas their formulation only refers

to conduct as found by the expert. Of course we say there's no need for an expert to consider conduct they find doesn't happen. But we think that the introductory wording that refers clearly to the paragraphs of the Claim Form again clearly delineates what conduct the experts are required to consider. If they find some or all of it doesn't exist, that falls away, but then they go on to consider the question of the benefits and efficiencies said to arise from that subset of conduct. So, we say this has the benefit of clarity, and assists the expert in addressing the relevant matters.

Then when we get into (a) the difference is much the same. As I said, it's competition expert - competition economist expert issue 11. You'll see from the blue text we say: “does the alleged conduct [referring back to the conduct of the introductory wording] provide the advantages/benefits/efficiencies alleged at paragraph 114 of the Defence?” So again, it's specifically those benefits, those efficiencies.

By contrast, we see in the green wording:

"What are the [open-ended] advantages/ benefits/ efficiencies … of this conduct, on the Android ecosystem and its participants including" - again widening it further.

Then, over the page:

"In particular as alleged in paragraph 114 of the Defence", and we say that's not the proper way to approach this.

Further down the page, Madam, security issue 9, it is the same issue again. If I could ask you very quickly to read 9(b) in blue and then over the page in green.

THE CHAIR: Yes. **(Pause)**

Yes.

MR KENNEDY: Madam, if I can have just one moment to find a paragraph of the Defence which I would like to show you. It's starting at paragraph 96 of the Defence, which is in core bundle tab 38, page - with apologies, Madam, page 4579, top of the page. You can see the final sentence there:

"The MADA/EMADA is in any event objectively justified, and / or its advantages ...(Reading to the words)... outweigh any disadvantages (which are denied) in terms of efficiencies which also benefit consumers."

Then if we could scroll down to 108, which is 4585:

"Further or alternatively, as to paragraph 127 [of the Claim Form] … supply of the Google Play Store ...(Reading to the words)... the GMS suite and Google Play Services is objectively justified and / or …[et cetera, et cetera]… which also benefit consumers."

Then we get particulars of that allegation or that averment:

"The GMS Suite apps … form an important part of ...(Reading to the words)... to users from the moment they first activate them, ensuring a consistent and positive 'out-of-the-box' experience for users."

Over the page:

"Which also reflects the ongoing competition between Android devices and Apple ...(Reading to the words)... value to users."

THE CHAIR: Yes.

MR KENNEDY: Then there's averment about other people doing similar things.

It's on that basis that we say in the blue text at 9(b) that, and it's over the page, the proper framing of the issue is about benefits, if any, provided to GMS device users. By contrast, what we see in the green text is the expert being asked to consider "advantages/benefits/efficiencies, (if any), to the Android ecosystem, so to the ecosystem itself seemingly. And its participants, including users, app developers, OEMs and Google. We say there's just no mention in either of those paragraphs of app developers, OEMs and Google.

It is said, you can see this in column C, that because paragraph 96 makes reference to the MADA and the EMADA and the MADA and the EMADA are agreements with

OEMs that that somehow pulls OEMs into the equation. We say that's obviously wrong. The MADA and the EMADA, or rather certain obligations arising thereunder, are the complaint of conduct. So that defines the conduct that needs to be justified but not the category of persons that are said to benefit from the conduct in question. So, we say that goes nowhere.

It's also said that, at 96 and 108, there is a reference to efficiencies arising also to consumers or rather benefits that also benefit consumers.

We say that the only particulars -- and I showed you this at 108 -- given of those alleged benefits are benefits to users. If there are other benefits that fall within this that are not pleaded, they ought to be properly particularised, we will consider them and if they end up on the pleadings they can go into the list of issues. So, we say that it's not enough that the pleading is in open-ended terms. It's only the particulars that are given that are relevant for present purposes.

That is security issue 9, Madam. I think that takes us to the app and/or digital content expert, starting at 17.

THE CHAIR: Yes.

MR KENNEDY: What we see is that everything is agreed up to 11. On page 18, if I could just ask you to read 11 in blue. There's no green text because Google says simply that they don't think this ought to be in.

THE CHAIR: Right.

MR KENNEDY: The objection, Madam, is this falls outside the field of expertise of the Class Representative's expert. But if we just have a very quick look at the pleadings, and actually they are paragraphs that Mr Jones took you to, I am just going to take them quickly - Claim Form paragraph 124, which is core bundle, tab 35, page 2035 - what we see is the averment that:

"The bundling of the Play Store with other Bundled Apps is thus capable of restricting

competition in that it provides Google with a significant competitive advantage ...(Reading to the words)... cannot offset the averments as to what Android app stores and providers, i.e., developers of android app stores, can or cannot do in the circumstances of the case."

I don't think we need to turn it up, but at Defence 104, which is tab 38 of the core bundle, page 4583, we see that that allegation is denied. So, it's clearly an issue on the pleadings and an issue that is joined as to whether or not other developers of app stores can offset the advantage that Google has.

If we could just take up the Order giving permission, which obviously defines the scope of the expertise in question, which is in the salient documents bundle, tab 4. It's internal page 2, bundle page 6. We see that permission was granted for one expert witness with expertise in the development, distribution, monetisation and use of apps and digital content for and on devices and on platforms.

The App Store is simply one form of app, Madam. I think that is uncontroversial. So, we really struggle to see how this doesn't fall within the expertise for which permission was given.

Madam, I think it may -- the real objection may be about the ability of the Class Representative's expert to speak for other developers, developers other than themselves or developers in general. We see that in connection with issues 15, over the page, on page 19, issues 15 and 16. We see this in column C.

THE CHAIR: Yes.

MR KENNEDY: This issue concerns Google Play's billing system. The expert cannot provide evidence for all app developers, and for that reason it's said that the issue goes beyond the permission granted.

Similarly, over the page, on 20, we say:

"In particular, the ...(reading to the words)... cannot provide evidence on behalf of

users or developers for Google."

Insofar as the objection not only to 15 and 16 but also to 11 is that the Class Representative's app expert can't give evidence about what app developers, including developers of app stores, can do generally or cannot do generally, we say that is simply wrong. We say that it's in the nature of expert evidence that the witness speaks to matters which are outside their direct perception. That is what distinguishes the opinion evidence given by an expert from the factual evidence given by a factual witness. The authorities, Madam, were canvassed before you at the last CMC. I wasn't there but I have read the skeleton arguments and I have read the transcript.

So, insofar as it's an objection in principle, we say it's wrong as a matter of principle. Insofar as Google's position is that this particular expert, our particular expert, is not competent to address questions of what competing app stores can do - whether there's demand for alternative payment systems, that's issue 15, or whether the requirement to use the Play Store and the PSPPS together gives rise to the benefits alleged - because of some shortcoming in his particular expertise, we say that should be explored in cross-examination in the ordinary way. It's not an objection to this issue being included in the list of issues when it's squarely a matter that's on the face of the pleadings, there is an issue joined, and we say it equally squarely falls within the scope of the expertise for which permission has been granted.

Madam, I don't need to take up much time on 15 and 16 because it's essentially the same issue. We'll look at them briefly. 15 is: “Is there demand from Android App developers for alternatives to the [billing system, the] PSPPS?” So that's the question about app developers and whether or not they would like to be able to use something differently, let me put it that way.

THE CHAIR: Yes.

MR KENNEDY: And, likewise, it's said at paragraph 122 of the Defence that the

requirement to use the billing system, the PSPPS, provides developers “with a safe, convenient … et cetera … way of [providing the relevant[purchases.” Again, we say that's clearly a matter that this expert can opine on and one that falls within the scope of the permission.

I think that deals with 11, 15 and 16. We say that the ‘all developers’ point is simply no objection at all. You will be pleased to hear that brings us to the end, app developer issue 21. The issue is: “Does the Commission” -- I suppose it could be service fee/Commission – “give rise to the benefits alleged by Google at paragraph 142 of the Defence? Could those benefits be achieved by other means …?”

If we just have a very quick look at the Defence, 142, that's core bundle 4606, what we see there is the averment that:

"Further, or alternatively, any disadvantages to the ...(Reading to the words)... lower fee."

What is said, you can see in column C, Madam, is that this goes beyond the permission granted:

"The expert is not in a position to provide expert evidence on such matters which fall outside their field of expertise."

No explanation is actually given for why that is the case, but I've shown you the Order.

"Expertise in development, distribution, monetisation and use of apps and/or digital content for and on / or devices or platforms."

If we go back to the pleading:

"Benefits to consumers, in terms of the prices and terms of the Google Play Store and/or … the acquisition of other apps and / or digital content from the Google Play Store at no or lower fees."

We say that's again squarely within the scope of the permission granted.

So, we say again that, if it's a question of principle, it's wrong. If there's some specific

alleged shortcoming on our expert's expertise, then that's a matter properly for cross-examination in due course.

Madam, you will be pleased to hear that those are my submissions, unless I can provide any assistance on any of those issues.

THE CHAIR: Just on a couple of issues there's reference to it already being covered by the economics expert, so that is in particular in relation to issues 15 and 21.

MR KENNEDY: The app developer has been covered already.

THE CHAIR: Yes.

MR KENNEDY: Madam, our answer to that is that it may well be the case that the same issue or sub-issue is addressed by two sets of experts. So, to take issue 15, which is the question of demand --

THE CHAIR: Yes.

MR KENNEDY: -- we say it's hardly surprising that that may be addressed by the competition experts, who will look at evidence in public sources or in studies for demand by Android App developers for alternatives to the PSPPS, and also look at the question of the supply of alternatives when they are considering under issue 7 what the effects are, because of course what they will need to do is they will first need to define the conduct and then look at the question of separate products as part of the tie-in analysis, and then they will come on to consider the effects of those, that conduct. But the evidence that we'll get from the app expert will of course be essentially factual evidence about what participants in the market are doing and we say that that will feed into the competition experts' analysis. Competition experts will be able to say: I've read Mr So and So's report. I understand that he has identified the following matters which he knows from his experience as a developer or an expert on developers that there is demand from A, and B and from C for alternatives. In addition, I have identified the following information from, wherever it is, and therefore, and then they will give

you, their opinion. So of course, they are not hermetically sealed.

THE CHAIR: Yes.

MR KENNEDY: It's quite proper that certain of the industry experts, since they were billed at the last hearing, will provide information that the competition economists can opine on. Of course, Mr Singer and Mr Holt aren't participants in the market, in the relevant sense, and so we say that that is the answer, if you like, at 15 and also at 21. So there's no risk of overlap on the content of the evidence, albeit there's an overlap in the issues that call to be addressed by each relevant expert, Madam.

THE CHAIR: Thank you very much.

MR KENNEDY: Thank you.

MR DRAPER: Conscious of the time, I shall be as quick as I can. Competition economist issue 12. You will have seen both in the -- this is objective justification on page 3. You will have seen in both my learned friend's blue text and in our green text that we do both give the same pleading references. So there's no issue as to the extent to which this arises from the pleadings, save for my learned friend's point about the use of the words "in particular".

Where they come in, and I should say this now because it has relevance to other issues, is what is pleaded in the Defence is a general averment as to certain benefits and efficiencies and it is pleaded that what follows are particulars of those efficiencies but not necessarily exhaustive.

That gives rise to two things. One is of course the expert economist might have a different way of characterising or explaining the efficiencies, so we obviously don't want to tie his or her hands in the precise wording in the pleading.

The second issue is one of -- is really a matter of pleading, it's not really about the experts. Obviously, the experts' enquiries are within the bounds of the disputes between the parties. But really what my learned friend seemed to be saying is that

they wished they'd made an RFI and sought further particulars of these efficiencies.

But, in any event, the first point is sufficient in my respectful submission in this sense. The experts should be given their head on how they describe the efficiencies that arise from these aspects of Google's offering. They might do so in precisely the wordings of the pleading or they might have a different way of characterising them.

As ever with these kinds of questions, the issue is to what extent do you really want to put the experts on such a restrictive description of matters that it sort of impedes them approaching it in a way they would wish to.

So that's the point in relation to 12. If we can then --

THE CHAIR: But is there an issue that the experts need to know what conduct they are being asked to consider? So, when you say that there is a general averment in one of the paragraphs and what follows is only examples effectively, I mean the experts, the Class Representative's experts cannot guess at what you mean by that, can they?

MR DRAPER: Here we are referring to efficiencies and benefits to market participants. If it were conduct, it would be much more straightforward. The expert would be asking does this conduct -- what conduct am I being asked to opine on? Does it happen or not?

With something like efficiencies, you can see there really is room for an expert to say: here is how I think these flow through in terms of the benefit to innovation at this level of the market. Our concern is just not to tie the hands too closely in how they express that. We are not asking them to go off and find something entirely novel and out with the four corners of the dispute between the parties. It's really just a matter of giving them some appropriate discretion in how they describe things which are ultimately economic concepts we are dealing with here, they are not primary facts in the way, Madam, that your reference to conduct would be.

If it was said: what is it that's being done, I can well see that a tighter leash should be appropriate. But where it's: please describe the efficiencies that result in this market, in my respectful submission it's appropriate for them to have a bit more leeway in how they express themselves.

MR FRAZER: But you do want the experts, however, to be on the same page, otherwise you might get ships passing in the night when it comes to their final report.

MR DRAPER: Yes, of course it's a matter of degree. As I say, if we are entirely out with the four walls of how we've articulated the case, then that would be a problem. But, as I say, it may be the way that it's taken forward, given it's a concern that arises out of the way we've pleaded the case principally, is for a request for further information to be made and that would shake this out and deal with any problem about things arising late. But I am not making an application for them. I am just saying logically that's the force of the point. It's not really of course about how tightly we tie the hands of the experts, it's more a point about whether we ought to be more tightly constrained on the pleading.

If I can come then, again trying to move as quickly as I can, to forensic accounting. That starts on page 6, towards the bottom. The issue here is essentially: ought there to be made provision in this list of issues for the experts to set out, first, the methodologies that they have considered for the purposes of “assessing the profitability of Google Play” and then to discuss the “limitations” of those?

Essentially, some of the discussion we had earlier when talking about the information to be provided to Mr Dudney and the other expert shows why these questions of methodology are going to be important because when they start to dig into the data, it's apparent from Mr Dudney at least, he's not going to just rely on how Google accounts, he might want to take his own view. The difficulty that will then arise is: well, if you are not looking at Google's accounts and just, for example, assessing the degree

to which attributions are reasonable, attributions of cost, and so on, you might then come up against the issue of how do I identify costs that should be matched to revenues? If I am not relying on how this has been accounted, how can I really as an expert start to put together an assessment that properly reflects the profitability of this business on the hypothesis that I am kind of departing from how the business itself does it?

We say in a context like that, the experts really ought to be setting out early on how they think that can be done, and our expert is going to want to know not only the calculations -- that's what we get in issue 3 -- but he or she is going to want to know what theoretical approach has been adopted here, what principles have been applied, and in particular if there are several methodologies, it would be nice to know why this one has been chosen. One might say those things will be ultimately shaken out between the experts in meetings, and so on, but this really is a case where these things are sufficiently fundamental that they should be in the first-round report so that both experts know there are methodology issues they need to address.

Just to give you an example: in 3 - which is where you come to crunch the numbers, and as we say the prior question is how you are approaching that - if you look at 3(b): "What are Google's (i) costs (ii) revenues and (iii) profitability relating to: … Google Play's billing system"

and the PSPPS, which is just the Class Representative's way of referring to the billing system.

As was touched upon earlier, the billing system isn't a discrete service, so that gives rise to obvious questions of methodology. If the experts are going to be carving up what is from Google's perspective a single service or business unit, or however you describe it, they are going to have to consider from the outset and quite seriously how they do that.

So those are my submissions on 1 and 2. The only other point, just to confirm, is that my learned friend is right to say that if we have 1 and 2, then Google does not need over the page in the green text

The conditionality implied by the start of that issue 3 .

So, if 1 and 2 are in, 3 can go in without those opening words. So, 3 would then be agreed.

The next is payment issue 8, which appears on page 10. You will recall -- so the subject matter of this is, now we're all being spun round in a washing machine, just to recall where we are here. These are the relevance of transactions that are not digital transactions qualifying as Relevant Purchases within this claim, so these are purchases made through apps that are not at issue in these proceedings. You can anticipate from the way I have just phrased it what one of the points is.

So, these are things like physical goods. So, you can through an app buy things that have reality out in the world, things like food on Deliveroo. So, you are not always buying a new costume for your avatar within a computer game, you're not always buying credits to be used within a computer game, for example. You might be buying food that will then be delivered to your house through something like Deliveroo. Or you might be ordering a cab that will arrive and have a nice chunky physical form and you get in it, and it does a physical thing. So, it's common ground that these are different, and they are treated differently and don't fall within the bounds of my learned friend's claim.

The point that's made is they are not saying that these are at issue, they are just saying effectively why they are different. Given Google treats these differently, they want to know why they are different. I can understand that, but that is in fact caught by earlier issues because if you go back up to the top of the payment system section, you will see that where this expert is starting is, 1:

"How do billing/payment systems operate in the context of online payments" -- so that's just to frame it with a more general discussion -- 2: "How do billing/payment systems operate in the context of the purchase of an app or additional functionalities, digital content or other benefits within an app (i.e., in-app purchases)?"

So, as I rather crudely put it, this isn't about things in the outside world, this isn't about food turning up at your door.

But obviously in answering that question and answering the next one in particular, what makes digital transactions special is obviously going to be considered in some detail. So look at issue 3:

"What (if any) are the features/characteristics of digital goods and services transactions made via app stores … that are relevant to the design of billing systems to facilitate such transactions?"

So, it's implicit in that you are being asked why are the billing systems considered appropriate to transactions that have these objective characteristics, so that entirely meets the concern expressed in support of issue 8. And issue 8 would instead require us to all go off on a side road talking about Uber and Deliveroo and things that just don't have much to do with these proceedings. I perfectly accept why digital transactions are different in some way and why they require particular provision is covered, and it's covered in the issues I have shown you.

If I can move then to the IT and/or mobile security issues, 5 and 9.

THE CHAIR: Yes.

MR DRAPER: The first dispute, as you'll see from issue 5 at the bottom of page 14 from the blue and green text, is our drafting refers to the conduct concerning sideloading and other app stores. So that the conduct is as the expert perceives it through the process of consideration that's got you to this issue, as opposed to them just asking: let's look at the conduct as alleged in the pleadings and opine on that. We

say it's just better to give the expert the opportunity to comment on the conduct as they have perceived, described and characterised it.

THE CHAIR: Oh, so is that 3(b)?

MR DRAPER: No, sorry.

THE CHAIR: No, I am just --

MR DRAPER: That went away. I had a note on that and I confused myself with it. So, on page 13, there was an issue with 4, that went away.

THE CHAIR: Yes.

MR DRAPER: So, we are now on page 14, issue 5.

THE CHAIR: No, I am looking at that one, it's just as to the conduct concerning sideloading and other app stores. Is there an issue here that requires the expert to make findings about the conduct?

MR DRAPER: No, but if you look back up, conduct will have been covered by -- yes, it's 3 and 4. So back on page 12, 3, what of the security risk, but then (b) -- I am sorry I completely misunderstood your question, Madam Chair:

"3(b). Please describe the conduct alleged … including … [et cetera and so on, and then continuing within that issue] ... what impact does each aspect of this conduct have …?"

So what we are trying to do is take the benefit in issue 5 of the assessment that's taken place in issue 3 because the expert will have characterised this conduct, understood and explained it in a way particular to them, and they shouldn't be tied to the wording in the pleading.

Obviously, they are being asked at that earlier stage to look at the pleading and look at what's alleged, but then apply their expertise in then characterising and explaining the effects of this conduct. That's the purpose of this, it's so it flows from the conclusions under issue 3.

THE CHAIR: So, is that the answer? We just refer to the issues above that deal with conduct so the expert can say: In light of the conduct section, this is what I consider the advantages, benefits and efficiencies to be?

MR DRAPER: As to conduct considered under issue 3 or some wording like that.

THE CHAIR: Yes. But do you want them to do both, consider the conduct as pleaded -- I suppose they have already commented on it. I just wonder -- what I am concerned about, you have probably gathered, and I understand your point about not prescribing it and tying it too much to the Claim Form, is what "the conduct" means.

MR DRAPER: Yes. As to the conduct considered under issues 3 and 4 maybe would capture it because then obviously inputting into 3 and 4 are the allegations, but outputting from them is the experts' characterisation, description and the extent to which that conduct is found to have effects. We want to capture that, we want to capture the output from 3 and 4.

THE CHAIR: Okay, so maybe -- I am not asking you to draft on your feet, but that's the concern I have there, that the expert who's looking at this needs to know in that box what conduct they are looking at.

MR KENNEDY: I think we can agree (inaudible) conduct referred to in 3 and/or 4 or something. We won't (inaudible) but we can pick it up. I'm sure that's capable of agreement.

MR DRAPER: Thank you very much.

The next small point is you will see from the blue text below that it's shorter than the green text. The reason it's shorter is the inclusion in ours of -- well, two reasons. The first is that we specify the market participants that we say are the subject matter or experience the efficiencies and there's no suggestion that we've failed properly to capture those market participants caught by the pleading. We say it would assist to identify those market participants so that they can be separately considered.

So that is the inclusion of those words. The only other words that are controversial are at the end there's the comma, “in particular as alleged in paragraph 114 of the Defence”, and I have already addressed that.

Again, the point is these are efficiencies. We've described them in a particular way, but the experts should be given some latitude as to how they characterise and explain those efficiencies because it's a matter of expert evaluation.

The next is 9. This in a way is -- well, it's the reverse of a point we've considered. The pleading reference that we give is to paragraph 108 in support of our wording which refers to capture the controversial words -- sorry, forgive me just a moment. At the end of our drafting which is on page 16, we say:

"What security advantages/benefits/efficiencies [and then skipping over] provide to the Android ecosystem and its participants (including users, app developers, OEMs and Google)?"

The point made against us is essentially that if you follow the pleadings through, where you eventually get is to benefits to users.

Now that's obviously right but what you can also take from the pleading is that we have an articulated case as to why our arrangements with OEMs and the services we provide to developers benefit them. So, for example, developers obtain access to a toolkit that means they can make better apps more cheaply, quickly, et cetera. Now the experts should be considering that intermediate step, so what happens at the developer-led stage. And obviously the reason the parties to these proceedings care about it is that benefits to developers flow through to users. If you have more and better apps and if you have more innovation at the developer level, ultimately that's to the benefit of users who are acquiring and using the apps.

So, our short point on that is that the pleadings, although they ultimately sort of result in benefits to users, they do canvass how one gets there. So, as Google likes to call

it, there's a whole ecosystem that is in some respects contingent in that the benefits at one level flow through to another. Obviously if you tinker with one bit of it, then you generate problems elsewhere in the ecosystem. So that's the short point in relation to that.

If I could then go to -- I hope, I haven't missed any -- app industry expert evidence.

THE CHAIR: Yes.

MR DRAPER: The context to this, and I can only do it in thumbnail because of time, is of course we've always had real concerns about the potential breadth of this evidence. At the last CMC, the Tribunal gave, in my respectful submission, broad permission on the basis that it had not been provided with any information that would enable it to give further specificity.

What was anticipated was that this process of agreeing a list of issues would bring that focus, although when you were shown the permission it is very general. It could only be very general because you weren't given enough information at the time as to, for example, who is this expert but, more particularly, what is the source of their expertise. So are they a developer who has done 20 years in the business and is able to speak to developer issues? Are they an academic who studies, for example, the dynamics between OEMs and Google? Using examples, I am having to do so because we say there has been a failure of the Class Representative to bring proper focus because the mechanism for agreeing these issues was that each side propose the issues that they propose each of their experts shall address. As regards this expert, we are still entirely in the dark as to even the aspect or area of the market or type of market participant it is that they are able to speak to.

For all we know it could be an academic; for all we know it could be a developer. We've had to make assumptions about what it is this person is able to speak to because we are asking –

THE CHAIR: Whether the person is able to speak to the issues, that's whether or not they are truly an expert and that's something you can take issue with further down the line with, isn't it?

MR DRAPER: Yes. There are probably at least two stages. I perfectly accept and embrace the idea that we'll be able to attack any straying beyond expertise. But at this stage, the question is: is expert evidence on these issues reasonably required to resolve disputes in the proceedings? We say if there's real doubt as to whether a proposed expert can speak to this meaningfully, then it can't be reasonably required. The Tribunal is not interested in -- it would be slightly unusual that at this stage you could have those concerns, but you can here because as I say, there is an extremely broad permission and so the concern that arises is as to whether these issues are being drawn narrowly enough that one can have some confidence that useful evidence will be elicited by them.

THE CHAIR: The problem here, isn't it, is that this is setting out the issues that the industry expert is going to give evidence on?

MR DRAPER: Yes.

THE CHAIR: The Tribunal acknowledged last time round, as did Google as I recall, the challenge that is facing the Class Representative because they don't -- they are unable to get factual evidence on this very easily, so I think we expressly said that we can look at the report when it comes in and you can take pot shots at is this properly expert evidence or not at that stage. Although that might be unusual, there is this issue -- I'm not sure what you are envisaging the Class Representative does to get this evidence before the Tribunal in another way.

MR DRAPER: Much of it obviously they will get from us is a partial answer. So if I take in some of the examples, I will be able to say they will get this because it's material we have and know, obviously we are alive to that. We've agreed many of

these issues doing as best we can, given the problem we don't know who this proposed expert is. But I perfectly take the point, and in agreeing what we have, we've had regard to that issue; that we have internal expertise and internal knowledge and the Class Representative has none. So, as you can see, we've agreed quite a lot of the issues which we think do address that imbalance; and where we've cavilled and pushed back is where it seems what's being invited is speculation that's not going to help.

So, issue 15:

"Is there demand from Android App developers for alternatives to ..."

And then PSPPS is used, but it means the billing system. And as was suggested to my learned friend, the expert economists are obviously going to have to address that, an aspect of their consideration of the market dynamics, and of course there'll be disclosure from Google in relation to it; that we are counterparties to these app developers, some of them really like everything we do, and others take issue with some of it and wish they had more freedom, in particular, unsurprisingly, to pay a lower commission.

So, there will be objective evidence coming from our disclosure in relation to this and the economists will use both publicly available evidence and the disclosed evidence to express a view on the extent of developer demand for alternatives.

16 then is a similar point in one respect in that the experts are being asked to opine on benefits that include, for example, benefits flowing to Google and users. That's where the pleading references take you, and we say those are obviously going to be considered by the competition economists in their assessment of efficiencies and any countervailing benefits when they look at effects, and also for the purposes of objective justification. But we respectfully doubt that the Tribunal can be persuaded at this stage that it's likely to elicit useful evidence from an app industry expert.

PROFESSOR WATERSON: On this point, if -- presumably Google gets some information from Android App developers, as you have suggested, that they are unhappy with some aspect of the system?

MR DRAPER: Yes.

PROFESSOR WATERSON: So, if that information was provided to the Claimant, then an expert could assess that.

MR DRAPER: Yes, and there will be evidence of developers who've got rather grumpy or taken attempts to circumvent the commission, for example -- that has happened with some developers. And the developers, obviously there are small developers and large developers, but there are some very large powerful developers. So, there is obviously evidence of them pushing back against the commission model. And as you say, Professor, that will be in the disclosure and will form part of the material available to my learned friends.

You --

THE CHAIR: Is there any particular reason -- sorry to interrupt -- why the Class Representative should see this through Google's spectacles, rather than a broader picture from an industry app expert who says: oh, nobody ever likes to say anything to Google, but we all feel this way?

MR DRAPER: It's slightly difficult to see how -- again, to an extent, I am forced to speculate because we know so little about the person at issue. And if it were -- just to give an example, if it were the head of the developers union or an association, I can see that might arise. But if it's simply a developer, someone with experience in developing in the industry, they will obviously be able to speak to their own experience and attitudes, but it is really very difficult to see how they're going to provide evidence of sufficient utility that you can say it's reasonably required if they are going to say, "I expect other developers feel the same" or, God forbid, they suggest they do a survey

of developers and we run into all of the problems that arise with surveys.

So we say, again these issues as to whether this evidence is reasonably required have to be decided based on what other evidence there is going to be and whether there is additional utility.

Coming then to 21, many of the same points arise about how is this expert expressing a view on benefits to users, because the commission gives rise to benefits in 21 and, as we've seen, much of Google's pleading essentially says that their arrangements have benefits for developers and those flow through to users. But the pleading reference there -- I will remind you of the page number, I won't take you to it -- 4606 of the core bundle is essentially focused on benefits that accrue to users. Again, we say as far as we can tell, this is an expert who is going to opine from a developer perspective, and we are obviously going to have evidence from other experts on the benefits to users, most notably the competition economist.

So unless I have missed any, and I don't think I have, those are my submissions on the issues still in dispute.

THE CHAIR: Did you do, and apologies if you did, number 11 on page 18?

MR DRAPER: If I did, I did it so badly --

THE CHAIR: I didn't make any notes.

MR DRAPER: Which was the page number, forgive me?

THE CHAIR: There we are, you did. Page 18, number 11. I am in trouble now.

MR KENNEDY: It's the scope of expertise point --

THE CHAIR: Yes, okay. All right.

MR KENNEDY: -- in relation to the app expert, which was compendious I think. But according to my notes, he did address it. If you start at 11 and move to 15 and 16 much as I did -- no criticism.

THE CHAIR: Okay, same point.

MR KENNEDY: The same point, I believe. He will correct me if I am wrong.

THE CHAIR: Right, thank you.

MR DRAPER: Yes. To an extent, it's captured by that general submission, but I should say this: it's a particularly powerful illustration because if you look at the market participants and perspectives that are canvassed by this issue -- and I am picking up on the language I think I used in my skeleton argument, so you may wish to look back at that if you have an opportunity -- we have OEMs because they are the immediate counterparty to the alleged restriction, the requirement that they pre-install the Play Store. We have other providers of Android App stores, and the expert is being asked to consider the impact upon them that's essentially derivative from the effect upon the OEM's conduct, and obviously you also are considering this from the perspective of a developer because the reason we have app stores is to allow access to apps produced by developers.

So this is a fine example of where we have concerns as to the ability of any single individual to speak to this issue. You might recall from my skeleton argument that there is a Trojan horse concern on this side of the court which is if issues are drafted broadly enough we can well anticipate that we might be facing an application for one or more additional app industry experts on the basis that, for example, they have particular expertise in what OEMs' positions are.

Yes, and there has been -- I should say that is not me speculating on my feet, that has been canvassed in correspondence. There has been a suggestion from the Class Representative to the effect that, well, if they need further experts they will pursue applications for permission. That's quite concerning at this stage if there's going to be a further broadening.

Thank you.

THE CHAIR: Thank you.

MR KENNEDY: Madam, I am acutely aware of the time, but if I might make three short points. Starting with a point of general principle that I think is actually agreed. It's reflected somewhat in the schedule. You'll see in various places it says that the column or the rows are intentionally left blank and that reflects agreement that's been reached with points falling away.

THE CHAIR: Yes.

MR KENNEDY: I think it's common ground on both sides that if a matter has fallen away because it's subsumed in another issue, or for some other reason, that further down the track it's not going to be said that evidence that properly falls within one of the other issues but might have fallen into one of the issues that was taken off the table at some point, there will be no objection taken. Obviously, it will have to be on a case-by-case basis, but that sort of mutual marker I think had been in the schedule itself and has found its way out of the schedule as the iteration has gone on. So it's just a point for the future, not for today, Madam.

THE CHAIR: Yes.

MR KENNEDY: Three short points, in light of what Mr Draper has said, one overarching point concerning objective justification. Mr Draper said that the particulars given are not exhaustive, but of course particulars ought to be exhaustive, that's the whole point of particulars, and so we say that they can't pray in aid the looseness with which the claim or the averments are pleaded in the Defence to then open up the scope of expert evidence. We say that's completely the wrong way round.

It's then said that we ought to make an RFI request of these paragraphs. I won't take you to the RFI requests that we did make, but of course, as is often the case, the response that you are met with is that it's a matter for evidence and you are trying to anticipate the evidence, and so we say that's not the correct way round.

If there are matters, and there appear to be matters, that Google knows it wants to

lead evidence on, on objective justification and on efficiencies, that it knows about now that aren't captured by the pleading, then we ought to see an amended Defence.

Two short points on IT security. Firstly, issue 5, that's page 14. It was said that no objection is taken to the list of market participants that are listed in green. That's not correct. If I wasn't clear in my submissions, Madam, then I will correct them now.

You see in green "Android ecosystem and its participants (including users, app developers, OEMs and Google) …". In light of the time, I won't take you there but if we go to the pleading, which is at 114, we see at (a) it's benefits to users, (b) benefits to users and (c) benefits to Google. So no mention of developers, no mention of OEMs. You have my point on the word "including" not delimiting sufficiently the scope of the evidence that's required.

Issue 9, it was said that the averment that had been made at 108 was sufficiently broad to include not only users -- I think Mr Draper accepted that on its face it refers only to users, but then he made the point that it's clear from the terms of the pleading that developers get access to a tool kit and then that has a sort of indirect benefit to users. It was notable that he didn't turn up paragraph 108, but we see no mention of any tool kit to developers.

There was obviously a reference to some other part of the Defence, which is not an averment about objective justification. In a sense, it's that type of speculation that exemplifies our concern. We are concerned that what happens down the line is we get an expert report that says: oh, yes, there is a particular benefit to users. But when you consider matters in the round, what you see is this merry-go-round of benefits that all eventually come back to users and that's of course what was meant when we pleaded a discrete benefit of the out-of-box experience to users.

So that's precisely our concern and that's precisely why we say it needs to be nailed down to the pleaded references and to the participants and the particular benefits that

are mentioned there.

Finally, app industry experts. Madam, you captured it well in your question, if I may say so, as to why we ought to see it through Google's spectacles. The thrust of Mr Draper's submission was: oh, don't worry, we are Google, we know all about this and we will tell you, we'll find it in the 3 million documents, the 2 million documents, or presumably in our expert reports or in our factual evidence and then you can take it from there.

We say that the permission that was given was deliberately wide, as you've mentioned, Madam Chair, to meet that concern, to allow our expert to lead evidence on matters where there is an information asymmetry, and all of the points about whether or not our expert can properly speak to OEMs or app developers or whatever else can be explored in cross-examination; and Mr Draper is already relishing the opportunity to cross-examine our expert. So, it's an overarching submission on app experts.

Unless I can be of any assistance, Madam?

THE CHAIR: No, thank you.

MR KENNEDY: Thank you.

MR DRAPER: Madam, it is not a rejoinder on this. I just want to literally mention the fact of Google's application that is unopposed for a slight extension of our permission to respond to my learned friend's expert evidence.

THE CHAIR: Yes.

MR DRAPER: Just to remind everyone what it is, at present we have, under the directions, a permission to put in factual evidence in response to the app industry report, and that obviously arises from a concern that's most acute that that is where we think the expert might well say things that our witnesses might want to respond to. But it's been accepted, our application is unopposed, that that permission ought to extend to the expert reports generally, on the basis that if we were to go through every

line of the list of expert issues, which we haven't, there are quite a few factual issues that, depending on how they are addressed and what is said within those expert reports, it might be that Google witnesses are better placed to respond or at least have further or additional material and it shouldn't just be a response from our expert, it may that be our factual witnesses also wish to chime in.

So, as I say, it's unopposed but I wanted to at least make sure it had been mentioned.

THE CHAIR: Yes, and I am afraid I might be the only person who has a concern about this, but I wanted to just probe -- what I am concerned to avoid is that, for example, we get factual evidence coming in after the economic experts have given their evidence and things like that. It sounds like you have certain experts you are particularly concerned that this will arise in relation to, because it would be slightly unusual if Google got to put factual evidence in after the economic experts had had their say.

MR DRAPER: Yes, but the limitation is obviously to -- these would be the drafting of factual witness statements in reply so it would have to be material arising from the report as opposed to just further things we would like to say or wish we had said elsewhere.

THE CHAIR: Is there any issue with it -- I expect the industry expert -- the industry app expert point and it's already been accommodated, but is there any issue in reversing the burden really so that Google have to come back and ask for permission on the basis that factual evidence is required?

MR DRAPER: Yes. Can I give an example?

THE CHAIR: Yes.

MR DRAPER: It may or may not persuade you sufficiently that you want to deal with it today, rather than leave it in the way that we've suggested. Taking the payment systems expert, if you have the table. Let's see if I can find it. So, the payment

systems expert is going to describe, on the basis of his or her expertise, how billing payment systems operate, issue one, and, two, how billing payment systems operate in the context of the purchase of an app, et cetera, and three, four. You'll see these are all comprising questions as to what in fact happens in the provision of these services, and of course we are quite well placed to give evidence on that and we will do.

But the point is to the extent that the experts said anything in traversing these issues that we, in the usual way, would wish to reply to because it raises a point we hadn't anticipated, then we should have that opportunity to respond with witness evidence. The alternative is of course that our expert effectively does it --

THE CHAIR: Yes.

MR DRAPER: -- instead. But where the substance of it is witness evidence, it's probably better to have it from that witness rather than second-hand through Google informing the expert and the expert then making the point.

Yes, just to give you an example -- I probably gave you the worst, as my instructing solicitor tells me. The best is probably issue 6. Issue 6 is effectively: please tell me what Google does. Although we obviously have a position, if there's something said in the Class Representative's report about what Google does, it would seem somewhat artificial for our expert to respond to it rather than the person at Google who knows best what Google in fact -- what is comprised in the billing system and can provide direct evidence on that.

THE CHAIR: Would that witness not have already given a factual witness statement?

MR DRAPER: Yes, but you see -- yes, is the answer, but of course this is something that we ex hypothesis haven't anticipated because we've set out our stall on what Google's billing systems do, but if the expert for the Class Representative says there's this additional thing or there's this different thing, then you would ordinarily have an

opportunity to reply to that. What we want to make sure is that the reply can come from a witness and not just from an expert, because it may be that -- it just arises simply from the fact that there's such a close interrelationship between the factual evidence and some of the expert evidence, but obviously we will be restrained in the extent to which we put in reply evidence. It will obviously be that evidence responsive to factual points.

THE CHAIR: Yes, thank you. I have your explanation, so I will take that away and think about that when considering the order.

MR DRAPER: Thank you.

THE CHAIR: I see the time. I was going to say of course I will give my ruling now, but I fear you might all look at me in horror at this time on a Friday night. So obviously we will reserve our ruling.

Could you possibly provide a copy of Annex A, updated to reflect where we've got to today.

MR JONES: Yes.

THE CHAIR: In Word, and then we can let you have a ruling that reflects our decisions.

MR JONES: Yes, we'll do that.

MR DRAPER: Can I just say, on behalf of all three of us and everyone else, we are very grateful to you for sitting late. We appreciate it's a burden on you but it has been important to get the expert list done.

THE CHAIR: Yes, and thank you for your submissions and for staying late yourselves.

(5.20 pm)

(The hearing adjourned)