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5 **IN THE COMPETITION**
6 **APPEAL**
7 **TRIBUNAL**
8

Case No: 1408/7/7/22,
1378/5/7/20

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

Monday 25th March 2024

14 Before:

15
16 The Honourable Sir Marcus Smith
17 Bridget Lucas KC

18
19 (Sitting as a Tribunal in England and Wales)

20
21 BETWEEN:

22
23
24 **Class Representative,**
25 **Claimant**

26 **Elizabeth Coll**
27 **Epic Games, Inc. & Others**

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29 V

30 **Defendants**

31 **Alphabet Inc. & Others**
32 **Google LLC & Others**

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35 **A P P E A R A N C E S**

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39 Jennifer MacLeod (On behalf of Elizabeth Coll)

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41 Colin West KC & Jagoda Klimowicz (On behalf of Epic Games, Inc. & Others)

42
43 Josh Holmes KC & Thomas Sebastian (On behalf of Alphabet Inc. & Others)

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1 **Monday, 25 March 2024**

2 **(10.30 am)**

3 **(Proceedings delayed)**

4 **(10.36 am)**

5

6 **Housekeeping**

7 **MR JUSTICE MARCUS SMITH:** Good morning. Before we begin, just to check that
8 we have good communications. I can see three of you, Ms MacLeod, Mr West,
9 Mr Holmes. Can you all see and hear us?

10 **MR WEST:** Yes.

11 **MR JUSTICE MARCUS SMITH:** Excellent.

12 **MS MACLEOD:** Yes.

13 **MR HOLMES:** Yes, Sir.

14 **MR JUSTICE MARCUS SMITH:** Thank you very much.

15 Secondly, this is a remote hearing which is taking place as if in open court. It is
16 therefore being live streamed on our website so I will start with the customary
17 warning.

18 An official recording is being made and by our direction an authorised transcript will
19 be produced, but it is strictly prohibited for anyone else to make an unauthorised
20 recording, whether audio or visual, of the proceedings and a breach of that provision
21 would be punished as a contempt of court. I am sure I don't need to say that, but as
22 always I do.

23 Moving on to more substantive matters, thank you very much for the documents.
24 We have before us a hearing bundle and an authorities bundle. I think we have paid
25 rather less regard to the authorities bundle than to the hearing bundle which we have
26 looked at.

1 This is a slightly unusually configured application in that we are effectively sitting as
2 two panels, chair in each, so I am sitting as the chair in the Epic Games Proceedings
3 whose application is before us now, and Ms Lucas is appearing as the chair in the
4 Coll Proceedings. We are therefore going to be ploughing somewhat separate
5 furrows, I think, in terms of ensuring that our respective proceedings are properly
6 case managed. So you may not get a unified response in terms of what we are
7 directing because what may be sensible for Epic may not be sensible for Coll and
8 vice versa. So you can expect somewhat different lines from each of us as
9 appropriate.

10 What I want to do is set out a few thoughts so that you can assist us in terms of just
11 how sensible they are and I stress these are much more my thoughts than Ms Lucas'
12 and I think, even if you don't push back on them, there is a high chance that she will.
13 So let's see how it goes.

14 This is Epic's application, not Coll's. Coll's Proceedings are a certified class action,
15 Epic is an individual claim. The defendants in each case Google are the same. Both
16 actions are relatively advanced. Epic has been delayed because it has been
17 slip-streaming behind similar US proceedings, those now having been resolved at
18 first instance, as I understand it, in Epic's favour but with an appeal ongoing.

19 The Epic Proceedings are due for trial in May 2025, having been adjourned
20 a number of times. The Coll trial is due in October 2025 and what we have before us
21 is essentially an application by Epic for some form of consolidation so that Epic is
22 tried with Coll. No application for an umbrella proceedings order is made but it is
23 essentially some form of consolidation that is sought.

24 Now, that has two effects. First of all, it has the incidental effect of adjourning Epic
25 by at least six months and that is a problem which I have. I don't like adjournments
26 unless they can be very clearly justified. It also significantly complicates the Coll

1 Proceedings which is where Ms Lucas is going to have problems.

2 That being said, there is, in our view, a fairly large amount of common ground. If we
3 simply look at the reasons for the application set out in Ms Rogers' statement, we
4 have common defendants, we have common issues, we have a concern that the
5 Epic Proceedings may be derailed by commitments offered in those proceedings by
6 Google in ongoing CMA investigations, and we have a risk of inconsistent outcomes.
7 Google supports the application in a fairly low key way, but makes the point, again
8 one that seems to be right, that some form of consolidation would avoid Google's
9 witnesses having to attend twice.

10 Epic's point is that the gap between May and October has become sufficiently
11 narrow that it is bridgeable and consolidation is a sensible course, so much in favour
12 of consolidation. What I think is important -- and I say this really anticipating what
13 will be Ms Lucas' primary concern -- is the reason for Ms Coll's opposition because,
14 Ms MacLeod, your written submissions make very clear that you accept the overlap
15 and the arguments in favour of consolidation. The opposition, as I understand it,
16 from Ms Coll is based upon prejudice to the class and in particular the very
17 considerable additional costs to the Class Representative if some form of
18 consolidation is directed which creates considerable funding difficulties, and we've
19 read the evidence of Ms Jazrawi to that effect.

20 So that is how we see the ground and can I begin with my thanks to Epic for raising
21 this point. It is, of course, precisely the sort of case management question that does
22 need to be drawn to the Tribunal's attention, but I do think we need to be careful
23 about placing too much weight on the existence of common issues. The fact is,
24 apart from Interchange Fee and Trucks in the Tribunal's overall list, the list is actually
25 quite technology heavy and there are more cases than merely Epic and Coll raising
26 similar issues which are certainly not ripe for UPO but which could quite easily be

1 decided inconsistently and the Tribunal will, of course, take steps to avoid
2 inconsistency, but it can't, with the best will in the world, consolidate everything.
3 So it does seem to us that we need to find a way of maximising the synergies
4 between the two claims whilst ensuring that the Coll Proceedings are not prejudiced
5 by any leveraging of such synergies. One thought that I had -- and I would be
6 grateful for the parties' pushback on this -- is that we leverage the synergies
7 articulated by Epic in the following way: that essentially the Coll Proceedings carry
8 on as directed, but that we make provision for a one-way evidence sharing process,
9 Coll to Epic, so that Epic is fully in the loop so far as the Coll Proceedings are
10 concerned. Epic is permitted to attend the Coll trial with counsel and to
11 cross-examine the Google witnesses for its part. In other words, there's limited
12 participation by Epic in the Coll Proceedings and the Google witnesses only attend
13 once so effectively one gets the cross-examination of the Google witnesses in Epic
14 in the Coll Proceedings.
15 That will add some time, but not a huge amount, to the way the Coll Proceedings
16 work. That additional time would require Epic to undertake to hold Coll harmless
17 against those costs which would be costs ultimately in the Epic litigation. The Epic
18 trial would then follow using all material, including that derived from Coll, at some
19 point in 2026. The Google witnesses would not be recalled and the trial would be
20 confined to the other unheard witnesses of fact and experts. The constitution of the
21 Epic Tribunal would have to be varied so as to be the same as Coll, but effectively all
22 that would happen is that Coll would be burdened by a series of questions of the
23 Google witnesses which would be directed solely to the Epic case, and which would
24 not form part of the record in Coll.
25 It is a somewhat unusual form of consolidation. What it is doing is it's simply taking
26 a limited synergy and running with that. I can't say that I am completely happy with it

1 myself as a proposal and I know that Ms Lucas is very concerned that even that is
2 disruptive of the Coll Proceedings. The alternative as I see it is simply to leave
3 things as they are and go for Epic first and leave Coll to follow in October, in other
4 words not make any form of consolidation order and that may be the simplest course
5 having spent 10 minutes articulating a limited benefit of synergies.

6 So I don't know whether Ms Lucas has anything to add to that before we hand over
7 to the parties, but if you do, then please, I think, add your concerns.

8 **MS LUCAS:** So from my perspective, as chair of the Coll Proceedings, the
9 President has mentioned one way evidence sharing, Coll to Epic. I would like the
10 parties to think about whether or not that's actually sensible and feasible in
11 circumstances where, for example, Epic is cross-examining by reference to
12 documents that have been disclosed or witness statements that had been filed in its
13 own particular case.

14 But it is, if we are going to try and get a manageable way through it, it does seem
15 sensible that witnesses are only cross-examined once and that that forms the factual
16 record in both hearings, whether they are consolidated or proceed separately.

17 So I do have some practical thoughts, so you must not think that this is something
18 that we are both necessarily completely ad idem, I am having to manage the
19 day-to-day management of the Coll case, so I have more and certainly different
20 concerns, but it does seem to me we have to somehow try and find a way through
21 this, especially as funding seems to be the key sticking point.

22 **MR JUSTICE MARCUS SMITH:** Yes. I mean, I think the concern that we've got is
23 really the one articulated, Ms MacLeod, by you and it's this, that if these were not
24 certified collective proceedings, we might be approaching this rather differently, but it
25 seems to us that it would be -- yes, I will put it as high as this -- it would be
26 irresponsible to derail the very intense process of certification where we know the

1 Tribunal looks at funding with a degree of intensity that doesn't arise in other
2 proceedings and the idea that we are going to cause difficulties in funding
3 arrangements which are inevitably high risk and well and carefully thought through in
4 manners kept away from the Tribunal, the idea that we are going to prejudice that is,
5 I think, at the forefront of our consideration.

6 So before we hand over to the parties, I think the essential concern we have is not
7 the usual one that consolidation is going to be impossible or disruptive or not
8 worthwhile, I don't think that is really where we are at. We are at a situation where
9 we are likely to say no to a broad form of consolidation purely and simply because it
10 looks like it is going to upset the apple cart of the Collective Proceedings Order that
11 has been made and I think that is where we are coming from.

12 We've already said enough. What we would be minded to do is to hear initial
13 reactions from Epic, Coll and Google in that order, but if anyone wants us to rise to
14 take further instructions, then that seems to us to be very sensible. Maybe we could
15 get a couple of sentences from each of you about reaction and then we can see
16 which course we take.

17 Mr West, I will hand over to you and then to Ms MacLeod and then to Mr Holmes.

18

19 **Submissions by MR WEST**

20 **MR WEST:** I am very grateful.

21 Epic's initial reaction to the proposal by the President of having a single trial with all
22 of the cross-examination and then a separate trial for any issues left over from Epic
23 is one we are broadly favourable towards. Obviously, we've only just heard the
24 detail of it so far, insofar as it's been sketched out by the President, and so I think we
25 would appreciate a bit of time to think about it a little more before addressing the
26 details of that submission, but broadly we see the force of that and the benefit of that

1 | proposal.

2 | **MR JUSTICE MARCUS SMITH:** Okay, thank you. Essentially, you are getting a lot
3 | of delay and rather less than half a loaf in terms of consolidation. But that is helpful
4 | as a preliminary indication.

5 | Ms MacLeod.

6 | **MR WEST:** If I could just address that briefly.

7 | **MR JUSTICE MARCUS SMITH:** Of course.

8 | **MR WEST:** It's true it does involve some delay, although, as the Tribunal will be
9 | aware, there are other proceedings on foot between the parties in other jurisdictions
10 | which are proceeding in the meantime. So it's not a case where there is simply no
11 | progress being made in the meantime, and whilst it's true that there would then, in
12 | a sense, be two stages to the trial, we see that very much as preferable to having the
13 | possibility of different outcomes arising from the trial where, as we had in
14 | Interchange, for example, one might have in Coll a ruling that says: clause 4.1 isn't
15 | an abuse of dominance, but then Epic says it is. We think that must be avoided if at
16 | all possible.

17 | **MR JUSTICE MARCUS SMITH:** I understand and I certainly would not be using
18 | adjournment or half loaf as a point of criticism. Just as an observation of the slightly
19 | unusual nature of what is going on. But thank you.

20 | Ms MacLeod, what you are getting is a degree of disruption to the Coll Proceedings,
21 | but two points in that regard. First of all, it is a limited disruption and secondly, it is
22 | one that would be underwritten by Epic in the sense that they would be undertaking,
23 | much in the way as the price of an interim injunction, to hold the Class
24 | Representative harmless against the additional time of the cross-examination of the
25 | Google witnesses which would not, to be clear, be for Coll's benefit at all, it would
26 | simply be for the benefit of Epic and the benefit of Google to ensure an absence of

1 duplication.

2 So really, we are making a proposal that is not in Coll's interests at all. The question
3 is whether it is sufficiently non-disruptive to be something that overcomes the
4 concerns that you have very helpfully articulated. That's where we are coming from,
5 just so you are clear. I am not selling this as something that's good for you, it's
6 something that's not particularly bad.

7

8 **Submissions by MS MACLEOD**

9 **MS MACLEOD:** We are very grateful, Sir, and thank you for laying that out. It might
10 be helpful just to start by making very clear what the Class Representative's position
11 is because there is a slight Chinese whispers element to it in terms of it being
12 responded to by the parties.

13 We did set out in our written submissions obviously what was a development from
14 the earlier position and that is that we are unable to support the proposition. That's
15 very much been taken as opposition and what I would like to make very clear is we
16 are not trying to be in any way obstructive to the efficiencies that the Tribunal needs
17 to make and can make and obviously clearly is considering, but we are just
18 hamstrung by the degree to which we can assist with that, given the funding
19 considerations that are in issue. We are not coming here with a hugely opposing
20 function to any form of consolidation, we are just trying to make it workable in the
21 interests of the class. So, we are very grateful for the preliminary indication.

22 If I may say so, there are three elements to the proposal and I think I do, like
23 Mr West, need to take some instructions on it overall, but it's been a very helpful
24 indication. Firstly, it's been very helpful in indicating that the degree of derailment to
25 the Coll Proceedings is going to be limited because that has obviously been
26 a primary concern to the Class Representative, that we don't lose the timetable, we

1 don't lose our experts and all of that kind of thing, so that's a very helpful indication
2 from that perspective.

3 The second area of concern, if I can put it that way, is the funding concerns which
4 you rightly articulated as really underlying the degree of obstruction that is being put
5 forward by us in this.

6 Obviously, the concept of those funding concerns being underwritten is something
7 that's likely to give us considerable comfort, but obviously I will have to take
8 instructions on that more broadly.

9 The third issue is more the practicalities of it and this is to pick up, Madam, on your
10 point and the degree to which the evidence from one trial could stand in another.
11 I think an issue that we'll be considering, if there is a little moment for instructions, is
12 the scope of the evidence that might be heard in the Coll Proceedings were they to
13 go first, and it's possible that we might come back, Sir, with a slight amendment to
14 the original proposal. It may be that's it's better to have both sides' factual witnesses
15 being heard in those earlier proceedings in order that the full scope of the factual
16 picture is heard, maybe less so for the expert evidence. I don't want to pre-judge
17 that, but I suspect that's where there may be some tweaking from the Class
18 Representative's side to the proposals that are being put forward. Obviously, I do
19 need to take full instructions, but that's my initial reaction to the helpful proposal
20 we've received.

21 **MR JUSTICE MARCUS SMITH:** No, Ms MacLeod, that is extremely helpful. Let me
22 be absolutely clear, we entirely appreciate the helpful way in which the Class
23 Representative has addressed what are really somebody else's concerns and in
24 doing so you are assisting Epic and you are also assisting the Tribunal in trying to
25 manage its proceedings in accordance with its rule 4 obligations as efficiently as
26 possible.

1 You have put your finger on, I think, the oddity of the proposal and it is this: at the
2 moment we are proposing an asymmetric consolidation, as it were, in that what
3 doesn't go in is Epic specific material into Coll. What one does is one produces in the
4 Coll Proceedings an augmentation in advance of trial of the record in Epic only, and
5 the only reason we are taking this, because it's, frankly, a very counter-intuitive and
6 somewhat strange way of proceeding, the only reason we are doing it this way is
7 because we want to make sure that the disruption to Coll is as minimal as possible.
8 So, for instance, you would not have to be troubled by disclosure between Epic and
9 Google if this is the course that is being run.

10 Now, we can see certain advantages in a more aggressive form of consolidation
11 which is not asymmetric, where there is, as it were, a moving across so that the
12 record in Coll is expanded. Now, we don't have a problem with that provided your
13 Class Representative doesn't have a problem with that. It seems to us that there are
14 two big considerations that you are going to have to first of all think about with your
15 client and secondly, I suspect, have a conversation with Mr West about, and it's this.
16 First of all, if one has a less asymmetric exchange, the disclosure process prior to
17 Coll is going to be more complex and more expensive. Secondly, if one has more
18 extensive consolidation, the trial is likely to be lengthened and not shortened, beyond
19 the asymmetric proposal.

20 But provided you can cope with that and provided the additional costs are catered
21 for, as it were, at Epic's expense, then that is a workable variant on the pure
22 asymmetric proposal that we came up with initially. It does, I think, depend upon
23 a clear articulation of what -- well, frankly, what risks to the Coll Proceedings you are
24 prepared to undertake.

25 I mean, whatever we do, this is a complexity to already complex proceedings which
26 we are only entertaining because we can see efficiency benefits, but we do want to

1 make sure that the risks to Coll are controlled in a very clear way and the
2 asymmetric approach has the advantage of, I think, being a little bit clearer than
3 something which is involving exchange bilaterally. That, I think, is all I can say there
4 and you clearly must think about it offline.

5 Do you want to say anything more about that before I --

6 **MS MACLEOD:** I wonder, Sir, if it's helpful, again I do need to take instructions --

7 **MR JUSTICE MARCUS SMITH:** Of course, that's taken as read, Ms MacLeod.

8 **MS MACLEOD:** It's very helpful to have the reasons for it articulated because, if
9 I may, there were slightly different buckets of costs to the Class Representative that
10 I can see the Tribunal is very helpfully trying to think about and it may be that it's
11 helpful for all of the parties to think about those different stages.

12 There's the disclosure stage which, as you have rightly pointed to, does contain
13 significant costs for the Class Representative if there were to be further disclosure.
14 There's then the witnesses, which don't necessarily entail a great deal of further
15 costs pre-trial, but do lead to an extended trial with further costs. Then there is the
16 expert costs and legal submissions which, at the moment in the proposals that are
17 being put forward, they are ones that we can leave to one side because they would
18 be left for a further trial in due course.

19 So it seems to me what I really need to take instructions on is the earlier buckets of
20 costs and where they might helpfully sit in terms of being split between the parties
21 and split between the two trials.

22 **MR JUSTICE MARCUS SMITH:** I think that's exactly right and what Mr West needs
23 to take instructions on is just how much his clients are prepared to underwrite those
24 additional costs because the issue that we have is that the funding arrangements are
25 such that -- well, leaving aside what Ms Lucas will have to say on the point -- I am
26 not prepared to disrupt those given the certification order that has been made. It

1 seems to me that that is quite important in terms of the credibility of the regime.
2 Clearly, one isn't saying we will never vary the way in which collective proceedings
3 are run, but and this is nobody's fault -- and I want to stress that -- this is an
4 application that is relatively late in the day.

5 Mr West's clients are quite rightly wanting to take advantage of the fact that the gap
6 between Epic and Coll has narrowed and that is why we welcome this application,
7 but it is pretty late in the day to be dealing with it. I think we would be taking a very
8 different approach if this was a pre-certification matter, but it's not and that is what is
9 explicitly informing our reaction. But I think I have said enough by way of signalling
10 our thinking.

11 Mr Holmes, in a sense, you have the easiest ride, it's really just whether the
12 witnesses come twice or once. We can see obviously advantages in them coming
13 once, but we would be very grateful for any views you have about what is, on any
14 view, a not very easy case management question.

15

16 **Submissions by MR HOLMES**

17 **MR HOLMES:** Well, Sir, we are grateful for the Tribunal's recognition of the difficulty
18 which would be presented for our side in having the same witnesses give evidence
19 twice on either side of the summer break. We agree with the Tribunal that it would
20 be preferable to avoid that if possible.

21 We would, if we may, like an opportunity to discuss amongst ourselves. We do see
22 the force in Ms MacLeod's observation that there may be relevant and useful factual
23 evidence to be derived from the Epic witnesses which should be heard alongside the
24 Google witnesses and is relevant not only for the Epic Proceedings, but also for the
25 Coll Proceedings. We are very mindful of that. We would like to consider the
26 proposal and whether we could suggest tweaks along the lines that Ms MacLeod has

1 proposed with a view to addressing that.

2 As we understand it, where that would leave matters is that factual evidence in both
3 sets of proceedings would effectively be heard in the Michaelmas term in the current
4 Coll window. There might be submissions by all three parties given that all three
5 would have live evidence, but expert evidence that was unique to Epic might then be
6 hived off for a subsequent hearing which would reduce the cost and complexity of
7 the joint case management and joint hearing from the perspective of the Class
8 Representative.

9 We are mindful that the situation that presents itself to the Class Representative is
10 not, of course, about the ultimate allocation of costs. It seems to us that
11 consolidation would be beneficial regardless of the outcome of the case when one
12 reaches the stage of ultimate allocation following determination of the case because
13 there will be fewer costs in the pot. Epic and Coll will face half the costs of a single
14 trial rather than all the costs of their own unique trials if, as we expect, we win and
15 equally, if we lose, then the costs fall to Google in any event. So this is about a cash
16 flow issue, if you like, not to put too fine a point on it, funds to keep the litigation on
17 track and we understand why that is important to the Tribunal.

18 There is no evidence at this stage that the Class Representative's commercial
19 funders would not foot some additional cost. Quite rightly, the Class Representative
20 has yet to ask the question, taking the view, as we see it responsibly, that it's for the
21 Tribunal to decide what is the appropriate approach to case management and to give
22 the funder a veto on the appropriate approach to case management would be an
23 example of the tail wagging the dog.

24 We have no criticism of the fact there's no evidence about that, but the Tribunal
25 simply doesn't know, one way or the other, whether funding would be available. It
26 seems highly likely that it would in circumstances where the funder has already

1 | invested a substantial amount and has a commercial interest in keeping the
2 | proceedings on foot, but having said that, we can see that the Tribunal can't depend
3 | on that and a middle way that would manage the costs, reduce the potential cost
4 | burden, keep the disruption to the Epic -- to the Coll Proceedings within manageable
5 | confines, does seem to us very well worth exploring. So with the Tribunal's
6 | permission, I would like the opportunity to take instructions and then I can give
7 | perhaps a fuller response having done so.

8 | **MR JUSTICE MARCUS SMITH:** Well, we will rise shortly. Just to articulate what
9 | we've got out of that very helpful submission, and it's this: you are obviously right,
10 | looking at the costs in the aggregate there is an advantage over and above the
11 | synergies of ensuring absence of the inconsistency which is, I think, the primary
12 | driver. We do take the point that collapsing the factual evidence into one trial is likely
13 | to be of benefit to all including Google.

14 | I think the area where I want to push back -- and it's not really a point for Google, it's
15 | much more a point as between Epic and Coll -- is this: that we hear what you say
16 | about the funding tail wagging the consolidation dog, but we don't think that is
17 | actually a proper way to articulate the somewhat interesting constellation of case
18 | management questions that we have. The fact is that we have a perfectly happy set
19 | of parties in Coll. The matters are being nicely case managed, there's no problem,
20 | and the reason I am attaching such weight to the Class Representative's concerns is
21 | because I do not want to upset a very stable apple cart by obliging the Class
22 | Representative to go to the funder and saying: "look, the goalposts have now shifted,
23 | you've undertaken a very significant risk in funding the action so far and undertaking
24 | to fund it for the future, we are now throwing in this additional material variant and
25 | we'd like you to reconsider your funding obligations in that light." Of course, the
26 | funders are likely to do so because they've invested as sunk costs, a significant

1 amount of money. My point, I think, is that they shouldn't be obliged to do so
2 precisely for that reason.

3 Of course, if we shift the goalposts the chances are that the funders will, in a degree
4 of unhappiness, say: "well, if that's what the Tribunal is directing, that's what we'll
5 do." The point is the Tribunal is not presently minded willing to direct that. What we
6 are willing to do is we are willing to disrupt the process of Coll, but not the funding
7 basis and that means that the savings that Google anticipates when, as you say,
8 they win both actions and seek to recover fewer costs -- well, I am obviously saying
9 that tongue firmly in cheek, I know where you are coming from, Mr Holmes, and
10 know Ms MacLeod and Mr West will say the precise opposite -- but the point of the
11 synergies and the costs advantages do depend, I think, on Epic being prepared to
12 minimise, eliminate, the funding issues that arise out of Coll. Now, that is, I think, the
13 critical dynamic which arises.

14 The fact is we are in a reasonably happy position because we can quite easily say:
15 "this is Epic's application, the price of it succeeding to a limited or greater extent is
16 an undertaking as to the funder's additional costs or the costs of the additional
17 action". If Epic are prepared to do that -- and we can't force them -- then great, we
18 can proceed to think about the details. If, on the other hand, Epic don't like the
19 idea -- and I can quite understand why they wouldn't -- well, we've already got two
20 sets of proceedings in the diary and they are both capable of being tried separately.

21 I think that has been very a helpful articulation of the dynamics. We have a potential
22 for costs savings and consistency in synergies. We would be irresponsible not to
23 look that at them very seriously, but whether it works, I think, is down to the
24 conversations in the next half hour or 45 minutes.

25 My next question is the mechanical one: how long do you want? Half an hour at
26 least, but shall we resume at midday?

1 **MR HOLMES:** Could we, Sir, perhaps take instructions and see how long we need?
2 If we could perhaps alert the registry if we find things progress more swiftly and only
3 half an hour is required, but otherwise midday would be, we think, sufficient.

4 **MR JUSTICE MARCUS SMITH:** What we'll do, then, is we'll provisionally say we'll
5 be back at midday. If you need longer, let us know; if you need less, let us know and
6 we will proceed on that basis.

7 **MR WEST:** Sir and Madam, before you rise, could I just ask one point of detail
8 which is when any residual trial on Epic might be able to be listed because it may be
9 relevant to the instructions that I am about to take, whether that would be in early
10 2026 or not until late 2026? It may also affect the question of inconsistent judgments
11 in the sense that it will be relevant to whether the judgment in Coll will have come out
12 yet.

13 **MR JUSTICE MARCUS SMITH:** I entirely understand. I mean, first of all, I think it
14 would be necessary for the judgment in Coll to come out. It would be asking for
15 trouble, I think, to have two trials that are to a degree related with two judgments
16 awaited rather than one. So I think the thinking would be that this would be a Coll
17 judgment coming out as soon as possible, with the Epic trial being listed as soon as
18 possible with that in mind in 2026 with Ms Lucas in the chair for that trial as well and
19 ideally with the same panel assisting her.

20 I don't think it would be late 2026, but I don't think it would be early 2026 either given
21 that Coll would finish shortly before the end of the year 2025. One then needs to
22 budget for the judgment. So I think we'd be looking at a hearing probably before the
23 summer vacation in 2026.

24 **MR WEST:** I am very grateful.

25 **MR JUSTICE MARCUS SMITH:** I mean, we are more than happy to debate
26 variants, but my gut tells me that the idea of parking the Coll judgment until after Epic

1 has been tried is a mistake on many levels. I mean, we are happy to hear contrary
2 proposals, but it just seems to us like a terrible idea and by all means take it away
3 and think about it, but that is my initial take.

4 **MS MACLEOD:** You will have no contrary proposals on that front from me, Sir,
5 I think it's fair to say.

6 Would it be right, Sir, to characterise the proposal being put forward as one that's
7 a slight extension of the read across from the Sportradar Proceedings, in the sense
8 that one trial is going first and there is a sense that that trial will, to some degree --
9 and obviously there are differences between this ruling and the previous ruling or this
10 proposal and the previous ruling -- there is a sense in which some of the issues will
11 bind the later proceedings, but the leftover ones will be left over to you, Madam, for a
12 later trial? Is that an accurate summary of the proposal, if I can check?

13 **MR JUSTICE MARCUS SMITH:** I think that is fair, Ms MacLeod. It's a somewhat
14 weaponised Sportradar process in that in Sportradar we simply had attendance by
15 counsel in the later proceedings and an ability to flag up areas where perhaps the
16 Tribunal shouldn't go in points of fact and that's as far as it went, so it was a kind of
17 read across order. Whereas here we would actually be, or the Tribunal would
18 actually be, hearing evidence which would then inform its factual consideration in the
19 later trial.

20 So that is, I think, the difference between Sportradar and this case. But if you view it
21 on a spectrum with full consolidation on the right-hand side and Sportradar on the
22 left-hand side, this probably closer to Sportradar than it is to full consolidation.

23 **MS MACLEOD:** I am very grateful, Sir. Thank you.

24 **MR JUSTICE MARCUS SMITH:** Thank you all very much. Unless you tell us
25 otherwise, we will resume at midday and we will adjourn the proceedings until then.
26 But thank you very much.

1 **MR HOLMES:** Thank you.

2 **(11.15 am)**

3 **(A short break)**

4 **(12.15 pm)**

5 **MR JUSTICE MARCUS SMITH:** Welcome back. Can I just check that you can see
6 and hear us. Good. Nodding. Well, who wants to go first? Mr West, do you want to
7 make a start? You are muted, I think, Mr West.

8 **MR WEST:** Can you hear me now?

9 **MR JUSTICE MARCUS SMITH:** Yes, thank you.

10

11 **Submissions by MR WEST**

12 **MR WEST:** So, as before, we remain in principle in favour of what might be called
13 the skimmed milk version of consolidation where one has a cross-examination of
14 Google's factual witness -- I am afraid I have stolen Mr Holmes metaphor -- that
15 where one has cross-examination of the factual witnesses from Google at trial one,
16 and again in principle we would be prepared to hold Ms Coll harmless against the
17 additional costs of matters happening in her trial which are of no benefit to her.
18 Although that would be subject to having a proper understanding of the likely size of
19 that exposure which we would take to be likely significantly less than the £2.2 million
20 cost of what I might call full cream consolidation, which is the figure we had been
21 provided with for our application.

22 We can also see some benefit in what might be called a semi-skimmed version
23 where we have all of the factual witnesses at trial one, just leaving out the expert
24 issues between Epic and Google. However, in that eventuality, it seems to us that
25 there is a substantial benefit to Coll because at the moment she has no factual
26 witnesses and the evidence that Epic's witnesses are able to supply would be of

1 benefit to her, we think potentially at least, and so Epic would, I believe, be reluctant
2 to pay the additional costs which Ms Coll would incur of time spent at the trial
3 hearing material which is of benefit to her. So in a sense it may be that these are
4 matters that the parties have to discuss between themselves to attempt to reach
5 a solution which is acceptable to all of them.

6 It may be that we are not in a position today to draft an order, as it were, whilst in the
7 hearing. It may be that these are matters we have to discuss, in particular such as
8 the likely exposure which Ms Coll anticipates would have to be covered by Epic
9 under any sort of form of cross-undertaking.

10 So that really is the position we arrived at on the matters of principle. There would
11 also be a question of timing in relation to Epic's expert reports if the expert report
12 process in the Epic Proceedings is decoupled from the progress of the Coll
13 Proceedings towards the trial in October, but that's a point again to which we can
14 perhaps come back.

15 **MR JUSTICE MARCUS SMITH:** Thank you. Ms MacLeod, do you want to go next?
16

17 **Submissions by MS MACLEOD**

18 **MS MACLEOD:** Thank you, Sir.

19 Picking up on Mr West's description of the different options, we, likewise, I think, are
20 in a position to favour the semi-skimmed option, if I can put it that way. We would be
21 in favour of the skimmed option, but we think the semi-skimmed option makes more
22 sense in that it allows the Tribunal to realise the greatest efficiency to the Tribunal
23 that is up for grabs, if I can put it that way, in that it lessens the risk of
24 inconsistencies between judgments to have the full factual picture heard in one trial.
25 So that makes sense to us.

26 Where we disagree and where we would push back against Mr West's suggestion is

1 the idea that, that is not a solution for which Epic should bear the costs. As we
2 understand the proposal as it now stands, Epic is essentially free to put in any
3 supplementary expert evidence, any supplementary positions and submissions in the
4 later trial, so it appears to us that it is going to achieve very significant efficiencies
5 from the proposal that will save it very considerable cost.

6 With that in mind and given that this is Epic's application for consolidation and this is
7 a proposal that has been put forward in order to meet Epic's goals, then we would
8 suggest that it is still appropriate for Epic to bear the costs of so doing. Those costs
9 are, to be clear, from the Class Representative's perspective twofold.

10 The first ones are the funding costs that have been canvassed in evidence and we
11 agree with Mr West that the funding costs are likely to be lower than the full fat
12 consolidation. We consider that perhaps only one week of additional court time
13 would be necessary, rather than two. It may be possible to make efficiencies. We
14 had budgeted for further CMCs which may or may not be necessary and the extent
15 of liaison between Hausfeld and Norton Rose Fulbright is likely to be less, although
16 not completely reduced, than the amount that was originally budgeted for.

17 I mean, this is, as Mr West has said, something that would need to be considered in
18 detail, but as a round figure, we consider that's likely to halve or thereabouts the
19 costs that were put forward by Ms Jazrawi in her statement and we think it might
20 come in a little bit under £1 million. We've just done a very quick set of sums, if we
21 can put it that way. So that's the amount that is upfront under consideration.

22 There is, however, also the adverse costs position and as we understand the
23 proposal, there would also be a sense in which Epic is underwriting the further
24 adverse costs that could arise in the event that the Class Representative is
25 unsuccessful at trial, but the trial was extended by virtue of having this extra section
26 added in. So it's not just a cash flow issue, as was suggested earlier, with the way

1 the proposal is being put forward now, there is that secondary consideration of
2 funding that the Class Representative would seek in those circumstances.

3 Subject to those tweaks, if I can put it that way, or those concerns, the Class
4 Representative would be in favour of the semi-skimmed slightly amended version of
5 the proposal that was so helpfully put forward by the Tribunal this morning.

6 **MR JUSTICE MARCUS SMITH:** Okay, thank you.

7 Mr Holmes.

8

9 **Submissions by MR HOLMES**

10 **MR HOLMES:** Sir, I am pleased to report that there is a considerable measure of
11 consensus between Google on the one hand and at least the Class Representative
12 on the other. We also favour the semi-skimmed option as the one which is likely to
13 realise the most efficiencies and to ensure that factual evidence of direct relevance
14 to the Coll Proceedings is available in the form of the Epic factual evidence.

15 So just to be clear about the nomenclature that I am using, by the semi-skimmed
16 option, we assume that this will be the Tribunal's proposal where a trial takes place
17 in the Michaelmas term of the Coll Proceedings but with a modest extension to
18 incorporate two things: firstly, the Epic factual evidence and, secondly, the
19 cross-examination of Epic's witnesses by Coll's counsel if so advised. So those are
20 the two elements that would change in the existing Coll listing.

21 Then there would be judgment in Coll at some point in the New Year and there
22 would be, as needed, a further trial of the outstanding issues in Epic which we
23 apprehend would focus upon the expert evidence and any supplementary points of
24 submission, to be listed at some convenient point in 2026.

25 That is how we understand it. We think that would ensure that when the Tribunal
26 hears and decides the Coll case, it has all of the directly relevant factual evidence

1 before it in relation to developer distribution of apps which has been lodged by Epic
2 and that that is appropriately tested.

3 The costs question is clearly not a matter for Google, it's a matter for Epic and Coll to
4 resolve, but that is how we see things.

5 If we are stuck with the existing sequential scheme, then, of course, the factual
6 evidence in Epic would have been available, at least in transcript form, for the Coll
7 Tribunal to consider. So, it's really ensuring that that benefit is still available while
8 realising the efficiencies that are available in hearing the factual evidence only once
9 rather than hearing the Google witnesses twice.

10 So, we think this is a creative way forward and we are grateful for the Tribunal's
11 suggestion of it.

12 **MR JUSTICE MARCUS SMITH:** Just to pick up on, as it were, the additional costs
13 that go to Coll, you have rightly identified the cross-examination of Epic factual
14 witnesses by Coll, but there would also be additional disclosure costs because of
15 course you can't cross-examine without having the relevant underlying factual
16 material being provided to Coll's legal team. So that would be – I am not saying it's
17 an absolute cost, there is obviously a benefit involved, but that would be an
18 additional cost layer that would emerge.

19 **MR HOLMES:** That is – I see your point, Sir. Of course, here, on the Claimants'
20 side, the additional disclosure is effectively the disclosure given by Epic --

21 **MR JUSTICE MARCUS SMITH:** Yes.

22 **MR HOLMES:** -- that isn't currently with Ms Coll and her team. Of course, Epic is
23 well familiar with its own disclosure and given this strong identity of interest between
24 the Claimants, it can be expected to surface relevant materials which will take the
25 burden off Ms Coll and her team to some extent. I think for our part we could
26 consider sharing the materials, but whether the burden of reviewing those materials

1 | would be as substantial as would be the case if Ms Coll were fighting alone in
2 | relation to the factual evidence, I very much doubt.

3 | **MR JUSTICE MARCUS SMITH:** Yes. That's very helpful. I am just making a few
4 | notes.

5 | Thank you, all. It does look as if we have a way forward, but there are significant
6 | details to be worked out. I think the question that we've got to address is to what
7 | extent we can allow the details to be worked out later on and to what extent we need
8 | to make certain fairly basic calls as to how the two trials are to be managed.

9 | So let me try to articulate -- and I do so with a view to everyone pushing back on this
10 | including Ms Lucas -- let me make a few indications as to the sort of directions that
11 | I think we probably should be making today in order to enable a profitable debate as
12 | to the detail going forward.

13 | Let me start with an observation. It does seem to me that we need to recognise that
14 | the skimmed and the semi-skimmed options are not at this stage completely clearly
15 | defined and I would be surprised if the parties didn't have slightly different views as
16 | to what they mean by "skimmed" or "semi-skimmed". I am not saying that there is
17 | gaming or anything like that going on, I am simply saying that, given the complexity
18 | of both sets of proceedings, it would be a little surprising if in an order we said: "yes,
19 | it's skimmed or semi-skimmed", and everyone would have exactly the same view as
20 | to what was going on. I think we need to recognise that penumbra of uncertainty, if
21 | I can steal H.L.A Hart's phrase, we need to recognise that exists at the moment and
22 | needs to be catered for.

23 | With that very significant warning, I don't think it should deter us from making some
24 | fairly brutal case management decisions provided we recognise the need for
25 | flexibility. What I would have in mind is this: that we make clear that there is going to
26 | be a consolidation of the Coll and Epic Proceedings with a view to conducting

1 a harmonised factual approach with the expert evidence in Epic following, but with
2 the expert evidence in Coll being part of the Coll trial.

3 It seems to me very important that that consolidation ensures that the integrity of the
4 Coll process is unimpaired. Let me explain what I mean by that. Let us suppose we
5 have this consolidation semi-skimmed so that there is participation by the Coll Class
6 Representative in the Epic disclosure and a cross-examination by the Coll Class
7 Representative of the Epic and Google witnesses to the extent advised. I mean
8 mainly Google obviously.

9 Those are additional costs, I will come to those in a moment, but they are also
10 incorporating a degree of dependence between the two actions and I would want to
11 be very confident that if, for example, Epic were to settle everything with Google, the
12 Coll action would be able to proceed unimpaired without any problems at all.

13 I do think that is something which the Coll Class Representative needs to bear very
14 fully in mind, that consolidation must not come at the price of a perfectly sensible
15 settlement of issues between Epic and Google which then leaves Coll saying: "gee
16 we were counting on these witnesses coming in, they are now not coming in and we
17 need some form of additional order to rescue a trial." I don't want that cropping up.
18 I don't think it's awfully likely but it is something which we need to bear in mind
19 because it has been an issue in both Interchange and Trucks, more complicated
20 proceedings, with many more parties, but we have discovered that settlements,
21 which we absolutely welcome, have had very adverse effects for the management of
22 a case going forward for those who are still in and I do want that to be borne in mind.
23 But subject to that, it seems to me that there is a lot to be said for the semi-skimmed
24 option, both in terms of consistency and in terms of costs savings. So we'd be
25 minded to direct something along those lines.

26 We would want as the price of that, an appropriately framed undertaking from Epic to

1 | underwrite the costs of Coll in this regard. Now, it does seem to us that that
2 | undertaking needs to be framed in a manner that leaves the Tribunal to assess what
3 | costs are paid pursuant to that undertaking in much the same way as a hold
4 | harmless provision in an interlocutory injunction is concerned because we do think
5 | that there is considerable need for Epic's costs -- sorry, for Coll's costs -- to be
6 | underwritten by Epic, but that we can't be expecting Epic to be writing a blank
7 | cheque in that any additional cost by Coll is something that is to be regarded as for
8 | the account of Epic. I do think that whichever Tribunal is taking this forward ought to
9 | have an ability to say: "well, there is this very real benefit which you, Coll, have
10 | derived from the presence of Epic even though it involved additional costs, those
11 | costs ought actually to be for your account and not for Epic's".

12 | In other words, Mr West, your client is writing a blank cheque, but it is subject to
13 | Tribunal control as to just how many noughts are added to the cheque and it isn't
14 | simply Ms MacLeod's clients writing the number of noughts in and expecting them to
15 | be paid. There is going to be a control which may involve both sides paying more for
16 | these additional costs just not as much as they would expect.

17 | That, I think, is something which we need to think about quite carefully, but we do
18 | need to, I think, articulate the starting point which is that, this is an accommodation
19 | being offered by Coll to Epic which, to the extent it offers real advantages to Coll,
20 | they ought to pay for, but subject to the starting point that this is a Coll
21 | accommodation of Epic.

22 | So self-standing case, semi-skimmed, costs underwriting.

23 | In terms of the working out of the detail, we would obviously consolidate the panels
24 | in that it would be Ms Lucas who would be taking both the Coll case and the Epic
25 | case forward. That is obviously necessary if one takes the semi-skimmed option. It
26 | may be slightly less necessary, but I still think necessary on the skimmed option.

1 So we would have a Coll trial extended as appropriate by the participation of Epic,
2 time for the judgments to be written with the usual Tribunal speed, but obviously
3 being handed down as early as possible in 2026, and with a trial of the rump end of
4 the Epic case heard by the same Tribunal at a convenient date as early as practically
5 possible in 2026.

6 Now, that has the happy consequence that I get out of Epic and doubles Ms Lucas'
7 obligations, which obviously I am entirely in favour of, but I think it is a necessary
8 consequence because there will be a lot of working out as to what the difference
9 between semi-skimmed and skimmed is.

10 We can say the intention is skimmed but as I said at the beginning precisely what
11 that means will have to be worked out going forward and that's why I think it's
12 necessary to embed flexibility in both what is being heard in the Coll trial and who is
13 doing the paying in the Coll trial, both of those being essentially at the discretion of
14 the Tribunal, and the parties are going to have to accord a degree of trust that the
15 panel is going to get the balance right because I don't think we can articulate, except
16 in these broad-brush terms, exactly how the balance operates going forward.

17 It will be a tricky order to draft, but I think the order needs to contain quite significant
18 degrees of flexibility by which I mean flexibility in the Tribunal and uncertainty for the
19 parties which will be closed out going forward, but will not be closed out today. The
20 final piece in the jigsaw is we would adjourn off the May Epic trial to that date in 2026
21 as discussed.

22 Now, having laid out the way I see the broad things work, I am going to hand over to
23 Ms Lucas, who is the person, I think, most directly interested in the implications of
24 that order rather than me. I don't know whether you have anything that strikes you
25 as a problematic right away?

26 **MS LUCAS:** I don't. Actually, having heard the President outline that proposal --

1 and we hadn't previously discussed it -- it was actually in line with the note that I had
2 made. I think something along those lines ought to be doable. Obviously critical is
3 maintaining integrity for Coll. We wouldn't want it to happen that Epic, for whatever
4 reason, didn't proceed and Coll therefore was derailed. That would be the most
5 unsatisfactory solution.

6 I agree with what was said about the costs and in particular the need for Epic, in
7 principle at least, to be seen to be underwriting that, but I am very cognisant of the
8 fact that in the Coll Proceedings at the moment there is an evidential gap around the
9 app developer piece and it seems to me that obviously one of the pluses to this
10 approach is that Epic can plug that gap to some degree and it may be that that
11 comes with some form of costs benefit.

12 Just so that Mr West's clients are well aware, I am quite cognisant of that being one
13 of the pluses to this approach and so we will need to keep an eye on that and if Coll
14 does benefit from this approach, then that will be reflected in costs in due course.

15 Yes, I hear what the President has said about my responsibilities in 2025 and 2026.
16 Plainly, it is sensible to have the panel be the same. We want consistency, the point
17 is we are going to get one factual evidential record and that is key, that's a driving
18 force and it would be pointless if at least we don't endeavour to try and keep the
19 same panel all the way through.

20 For once, the President and I are in agreement.

21 **MR JUSTICE MARCUS SMITH:** Excellent, and we didn't fix it. This has been a
22 genuine consensus which is remarkable and very pleasing.

23 I think what we'll do is we will take reactions in reverse order because Mr Holmes,
24 I think, you will have least to worry about, then we'll hear from Ms MacLeod and
25 then, Mr West, you can finish up. We'll go through as many rounds as are necessary
26 in order to see whether we've at least articulated the problems to this solution so that

1 everyone leaves the virtual hearing as happy as they can be. I mean, there are
2 compromises obviously at every stage, but it does seem that we've got something
3 which might work. But, Mr Holmes, you first.

4 **MR HOLMES:** Sir and Madam, those were very helpful observations. I think, if
5 I may say so, you put very well the issues that will need to be ironed out in settling
6 the order.

7 If I could simply float one further suggestion for maximising the efficiencies of this
8 process, which is strictly speaking a proposed direction in the Epic Proceedings
9 rather than the Coll Proceedings because it concerns the expert evidential rump.

10 It's a suggestion, I should say, that I floated with counsel for the other two parties
11 during the course of the adjournment for instructions. The suggestion would be to
12 adopt Mr West's proposal for a sequential approach to the Epic evidence. That
13 would have the effect of ensuring that the Epic expert evidence went no wider than
14 was necessary in view of any gaps or difficulties that were seen with the evidence
15 that Ms Coll's team produced.

16 It would enable a tailored and focused approach and would ensure the rump went no
17 wider than it needed to. We thought that the proposal that Mr West brought forward
18 in his submissions worked well and we would suggest that we continue to adhere to
19 that.

20 **MR JUSTICE MARCUS SMITH:** I must say that seems entirely in line with how we
21 see it, which is essentially everything Coll-related is done at the Coll trial and then
22 there is a rump end in that everything that is Epic specific is dealt with in the second
23 trial, and it's only to the extent that it's necessary to deal with an Epic issue in Coll
24 that it is done so. I think that's really what you are saying, Mr Holmes.

25 **MR HOLMES:** Yes, Sir. The expert -- because Epic would have seen Coll's
26 evidence in advance of settling their own, they could avoid duplication and their

1 expert could simply adopt matters to which they could adhere. It would greatly
2 reduce the paperwork and it would make the rump trial much more simple and
3 straightforward.

4 **MR JUSTICE MARCUS SMITH:** That makes, I think, very good sense. Okay. To
5 the extent that wasn't embedded in our proposed order, it is now. Ms MacLeod, we
6 will see what you have to say about the shape that we have been mooting.

7

8 **Submissions by MS MACLEOD**

9 **MS MACLEOD:** I am grateful, Sir.

10 I think it is important just to start, as you said, by being as clear as it's possible to be,
11 given the penumbra of uncertainty, as to what we are agreeing to, Sir.

12 As we understand it, the semi-skimmed option is the one that is primary in
13 everybody's minds and what that entails is the factual evidence from the Epic
14 Proceedings on both sides being imported into the Coll Proceedings.

15 Now, that is something that we are content with. As I have indicated previously, we
16 do still have the residual concern that I know the Tribunal is very mindful of that that
17 will increase our costs and that those costs are coming primarily to the more direct
18 financial benefit of others concerned. As you said at the outset, Sir, this is
19 something that is to some degree being imposed on the Coll Proceedings, although
20 of course we accept what you, Madam, were saying about the potential benefit to us
21 as well.

22 So that is where we understand we've got to and given that, we are happy with that
23 proposed approach, I think it carefully balances the concerns that we had at the
24 outset, in particular in relation to funding, with the efficiencies for all parties and
25 importantly for the administration of justice.

26 In terms of the process going forward, I am mindful of the need in particular for there

1 to be no derailment of these proceedings and for there to be certainty as soon as
2 possible given the flexibility that the Tribunal has indicated is necessary. I am very
3 much in the Tribunal's hands, but would it be helpful to have a draft order from the
4 parties, if necessary, with different forms of wording in order for this to be crystallised
5 as soon as possible, or is that something the Tribunal would prefer to do first?

6 **MR JUSTICE MARCUS SMITH:** No, I think it would be helpful that, because the
7 parties know the sensitivities of preparation and particularly, I think, how best to
8 merge those streams that should be merged and keep separate those streams that
9 should be kept separate, the first draft be articulated by the parties with the Tribunal
10 looking at the fruits of their endeavours rather than us trying to create a form of order
11 which inevitably will be bifurcated by our different understandings of two separate
12 cases. So I think it's useful for the parties to do that.

13 Just to be clear, yes, it is semi-skimmed. Yes, it is, therefore, not asymmetric as
14 initially mooted, but an exchange of material to the potential advantage of Coll, but
15 the starting point is that there is an undertaking to underwrite all additional costs by
16 Epic to Coll, save that -- and this is where Coll has to take into account a degree of
17 uncertainty itself -- the extent to which that undertaking is called upon is in the hands
18 of the Tribunal, it nevertheless being clear that, as we've said many times, that it's an
19 accommodation to Epic for the benefit of all concerned that one is dealing with
20 matters. But I do want it to be clear that although we are minded to have an
21 undertaking that is a blank cheque so far as Epic are concerned, it is not a blank
22 cheque that Coll writes, it's a blank cheque that will be written by the Tribunal in light
23 of what we've said today.

24 So there is that degree of uncertainty embedded and I think you are going to have to
25 take away from this hearing that you have got a degree of protection against
26 additional costs, but it is not an absolute protection, it is a qualified one, and it would

1 not be impossible, far from it, for there to be additional costs provided those were
2 tied into real additional benefits that are accruing to the Coll process by virtue of this
3 bilateral and not asymmetric line that is going down the semi-skimmed route.

4 Essentially, everyone is giving something up, but they are getting something for it in
5 return. It will require quite careful drafting in order to make sure that it is properly
6 articulated, but I don't think there is a deal breaker there. But if there is, then
7 obviously it's for the parties to speak up now.

8 **MS MACLEOD:** There isn't on our side, Sir. I am very grateful.

9 **MR JUSTICE MARCUS SMITH:** That's very helpful. The transcript will obviously
10 speak for what it says, but it will inform the line.

11 Mr West, it's not quite a blank cheque, but you get a little bit more than what we
12 articulated this morning and it's a blank cheque with a degree of control in the
13 capable hands of Ms Lucas.

14

15 **Submissions by MR WEST**

16 **MR WEST:** I am grateful for that indication.

17 As I said at 12.15, one of the concerns of those instructing me was to understand
18 their likely exposure and potential likely maximum exposure under this undertaking.

19 A blank cheque is not something that I currently have instructions to offer and indeed
20 it may be that that would need to go higher within the company to secure the
21 appropriate authorisations.

22 As always in these cases, the concern may be more apparent than real because we
23 do have a costs budget in the Coll case and that, in a sense, sets the limit of the
24 exposure. It ought to be possible to put a number on the likely eventual exposure
25 and so it may be that between the parties that's a matter we can resolve.

26 I cannot guarantee we have instructions to write a cheque with a signature and no

1 number on it.

2 **MR JUSTICE MARCUS SMITH:** No, I understand. I think you are right, Mr West,
3 that it's not a deal breaker. It may become a deal breaker when the details are being
4 unpacked or it may resolve itself without further issue. My sense is that the latter is
5 the case, not the former, and we ought to allow the process of the parties to draft an
6 order which satisfies all of their interests without going any further.

7 I think that meets everyone's objections or issues. In a sense it's very much Coll and
8 Epic that will do the heavy lifting on the drafting the order. Google, in a sense, are
9 keen to have the benefits of an entirely sensible approach to limited consolidation,
10 but equally if they -- they are not giving up very much, if anything, for those benefits,
11 it's much more Coll and Epic in terms of costs and disruption that we need to bottom
12 out.

13 I think the parties have a good enough steer as to how the Tribunal would approach
14 that in order to at least have a go at drafting an order to see if this proposal has legs.

15 **MR WEST:** Indeed, so I agree. I share clearly the Tribunal's hopes and
16 expectations and we shall see.

17 In relation to the expert evidence, we also agree with Google's approach that there
18 should be sequential exchange and that Epic's expert evidence should be limited to,
19 as it were, supplemental points, although due to the possible risk of one or the other
20 party settling, the expert evidence for Epic will nevertheless have to be stand-alone,
21 but I anticipate the way that will be achieved in practice is by Epic's experts adopting,
22 to some extent, parts of Coll's evidence.

23 In relation to the dates for service of that evidence, again, given the need for that
24 evidence to be, as it were, supplemental, we agree with the sequential approach.

25 But we are now heading towards a trial in relation to this expert evidence in 2026, so
26 it may be that it is inappropriate for that to be served according to the deadlines

1 | which Epic had proposed when we thought -- when we were applying to head
2 | towards a trial in October of 2025. So it may be that it's more appropriate for Epic
3 | and Google to serve their evidence for the 2026 trial some time in 2025.

4 | **MR JUSTICE MARCUS SMITH:** Yes. I mean, I can see some sense in revisiting
5 | the timeframes in light of what is now agreed is to be the semi-skimmed approach.
6 | Clearly that, I think, would be sensible, but I don't think it would be sensible to say
7 | more than that. I think the parties do need to take away the spirit of what we are
8 | proposing and see how far it works in terms of a more granular articulation.

9 | **MR WEST:** The final point on experts is if Epic's expert evidence is to be, as it were,
10 | supplemental, then there does need to be provision for Epic to be provided with the
11 | expert evidence of the other parties in order to achieve that.

12 | Then finally, in relation to agreement of the order, we think it's important that there
13 | should be a deadline to try and focus the parties' minds to achieving that, not least
14 | as there are some upcoming deadlines in the proceedings themselves. We would
15 | propose that the parties seek to agree that by 3 April.

16 | **MR JUSTICE MARCUS SMITH:** 3 April? That seems remarkably relaxed, I must
17 | say.

18 | **MR HOLMES:** Sir, I thought that Mr West was about to suggest this time tomorrow
19 | or the day after. It is surely preferable to get an order done during the course of this
20 | week, if we can?

21 | **MR JUSTICE MARCUS SMITH:** I agree. I think that's what we should be aiming for
22 | and I am not going to direct that it be done, but let's get it done by 4 o'clock on
23 | Wednesday and then we've got Thursday to work things out. I mean, if it doesn't
24 | work, then probably the whole proposal is not working and it seems to me that if
25 | we've got the basic structures right, then this ought to be reasonably straightforward
26 | for teams of the calibre that we have got in front of us to sort out. If, on the other

1 hand, it can't be done in that timeframe, then probably there's something wrong that
2 we've all missed.

3 **MR WEST:** Yes, I am reminded that members of the Epic team are currently in trial
4 in Australia, but we will endeavour to achieve that timing if at all possible.

5 **MR JUSTICE MARCUS SMITH:** Well, Ms MacLeod, do you want to have a go at
6 the first cut --

7 **MS MACLEOD:** We were going to offer that, Sir. So, yes, we are very happy with
8 that.

9 **MR JUSTICE MARCUS SMITH:** Thank you. I think in a sense you are the ones
10 that have most skin in the game because it's Epic that is being forcibly imported into
11 Coll rather than the other way round. What we are looking for is a very clearly
12 demarcated intrusion of Epic into Coll and it does seem to me, therefore, that it's
13 appropriate that you have first cut.

14 That then enables Mr West's team to do the commentary on that with Google,
15 I suppose, taking up the rear because in a sense Google have just an interest in
16 non-duplicating their factual witnesses rather than anything more. So, let's aim to
17 get it done before the Easter vacation. I am very grateful to you for accepting the
18 burden of taking the first draft.

19 **MS MACLEOD:** I am grateful, Sir. That's fine by us.

20 **MR HOLMES:** Sir, if I may, there's just one consequential question which might be
21 worthy of consideration if the Tribunal has time. It's simply the question of factual
22 reply evidence in the Epic proceedings. It does strike us that if there is going to be
23 a single factual record, it might make more sense for Google to produce a single
24 round of factual evidence, the first round in the Coll Proceedings, which picks up any
25 reply points.

26 So rather than producing this week a set and another set fairly shortly afterwards on

1 17 May, we wondered whether the Tribunal saw merit in having just one round and
2 delay matters until then.

3 **MR JUSTICE MARCUS SMITH:** Well, I think that seems extremely sensible and to
4 the extent you need it, therefore, I will direct an adjournment of the Epic reply
5 evidence to be swept up into the order that Ms MacLeod is drafting.

6 **MR HOLMES:** I am grateful.

7 **MR JUSTICE MARCUS SMITH:** So in a sense, this is an order which will be made
8 in both proceedings, so we'll have to draft it on that basis. That seems very sensible.

9 **MR WEST:** One possibility which occurs to me or one possible outcome of this
10 process is that the parties do agree the broad outlines but are not able to agree all of
11 the details, in which case I anticipate we may ask the Tribunal to resolve any
12 outstanding points.

13 **MR JUSTICE MARCUS SMITH:** Yes, I think that's a given. What we'll accept,
14 although with some reluctance, is an agreed order which has in different coloured
15 type or different alternatives set out, but we would very much hope that we are not
16 forced to elect between drafts and we are instead presented with a single approach
17 given the degree of alignment that exists between the parties.

18 But I think we'll have to leave that to the parties' good sense. We are certainly not
19 making any direction that the parties agree, nor are we making any direction the
20 parties agree by a certain point in time. I think what we are saying is: "do your best
21 and get us something before we rise for the Easter vacation." But if it can't be done,
22 then we'll address the problems when they appear.

23 **MR WEST:** Thank you very much.

24 **MR JUSTICE MARCUS SMITH:** Is there anything more before I end this hearing?

25 **MR HOLMES:** Not from us, Sir.

26 **MS MACLEOD:** Not from us, Sir, either. Thank you.

1 **MR JUSTICE MARCUS SMITH:** I think, on behalf of Ms Lucas and myself, can
2 I express our thanks for the helpful and constructive way in which these not
3 insubstantial and not easy issues have been addressed by you all. We are really
4 very grateful and we look forward to receiving a draft in due course.

5 Thank you very much. I will end the hearing now. Thank you.

6 **MS MACLEOD:** Thank you.

7 **(1.01 pm)**

8 **(The hearing adjourned)**

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