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4 record.

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

Case No: 1403/7/7/21

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

12 Friday 15th
13 November 2024

14
15 Before:
16 Ben Tidswell
17 Dr William Bishop
18 Tim Frazer

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

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23 **BETWEEN:**

24
25 Dr. Rachael Kent
26 **Class Representative**

27
28 v

29
30 Apple Inc. and Apple Distribution International Ltd
31 **Defendants**

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

35
36 **[IN OPEN SESSION]**

37
38 Mark Hoskins KC, Tim Ward KC, Matthew Kennedy & Antonia Fitzpatrick (Instructed by
39 Hausfeld & Co. LLP) On behalf of Dr. Rachael Kent

40
41 Marie Demetriou KC, Brian Kennelly KC, Daniel Piccinin KC, Hugo Leith & Hollie Higgins
42 (Instructed by Gibson, Dunn & Crutcher UK LLP) On behalf of Apple Inc. and Apple
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1
2 **Friday, 15th November 2024**

3 **(10.30 am)**

4 **[IN OPEN SESSION]**

5 **MR TIDSWELL:** Some of you are joining by live stream, so I should start with the
6 customary warning.

7 An official recording is being made and an authorised transcript will be produced, but
8 it is strictly prohibited for anyone else to make an unauthorised recording, whether
9 audio or visual, of the proceedings and breach of that provision is punishable as
10 a contempt of court.

11 Good morning, everybody. Morning, Mr Hoskins.

12 **MR HOSKINS:** Do you want to kick off or do you want me to kick off?

13 **MR TIDSWELL:** I am happy for you to take us through the agenda. I think we have
14 quite a lot of what was on the original agenda resolved, I think.

15 **MR HOSKINS:** Famous last words.

16 **MR TIDSWELL:** A happy PTR. Just before you do get going, actually, there is one
17 thing I should raise. I am not sure if we have raised this before, but just in case we
18 haven't, to make sure everybody is aware of it. It involves Professor Sweeting.
19 Professor Sweeting used to work for Dr Bishop, at Lexicon, which is the UK version of
20 Lexicon quite a long time ago between 1997 and 1999, so obviously they know each
21 other as a result of that and have worked together. We don't think that causes
22 an issue, but we thought it was important that it was clear to everybody. If anybody
23 does think it is an issue, then obviously you will let us know -- not now, of course, just
24 upon consideration and instruction. Otherwise, I'm happy for you to walk us through.

25 **MR HOSKINS:** I think it is probably the same on both sides given the line-up. There
26 has been tag teaming going on with who is dealing with what issue.

1 **MR TIDSWELL:** Yes.

2 **MR HOSKINS:** I am looking at the agenda we sent you on 6th November.

3 **MR TIDSWELL:** Yes.

4 **MR HOSKINS:** The first one on that agenda is the CMA's application to make oral
5 observations at the trial. I think that's effectively agreed between the parties and as
6 long as the Tribunal is happy, I think that's ...

7 **MR TIDSWELL:** Yes, I think we might have made that order. I think we made that
8 order.

9 **MR HOSKINS:** Sorry.

10 **MR TIDSWELL:** It is hard to keep track of it all. I think that order has been made,
11 and I think the CMA's attendance was dispensed with at their request, so I think that's
12 all under control.

13 **MR HOSKINS:** Then we come on to the timetable, including hot tubbing and
14 cross-examination and that's what I am going to deal with. Do you think it probably
15 makes sense to start with the hot tubbing issue first and then the trial timetable.

16 **MR TIDSWELL:** It does.

17 **MR HOSKINS:** I don't know who you want to hear from first, in a way, because we all
18 saw the Tribunal's letter on hot tubbing and we are happy with that. Apple are not
19 happy with that, so I don't know -- maybe you want to hear from them first and then
20 me to respond, or if you want me to explain why there should be hot tubbing. I am in
21 your hands.

22 **MR TIDSWELL:** I think it might make sense to hear from Apple on that first, if you are
23 happy to do that. Certainly, Mr Piccinin, as you might imagine, we start with the
24 expectation that it might be useful, but obviously an open mind if you tell us it is not
25 appropriate and to be persuaded --

26 **MR PICCININ:** Absolutely. The starting point is that the parties are in agreement

1 | there should not be hot tubbing for any of the experts other than the economists, so
2 | that's where we are.

3 | **MR TIDSWELL:** Yes. I have to say, we did turn our minds to the accounting experts,
4 | but having thought about it and assessed our forensic accounting expertise, we
5 | decided cross-examination might be a better way forward on that. Certainly, I think
6 | that's why we are talking about the economic experts.

7 | **MR PICCININ:** Yes. In relation to the economists, Dr Kent has made a proposal,
8 | which we say is a somewhat complex process, involving four distinct hot tubs with
9 | various combinations of the experts, and then with several sessions of traditional
10 | cross-examination interleaved between each of those four hot tubs, running to eight
11 | days in total. Roughly half of that is the hot tub, and half of that the traditional
12 | cross-examination.

13 | We say that proposal, in addition to being unduly complex, is underdeveloped.
14 | Dr Kent says that the hot tubs should cover the entirety of the economic issues at one
15 | level of generality, everything from market definition through to incidents -- or pass on,
16 | if you prefer -- but doesn't say which issues within that should be dealt with in the hot
17 | tub.

18 | Instead, the proposal Dr Kent has made is that the experts over the coming weeks
19 | should nominate their top six points or up to six points from the joint economic expert
20 | statements in each of the four big topic areas that they would like to have dealt with in
21 | the hot tub, so that could cover any six positions from each area. Then they say if the
22 | experts can't agree on which propositions should be hot tubbed, the Tribunal will be
23 | required to sort that out. We say that is both unworkable and burdensome for
24 | everyone involved, but it also makes it entirely unclear why, in particular, Dr Kent
25 | envisages that hot tubs would be helpful, because they haven't identified what it would
26 | be helpful to resolve.

1 Our position is that although hot tubs, of course, are very useful in lots of cases for lots
2 of different reasons, this is not an appropriate case for hot tubs at all, unless -- and
3 this is an important unless -- there are any specific points the Tribunal had in mind that
4 the Tribunal wanted to clarify with the economists, in which case, of course, that's
5 a matter for the Tribunal, and then what's left are logistical concerns.

6 **MR TIDSWELL:** Would it be helpful for me to tell you where we are with that?

7 **MR PICCININ:** That would be helpful, sir.

8 **MR TIDSWELL:** I don't want to take you out of your way, but perhaps to save you
9 guessing on that.

10 I should preface that by saying we have looked at some of the material we have, but
11 we are by no means experts on the expert reports, but we have certainly looked at the
12 joint expert statements. I think from our point of view, two things, really. One is it
13 seems to us that in this case, the hot tub is most likely to be useful not particularly to
14 resolve issues, because it seems unlikely we are going to be able to do that in the
15 course of the hot tub, given the number of the issues, and also the positions the parties
16 are taking.

17 So really from our point of view, it is more likely to be useful to clarify issues, and
18 particularly for us to be able to have a very clear understanding of the things which are
19 in dispute and what the key reasons for the dispute are, if I can put it that way.

20 The second thing is I think we probably, at least to the extent we have under it so far,
21 are most interested in the issues that appear between Dr Singer and
22 Professor Sweeting, which I think I have probably characterised in the list and the
23 Class Representative's skeleton as the exclusionary abuses and the objective
24 justification perhaps.

25 **MR PICCININ:** Those are the two points that the experts (inaudible).

26 **MR TIDSWELL:** It seemed to us if we were going to do a hot tub, it was likely, certainly

1 not to the exclusion of the others, but we would be likely be wanting to focus on those
2 two experts and those issues. I don't know, Dr Bishop, if you want to say anything
3 further about that.

4 **DR BISHOP:** That is not to say that the other expert reports don't come into it, they
5 certainly do, but the way the debate developed between Dr Singer and
6 Professor Sweeting, it became a summary at the core of the case with those things
7 feeding into it. So, other issues such as incidence don't arise unless there is
8 an overcharge. Market definition is another way of looking at whether there is real
9 competition. The core of the case is concentrated in that exchange with all the other
10 stuff fitting in. It is very important, however, that we look at all those because a debate
11 between two experts partly founded on what some other expert says might collapse if
12 the other experts' evidence is unsound.

13 **MR PICCININ:** I think I understand that. Just to be clear, is what the Tribunal has in
14 mind, then, a short hot tub of, say, a day or less only between Dr Singer and
15 Professor Sweeting, or is it something else?

16 **DR BISHOP:** I think certainly those two, but ... no, I think we'd probably have a day
17 and a half, say, a day/a day and a half, but I think Professor Hitt, for example, I think
18 it would be odd not to have Professor Hitt there since so much of what Dr Singer
19 criticises is in there, and so much of what Professor Sweeting relies on is in there. So,
20 I think all four of the economists, really.

21 **MR TIDSWELL:** I would anticipate, and this is again where we'd got to in our thinking
22 on it, so we're very much open to anything you say about it, but I think we would
23 anticipate we would probably run through the topics set out in the Class
24 Representative's skeleton at 15.2 and probably more or less in that order, but certainly
25 in terms of the weight of the discussion, we would expect it to be on those three items
26 in the middle of which we talked about.

1 **MR PICCININ:** The idea is all of this would happen at the start of the economic
2 evidence and after that, we would have traditional cross-examination.

3 **MR TIDSWELL:** Yes. Obviously, we will have to hear what Mr Hoskins has to say
4 about his proposal, but certainly in terms of meeting the objective we thought the hot
5 tub served, that seemed to us to be the most obvious way to deal with it.

6 **MR PICCININ:** Yes. Then the traditional cross-examination could still cover
7 everything, including the matters that have been covered in the hot tub.

8 **MR TIDSWELL:** Yes. Again, obviously I will have to hear Mr Hoskins on that, but if
9 we were to do it that way, I don't think we would be seeking, as I indicated earlier, to
10 resolve issues through that questioning. It is more for our benefit for clarification.

11 **MR PICCININ:** Rather than me making submissions which attempt to oppose
12 Mr Hoskins' proposal, it may be that it is first worth finding out whether Dr Kent is
13 happy with the proposal you have just made instead.

14 **MR TIDSWELL:** Before we do that, I suppose implicit in your suggestion is that you
15 think you might be able to live with that, and you may have to take instructions on that.

16 **MR PICCININ:** I would like to take instructions. I think we have always said we are
17 not opposed -- if the Tribunal would find it helpful to clarify matters, that's a very
18 different thing from the proposal Dr Kent has put forward. Obviously if the Tribunal
19 wants to clarify matters, that's fine.

20 What we are concerned about is the kind of overly complex hopping in and out of the
21 hot tub proposal that Dr Kent has, and we are also very concerned about a proposal
22 that would limit our ability to cross-examine either in principle or just because it takes
23 up so much of the time that there is no time left for traditional cross-examination, but
24 your proposal does not seem to me to have either of those two problems, if I can put
25 it that way.

26 The one final thing I should mention just before I take instructions and let Mr Hoskins

1 say what he has to say about that is that there is a logistical concern involving
2 Professor Hitt, which you may have seen. His issue is that he has teaching
3 commitments at the Wharton School in Philadelphia, and those commitments run from
4 Monday to Wednesday. His position is that he can teach at least one class for each
5 course remotely, but it is worth bearing in mind that Monday and Wednesday are the
6 same course. So that just creates a logistical issue in terms of where --

7 **MR TIDSWELL:** Sorry, I am not sure I followed the practical implications of that. What
8 does that mean in practice? If we were to say -- for argument's sake, let's say we were
9 to do a hot tub on Monday 3rd and the morning of Tuesday 4th, is he going to be able
10 to do that or not?

11 **MR PICCININ:** That would be difficult. We would then also need to look at when --

12 **MR TIDSWELL:** He is coming back. Presumably that would be followed by --

13 **MR PICCININ:** Dr Kent's experts.

14 **MR TIDSWELL:** -- Dr Kent's experts. It just depends, doesn't it? If one were to work
15 on the basis there are broadly six or six-ish days, presumably you would be starting to
16 call your experts some time on Tuesday 11th or Wednesday 12th.

17 **MR PICCININ:** Yes. Another option, if you have the timetable in front of you, would
18 be the previous Friday is listed as a non-sitting day.

19 **MR TIDSWELL:** Yes. Funnily enough, I did actually give some thought to whether it
20 was possible to squeeze more into January, effectively. The difficulty with that is I think
21 there is quite a lot of pressure on the timetable anyway, and I don't think a day is -- we
22 do think it might be more than a day, and the difficulty, of course, is if you -- what I am
23 anxious to avoid is I don't want to find the experts have gone into a hot tub on
24 31st January and been sworn and then not be available, particularly for Mr Hoskins,
25 to help him -- actually for you to help you prepare your cross-examination of
26 Mr Hoskins' witnesses when you get early into the week, which is I assume what you

1 might well be doing on that week and otherwise. So, they are going to be in purdah if
2 we were then coming back on the Monday morning.

3 The third thing about it is it is not very attractive from the Tribunal's point of view
4 because frankly we could do with the extra time to prepare for the hot tub. All of those
5 things made me think it wasn't a great idea, but before we saw this timetable, it was
6 certainly on my list of different ways of looking at it.

7 Just to come back to Professor Hitt, we are not unsympathetic to the problem, and
8 obviously it is a problem. I think there are certainly members of the panel who have
9 taught before and understand the commitment, but we have a trial here and the
10 difficulty is it is very tight and I am not sure how we are going to be able to
11 accommodate that if we have to work around Professor Hitt's availability.

12 It may be we have to ask him to find some way of managing that. I don't know what
13 the answer is. If he can do it remotely, maybe we help him manage that, given the
14 time differences, by starting a little bit earlier and finishing a bit early, but I think the
15 default position really needs to be that the trial and the needs of the trial timetable
16 need to drive things rather than Professor Hit's availability.

17 **MR PICCININ:** I understand. Perhaps if we hear from Mr Hoskins now and I'll take
18 instructions on those core points.

19 **MR TIDSWELL:** Yes, let's do that, thank you. Mr Hoskins?

20 **MR HOSKINS:** We have no more points. We have no axe to grind on these issues,
21 it's simply what the Tribunal finds helpful. If the Tribunal finds helpful two days of hot
22 tub followed by cross-examination -- and I have taken instructions, we are perfectly
23 happy with that -- it is what works for the Tribunal.

24 **MR TIDSWELL:** I thought the suggestion was very interesting and actually --

25 **MR HOSKINS: (Overtalking).**

26 **MR TIDSWELL:** Well, quite, and I think we have seen some examples of really quite

1 intense examples of hot tub which form a slightly different purpose to the one I have
2 described. If we were minded to do that, then obviously that would be helpful.

3 I think we have probably got to the point where we thought that looked quite difficult,
4 given the number of experts, and just the time we have. I think if we perhaps had
5 more luxury of time, it might have been more attractive.

6 **MR HOSKINS:** It was just a suggestion. We thought you would want some hot
7 tubbing. We thought there should be some cross-examination. That was the
8 suggestion to make it work. Equally, if you prefer two days and then the cross, we are
9 happy with that.

10 **MR TIDSWELL:** On this basis, we wouldn't be restricting the cross-examination.

11 **MR HOSKINS:** No.

12 **MR TIDSWELL:** I think we would say to you, and we would hope you wouldn't be
13 asking the same questions we would ask, because that would not hopefully deliver
14 any different answers, and we would hope the hot tub was helpful to focus some of
15 the questions you want to spend most time on, but I am not sure we are advancing
16 this as an enormous saving of cross-examination time, if I can put it that way.

17 **MR HOSKINS:** That relationship between hot tubbing and cross-examination is one
18 of the unspoken questions, because if there's been a hot tub and you have asked
19 questions, you don't want us trampling over the questions again if it has already been
20 dealt with properly, but then there is the issue of to what extent do we have to put our
21 case and is someone going to complain if we -- at the end of the day I think the
22 advocates just have to use their expertise and experience.

23 The point in this is to make sure you get to see the evidence. I mean, the case law
24 doesn't say you have to put every single point. For example, Tui, which is cited in
25 Apple's skeleton. It's important, but you don't have to put every point. As a counsel
26 team on both sides, we have to make sure the proper issues are ventilated.

1 **MR TIDSWELL:** Yes.

2 **MR HOSKINS:** Hopefully we will do a good job. I don't think you can be didactic about
3 the relationship between the hot tub and cross-examination. You just sort of have to
4 trust us and we have to trust you, and if you think we are doing something
5 inappropriate, you will tell us and we will stop.

6 **MR TIDSWELL:** That's helpful. I suppose the other question -- let me just come back
7 to your point about putting the case, but the other question is if we do that, we are
8 taking up all of Monday and a decent chunk of Tuesday -- let's say it is a day and a
9 half, although as we know these things might slip a bit -- that does cut down the time
10 in the timetable for expert evidence. It seems to me that was probably, at the moment,
11 with the remainder of the timetable, giving you three days each.

12 Now there are a lot of experts, I wasn't sure whether you felt that was enough. If it is
13 not enough, there are ways of managing that. One is we have a bit of overflow
14 time -- what we could do is we could cut down the time you have preparing the
15 closings. I appreciate that's not very welcome, but certainly there is, one would hope,
16 there might be a little bit of trimming that could be done there.

17 The second is we are very happy to give up some reading time if that is what makes
18 a difference. I would not want anybody to feel that they were not going to get a proper
19 chance to deal with the expert evidence after the hot tub. I think that's really the key
20 question about putting the hot tub in -- that was really the reason for me thinking about
21 different variations, as Mr Piccinin brought up. Because I don't want you to feel you
22 have not got enough time in that period to deal with the experts.

23 **MR HOSKINS:** This is an art, not a science -- it is barely an art. Three days each for
24 cross sounds fine to me because we will make it work.

25 **MR TIDSWELL:** That was my feeling, that it ought to. If that weren't the case, then
26 someone should be shouting now rather than --

1 **MR HOSKINS:** Sure. Is this about going to the stake as an advocate, saying, "I need
2 an extra two hours now". I think adopting this, there may have to be a degree of
3 flexibility if something's gone a bit longer, etc. Some people may go short.
4 There is some scope for flexibility in the sense that what immediately follows the
5 economic experts, as you say, is the break for the written closings and your reading
6 and our prep for doing the oral closings. So, there is scope for you to inject some
7 flexibility if the cross is taking a bit longer, but I would be very happy to plan. If we are
8 looking at the most recent version which was sent to you, the hot tub is on the 3rd and
9 4th. I guess then the 5th, 6th and 7th would be our experts being cross-examined by
10 Apple, 11th and 12th -- sorry. 5, 6 and 10 would be us, wouldn't it?

11 **MR TIDSWELL:** Yes. You get half of the 4th and half of the 10th, I think, so I am
12 afraid it is a bit fragmented. There is the option to sit on the 7th, maybe just to deal
13 with that. There are lots of reasons to put in a non-sitting day because it makes it
14 easier for everyone, but one of the main reasons for putting in a non-sitting day is to
15 give us some redundancy. Clearly if we needed that 7th, we could use it if we needed
16 it.

17 Just changing subject completely, if you go back to January, I was a bit nervous about
18 scheduling factual witnesses on the 17th and taking up that non-sitting day just
19 because I would prefer to have it available for overflow than to take it, but again that
20 depends on how long you are going to be. It seems to me you have potentially
21 five -- I think you are doing most of the cross-examining here -- you have potentially
22 five, you might have seven. I thought if you had five, then you actually have quite a lot
23 of time to do that. If you have seven, maybe you do need some extra time, but
24 I wondered whether we could work on the basis that we will keep that day, the 17th,
25 as a non-sitting day available if you need it. Obviously, I am not suggesting you leave
26 it until the Thursday to tell us that.

1 **MR HOSKINS:** Sure.

2 **MR TIDSWELL:** But when you do your proper planning and your cross-examination,
3 if you think you need it, you could ask for it and you would expect to get it if you need
4 it.

5 **MR HOSKINS:** You will understand the trial is looming large, but we are still quite
6 a far way out. To be absolutely frank, we are still working on the cross, but we will be
7 in a better position at the start of the trial. We can have this conversation again and
8 give you a better indication of how long we think we need. Again, I am perfectly happy
9 with that, the 17th as a non-sitting question mark, and we come to that at the start of
10 the trial when we have a better sense.

11 **MR TIDSWELL:** I would rather leave those and the 7th, the same sort of thing, leave
12 it as a non-sitting day, but once you have done your preparation and you think there
13 is not enough time for the economic experts between the two of you, then obviously
14 we have a pressure valve there. Plus we can always cut short the time for preparing
15 the closings.

16 **MR HOSKINS:** So do you want to schedule the hot tub for the Monday and the
17 Tuesday, or just the Monday and half of the Tuesday?

18 **MR TIDSWELL:** Well, the reason for not making it two days was my concern that we
19 are taking up too much of your cross-examination time. I think given that we were not
20 expecting it to change the course of history, rather just to help us along, I think we
21 probably thought a day and a half was sufficient. If we can do it in a day, we will do it
22 in a day.

23 Again, to the extent you are still in the foothills, we are still on the beach, I think, in
24 terms of understanding --

25 **MR HOSKINS:** We are here to help you, actually.

26 **MR TIDSWELL:** I don't think it is yet clear to us how much time we would want in the

1 hot tub and exactly what we would focus on, but I think for timetabling purposes, as
2 you say, there is plenty of time to sort this out and we don't need to settle on it today.
3 If we plan to put the hot tubbing on Monday and Tuesday morning and then work out
4 how everything looked after that, that's probably the way to go.

5 **MR HOSKINS:** Then our expert witnesses would come into the box on the PM on
6 Tuesday 4th. It would be us on 5th, us on 6th. What happens on the 10th?

7 **MR TIDSWELL:** It depends whether we sit on 7th or not.

8 **MR HOSKINS:** I am assuming not sitting on --

9 **MR TIDSWELL:** If we don't, then I think Apple wants to flag the three days of this
10 three out of six. You are going to put a witness in the witness box on the 10th as well.

11 **MR HOSKINS:** So AM is us and PM is Apple.

12 **MR TIDSWELL:** Yes.

13 **MR HOSKINS:** Sorry to do this, but it is helpful.

14 **MR TIDSWELL:** No, I agree, I think that's exactly right.

15 **MR HOSKINS:** Then the Apple witnesses on the morning of 10th, 11th, 12th and the
16 morning of 13th, and that's the three days for them.

17 **MR TIDSWELL:** Yes.

18 **MR HOSKINS:** So that is three days and three days --

19 **MR TIDSWELL:** Yes, and that is sitting within the timetable without using the 7th or
20 curtailing the time for written closings preparation. We have that expansion if as we
21 get closer you think you need it.

22 **MR HOSKINS:** I mean, as I say, that looks fine to us. On the Professor Hitt point, we
23 heard what you said, etc, but, as you said, I don't need to go over the point, you have
24 the point. It can't be the tail wagging the dog in terms of how the trial works. When
25 you said he could do it remotely, I wasn't sure if that was the teaching or the
26 cross-examination.

1 **MR TIDSWELL:** The teaching. I am assuming he is going to be here, that may not
2 be right. I suppose he could do what he likes, but I meant for the teaching.

3 **MR HOSKINS:** I wanted to check, because obviously with the cross --

4 **MR TIDSWELL:** No, quite. That's (inaudible). I understand that.

5 **MR HOSKINS:** I don't think there is anything else I need to say.

6 **MR TIDSWELL:** Just on the point about putting your case, I don't -- it seemed it me
7 that unless you were agreed on a formula that was going to work, there was not much
8 I could or should be doing about that. If you want to put some formulation that -- but
9 in a way, I suspect the formulation you put is probably the modus operandi we're going
10 to operate under any way, which is that I am certainly not expecting you to put every
11 point to every witness. We know that is not how it works but on the other hand, if you
12 manage to leave a gap somewhere and Apple has something to say about it, then
13 clearly they have something to say about it.

14 **MR HOSKINS:** And vice versa.

15 **MR TIDSWELL:** And vice versa, yes.

16 **MR HOSKINS:** It may become a question of weight, rather than excluding a point, but
17 that's what we are here for and if we do our job properly, it won't be a problem, but the
18 idea that we can chart rules about it precisely, it is just impractical.

19 **MR TIDSWELL:** So unless anybody wants to revisit that, I think we just see how it
20 goes; and if you come to some arrangement about how you want to do it, that's fine.

21 **MR HOSKINS:** I am not encouraging and seeking an arrangement. There is case
22 law on it. TUI is the most recent and high ranking, and we are all experienced
23 advocates, and we have to do our job properly.

24 **MR TIDSWELL:** Good. Mr Piccinin?

25 **MR PICCININ:** I think we can find a way to make this work for everyone. If we have
26 the hot tub on the 3rd and then the morning of the 4th with all four experts, our proposal

1 | would be that we should then have three and a half days each for cross-examination.

2 | **MR TIDSWELL:** Yes.

3 | **MR PICCININ:** One way we could do that is we start with Dr Kent's experts in the
4 | afternoon of the 4th, continue on the 5th, 6th and 10th. Then on the 11th and 12th,
5 | Dr Kent can cross-examine Professor Sweeting, and then on the 13th and 14th if
6 | needed, they can cross-examine Professor Hitt. That way, we end up with something
7 | that is consistent with his teaching commitments as well. So everyone gets the time
8 | they need.

9 | **MR TIDSWELL:** I think what I don't want to do is to drive a timetable on
10 | Professor Hitt's teaching commitments, and I am afraid that's not what we are doing
11 | here. If we can make it work for him, I am very happy to do that and make some
12 | accommodation for him, but if you need three and a half days for cross-examination
13 | of Dr Kent's witnesses, then we will be able to make that happen. If you only need
14 | three days, then obviously we have to adjust the timetable we just talked about. If you
15 | need it, it's available, and we will find a way to do it whether we do it that way or
16 | whether you would make use of the 7th depends on, I suspect, all sorts of factors.
17 | I think perhaps I would rather leave it for now. I appreciate that may make it more
18 | complicated for Professor Hitt, but I'm afraid we just don't think we can drive
19 | a timetable based on his availability at the moment.

20 | **MR PICCININ:** Sir, as for the 7th versus the 10th, I don't think that makes any real
21 | difference to us, but, as it is, we are not --

22 | **MR TIDSWELL:** Just to be clear, the impression I was getting was that you were
23 | trying to avoid Professor Hitt having to turn up any earlier than the 13th and if we were
24 | to --

25 | **MR PICCININ:** Any earlier than the?

26 | **MR TIDSWELL:** 13th.

1 **MR PICCININ:** That is the --

2 **MR TIDSWELL:** If we were to use the 7th and that might well not be the case, he
3 might have to come on the 12th.

4 **MR PICCININ:** Unless there was a gap.

5 **MR TIDSWELL:** Absolutely. Again, if that is the way we solve it, then we deal with
6 that as a problem relating to Professor Hitt with the timetable we've set. What I don't
7 want to do is create a timetable around Professor Hitt --

8 **MR PICCININ:** We are not doing that, sir.

9 **MR TIDSWELL:** Just to be clear, what I would like you to do is to approach this by
10 deciding how much time you will need with Dr Kent's witnesses. You don't have to tell
11 me the answer today because we have the flexibility to expand beyond three days to
12 three and a half days, if that's the right answer. We have not talked about
13 re-examination, which is probably not going to make a lot of difference, but we
14 probably ought to --

15 **MR PICCININ:** That's including re-examination.

16 **MR TIDSWELL:** Just like I don't think Mr Hoskins is in a position to be absolutely clear
17 about what he needs now, I don't think you are either. So can we just -- unless you
18 have prepared your cross-examination. What I would rather you did was prepare your
19 cross-examination and then we can have a discussion about exactly what we do in
20 that week. If as part of that you say it would help a lot for Professor Hitt to come on
21 this day and not that day and we can make that work, then of course we'll do that, but
22 I don't want you to be deciding on how long you are going to cross-examine or to be
23 colouring that question by Professor Hitt's availability.

24 **MR PICCININ:** To be clear, that isn't what we are doing at all. We have given quite a
25 lot of thought to how long we need to cross-examine. We have had the experts' reports
26 for quite some time now and we have been reading them very carefully. So, the three

1 and a half days we are putting forward is certainly not geared to get Professor Hitt into
2 one day or another.

3 **MR TIDSWELL:** That's fine.

4 **MR PICCININ:** Equally, this proposal already involves Professor Hitt having to do
5 teaching remotely from the UK on the 3rd and 4th. We are not saying the whole trial
6 timetable needs to be organised around Professor Hitt's availability, of course not.

7 All I am saying is having made those decisions -- so we have the hot tub where we
8 want the hot tub and for the length of time the Tribunal wants the hot tub to take, then
9 we have the amount of cross-examination which certainly we say we need for
10 Dr Kent's experts. Given the substance they are covering, we land in a position where
11 without much further work, we can make Professor Hitt's cross-examination come at
12 a time where it happens to suit his teaching commitments. Since that is feasible, it
13 would be desirable, in my submission, for us to lock that in.

14 **MR TIDSWELL:** I just don't think I do want to lock it in. What I would like to do is -- I
15 think we have a framework here and it is clear there are some things that may need
16 to change, which includes people's views on how long it is going to take. You say you
17 may know the answer, but I would like you to think about it. I don't think I have seen
18 anything to date where you have told us that's the position before now, so this is the
19 first we have heard about exactly how long you think you are going to take.

20 I would like you to think about it as you do more of your preparation, and I would like
21 to see an agreed timetable, if that's possible, closer to the trial. Obviously, that should,
22 if it is possible, try to accommodate Professor Hitt's availability; but if it isn't, then we
23 are going to deal with that.

24 **MR PICCININ:** Yes. I understand that sir. Obviously, it is not just Professor Hitt, this
25 is a more general point: with Apple's witnesses travelling from the United States, it
26 would be desirable if we knew when people were giving evidence in the timetable so

1 they can plan their journey.

2 **MR TIDSWELL:** I completely agree with that. What would be helpful would be the
3 next version of the timetable to be much more precise about who is giving evidence
4 when. I am sure Mr Hoskins is prepared to agree to this; that at some stage there
5 needs to be some clarification about who you want, when, for how long, just like we're
6 expecting people to be clear about the experts as well. I just think that asking
7 Mr Hoskins to commit to that now --

8 **MR PICCININ:** I wasn't asking him to do it on his feet, but it does need to take place
9 soon --

10 **MR TIDSWELL:** No, I appreciate that. It does, I agree.

11 **MR PICCININ:** -- really in the next couple of weeks, because otherwise we are in
12 a position where these arrangements are just being left too late, and there is really no
13 good reason why it should take this long to figure out who you need to cross-examine
14 and for how long. It is common to have a more developed timetable than this at a
15 PTR.

16 **MR TIDSWELL:** We are quite a long way out, though, aren't we, Mr Piccinin? I still
17 think there is quite a lot of work to be done by both sides as to --

18 **MR PICCININ:** We don't dispute that, sir.

19 **MR TIDSWELL:** We have a framework. We know when we are doing the hot tub, we
20 know roughly what we have to play with for cross-examination. The benchmark is
21 three days, but if you think you need more, then obviously -- and that goes both ways,
22 of course.

23 **MR PICCININ:** Yes.

24 **MR TIDSWELL:** If you want to come up with a timetable, I think it would be helpful for
25 the next version of the timetable to have exactly how that time is going to be spent
26 with which witnesses. That's the next step, I think, and that applies to factual and

1 economic. I don't think I can set a date for that other than to indicate that the sooner
2 you can do it, the better for everybody, but if you are having difficulty with it, you can
3 come back to me, and we'll deal with it.

4 **MR PICCININ:** I am grateful, sir. I think that's probably as far as we can take it today.
5 Mr Kennelly has a further point on the timetable, though.

6 **MR HOSKINS:** Can I just explain where we have got to.

7 As I understand it, we are sticking with the framework at the moment, which is the one
8 you and I discussed, which is hot tub on the 3rd, on the morning of the 4th, our
9 economist experts being PM Tuesday, none on the 5th and the 6th. The 7th is
10 a non-sitting day with a question mark beside it. Then on the 10th it's our experts in
11 the morning, Apple's experts coming in the afternoon, and it's Apple on the 11th, 12th
12 and the morning of the 13th.

13 As things currently stand, the written closings stay as they are.

14 **MR TIDSWELL:** That's the framework. I think we have given you a pretty clear steer
15 that there might be a request for three and a half days rather than three days, in which
16 case I would like you, if you can, to work out how you manage that, and if you can
17 accommodate Professor Hitt on that, obviously you should do that.

18 **MR HOPKINS:** I understand that, of course. The question about the order of the
19 witnesses is not actually for us to determine. For example, for the factual witnesses,
20 we have now a three and a half days' window for them. To a certain extent, it is in
21 Apple's power. We know we need to say go and nap on who we need, but we have
22 said we need five of the seven already.

23 **MR TIDSWELL:** No, I understand. I think the point is -- sorry, carry on.

24 **MR HOSKINS:** We can give a better estimate of how long we think we are going to
25 be, but they might take lesser or longer in real life. We can't be faced with the situation
26 where X has to get a plane when actually there is an hour left of questioning, so there

1 will have to be a degree of flexibility.

2 It is Apple's choice in which order they call their own witnesses, so they're not waiting
3 on us. We don't get to dictate that, so they have a degree of control over who has to
4 be there when already, I just make that point.

5 **MR TIDSWELL:** That is right, of course. I can also see it is material to their decision
6 about the order, both to know how long roughly you think you are going to be.

7 **MR HOSKINS:** Sure.

8 **MR TIDSWELL:** And also to know who you are going to want and who you are not
9 because clearly if there are witnesses you are not going to call, that may have
10 a bearing on how they order them.

11 **MR HOSKINS:** We have told them the ones we definitely want --

12 **MR TIDSWELL:** Yes, two you are still thinking about.

13 **MR HOSKINS:** -- two outstanding, one of them I have to deal with. It is quite odd
14 because she is the witness who deals with the IP issues and her statement actually in
15 content is about a page and a half long, which says Apple has IP and quite a lot of this
16 stuff, which isn't controversial. We have tried through correspondence to say what
17 point is this going to because there are still IP points on the pleadings, for example.

18 Now if, for example, the only purpose of that witness is Apple has some IP, then I don't
19 need to cross-examine, but equally, do we really need a witness at all? Apple also
20 has some control over that, but if there is some point I am just not aware of yet,
21 because we have not been able to figure out why you would need a particular witness
22 saying Apple has some IP. You understand why I am loathe to give something up
23 when I have not seen what the significance of that witness is supposed to be yet.

24 So, we are slightly -- I hear from the other side, "Oh, they should know, they should
25 know". Equally, this is not a game. I can't give something up if I am not quite sure
26 how this is going to play out. It works both ways.

1 **MR TIDSWELL:** I'm afraid I don't know the answer to that question.

2 **MR HOSKINS:** No, I don't expect you to.

3 **MR TIDSWELL:** If we can just take it in steps. If you can indicate how long you think
4 you are going to be, as soon as you can sensibly do that. I am not asking you to do it
5 today, but clearly that's an important step in the process.

6 Then clearly we need to understand from Apple in what order they are going to call
7 their witnesses, then we can put them into the timetable. I hope it is not that difficult.

8 As I said to Dr Bishop, I am not suggesting that there is a date that this has to be done
9 by, but it certainly is something we ought to be focused on, and the sooner we can do
10 it, the better.

11 Clearly if it is not done within a certain period of time and somebody feels it's causing
12 a problem, then -- I don't want to hurry you along in your preparation, but I don't want
13 you to be dragging your feet in terms of giving views either. That applies on both
14 sides.

15 **MR HOSKINS:** We are not dragging our feet in preparation. It is just a question of
16 when we are confident enough to say, "We need this witness for that long". Equally,
17 it is unhelpful if we give an indication and it is wildly off because then they say, "He
18 has a plane booked and he has to ..."

19 **MR TIDSWELL:** No, I understand.

20 **MR HOSKINS:** I hope you are getting the sense from us that we are here to help.

21 **MR TIDSWELL:** I'm sure you are. Everybody is here to help.

22 **MR HOSKINS:** In relation to -- it is Apple's choice in what order they call witnesses,
23 but it would be odd to have Professor Sweeting before Professor Hitt, given that
24 Professor Sweeting relies to a large extent on what Professor Hitt says. So, the
25 Tribunal may have a view on that. I understand about Professor Hitt's availability, I am
26 not going to -- it would be a very odd one to have Professor Sweeting, then

1 Professor Hitt, given the degree to which Professor Sweeting's evidence is based on
2 Professor Hitt's opinion.

3 **MR TIDSWELL:** I think we have given a clear steer to Mr Piccinin that he needs to go
4 away and work out how long he thinks he needs, and obviously you are going to do
5 the same about how long you need and have that conversation. Then it is between
6 you to construct something which has some names in. If that's a sticking point at that
7 stage and you think it is a problem, we will look at it.

8 **MR HOSKINS:** I have made my point to that.

9 **MR TIDSWELL:** We can see the force of it, but on the other hand, at the end of the
10 day, I think it is probably for Apple to decide how they want to do it.

11 **MR HOSKINS:** But you can tell them in practice.

12 **MR TIDSWELL:** Yes. We probably could tell them, but I think if there's a reason why
13 they want to do it that way, which presumably is, one would hope, something more
14 significant than Professor Hitt's availability. If they want to make a mess of their case
15 because of Professor Hitt's availability, then they may have to take the consequences
16 of that.

17 I am not suggesting any of that is what they are going to do or why they are going to
18 do it, but I don't particularly want --

19 **MR HOSKINS:** I am not asking to you make a ruling today, certainly not. I am making
20 what seemed an obvious point that it is an odd way round.

21 **MR TIDSWELL:** Yes, okay. So, we're done with the -- is there anything -- Mr Kennelly
22 is going -- sorry, Mr Piccinin.

23 **MR PICCININ:** Can I respond to that? Where I agree with Mr Hoskins is that it is up
24 to us as to the order in which we call our experts. I'd just like to put on record that
25 I don't accept Mr Hoskins' characterisation of Professor Sweeting's evidence as
26 relying heavily on Professor Hitt's evidence. We have tried to have of a division of

1 labour between the two of them where we don't have two experts commenting on the
2 same issues.

3 **MR TIDSWELL:** I think you would probably do the market definition of dominance
4 before you go on to the abuse --

5 **MR PICCININ:** The thing is that Professor Hitt's evidence goes to more than just the
6 definition of dominance. It also includes incidence, and you would normally do abuse
7 before you would do incidence. So, there is no perfect way of dividing them up.

8 Of course, we will also have a day and a half of having everyone in the room for the
9 Tribunal to elucidate all of the interrelationships between them, which is the virtue of
10 the proposal the Tribunal has made.

11 **MR TIDSWELL:** I think we have probably covered it. We will leave it with you to sort
12 out. If you can't sort it out, then obviously we will deal with it.

13 **MR PICCININ:** Absolutely.

14 **MR TIDSWELL:** Mr Kennelly.

15 **MR KENNELLY:** Sir, (inaudible) and we raised this in correspondence. You asked
16 us to deal with it at the PTR and we have agreed.

17 It's Mr Hoskins' point that it is for Apple to tell him the order in which the witnesses of
18 fact are to be called. The problem is, not least with the seniority of these fact witnesses
19 from Apple, the order in which they are called depends on how long Mr Hoskins needs.

20 **MR TIDSWELL:** Yes, I can see that. I think I have indicated to Mr Hoskins he needs
21 to tell you that so you can work out what order to deal with them.

22 **MR KENNELLY:** I am obliged, but what's important in view of what Mr Hoskins has
23 said is perhaps to inject some urgency into the exercise. If I may throw in my ha'penny
24 on that point, and I hear what the Tribunal says about it, Dr Kent's case has prepared
25 Apple to put forward its most senior executives. Because of their diaries and their
26 regulatory and professional commitments and the timing of this trial, it is vital they

1 know when they are required so they can make the arrangements to travel from the
2 US and be here and know roughly when they can leave in order to return to their
3 commitments.

4 Again, the Tribunal has this, but Mr Schiller is a member of a very small executive
5 team running the whole of Apple; Mr Federighi is in charge of software for the whole
6 company; and Mr Parekh will be the Chief Financial Officer for the whole company.

7 So it doesn't do for Mr Hoskins to say, "I am busy doing my cross prep and I will tell
8 you when I am ready", which in effect is what he was saying. We need to know sooner
9 so we can make these arrangements. Even Ms Harlow doesn't know whether she
10 needs to travel from the US at all. Mr Hoskins says we don't know what we seek to
11 get from her evidence. Well, we seek to get from her evidence what we say in her
12 statement, and we can work it out from that. It is really a matter for him what he needs
13 to take from that.

14 **MR TIDSWELL:** The difficulty with that -- sorry to cut in -- is it really forces him to call
15 her. If that's the way this is going to be, he is going to end up calling her and she is
16 going to have to fly over, and he may only have that question to ask which he has
17 indicated.

18 In a way, I don't really think I can get into this, other than to say you don't have to be
19 a fortune teller to see what's going to happen here. I just wonder -- I mean,
20 I completely take the point you are making, and I obviously understand that -- I think
21 the way this was put when it was put on the agenda was you needed to know whether
22 they were going to be called or not. We have got some progress with that, albeit there
23 are still two you are not sure about. Then obviously we have a window, which is now
24 pretty clear, but it does stretch, I appreciate, over a whole week, and that is no doubt
25 unhelpful, but you do have some control over that because on the assumption you
26 have at least some idea of how long they are going to be, you can work that out

1 yourselves as to the extent of the topics they cover, and so on, you can start to think
2 about when you want them.

3 It is not like they can't work when they are in the UK, Mr Kennelly, it is no doubt
4 possible for them to do things here if they are engaged with the trial. I am not
5 unsympathetic, but what I am anxious to avoid is Mr Hoskins telling us he needs
6 Mr Rollins for a day or Mr Schiller for a day, and then finding when he gets into it, he
7 actually needs them for two days or doesn't need them at all as it happens.

8 So, I do think, given we are still a little way away from the start of this trial, Mr Hoskins
9 needs a little bit more time and deserves a bit more time, but he is going to have to
10 come up with the goods quite soon.

11 I understand entirely where you are coming from and I am not pushing back on it, but
12 I just think the reality is he is not in a position to give you a reliable answer at the
13 moment, and he needs to get his skates on and do that, I appreciate that. In the
14 meantime, you need to do what you can to facilitate the process of getting the order
15 right.

16 **MR KENNELLY:** I am very grateful. Two points on that. First of all, in terms of
17 Ms Harlow, really if Mr Hoskins is not clear what Ms Harlow is speaking to, it is for
18 Dr Kent's team to tease out what Ms Harlow's evidence is supposed to stand for. He
19 either accepts it or he doesn't. If he doesn't accept it, then they should call her, they
20 should ask for her to be cross-examined but if there's doubt about its significance, they
21 can tease out that evidence in correspondence. That has not happened.

22 On the second point about --

23 **MR TIDSWELL:** I got the impression -- I did get the impression from Mr Hoskins they
24 had asked you the question and not got an answer. Is that not right?

25 **MR HOSKINS:** We did ask in correspondence and we got an answer, but not
26 sufficient to give us comfort.

1 **MR TIDSWELL:** In a way, let's not get into the detail. Carry on, Mr Kennelly.

2 **MR KENNELLY:** There has not been an attempt to tease out precisely the
3 significance of Ms Harlow's evidence. I will be corrected if I am wrong about that, but
4 that is not my reading of the papers.

5 But in any event really all I am asking for is that the Tribunal gives Dr Kent's team
6 a sense of urgency as to when this is required, and that Mr Hoskins should not leave
7 the Tribunal today thinking really it is a best endeavours idea, that he should
8 understand there is serious professional and personal inconvenience in being made
9 to wait to know when roughly -- and by the way, members of the Tribunal, of course
10 we are not holding Dr Kent's team to the minutes of the time estimates they give.
11 These are estimates, of course they are, but they will be very important and helpful in
12 understanding for us the order in which we call the witnesses and roughly when they
13 can make their arrangements. That is all we seek.

14 **MR TIDSWELL:** I hope Mr Hoskins has got the message that the best he can do, the
15 soonest he can do it. I am not sure I can do more than that, Mr Kennelly, other than
16 set a date for him to do it, and I am not prepared to do that at the moment, but if I have
17 to do that, I will, of course.

18 **MR KENNELLY:** I am grateful. The basic point is Mr Hoskins must have been able
19 to work out roughly how long it is going to take because they told us they would need
20 about four and a half days for cross-examination. Someone has done a rough
21 estimate somewhere, and that can be refined and updated and then provided to us.
22 Obviously the Tribunal has the point that it is particularly important so that a witness
23 is not kept over the weekend, but that's the point, sir, you made to me because
24 currently the window for fact witnesses stretches over the weekend of the 18th and
25 19th --

26 **MR TIDSWELL:** That's quite different from the experts, isn't it? The reason for not

1 wanting the experts over the weekend is because they can't help with preparation.

2 That's not the case with factual witnesses, so I'm afraid -- if that's helpful.

3 **MR KENNELLY:** It is simply a question of their own commitments and professional
4 commitments.

5 **MR TIDSWELL:** Again, that is where the relationship between the time taken and the
6 order you call them in becomes material, doesn't it? I understand that's why you need
7 to know the times because that's what you're trying to avoid, which is to put them so
8 you don't end up taking more of their time than needed. I understand all that and
9 I think Mr Hoskins does as well.

10 **MR HOSKINS:** (Inaudible) It has been laboured. I get the point. We are not trying to
11 be obstructive. It is just, as you said, if we just come up with something now and it
12 turns out not to be a good estimate, it is going to be worse for the Apple witnesses.
13 We are not holding anything back. As soon as we can get a sensible estimate,
14 we absolutely will.

15 I think Mr Ward, who can't stand very well, has something he would like to say on
16 Mr Rollins, if he may.

17 **MR TIDSWELL:** Yes, of course. Mr Ward.

18 **MR WARD:** Thank you. Just to confirm that as things stand, we do expect to call
19 Mr Rollins. I echo everything Mr Hoskins said about perfecting our time estimates and
20 informing Apple when we can.

21 **MR TIDSWELL:** I have lost track slightly of who is who. Was it Mr Rollins and
22 Ms Harlow who were your two you were not sure about?

23 **MR WARD:** They were the two.

24 **MR TIDSWELL:** You now think you probably will be calling Mr Rollins, so he's going
25 on the list, but Ms Harlow is the subject of the dispute you've just --

26 **MR HOSKINS:** I am being asked to give up something. I don't know what it is, and

1 that's -- you are absolutely right. I am very happy to have further discussions with the
2 Apple team to see if we can sort this out. If we can't, you are right, the inevitability is
3 just we'll just have to say she has to be here in case we need to question her, but we
4 will try to avoid that through conversation.

5 **MR TIDSWELL:** Well, I think so. It shouldn't be necessary for the Tribunal to get
6 involved to make this work.

7 **MR HOSKINS:** I agree.

8 **MR TIDSWELL:** I do expect you to try to make it work and I don't expect anybody to
9 be playing games with that, and trying to inconvenience other people's witnesses or
10 trying to alter the timetable to make things work better for witnesses is not the game
11 we are in. So, with that, I am sure none of you would want to do any of that and what
12 I would like you to do is to try to do your best to sort it out as quickly as possible.

13 Yes, Ms Demetriou?

14 **MS DEMETRIOU:** May I mention in relation to Mr Rollins we have been asking
15 Dr Kent's team to confirm the position with respect to Mr Rollins for some time. We
16 have been working on the basis, I think you have seen from our skeleton argument,
17 that Mr Rollins was not a witness in the case for trial, but we had served his statement
18 in response to questions from Dr Kent, and we had understood his statement to be
19 non-controversial. We now hear from Mr Ward that that's not so.

20 What we would propose to do in light of that indication is to apply for permission early
21 next week to adduce a very short supplemental statement from Mr Parekh, who is able
22 to speak to the evidence given by Mr Rollins, or at least the majority of it. He will
23 explain the extent to which he is able to speak to it, which will therefore render things
24 more efficient because my learned friends can cross-examine Mr Parekh on those
25 same matters, given that he is in a position to speak, as we understand it, to that
26 evidence. He will be the CFO at that stage, and it will lead to greater efficiency, given

1 he is already a witness who we were proposing to call in the litigation.

2 So, we propose to make an application early next week seeking permission for that
3 short supplemental statement, and to foreshadow a further point we will raise early
4 next week, we have very recently, I think last night, provided some additional
5 disclosure. There are a few documents which were redacted documents in the other
6 proceedings, which we have now provided in unredacted form.

7 We propose that the very short supplemental statement from Mr Parekh, which will be
8 in the order of one to two pages, should deal briefly with some of that evidence
9 because it is relevant to his witness statement. Again, I don't have an application
10 before you, we wanted to know what my learned friend's position was in relation to
11 Mr Rollins, but I do want to flag that that's an application we will make early next week.

12 **MR TIDSWELL:** Yes. No doubt we will have to wait and see what that looks like and
13 whether Dr Kent is prepared to agree to it; and if not, then we will deal with it.

14 **MS DEMETRIOU:** Thank you.

15 **MR TIDSWELL:** Thank you.

16 **MR HOSKINS:** That's everything on the timetable.

17 **MR KENNELLY:** No, no, no. I am afraid there is a further request from Dr Kent on
18 the timetable. I am sorry to bother the Tribunal with this, it's the one thing we shouldn't
19 have to raise with you, but because the timetable is tight, this is something which the
20 Tribunal will have to resolve. It is the timing for closings.

21 **MR TIDSWELL:** Yes.

22 **MR KENNELLY:** You will see at the end of the timetable, Dr Kent is seeking equal
23 time in closing and additional time in reply, an extra half day. That is inappropriate for
24 closings and the practice of this tribunal is to give each side equal time, and the equal
25 time for the claimant or appellant is split between their closing and their reply.

26 It would be unfair -- that's the Tribunal's practice -- it would be unfair to say otherwise

1 as this tribunal knows very well, and indeed my learned friend. At the end of trial, each
2 side is entitled to equal time. The normal order is: claimant, defendant, claimant, but
3 the claimant's time is split between its closing and its reply.

4 We are surprised this is insisted upon by the Class Representative's team because
5 my learned friends know from other trials in this tribunal, that's the approach the
6 Tribunal has taken in the -- there is no need to take up transcripts and orders; if any
7 of this is in dispute, we can do so, but in the Trucks case where my learned friend
8 Mr Ward led the claimants' team, they had two days for their closing, the defendants
9 had two and a half days, and Royal Mail had a half day in reply. In Merricks, in the
10 causation trial in 2023, there were two days of oral closings, and it was split evenly on
11 the same basis. In Le Patourel again there was a similar split to Trucks: five days of
12 oral closings, the class representative had two days; BT took just short of two and
13 a half and a half day in reply. That reflects the normal practice in this tribunal.

14 So, for that reason we haven't agreed to Dr Kent getting an extra half day in reply at
15 the end of the trial. It's not fair and not appropriate, and that's why we ask the Tribunal
16 to resolve the question.

17 **MR TIDSWELL:** Mr Hoskins.

18 **MR HOSKINS:** There isn't a practice. I think I have been doing this long enough to
19 say that if there was a practice to that effect, I would be aware of it, but there is not
20 a practice. It is quite simple: we have an extra thing to do, we each have to make
21 closing submissions, and then we have to reply to Apple's closing submissions. So
22 we have an extra thing to do, so we need a little bit of extra time and we have
23 suggested half a day, which is hardly excessive.

24 There is also a conundrum in this because what's being suggested is when we are
25 making our closing submissions, we have to work out how much time we are going to
26 need to reply to Apple's closing submissions before we have heard Apple's closing

1 submissions. I like to think I am a reasonably good advocate, but that's beyond me,
2 to be honest. Until I've heard their closing submissions, I don't know what the reply is
3 going to be. Because we have something extra to do and because of the conundrum
4 I have just described, having two days, two days and a modest half day's reply seems
5 a very sensible thing to do. Ultimately, this is all a question of making sure the Tribunal
6 has heard all the issues ventilated. It's not about whether we get an extra hour or they
7 get an extra hour, what would the Tribunal find helpful?

8 Now I hope if we do our job properly: a decent reply to their oral closing submissions,
9 the chance to ask us further questions in light of their oral closing submissions will be
10 helpful to you, and that's why we have proposed the proposal we have made.

11 **MR TIDSWELL:** There is no suggestion, is there, that we don't have enough time?
12 This is not being driven by a lack of time, is it? This is more of a principle point, is that
13 right?

14 **MR KENNELLY:** It is a fairness point, sir. In a context where we have two days to
15 close and they have already had two days, an extra half day is a lot. It is much more
16 than they would ever get normally, and it allows them to inevitably develop their
17 substantive case to which we have no right to reply. They will have our written
18 closings. If they are asking for a 120-page page limit for their opening, one can only
19 imagine the length of the written closings. They would have an extensive picture of
20 our case sufficient for the purpose of --

21 **MR TIDSWELL:** We will come back to that one.

22 **MR KENNELLY:** Indeed. Thank you.

23 **MR TIDSWELL:** You have my point.

24 **MR KENNELLY:** They have a written closing to which to reply.

25 **MR TIDSWELL:** It is not a particularly attractive discussion I have to say, because
26 from our point of view, what we would like you to do is to take the time you need to in

1 order to tell us the things we need to know about. Clearly there needs to be a principle
2 of fairness on that, I don't think it necessarily follows that it's hard on one measure or
3 hard on another.

4 In some ways, I am rather inclined just to leave this and let's say we have a week in
5 which we are going to deal with the closings. I don't -- if I get any sense that anybody
6 is gaming that, that is going to be unattractive, and I will do something about it, but
7 what I would really like you to do is when you have worked out how much time you
8 need, you tell us.

9 If you want to take an extra half day because he thinks he needs an extra half day,
10 then if you have something to say, that's fine, we will hear it. I am just not sure how it
11 helps us particularly -- what you could be saying is you need five days, rather than
12 four, because he is getting an extra half day. If that is where we end up, then fine.

13 **MR KENNELLY:** Then I don't have a problem with that. We will see how it will go.
14 We are coming to the end of our closing and Mr Hoskins says half a day --

15 **MR TIDSWELL:** No, I understand the point. If you have something helpful to say,
16 then obviously we would like to hear it. I am not sure the timing really answers the
17 question. I am alive to the fairness point, I absolutely am, and I am not suggesting it
18 is not right. I am just saying I don't think that making a decision now about exactly
19 how long you each need and how one deals with that fairness point is terribly helpful,
20 but the marker has been put down.

21 **MR HOSKINS:** There is one other issue on the hot tub which the Tribunal had asked
22 the question in the letter: how are we going to identify the issues in the hot tub. We
23 have made a proposal on that. It did die in a ditch. I was trying to help you. I think
24 there was a proposal to see if that was helpful to you or not.

25 **DR BISHOP:** We thought at the beginning it helped, but it is again something that will
26 have to be clarified a lot as we approach the hot tub itself, but, yes, the proposal about

1 six items on each matter is a good beginning I think.

2 **MR HOSKINS:** That is what I thought. It is just a guide for you. It at least breaks
3 down the joint expert statements and gives you something to work from. If you are
4 happy with that, it does appear Apple opposes it, but obviously that's what we are
5 suggesting.

6 **MR PICCININ:** Sir, if the Tribunal would find that helpful then we will do it.

7 **MR TIDSWELL:** I think it would be helpful to have some suggestions from the parties
8 and if you think that's a good a way as any of doing it, let's do that.

9 **MR PICCININ:** What we don't want is some elaborate process of arguing about what
10 should be. Each party's experts can put to the Tribunal what they think (inaudible) and
11 the Tribunal can --

12 **MR TIDSWELL:** I think it would be helpful if the experts could try to reach some
13 agreement about what the two points are. I don't need competing views on the things
14 that matter. We would like the experts to try to agree what they think things are. Which
15 is done anyway in the joint expert statements. When do you think it would be sensible
16 to expect that?

17 **MR HOSKINS:** Well, we suggested -- the suggestion we had was more mechanic in
18 the sense that you each put six and hopefully there would be some common ones,
19 and you would just have the common ones and the ones that were not common would
20 just be listed separately. If you want them to have -- I don't know what the availabilities
21 are of the experts, there is a danger --

22 **MR TIDSWELL:** I don't think we're being prescriptive about that. I just think it is not
23 particularly helpful to have disagreements about the list of six things we are trying to
24 seek agreement on. It's not particularly helpful.

25 **MR HOSKINS:** Let's leave it to the experts. We would suggest, if you go to
26 paragraph 15.3 of our skeleton, we have suggested that the experts should exchange

1 their lists of 6 by 22nd November.

2 **MR TIDSWELL:** I am not sure we need it that early, frankly.

3 **MR HOSKINS:** That will give them more time to have the discussion, then.

4 **DR BISHOP:** If you can do it by then, that is fine, but I don't think there should be any
5 pressure to do it by then.

6 **MR PICCININ:** Sir, perhaps I might also add that we don't need to be quite that
7 prescriptive about the mechanics of each side choosing six and then exchanging.
8 Perhaps the experts can just be left to have that discussion in a constructive way
9 between themselves.

10 **MR TIDSWELL:** I think it would be helpful if we could just say to you that we would
11 find it helpful for the experts to indicate what the key items are for each of the six --

12 **DR BISHOP:** It should be as close to bullet points as possible. That's probably not
13 possible, but fact bullets, as it were, not page after page.

14 **MR HOSKINS:** That's why I thought we could do it by reference to the propositions in
15 the joint experts statements because then -- they have already done that exercise. As
16 you say, if we have to start recalculating -- so that would be the suggestion: they sit
17 down, they go through the JES they have each produced with each other and just say:
18 yes, no, yes, no.

19 **MR TIDSWELL:** It's not saying the things they don't include in the six are not
20 important, it's just they are not the most important. We would like some sense in which
21 six they think are most important.

22 The date we set for that, do you want to comment? I am unlikely to be looking at it
23 before the end of the year --

24 **DR BISHOP:** I think that's right, certainly for me.

25 **MR TIDSWELL:** -- given other commitments. It is something I thought we would be
26 doing as part of our preparation, isn't it.

1 **DR BISHOP:** Yes, I think so.

2 **MR PICCININ:** Before the end of term, or by the end of term.

3 **MR TIDSWELL:** Yes, that would be helpful, I think.

4 **MR HOSKINS:** I think that's everything on the timetable.

5 Do you want to deal with the page length? We might as well do that now.

6 **MR TIDSWELL:** Yes. I have to say just in terms of what we would find most helpful --

7 **MR HOSKINS:** Absolutely.

8 **MR TIDSWELL:** -- the way we would like to look at the document is that it is a bit of
9 a roadmap for us, a framework, so it is very clear for us what we need to be focused
10 on and how we need to be looking at it.

11 We do find the longer these documents get, the less effective that is. 120 pages I think
12 is too much because I think we will just get lost, and actually, I think we would much
13 rather have something that was more like 50 pages, and which gave us clear
14 directions about things to go and read. We have a reading week, and you can be sure
15 we will go and read things. So, we would rather have a roadmap like that than have
16 something which has everything in it and is much harder to find your way through.

17 **MR HOSKINS:** In terms of what we have in the stocks, waiving no privilege, it is
18 an odd case because there are quite detailed facts about the Apple agreements and
19 guidelines and stuff, but there's not actually any real dispute about those facts. We
20 have a section which takes you through those sorts of Apple documents -- it is covered
21 in the witness evidence as well, but we thought you might find it useful to have that in
22 one place, but that takes -- I can't remember, it is like ten/fifteen pages, just setting out
23 the relevant bits. Hopefully that would be a useful roadmap for that, but you could
24 equally read the documents -- you could just have, "See paragraphs blah and blah"
25 and you would go and read it, and that would be a page --

26 **MR TIDSWELL:** I think you can see we are with the witness statements --

1 **MR HOSKINS:** But this is the document -- the DPLA and guidelines and that sort of
2 thing. We've sought to synthesise and summarise it. I don't think it is controversial,
3 but I just thought you might want that in one place. Equally, you could have a reading
4 list and look at this document, look at this clause, but that's one thing.

5 I don't want to put words in your mouth, I think you would find it helpful if the law was
6 set out clearly in that document at the start, because I think that's going to be quite
7 important between us. There are going to be some issues on the law which are really
8 quite significant.

9 **MR TIDSWELL:** Yes.

10 **MR HOSKINS:** Certainly, for my part, I imagine the opening will be taking you through
11 the law as well to set the framework for what comes, but if you do both those things,
12 you are probably at sort of 50 pages, to be honest. So, I guess what I am saying is:
13 well in mind we don't want to overload up, 50 sounds a little bit light in terms of what
14 we can do to help you, but I understand you don't want great tracts of narrative and
15 argument on the evidence, which is not what we were intending to give you.

16 **MR TIDSWELL:** We are going to have three days of hearing you tell us about it as
17 well. The reality -- not wanting to be unkind about these documents, but they are not
18 the documents you go back to, are they? You go back to the closings, not to the
19 openings. So, in a way, the only real value of them is to set us up so we know what's
20 going on.

21 **MR HOSKINS:** Well, that is to set you up. I have certainly done trials where I have
22 used the openings as part of the closings, so rather than repeat stuff, you say the law
23 was set out --

24 **MR TIDSWELL:** And maybe that's a perfectly sensible thing.

25 **MR HOSKINS:** -- in the openings.

26 **MR TIDSWELL:** I am not suggesting -- just to be absolutely clear, I'm not suggesting

1 you don't cover law. We definitely want you to cover law. We're assuming that's going
2 to be an important part of it. That's the best place for it to be, that's the only place
3 really, we are going to get there before we get to obviously to closings. So not
4 discouraging that at all.

5 I think more of a set of references to the things that matter rather than a lot of the
6 material from other documents is probably more helpful, I think, obviously on the
7 assumption we will want to go and have a look at the documents.

8 **MR HOSKINS:** Sure.

9 **MR TIDSWELL:** Look, I mean, I appreciate the difficulty with it. It is probably fair to
10 say there are slightly different views on the panel as to what length is appropriate, and
11 I have been generous to you in some respects already, but I'm not unsympathetic to
12 the task -- we'll see what Mr Kennelly has to say.

13 **MR KENNELLY:** We also have sympathy for what Mr Hoskins has said to you. My
14 learned friend describes the need to set out the law. We agree. (Inaudible) and the
15 guidelines and the salient facts, to give you the highlights, but the cross-references for
16 the other things you need to have. To do all of that will require more than 50 pages,
17 which is why we suggested 80.

18 We believe it is possible to do what Mr Hoskins describes while providing clarity to the
19 Tribunal in about 80 pages. Less than that, you will get far more cross-references and
20 less helpful text. The text is really what helps you because that's what you read and
21 it prepares you for the oral openings, which is why we have asked for 80 pages.

22 **MR TIDSWELL:** Mr Hoskins, what do you think about 80?

23 **MR HOSKINS:** I will take 80 rather than 50, that's for sure.

24 **MR TIDSWELL:** We think that's fine with us, we will make it 80. Can we make it 80
25 as a limit?

26 **MR HOSKINS:** Yes, and the guiding light is to help you, not to swamp you.

1 **MR TIDSWELL:** Good, thank you. Where do we go next?

2 **MR HOSKINS:** I think we can move on in the agenda. This is now Apple's application
3 for Mr Parekh to give evidence by video link.

4 **MR TIDSWELL:** Yes. This is agreed, isn't it, I think? Is that right?

5 **MR KENNELLY:** It is agreed, but obviously we are happy to address the Tribunal on
6 it. It is an important point.

7 We know that under the Rules and the Guide to Proceedings, a party must take all
8 possible steps to secure the attendance of a witness in person, so we are anxious to
9 reassure the Tribunal that we have done that. We have tried to set out in detail why
10 in the case of Mr Parekh, uniquely among the Apple witnesses, he is under particular
11 constraints because of his particular professional and regulatory obligations in the
12 United States in January and in the period building up to January 2025. I am happy
13 to address you on those, I don't want to waste the Tribunal's time.

14 **MR TIDSWELL:** We were certainly satisfied that was a proper way to proceed, and
15 we are happy with it. Obviously, the arrangements, which I think you have indicated
16 you are going to work out between you, need to be sorted out and it would be helpful
17 to understand in advance what is proposed to make sure we are comfortable with that
18 as well, but we are happy to make the order.

19 **MR KENNELLY:** I am obliged.

20 **MR TIDSWELL:** Thank you.

21 **MR HOPKINS:** Is this an appropriate time for a break?

22 **MR TIDSWELL:** Yes, let's do that. We will come back at 11.50 -- no, we won't. We
23 will come back at 11.55.

24 **(Short break)**

25 **MR KENNEDY:** Mr Hoskins and I have traded places. Looking at the agenda, sir, we
26 are now at 3(d), which is any outstanding issues with the trial bundle. Then we are in

1 the Class Representative's applications, of which there are three. The first is for
2 admission of certain people into the Confidentiality Ring; the second is for specific
3 disclosure. I think that may have largely gone away, but I think there may still be
4 a small issue to iron out. Mr Ward is dealing with that.

5 **MR TIDSWELL:** That's the letter of facts, is it?

6 **MR KENNEDY:** It is the letter of facts and (inaudible).

7 **MR WARD:** There has been another correspondence on that, so I don't know if it is
8 live, or we're all agreed now.

9 **MR TIDSWELL:** We will find out.

10 **MR KENNEDY:** The third application is for the amendments to the Re-Re-Amended
11 Claim Form, and that is not opposed. Then the final issue is any outstanding issues
12 on the joint expert statements, and that will be with Mr Ward. I wondered, sir, whether
13 it would be --

14 **MR WARD:** There is a question about some redactions which you have seen as well.
15 I would suggest we deal with that at the end because it would have to be in closed
16 session, unfortunately.

17 **MR TIDSWELL:** Yes, okay.

18 **MR KENNEDY:** What I was going to propose was if I dealt first with the trial bundle
19 and then with the Claim Form in the hope they are both uncontroversial -- certainly the
20 Claim Form is not opposed -- then we can move into the other applications where
21 there is some dispute.

22 On the trial bundle, sir, it is really just to give you an update. The parties are in the
23 process of agreeing the contents of the bundle, significant progress has been made.
24 The entire bundle will be available in electronic form on the Opus platform in the week
25 beginning 25th November. At some point during that week, it will be ready on the
26 online platform.

1 **MR TIDSWELL:** Can it be made available to us as soon as possible after that as well?

2 **MR KENNEDY:** Yes. So that's available to you on the week commencing the 25th.

3 My understanding is it should be made available to the parties on the 25th, and the

4 parties will perform some checks to make sure it's ready for you.

5 **MR TIDSWELL:** Yes, of course.

6 **MR KENNEDY:** As soon as we have a concrete estimate, we will obviously write to

7 you, sir, and let you know when to expect access and how to access it on the usual

8 website.

9 **MR TIDSWELL:** Yes, thank you.

10 **MR KENNEDY:** Turning to the question of hard copies, sir, what we proposed in our

11 skeleton argument was to provide hard copy bundles to the Tribunal of pleadings,

12 factual witness statements, and expert reports, including the joint statements.

13 There are two questions, sir: are you content with that and, if so, how many copies

14 would the Tribunal like to be provided with?

15 **MR TIDSWELL:** Certainly, it seems sensible. Just to check, when you talk about the

16 witness statements and the expert reports, would that include all the exhibits?

17 **MR KENNEDY:** It would exclude the exhibits (inaudible).

18 **MR TIDSWELL:** Yes. That's fine. We are happy with that. I think we'd all like a hard

19 copy on that basis, so we'd probably want five altogether.

20 **MR KENNEDY:** That wouldn't be available until the week commencing 2nd December

21 when the platform will be up and running (inaudible) and obviously as soon as possible

22 after the electronic version is ready.

23 **MR TIDSWELL:** All right. Thank you.

24 **MR KENNEDY:** Sir, the further thought we had on hard copies is if it would be helpful,

25 we could prepare a hard copy bundle of all the contemporaneous documents that were

26 referred to in our written closing statements, and we could cross-refer to that bespoke

1 hard copy bundle, if that would be something that would assist the Tribunal.

2 **MR TIDSWELL:** Sorry, so you are talking about later on in the trial?

3 **MR KENNEDY:** Later on, right at the end, sir.

4 **MR TIDSWELL:** Yes.

5 **MR KENNEDY:** We would prepare the written closings and identify each of the
6 documents referred to in that document, in the written closing itself, and prepare a hard
7 copy bundle of those documents, and we would create a separate reference and add
8 that to the written closing itself. So, you could sit with your bespoke hard copy bundle
9 of contemporaneous documents, work through the written closings at the time, and
10 also in your deliberations, sir.

11 **MR TIDSWELL:** There wouldn't be a common bundle, then. It would just be your --

12 **MR KENNEDY:** We have not discussed it with Apple, which is why it would be on a
13 unilateral basis. We don't think it's helpful to produce a common bundle. We can
14 obviously take that away.

15 **MR TIDSWELL:** Timing is the problem.

16 **MR KENNEDY:** It wouldn't be ready on the Monday when we start the oral closing,
17 so it would necessarily be ready at a later point in time. So again, it is a question of
18 (inaudible).

19 **MR TIDSWELL:** Perhaps we should think about it. I don't know if the other panel
20 members have a view, but my immediate reaction is we are likely to be marking up
21 either the electronic version or the hard copy, depending on what the documents are,
22 and actually we won't want to lose those markings. I suspect it is probably not the
23 right answer, but perhaps we can have a think about it and if we need it, we can let
24 you know if there is a different view.

25 **MR KENNEDY:** We will be happy to assist if we can.

26 **MR TIDSWELL:** In the meantime, assume we are not doing that, but we will let you

1 know if we think it would be helpful.

2 **MR KENNELLY:** Forgive me for asking the same question to which I know the answer
3 already, but just to be clear, on the -- what's proposed is there will be a fully paginated
4 soft copy bundle -- sorry? The question is: we will need, not least for our witnesses,
5 hard copy bundles which are larger than the ones which are proposed for the Tribunal
6 by 2nd December.

7 The question I had, which I directed to the Class Representative, is when the soft copy
8 bundles are prepared, will it be possible through Opus to print out more hard copy
9 bundles properly paginated, as are required by whoever needs them.

10 **MR KENNEDY:** Yes, absolutely. The parties can create custom bundles for their
11 witnesses if that's what they want to do. It should all be -- it's not within my technical
12 capabilities, someone else's.

13 **MR KENNELLY:** I am obliged.

14 **MR KENNEDY:** I think that's everything on the trial bundle, sir.

15 That takes us then to the Claim Form.

16 **MR KENNELLY:** Oh, sorry. I have been reminded of something else. For the
17 witnesses on the stand, they will need hard copies. I appreciate that it is possible to
18 upload them. We can give them soft copies.

19 **MR TIDSWELL:** Will they? We will have Opus in the courtroom, will we?

20 **MR KENNEDY:** We have Opus and certainly documents referred to by (inaudible) in
21 cross-examination will be brought up on the screen.

22 **MR KENNELLY:** This is important because our witnesses have specifically asked to
23 have hard copy bundles so they can see the hard copy documents when they are
24 being cross-examined. That's something they are entitled to ask for and that's
25 something they will need for the trial.

26 **MR TIDSWELL:** I think I am just going to have to leave you to sort that out.

1 Presumably if no-one else is going to provide them, you can provide them.

2 I suppose the other thing to mention in that regard is Mr Parekh because he is going
3 to be sitting in some room in California, wherever he is, and he is going to need access
4 to some form of a bundle and there can be some assurance about exactly what he
5 has and what he is seeing, but that's part of the protocol we talked about earlier.

6 **MR KENNELLY:** Indeed. Just to bear in mind for the witnesses that will be here, hard
7 copy bundles will need to be ready for the purposes of --

8 **MR TIDSWELL:** Of the entire trial bundle?

9 **MR KENNELLY:** We will have to have a discussion with the Class Representative as
10 to whether it is the whole trial bundle. That may be unnecessary.

11 **MR TIDSWELL:** It is going to be huge, isn't it?

12 **MR KENNEDY:** Enormous I think, sir.

13 **MR TIDSWELL:** Are you all right, Mr Kennelly?

14 **MR KENNELLY:** I am fine, sir. Sorry.

15 **MR KENNEDY:** (Inaudible) it's all evidence, but 3,000 documents. I don't know how
16 much that is in pages, but that is what I mean.

17 **MR TIDSWELL:** Maybe we should just leave that with you to work out. No doubt
18 there will be all sorts of ways you can deal with that. If you were able to produce a list
19 of documents you knew you were going to deal with -- you may not want to do that -- or
20 at least holders you knew you were going to go to, I don't know. It seems highly
21 unattractive to have however many hundred bundles sitting in there probably for very
22 little purpose, but clearly if that's what you have to do, that's what you have to do.

23 **MR KENNELLY:** That's certainly not our request. It should not be necessary to have
24 hundreds of bundles there. Your suggestion, sir, if I may say so, would work very well
25 if the Class Representative, in preparing for cross, had hard copy bundles of the
26 documents they wished to take the witness to --

1 **MR TIDSWELL:** I can see why he might not want to do that, Mr Kennelly.

2 **MR KENNELLY:** I am not suggesting they could give it to us in advance. The point
3 is they are ready for the witnesses, so they at least have a hard copy to look at when
4 they are being questioned about something --

5 **MR TIDSWELL:** Just to understand, is there a reason for this, Mr Kennelly, or at least
6 one you can tell me about -- it is a slightly odd request in the modern world. Is it
7 because they are not familiar with dealing with technology, or --

8 **MR KENNELLY:** No. In fact, I think in the Visa trial, sir, before you, certain witnesses
9 specifically asked for hard copy versions of documents. They could orientate
10 themselves and see which document it was, and they could see the beginning and the
11 end of it. That's a perfectly normal --

12 **MR TIDSWELL:** Yes, I see. No, I understand.

13 **MR KENNELLY:** As far as I am aware, it is concerned along those lines, so they can
14 properly understand the document they are looking at, orientate themselves, and be
15 able comprehensively to answer any question they are being asked by reference to
16 the document as a whole. That would make it fairer for the witness.

17 **MR TIDSWELL:** Well, I would hesitate to agree that it is an unfair process if it is all
18 done electronically, there are plenty of courts which operate on that basis, but if that's
19 the position you have adopted, then it is really incumbent on you to find a way to make
20 it work; and clearly if you require assistance, it has to be given voluntarily rather than
21 compulsorily. I think it is just about finding a mechanism that works which is not
22 disproportionate.

23 **MR KENNELLY:** Indeed. There must be a middle ground between having a specific
24 document, and I can see from a cross-examiner's perspective why they wouldn't want
25 to give a roadmap to the witness who is being cross-examined, but between that and
26 the full set of trial bundles, there must be a sensible compromise we can reach, and

1 we will discuss it with the team for Dr Kent.

2 **MR KENNEDY:** Sir, we'll take it away. This is the first we are learning of the desire
3 for hard copy bundles, but we will obviously discuss it and find a solution.

4 **MR TIDSWELL:** Yes, thank you.

5 **MR KENNEDY:** Sir, I think that takes us to the Claim Form. It is not opposed, so
6 I propose to take it quite swiftly. The amendments are in tab 6 of the core bundle and
7 it is page 63 if you are working from the electronic .

8 **MR TIDSWELL:** It is just this paragraph 20, is that right?

9 **MR KENNEDY:** You will see in paragraph 19 is the "Class" definition which refers to
10 the relevant period, and 20 defines the relevant period, and the amendment is simply
11 to bring the relevant period up to today's date.

12 **MR TIDSWELL:** That's the only amendment, is it? I couldn't see anything else.

13 **MR KENNEDY:** That is the only amendment, and it is not opposed. The reason for
14 the amendment is the Tribunal's decision in Sony and the practice thereafter. I don't
15 propose to take you through those authorities --

16 **MR TIDSWELL:** No, no need to do that.

17 **MR KENNEDY:** -- and you were in Sony, sir. It has some knock-on effects on some
18 other documents. The CPO itself needs to be amended and we have proposed
19 amendments to the CPO in the draft order. The draft order is in tab 5, it might just be
20 useful to have that: core bundle, tab 5.

21 I pick it up at paragraph 4, you see paragraph 6(g) of the CPO itself is amended to
22 reflect the Claim Form relevant period up to 15th November. Paragraph 7 introduces
23 a new domicile date for the new class members, so for those who have entered the
24 class between 9th August 2024 and 15th November 2024, the domicile date is today's
25 date, and that's what sets running the opt-out period provided in paragraph 8, which
26 is at paragraph 6 of the order. Paragraph 7 deals with opting out. So, for class

1 members domiciled outside the United Kingdom, it is really housekeeping to bring
2 those changes through to the order, sir.

3 In addition to the CPO, we have two further notices: a further CPO Notice, which is
4 based on the CPO Notice you approved all those years ago, but simply again brings
5 it up-to-date to reflect the change to 15th November.

6 **MR TIDSWELL:** I have looked at those, yes.

7 **MR KENNEDY:** Then, sir, the trial notice --

8 **MR TIDSWELL:** That's right, yes.

9 **MR KENNEDY:** -- which is of our own making, but we simply thought it would be a
10 good idea to let the class members know when the trial is, and how they can access
11 it. That's based on the notice for the CPO Notice you approved all those years ago,
12 but reflecting the differences in the nature of the hearing and the different dates.

13 Sir, unless you had any questions, that's all I propose to say about the Claim Form.

14 **MR TIDSWELL:** No, I don't have any questions. I have looked at the Notices. They
15 are agreed, aren't they?

16 **MR KENNEDY:** In principle they are agreed. The application provides for approval
17 of the Notices and approval of the publication plan. The plan for publication is via
18 website, the eblast, sending to people who have registered for updates, and then the
19 PR team will issue press releases in the national and regional media. So again,
20 a re-run of the Notices that were carried out previously, albeit a slightly reduced set of
21 media channels than the first time round.

22 **MR TIDSWELL:** That's very helpful, thank you.

23 **MR KENNEDY:** Sir, I think that brings us on to the confidentiality application, which
24 is also with me.

25 Sir, if we could open our application, which is core bundle tab 4, page 40, at
26 paragraph 7 you will see the terms in which the application was made. The application

1 was for the admission of five people, three from the Consultative Group: Dame
2 Elizabeth Gloster, of One Essex Court; Mr James Walker, of Resolver; Mr Kevin
3 Jenkins, formerly of Visa; and two representatives from the Class Representative's
4 funder, Mr Blake and Ms Ioannou. Three of those are agreed, sir. In relation to Dame
5 Elizabeth, Apple have agreed for her to be admitted into the Ring, and likewise the two
6 representatives of the funder. So, what is in dispute is the admission of Mr Walker
7 and Mr Jenkins.

8 Sir, the basis for that objection is said in Apple's skeleton to be that each of Mr Walker
9 and Mr Jenkins has had and continues to have connections with developers of iOS
10 apps and, in addition in the case of Mr Jenkins, has had involvement in payments to
11 businesses. Apple says as a result of those connections, it is concerned that
12 Mr Walker or Mr Jenkins could even unintentionally use confidential information about
13 developers or about Apple in the course of their other activity.

14 That's the concern: it's the inadvertent, as I understand it, use of confidential
15 information as a result of other activities which Mr Walker and Mr Jenkins are involved
16 in. We don't understand there to be any suggestion there would be deliberate use of
17 that information, and obviously Mr Walker and Mr Jenkins are experienced
18 businessmen who are assiduous in their use of and handling of confidential
19 information.

20 If I could take Mr Jenkins first, sir. The basis that Apple identified in correspondence
21 was that Mr Jenkins is an adviser at Curve, a mobile wallet and a direct competitor of
22 Apple Pay; and Curve also has an iOS app and is therefore an iOS app developer.
23 On that basis, Apple said it would be inappropriate for Mr Jenkins to have
24 commercially and competitively sensitive information pertaining to the defendants
25 and/or other developers. That is Gibson Dunn's letter of 20th October, which I don't
26 think you need to turn up.

1 Sir, the position is that Mr Jenkins is not, and was not at the time of that letter, involved
2 at Curve. That was explained in Dr Kent's application. Mr Jenkins' role at Curve
3 ended in October 2021, so over three years ago. The original reason which was stated
4 to be Mr Jenkins' present involvement at Curve was based on a misunderstanding of
5 what the true factual position is.

6 In its skeleton argument, Apple raised a second basis for concern, which was that
7 Mr Jenkins is a board member of another entity called Red Badger, which describes
8 itself as assisting its clients to build digital products, including iOS apps. This is also
9 based on a misunderstanding of the true factual position. Mr Jenkins is no longer
10 a board member and has not been for around four years. This was explained in a letter
11 from my solicitors on Wednesday.

12 If we could just turn it up briefly, I think it is useful to have a look. It is in the
13 correspondence bundle, tab 45, page 160. If we pick it up at the bottom of the page,
14 that's paragraph 5, my solicitor said:

15 "In order to ensure absolute clarity ahead of the PTR: in relation to Curve, Mr Jenkins's
16 role with Curve is historic, having ended in 2021... ."

17 So, the position with respect to Curve was confirmed. Then over the page, or down
18 the page, at (b), in relation to Red Badger:

19 "Mr Jenkins has confirmed that he is no longer a board member, having left this role
20 around four years ago."

21 So that's Red Badger, sir. Then at 6 Hausfeld went on to say:

22 "Mr Jenkins has confirmed that he is not involved with and does not advise any app
23 developer or competitor of Apple in any capacity."

24 So not limited to Curve or Red Badger, but rather as a blanket proposition.

25 In sum, the case for Mr Jenkins is he is no longer involved in either of the two
26 businesses which form the foundation for Apple's original concerns; and he is not

1 involved with any business of the same nature, as explained in paragraph 6 of
2 Hausfeld's letter.

3 Sir, in response to that, Apple have stated they simply do not have sufficient
4 information as to Mr Jenkins' professional engagements to determine whether he
5 could be admitted to the Outer Confidentiality Ring. Apple requested further details of
6 Mr Jenkins' professional engagements from 2020 to present, and confirmation of the
7 termination of Mr Jenkins' role at Red Badger.

8 Sir, we were slightly baffled by the latter request for confirmation in respect of Red
9 Badger because as I have shown you, that information had been provided on
10 Wednesday night, but nonetheless, my solicitors wrote to Gibson Dunn last night
11 reconfirming the position in respect of Red Badger -- I think you will have that letter,
12 sir --

13 **MR TIDSWELL:** Yes.

14 **MR KENNEDY:** -- in loose form, rather than in the bundle. I don't think you need to
15 look it up, but that is the factual position with respect to Mr Jenkins, and we are slightly
16 at a loss as to why objection continues to be taken to Mr Jenkins in circumstances
17 where he doesn't hold any role which is either a counterparty or competitor to Apple.

18 Sir, turning to Mr Walker, the basis for Apple's objection to Mr Walker is that he is the
19 founder of JamDoughnut, which is an iOS developer and has an iOS app, and like
20 Mr Jenkins, Apple said it would be inappropriate for Mr Walker to have access to
21 commercially and competitively sensitive information pertaining to the defendants
22 and/or other developers. That's Gibson Dunn's letter of 25th October again.

23 Dr Kent addressed that concern in her application. She explained that Mr Walker
24 founded and ran JamDoughnut but stepped back from a managerial role until 2023,
25 and Mr Walker is now a minority shareholder in JamDoughnut with no involvement in
26 or influence on the day-to-day running of the business or its strategy and direction.

1 Sir, we say it cannot be the case that anyone who holds any shares in any company
2 which is a counterparty to Apple can't be in the Confidentiality Ring. It has to be a
3 question of degree, and the question has to be: what is the role of the person in the
4 company in question?

5 We absolutely see, sir, if what you are talking about is someone who is actively
6 involved in the day-to-day running of a company as a counterparty or competitor, there
7 may well be a risk that that person is unable to put out of their mind information they
8 have learned in the course of these proceedings, and there might be a risk of
9 unintentional use, but we say this is not that case, sir, because Mr Walker as was
10 explained in the application, has no involvement or influence on the day-to-day running
11 of the business or its strategy or direction.

12 In those circumstances, we say the confidentiality obligations stipulated in the order
13 itself, which prohibits use, distribution, et cetera, are sufficient to protect Apple and
14 other parties' confidential information in this case. That's the position on Mr Walker,
15 sir.

16 There is one further matter I would like to address in terms of Apple's position. There
17 has been a suggestion that Dr Kent or her legal advisers were not aware of the roles
18 Mr Walker and Mr Jenkins had, that the due diligence conducted by Dr Kent was
19 inadequate, and there may have been some lack of transparency on Dr Kent's part.

20 We say that's quite a serious suggestion and one that really ought not to have been
21 made. It is not in the bundle, but hopefully you have a hard copy extract from Dr Kent's
22 First Witness Statement, which is dated 10th May 2021.

23 **MR TIDSWELL:** Yes.

24 **MR KENNEDY:** This is the witness statement which accompanied the original CPO
25 application and sets out why Dr Kent is a proper person to be authorised to act as
26 Class Representative.

1 | If we turn to internal page 16, you will see paragraph 37, this is introducing the
2 | members of the Consultative Group. (a) is Dame Elizabeth, over the page (b), halfway
3 | down, James Walker. If you look four lines down, it says:

4 | "Mr Walker is also CEO and founder of JamDoughnut, which is a service to help
5 | consumers receive rewards for their loyalty and ensure they can trust ...", etc, etc.

6 | So, his role in JamDoughnut was disclosed at the time in this witness statement.

7 | Similarly sub-paragraph (c), Kevin Jenkins, and in the third line:

8 | "Mr Jenkins is currently a senior advisor at Curve, a financial technology (or 'fintech')
9 | challenger bank."

10 | We say those roles were disclosed to Apple at the time the application was made. So,
11 | to see the suggestion that Dr Kent or her advisers did not know about those roles, or
12 | that there is a lack of transparency -- to see where that comes from, we might take
13 | a quick look at the correspondence.

14 | **MR TIDSWELL:** I am not sure we do need to get into that --

15 | **MR KENNEDY:** If it is not helpful, sir --

16 | **MR TIDSWELL:** We will see -- I don't know who is dealing with it, I suppose
17 | Mr Kennelly is. If they want to pursue that, the Witness Statement from Dr Kent is very
18 | clear about that. Let's see whether they make a point on it. It is --

19 | **MR KENNEDY:** The short point is the particular roles Apple were concerned about
20 | were not identified in the original letter of 2nd October. They said simply, "We are
21 | worried about the professional backgrounds". Hausfeld replied saying, "These are the
22 | professional backgrounds", cross-referring back to the witness statements, and only
23 | subsequently on 25th October were the specific roles detailed.

24 | So, in those circumstances we say the criticism is unfairly made, that we didn't guess
25 | the roles that Apple were concerned about in circumstances where they simply could
26 | have said, "This is what we are worried about". That's the point, sir, we don't need to

1 turn it up.

2 **MR TIDSWELL:** No, I understand the point. I am just not sure it really helps us with
3 the answer.

4 **MR KENNEDY:** I am grateful, sir. I think that takes us through Apple's objection and
5 our position on it. We say with Mr Jenkins there are no activities, and with Mr Walker
6 we say those activities are not of the sort where the risk we understand to be in
7 consideration arises.

8 Sir, just finally on the question of why we say it is reasonable and necessary for the
9 members of the Consultative Group to be admitted. In my submission, sir, it is simple:
10 in order to be able properly to advise Dr Kent in their capacity as members of the
11 Consultative Group, Mr Walker and Mr Jenkins may need to see the documents which
12 contain confidential information. To give a hypothetical example, it may be that in the
13 course of the trial, a strategic decision is taken by the legal team as to how to approach
14 a particular matter because documents have come up in the course of
15 cross-examination, in the course of Apple's opening. Dr Kent may think that particular
16 strategic decision is counterintuitive, and she may want someone other than the legal
17 team to provide her with their view on it.

18 Insofar as that decision by the legal team is based on the contents of particular
19 documents, you can well see that the advisers in the Consultative Group would need
20 to see the information to be able to provide Dr Kent with that advice, and the issues
21 may well be on technical matters. Mr Jenkins is a payment expert, and of course a
22 large degree of the dispute is about how the ASPS and the commerce engine works
23 and how it interfaces with other aspects of payment systems.

24 So, we say there is no great mystery as to why the issue may come up in due course.
25 Apple suggests that Mr Walker and Mr Jenkins are not responsible for the conduct of
26 the litigation and therefore it is unclear why they would need to see confidential

1 information. We say it is precisely because they are not having conduct of the
2 litigation -- and I go back to the example I just gave you, sir: the role of the Consultative
3 Group is to be another source of advice separate from and with a different set of
4 specialisms to the legal team.

5 Apple also suggests Mr Walker and Mr Jenkins are not necessary because other
6 members of the Consultative Group are in the Ring, but the only other member of
7 course is Dame Elizabeth. The purpose of the Consultative Group, in my submission,
8 sir, is to have complementary specialists. Dame Elizabeth will be able to give advice
9 on the legal matters, but Mr Walker has specialist expertise in consumer matters, and
10 Mr Jenkins has specialist expertise in payment systems. That is why the Consultative
11 Group is designed the way it is designed. So, Apple's proposed approach with just
12 Dame Elizabeth in the Ring deprives Dr Kent of the potential of advice of two-thirds of
13 the Consultative Group.

14 The third point Apple makes is that the scale of the confidentiality designations has
15 been reduced. It has been reduced, but in absolute terms, the quantity of Outer
16 Confidentiality Ring material that remains confidential is huge because it is only those
17 things that have been referred to in other documents which have been subject to the
18 designation and de-designation process. So, it may well be that Dr Kent's team is
19 rooting through the hinterland of disclosure and finds a document she wishes to
20 discuss with the advisers. So, we say there is still a huge amount of confidential
21 information in play which may well need to be advised upon.

22 Sir, there is an alternative to admitting Mr Walker and Mr Jenkins into the Ring, and
23 that's to use the paragraph 7 function within the Confidentiality Ring Order. I don't
24 know if it is helpful to turn this up.

25 **MR TIDSWELL:** This is putting to Apple the need to put the documents and then
26 asking for a response.

1 **MR KENNEDY:** (Inaudible) to identify the documents, which we do.
2 Identify specific Confidential Information by reference to the documents if possible.
3 We say that obviously betrays or risks betraying Dr Kent's strategic approach.
4 **MR TIDSWELL:** Can we have a quick look at that? Where do we find that?
5 **MR KENNEDY:** I think it is in the final tab. It's tab 22, sir.
6 **MR TIDSWELL:** Of which bundle?
7 **MR KENNEDY:** The core bundle. Yes, tab 22. It starts on page 318 of the pdf. 7.2
8 starts on page 15, internal page 15, bundle page 332:
9 "A party that receives Confidential Information in the Proceedings may request that:
10 7.2.1 certain Confidential Information is to be provided ... to persons [outside of the
11 ring].
12 7.3.1 If a party wishes such Confidential Information to be provided ... it shall notify
13 and request the express written consent of the other Party, specifying the name and
14 role of the proposed person(s), the specific Confidential Information that is to be
15 provided or made available to such person(s) (by reference to the relevant documents
16 insofar as practicable) and provide an explanation of why it is reasonable and
17 necessary for the Confidential Information to be provided"
18 We say that in the circumstances we are envisaging, it would be entirely unfair to
19 expect Dr Kent to say, "We would like to see document A, B, C and the reason we
20 want to see it is because we are going to cross-examine Mr Schiller on it", for example.
21 There is a second aspect to that, sir, which is that Apple has ten working days in which
22 to respond, and in the course of trial where decisions are likely to be taken in less than
23 ten hours, overnight, it is just obviously not practical.
24 Sir, those are my submissions on the application, unless I can assist any further.
25 **MR TIDSWELL:** No, thank you. Mr Kennedy.
26 **MR KENNELLY:** Thank you, sir. As my learned friend said, Dr Kent has applied to

1 add five people to the Confidentiality Ring. We haven't objected to three, but there
2 are these two to which we do object. The basic problem is they continue to have
3 commercial relationships, or potential commercial relationships, with iOS app
4 developers.

5 Just to recall the purpose of the Ring, it is to protect information defined as information,
6 the disclosure of which could significantly harm the legitimate business interests of the
7 undertaking to which it relates, or the private affairs of an individual, the disclosure of
8 which could significantly harm his or her interests.

9 So, by definition, we are concerned here with very sensitive information, and that's the
10 kind of information which it is proposed Mr Jenkins and Mr Walker will see. The
11 problem is their role. They work for or offer themselves to work for companies which
12 would benefit from having insights gained from seeing the confidential information.

13 May I just go back to some of the facts my learned friend took you to because they
14 themselves reveal the problem. If we could begin with Hausfeld's letter of 18th
15 October, it is in the correspondence bundle, page 46. It is tab 18 in my hard copy
16 bundle, **[CR/46]** -- the PDF should match.

17 We see here how Hausfeld described the roles of Mr Walker. First of all, they say
18 Mr Walker is a consumer expert and founder of Resolver -- I will come back to him,
19 but focusing on Mr Jenkins, he is a former CEO of Visa UK and is -- is in the present
20 tense -- a senior adviser to digital transformation and payments-related companies. It
21 goes on to say they aren't app or app store developers, they don't sell content, but my
22 focus is on Mr Jenkins' current role as a senior adviser to digital transformation and
23 payments-related companies. We infer that is his professional occupation -- current
24 occupation. If we go next to the Gibson Dunn letter on page 64 we see why we have
25 a concern because that information wasn't complete --

26 **MR TIDSWELL:** I discouraged Mr Kennedy from getting into all that. By all means,

1 Mr Kennelly, but it is clear, isn't it, that Dr Kent made the position plain in her May 2021
2 statement, and it may be the correspondence can be criticised for not being plainer.
3 Do we need to get into that? What I am really interested in is what the problem is now
4 rather than how we got there.

5 **MR KENNELLY:** I'm only showing you this correspondence to show you the current
6 facts. I am not seeking to criticise Dr Kent's team or infer about -- I am showing you
7 this to show you the particular problem arising from Mr Walker and Mr Jenkins' current
8 professional roles and why we say it is unsafe for them to be in the Ring.

9 **MR TIDSWELL:** Of course we are dependent on, apart from Dr Kent's statement,
10 which is now quite old, we are dependent on the correspondence, but the
11 correspondence appears to suggest that all of the particular roles you are bothered
12 about have either changed or have stopped. So is that a matter of dispute, still, or are
13 you saying you don't know?

14 **MR KENNELLY:** No, it is not correct to say that the points which were of concern to
15 us have ceased. Our concerns are broader, and that's why I took you first to the fact --

16 **MR TIDSWELL:** Sorry, I understand -- sorry, my fault for not asking the question as
17 accurately as I could. There is a specific point you have raised questions about
18 current engagements and we are told those current engagements are no longer
19 current. There's a broader point you have raised, which I understand and obviously
20 we will come back to, but just to be clear on the current point, the position, I think, isn't
21 it, we have been told there are no current engagements?

22 **MR KENNELLY:** We have been told that, but in considering the sensitivity of the
23 information in play, the Tribunal will understand why Apple has some concerns based
24 on the fact, for example, that for Mr Jenkins, his current LinkedIn profile still says that
25 he is currently involved with Red Badger, the company which is actively involved in
26 assisting clients develop iOS apps. So, we obviously have to take on trust what we

1 are told --

2 **MR TIDSWELL:** That's my question, really, I think that's what I am driving at. In
3 relation to the current appointments, are you taking a point that says, "We are not
4 satisfied with just a letter" or presumably a LinkedIn entry which is less useful to us.
5 Are you saying you want more reassurance, in which case presumably you want
6 a witness statement. Is that what you are saying.

7 **MR KENNELLY:** No, sorry, we are not asking for a witness statement here. We have
8 been told that Hausfeld have taken on instructions the current roles of Mr Jenkins and
9 Mr Walker. If we need a witness statement, if that is what is required, (Overtalking)
10 I will be told, but that is not what we currently ask for --

11 **MR TIDSWELL:** I just want to get to the bottom of this in relation to current roles.
12 What I want to know is: is this about the current roles or is it actually about the broader
13 point.

14 **MR KENNELLY:** It's a much broader point. It is about the broader point. The broader
15 point, which is not disputed at all, is the real problem here. Because Mr Jenkins is
16 held out by Hausfeld to be currently an adviser to companies which have a direct
17 commercial interest in the confidential information that would be revealed in this case.

18 **MR TIDSWELL:** Yes.

19 **MR KENNELLY:** On that -- sorry, sir.

20 **MR TIDSWELL:** You carry on, please.

21 **MR KENNELLY:** On that, I took you to the Gibson Dunn letter on page 64 in the
22 correspondence bundle to make a point about Mr Walker's company, JamDoughnut,
23 because this is not in dispute -- we will come back to what the Class Representative
24 says about his role at JamDoughnut, but the point made by Gibson Dunn in
25 paragraph 3 is that both of the companies, including JamDoughnut, are competitors
26 to other app developers, including Apple in the case of Curve, but certainly

1 JamDoughnut is competing with other app developers and they are counterparties to
2 Apple.

3 Then we go on to see what the Class Representative said in their application. That's
4 in the core bundle, page 39. I would ask you to go to page 43. My learned friend took
5 to you this page, but this page actually shows you the problem. In paragraph 18(a),
6 we are told that Mr Walker founded JamDoughnut but he stepped back in October
7 2023 from a managerial role. We are told he is now a minority shareholder not
8 influencing day-to-day running, and we are told he has no active involvement with
9 developing or operating iOS apps, but he is a former founder, very recently stepped
10 back from day to day management and is a minority shareholder in JamDoughnut,
11 which is, as we pointed out, an app developer, with a direct commercial interest in the
12 confidential information which is being revealed. That in itself, on the face of Dr Kent's
13 application, indicates that Mr Walker should not be in the Confidentiality Ring.

14 **MR TIDSWELL:** Because he is a minority shareholder?

15 **MR KENNELLY:** Because of his role. The problem here, sir, is not because of any
16 concern they will deliberately breach their undertakings to the Tribunal. It is that when
17 they see this sensitive commercial information, which is of obvious interest to their own
18 business and that of their clients, it is very hard to unsee that information, put it out of
19 one's mind when one later comes to make commercial or strategic decisions or offer
20 advice to one's own clients. That's the risk. That's why the Tribunal normally takes
21 a strict approach to admitting non-professionals to the Confidentiality Ring.

22 Looking back to Mr Jenkins -- sorry. We see now in the skeletons -- you saw we raised
23 the point about Red Badger and Red Badger's own website, which is the evidence we
24 rely on to show it helps clients build iOS apps. My learned friend took you to Hausfeld's
25 letter of 13th November. I won't go back to that, but I'll repeat the point I made
26 a moment ago, which is even if Mr Jenkins is no longer involved with Curve, and even

1 | if he is not currently, they tell us, advising any app developer in any capacity, we are
2 | told his professional occupation is to advise developers in relation to online payments.
3 | Considering the nature of the confidential information, which is proposed to be shown,
4 | that's the concern we have.

5 | Even if Mr Jenkins, for example, was not developing app developers on general app
6 | development but was focusing only on online payments, it is suggested by Dr Kent
7 | that this is quite disconnected from the issues before the Tribunal, but it is not so. As
8 | the Tribunal knows, an important part of Dr Kent's case is the challenge to the payment
9 | restrictions.

10 | In addressing the alleged infringement, the Tribunal will examine the competitive
11 | environment in which app developers would compete on iOS absent those restrictions.

12 | We know the issues concerning merchant to record services are before you, and it will
13 | be necessary to examine how they would compete. It would be necessary to examine
14 | the security and privacy implications which would arise if they were allowed to compete
15 | on iOS, and all of that involves confidential information which will be of great interest
16 | commercially to the clients of Mr Jenkins, or potential clients of Mr Jenkins.

17 | To give you an example of the kind of information, which is currently confidential, could
18 | I show you Professor Sweeting's report at page -- you should have the expert reports.

19 | **MR TIDSWELL:** Yes, we do, yes.

20 | **MR KENNELLY:** [ER/20/2476] is Sweeting 1. Go to 2539 --

21 | **MR TIDSWELL:** Where I think there is about a three-page difference in the ...

22 | **MR KENNELLY:** Page [ER/20/2539], we see reference to an Apple survey. The
23 | results of that survey are confidential --

24 | **MR TIDSWELL:** Sorry, can you give me the --

25 | **MR KENNELLY:** Sorry. It is footnote 198.

26 | **MR TIDSWELL:** We only have a non-confidential version. I don't know how

1 confidential that is, but I assume it is confidential because somebody has blanked it
2 out.

3 **MR KENNELLY:** That is the point I am seeking to make. This is a 2022 survey and
4 it's a survey, the results of which are confidential, but it goes to particular parameters
5 of competition which are important to users. The survey was also confidential, they
6 are of real commercial utility, and they could be used to advise future app developers,
7 platform developers, mobile wallet developers, and what Apple customers want.
8 Obviously of use to Mr Walker's company and to Mr Jenkins' job.

9 There's also confidential information on the spending habits of Apple customers in
10 particular market segments -- I'll just give you the reference. That is in Hitt 2,
11 **[ER/18/1640]**.

12 Again, if you were advising an app developer in relation to where they should focus
13 their energies, where are the lucrative markets, all of that confidential information
14 would be extremely helpful.

15 In view of that prejudice, we ask what is the prejudice to Dr Kent if Mr Jenkins and
16 Mr Walker continue to be outside the Confidentiality Ring? The starting point is that
17 the Tribunal has well in mind how many of the redactions have been lifted from the
18 reports since September. You can see yourselves from the reports before you how
19 few redactions there are now.

20 More importantly, at times when my friend described Mr Walker and Mr Jenkins as if
21 they were industry experts retained by Dr Kent, Dr Kent has industry experts in relation
22 to the lawyers and economists who are within the Confidentiality Ring. To the extent
23 that they need industry expertise on confidential material, they have that.

24 **MR TIDSWELL:** It's a different point, though, isn't it? Because this is the Consultative
25 Group and the benefit Dr Kent gets from having people who are not involved in the
26 litigation other than in that capacity and the ability to go and seek advice from them.

1 Of course, this is something the Tribunal has promoted, it's seen as being a very
2 helpful thing for the class representatives to have a point of reference which is away
3 from lawyers, away from the funders, away from everybody else. Certainly, I think we
4 see it as being quite an important function.

5 Now, that's really the balance, isn't it? I think, fine, you can say there are other ways
6 for Dr Kent to test a particular point with the experts but we are really talking about the
7 conflict here between the confidentiality of the material that Apple is disclosing on the
8 one hand, and the ability of the Consultative Group to perform a function that we
9 should all want it to perform on the other. Of course, the difficulty with that -- and
10 I suspect this is the first time this has really come up, but the difficulty is that it makes
11 perfect sense for Dr Kent to put in the Consultative Group people who really
12 understand the subject matter of the litigation, and therefore you get -- that's what
13 promotes the conflict, isn't it?

14 **MR KENNELLY:** Indeed, sir. In fact, I am not aware of this problem coming up before,
15 but one can see immediately what the problem is. If one goes back to Dr Kent's First
16 Witness Statement -- there is no need for the Tribunal to take it up -- she puts forward
17 Mr Jenkins in particular as a member of the group because of his current role as
18 a professional adviser to the kinds of companies that would be interested in the issues
19 in this case.

20 **MR TIDSWELL:** (Inaudible) point of view, because she knows she is going to have to
21 deal with strategic decisions that involve that sort of input.

22 **MR KENNELLY:** Indeed. For the same reason it is unsafe for that individual, without
23 impugning his integrity in any way, to see the most sensitive information, which is the
24 information in the Confidentiality Ring because of his current role advising the very
25 companies that would benefit from having that for commercial and competitive
26 purposes. That is the tension.

1 So, to the extent my learned friend said these individuals are almost like grandees
2 apart from all of this and couldn't possibly be interested, that is the intention behind
3 how Dr Kent justifies their presence on the panel in the first place. The balance needs
4 to be struck by obviously allowing them access to all the information they have in the
5 non-confidential versions, but the confidential information should not be shown to them
6 because of their ongoing role or potential role with competitors of Apple and
7 competitors of the developers whose confidential information will be before you. That's
8 where the balance needs to be struck, in our submission.

9 That applies equally to Mr Walker because of his former and recent very senior role in
10 a company developing iOS apps. Although he is a minority shareholder, it is unreal to
11 think he has no involvement at all, or no potential involvement with that company, in
12 the issues relating to this case; or that he can put them out of his mind when the
13 discussions arise as inevitably they will.

14 **MR TIDSWELL:** Your point -- it may be there is a point of distinction for Mr Walker
15 because of the minority involvement, but I think you are making a broader point in
16 relation to both of them, aren't you, which is they are both in the business providing
17 consultative services -- services of advice, if you like, senior advisory services to app
18 developers or people who might have an interest in app development. That's the
19 important point.

20 **MR KENNELLY:** Mr Jenkins definitely is, as Hausfeld tells us. Mr Walker, it's not as
21 clear, but because of his former senior role with JamDoughnut and because of his
22 continuing shareholding, one must infer the risk arises. I am afraid we don't agree with
23 my learned friend saying it is a minority shareholding alone. That's the problem. It is
24 the commercial reality of the fact that he founded the company, stepped back recently
25 from it, and even though he may not be involved in day-to-day management, it is unreal
26 to think he has no discussions about anything where this information could not be put

1 out of his mind. There is a well of information --

2 **MR TIDSWELL:** That's very speculative. I am not sure I would accept it put that way,
3 Mr Kennelly. I think in a way, if your point is a better point, which is there is nothing to
4 stop him getting more involved, I do think what we have been told at face value is that
5 he is not involved. If we are accepting what has been said at face value, that's what
6 the position is, as I understand it.

7 **MR KENNELLY:** (Inaudible) sir, you are putting back to me. You can see the concern,
8 and the two other points Dr Kent made in response to us was that they are giving these
9 undertakings so there is no question of them breaching them. If that were true, anyone
10 could join the Ring provided they give the undertakings. The problem is that, with the
11 best will in the world, they can't put out of their minds when they see this information
12 and then go back to their professional tasks. Or in the future, in Mr Walker's case, he
13 is potentially open to a discussion with his former colleagues in JamDoughnut.

14 **MR TIDSWELL:** I think you made the point earlier that obviously we put professionals
15 into these rings all the time because they can't put it out of their minds either, but you
16 are saying there is a distinction.

17 **MR KENNELLY:** There is a distinction because the involvement of the professionals
18 is indispensable for the just prosecution of the cases, and in many cases the
19 professionals owe separate professional obligations which creates a further layer of
20 protection permitting them to be added to the ring, but this question of indispensability
21 doesn't arise here, because although it is important to have a dialogue with
22 a consultative group, the Class Representative has not explained why -- and this really
23 was the thrust of the submission that Mr Walker and Mr Jenkins should be given the
24 same access that has needed to be given to their experts and lawyers for the purposes
25 of advising urgently, because that was the point made on particular documents'
26 confidential information that arise in the course of the trial. That really is the question

1 of urgent engagement with something, confidential material, which is more realistically
2 required of the experts and lawyers instructed.

3 A further point Dr Kent made in her skeleton was that in others' cases, all the members
4 of the Consultative Group were added to the Confidentiality Ring, and the example is
5 given of the O'Higgins case, but of course that's not relevant at all because as the
6 Tribunal knows, O'Higgins concerned a historic foreign exchange cartel. It was
7 a follow-on action in respect of conduct that had ceased in 2013. The information was
8 historic, whereas we are dealing with ongoing commercial relationships
9 and allegations against ongoing behaviour. That's why it is quite different and more
10 sensitive in this context.

11 We have been careful -- just to be clear, one does not lightly agree to the addition of
12 members to the Ring when they will see this information, which by definition is
13 potentially harmful to Apple and to developers. We don't lightly disagree and that's
14 why we made no objections to the funder's representatives, for example, but in relation
15 to Mr Jenkins and Mr Walker, on the face of the undisputed roles they hold and
16 Hausfeld's own evidence, we have to maintain the objection.

17 **MR TIDSWELL:** The point about the paragraph 7 procedure, you are not saying
18 anything about that. You are not suggesting that's -- presumably if they asked you to
19 show the survey referred to in 198 to Mr Jenkins and Mr Walker, you would say no.

20 **MR KENNELLY:** We'd have to understand the reason for it. I can't say in advance
21 that we would say no, but maybe --

22 **MR TIDSWELL:** It is not very likely, is it, given the concern you have raised.

23 **MR KENNELLY:** The Tribunal is very clear about how the parties must engage on
24 issues of confidentiality. On a specific query like that, we would be expected, in
25 the spirit of cooperation required by the Tribunal, to understand if there was some
26 halfway house that could be accommodated to deal with a particular request made,

1 and although we have a maximum of ten days – obviously, Apple, mindful of its duties,
2 would seek to do so faster if they could; it would depend on the nature of the
3 information. Some information will be more sensitive than other information --

4 **MR TIDSWELL:** Would there be -- sorry, carry on.

5 **MR KENNELLY:** On the point that the objection to the paragraph 7 procedure is that
6 if we have to tell them the document we are looking at, it would reveal our strategy,
7 that objection can be made to the paragraph 7 procedure in every case. That arises
8 in every situation where the paragraph 7 procedure needs to be used. So that's no
9 objection, that's the price that has to be paid in order to allow a relaxation of their
10 restrictions imposed under the Ring.

11 **MR TIDSWELL:** If one way to deal with the timing problem was to shorten the
12 response time, is that something you would be prepared to contemplate?

13 **MR KENNELLY:** Apple has considered that. The difficulty is it would apply across
14 the board. Ten days may be very difficult for Apple for some information and may be
15 generous in other contexts. It is impossible to predict in advance for all purposes
16 whether ten days can be shortened. That's the difficulty. So I can't offer a general
17 shortening of that time for all purposes.

18 **MR TIDSWELL:** Thank you.

19 **MR KENNELLY:** I am so sorry. I have to check that there is nothing else I have
20 missed.

21 Of course, my clients are in the Tribunal, and we can propose that during the trial
22 itself -- because I can understand that, in the course of the trial, matters are more
23 urgent than they are previously -- we could shorten that to three days because we will
24 have greater direct engagement during the trial itself and we can offer three days for
25 the purposes of that procedure, the paragraph 7 procedure, in the course of the trial.

26 **MR TIDSWELL:** Thank you, that is helpful. Thank you very much.

1 **MR KENNEDY:** Sir, I don't want to keep anyone from their lunch, but two points of
2 detail. The first on Hausfeld's letter of 18th October, which is tab 18 and page 46 of
3 the bundle, it is the second sentence of paragraph 3. It says:

4 "Mr Jenkins is formerly the CEO of Visa UK and is a senior adviser to digital
5 transformation and payments-related companies."

6 I think at some point, it was suggested that that sentence referred to developers. Sir,
7 we can see it doesn't refer to developers. In any event, the status of Mr Jenkins'
8 current activities was clarified in Hausfeld's letter of Wednesday evening, which is
9 tab 45, page 161 of the bundle. It is paragraph 6 which I took you to at the start of my
10 submission, sir:

11 "Mr Jenkins has confirmed that he is not involved with and does not advise any app
12 developer or competitor of Apple in any capacity."

13 So that is the position in terms of Mr Jenkins' current role.

14 What we are faced with now is speculation about what Mr Jenkins might or might not
15 do in the future, which was not the basis on which the objection was first taken in
16 correspondence or in the skeleton argument.

17 **MR TIDSWELL:** That may be right, but if that is the position that's being now put,
18 there is this difficulty, isn't there? As I understand it, unless you are telling me
19 something different, at least Mr Jenkins, and possibly Mr Walker, are in the business
20 of providing advice to people about app development -- or is that not right?

21 **MR KENNEDY:** Sir, I will need to take instructions because that's not my
22 understanding standing here. If I can turn my back.

23 **MR TIDSWELL:** Before you do, maybe to crystallise the point as Mr Kennelly has put
24 it: what's being said, I think, it is all very well what they may or may not be doing now,
25 but if they are going to get a lot of information which is very relevant to that subject
26 matter, then what assurance do we have that they are not going to be able to

1 inadvertently use that in another context in the future, which is obviously a very difficult
2 thing for anybody to deal with.

3 Absent saying to them, "You have to sit at home and play golf" or whatever it is, which
4 I don't think anyone is going to suggest is reasonable, how do we manage the
5 possibility of what they are going to do in the future? That's the point that's being put.

6 **MR KENNEDY:** Sir, I think the question of what happens in the future is in a sense
7 governed by the obligations they agree to now.

8 **MR TIDSWELL:** That doesn't answer the point, though, does it? The point that has
9 been put is once you have the information, you have got it. It doesn't matter how
10 careful you are in relation to what's said in the order, not using it we all know is quite
11 a difficult thing. There is just an inherent compromise which comes from these orders,
12 which is uncomfortable because we all know once you've have read and understood
13 the information, it is possible to use it without even trying. Indeed, by trying not to, you
14 can't get it out of your head. As Mr Kennelly has said, we make that compromise for
15 the purposes of necessity in order to be able to try these cases.

16 I think the point he is putting which I think you need to deal with is whether or not this
17 is on one side of the line or the other. Is this really on the side of the line which is
18 necessary, and we should effectively take that risk in relation to the CRO, or is it not?

19 **MR KENNEDY:** Sir, we accept it is difficult to put information out of your mind, and
20 that's where the risk comes from. We say if we look at the current activity, that inability
21 to put information out of your mind risk doesn't arise because of the particular nature
22 of the current activity.

23 There is one point of detail I might just deal with now about Mr Walker. If you go back
24 to the application at tab 4 of the core bundle, page 43 electronically, Mr Kennelly took
25 you to paragraph 18(a), which is a description of Mr Walker's current involvement with
26 JamDoughnut. Mr Kennelly read out to you that he has no influence or involvement

1 in the day-to-day running of the business, but the sentence continues:

2 "... or its strategy and or direction."

3 So in a sense, it covers both the high level strategic conversations, which I think my
4 learned friend was alluding to when he referred to potential conversations with former
5 colleagues, and the more acute sort of risk area which is if you are involved day-to-day
6 in running a company, you have fiduciary duties to that company to act in its best
7 interests. Of course, we recognise in that instance, there would be an unacceptable
8 risk, we just say we are not in that situation.

9 **MR TIDSWELL:** How do we control for the possibility that Mr Walker might, let's say,
10 the current executives all leave, and somebody needs to run the company, so
11 Mr Walker says, "I will step up and do that".

12 **MR KENNEDY:** I think Mr Walker ought to ask himself the question: can I step up and
13 do that, given the confidential obligations I have agreed to under the terms of the
14 CRO? It may be that Mr Walker and Mr Jenkins' future possibilities are limited
15 because of the risk of being unable to put something outside their minds; and if they
16 sign up to the CRO, they are bound by the CRO.

17 That is what I was coming on to, sir, which if you are thinking about the future, this
18 may circumscribe what they can do. It may not be they are just reduced to playing
19 golf, but there may be something in between golf and advising app developers or
20 categories of app developers, which is where the line is drawn. You will be relying on
21 their judgment to make sure they get that decision correct, and we say Mr Jenkins was
22 the managing director and Chief Executive of Visa UK. This is an extremely
23 experienced businessman, whom I am sure we can -- I am not giving evidence from
24 the Bar, but I am sure we can infer is adept at handling confidential information and
25 knowing what to do and what not to do.

26 That's my submission on the future. Obviously, I can't give an ironclad guarantee as

1 to what they will or will not do in the future. Like you, sir, I don't have a crystal ball.
2 The most I can say is it may be that the obligations they voluntarily agree to
3 circumscribe their freedom of action.

4 **MR TIDSWELL:** That's really self-regulation, isn't it?

5 **MR KENNEDY:** Yes, but in the same way that it is for all the signatories to the CRO,
6 and I appreciate the --

7 **MR TIDSWELL:** Do you think they understand that?

8 **MR KENNEDY:** I would think they do, given who they are, sir, but if the Tribunal is
9 concerned about that, then a process can be arrived at whereby that is made clear to
10 them, there may be some circumscription of what they can do in the future. If there is
11 an additional process that needs to be undertaken, I am sure those behind me would
12 be happy to do so, sir.

13 We don't shrink away from the fact that the Tribunal is faced with a balancing exercise.
14 In a sense, sir, the significance extends beyond this particular case. This may be the
15 first time this has arisen, but the Tribunal is essentially faced with a useful consultative
16 group, or a less useful consultative group, and the risk -- and we say it's a small risk
17 given the particular facts you're faced with -- of this inadvertent use of confidential
18 information.

19 We say in those circumstances, sir, the balance lies with Dr Kent, and we ask you to
20 make the order and allow them into the Confidentiality Ring, but we don't shrink away
21 from the fact this is a difficult question and that there is a tension between those two
22 objectives.

23 **MR TIDSWELL:** The offer that was made at the end, about three days, is that helpful
24 at all?

25 **MR KENNEDY:** It is better than ten days, sir, to state the obvious. I think we still
26 press for their admission to the Confidentiality Ring, unless I am told otherwise, but I

1 don't think ...

2 **MR TIDSWELL:** No that's fine, thank you very much. We will rise. How much do you
3 think we have after the break?

4 **MR WARD:** I don't know whether our disclosure application is now agreed. I have
5 a point I want to make on -- the point that has to be in closed session about the
6 unredactions, and then I think there are one or two minor items.

7 **MR TIDSWELL:** So, there is no point trying to finish it now, we are going to have to
8 come back.

9 **MR KENNELLY:** Unless I have misunderstood, there is nothing between us on
10 disclosure. It is all agreed. In the spirit of constructive engagement, we have agreed
11 to everything.

12 **MR TIDSWELL:** That's very helpful. We were a little bit behind --

13 **MR KENNELLY:** The very last thing was agreed last night, sir. So on disclosure there
14 is nothing left to discuss.

15 **MR WARD:** We will make sure we are ad idem over lunch on that.

16 **MR TIDSWELL:** We will take a short adjournment and come back at 2 o'clock and
17 finish everything off then. Thank you.

18 **(1.02 pm)**

19 **(Lunch break)**

20 **(2.00 pm)**

21 **MR TIDSWELL:** Mr Kennedy, I hope you have received a judgment.

22 **MR KENNEDY:** We did, sir. I have done my best to digest it.

23 **MR TIDSWELL:** I don't think it changes things very much. First of all, it seemed to
24 me it might be helpful to orient ourselves in the framework of the decisions that have
25 been made, and I think there are a couple of points which are worth picking up.

26 If you have it handy, the points I thought were interesting and of some relevance were

1 paragraph 37, which is the quotation from Mr Justice Roth's decision in the
2 Infederation case, and just the observations he makes there in the quotes, but actually
3 particularly further down the page where Lord Justice Floyd draws it all together. He
4 talks in (ii) of:

5 "An arrangement under which an officer or employee of the receiving party gains no
6 access at all to documents of importance at trial ..."

7 I think the point that's worth picking up there, and I will ask Mr Kennelly to comment
8 on this as well, we are talking about going to trial here of course. I think it is possible
9 to look at the request -- it is an unusual situation, isn't it, a situation with a collective
10 action and a class representative? There is at least I think a point to be made in your
11 favour as to whether this consultative group is somehow akin to the client.

12 **MR KENNELLY:** You have anticipated a point I wanted to pick up, sir, precisely on
13 39(ii), which is that given the (inaudible), the consultative group is in a sense akin to
14 the client. The client's representative may not always have expertise in the subject
15 matter in the way that a lay client ordinarily would have some expertise, it being their
16 business. That heightens the importance of the consultant group, in my submission,
17 and their ability to perform their function and have access to the documents. So, we
18 do agree with that, sir.

19 **MR TIDSWELL:** That's helpful. Why don't we see -- I think when you go on, of course,
20 you are -- the observations there is no universal form of order and different types of
21 information require different layers of protection, and so on. You go back, of course,
22 to Mr Justice Roth's observations in paragraph 42 of Infederation:

23 "Any dispute over admission of an individual to the ring must be determined on the
24 particular circumstances of the case."

25 So, I am not sure we end up in a completely different position, but certainly I thought
26 it was a helpful framing of the discussion we had earlier.

1 **MR KENNEDY:** Sir, the points we would unsurprisingly stress is the stress on the
2 exceptionality of the Confidentiality Ring, which is emphasised in 2(iv), in particular
3 with regard to external eyes only, and then (v). Again, this is external eyes only:

4 "[The] onus remains on the disclosing party throughout to justify that [continuing]
5 designation."

6 So, it is the exception, not the norm, that materials are in rings. Obviously it depends
7 on the nature of the ring, the Class Representative herself is in the Outer
8 Confidentiality Ring, but then we come back to the point you started with, sir, which is
9 collective proceedings are of a slightly unusual nature, consultative groups are of
10 a slightly unusual nature.

11 We don't think much can be derived from the facts of this particular case because as
12 you say, sir, it will vary from case to case, but it does seem that some importance was
13 attached to the fact that the people who were proposed to go in the external ring were
14 potentially involved in negotiations with the various counterparties, which is what gave
15 rise to the particular prejudice.

16 We say the factual position for developers vis-a-vis Apple is ordinarily quite different
17 in that there is not a sort of negotiating dynamic between an ordinary iOS app
18 developer and Apple. This is not a case like Trucks where a similar issue arose, where
19 you had large companies negotiating with the OEMs, and a similar issue about access
20 to certain disclosure arose.

21 Beyond that, we don't draw any particular points from this particular decision, sir.

22 **MR TIDSWELL:** Yes, thank you. I suppose the only other thing to say is we are
23 already probably back in the same place, in a way, which is asking ourselves the
24 question as to how you balance the interests, because there clearly is a balancing
25 exercise.

26 **MR KENNEDY:** It is a balance of interest. Sir, it is a decision for the Tribunal, because

1 we said we think the balance favours us and (inaudible) Mr Kennelly.
2 I don't know if I can assist you further in helping to convince you that the balance lies
3 with us, unless I can be of assistance.

4 **MR TIDSWELL:** Probably the only way you could assist, which we talked about before
5 the short adjournment the question of what protection might be forthcoming by way of
6 undertaking, but I don't imagine you are in any different position than you were before
7 the short adjournment, so you need to think about that further.

8 **MR KENNEDY:** We want to be entirely receptive to concerns the Tribunal had or any
9 process the Tribunal would like us to go through. (inaudible).

10 **MR TIDSWELL:** Good. Thank you. Mr Kennelly?

11 **MR KENNELLY:** Taking up the first point about whether there is an analogy to be
12 drawn between the officers or employees of a party and the members of a consultative
13 group. In my respectful submission, that is not a good analogy. A consultative group,
14 even in the context of collective proceedings, is not to be treated as the executive
15 officers or employees or Board of Directors of the Class Representative.

16 In fact, in the short time available to us, I haven't been able to explore this as far as
17 the case law, but certainly my understanding is the consultative group is to provide
18 some external perspective and expertise to the mechanics of the case which will be
19 run by the Class Representative, with the very deep assistance of the lawyers and
20 experts.

21 So, in my submission, I don't see that link between an officer or employee of a party
22 and the membership of a consultative group here. In fact, my submission to the
23 Tribunal is that a consultative group is a further level removed from those who are
24 intimately involved in the conduct of the case in the context of collective proceedings;
25 namely the Class Representative, the lawyers and experts, external experts, all of
26 whom are within the Ring.

1 **MR TIDSWELL:** I am not sure I fully accept that, Mr Kennelly. I think there is an
2 analogy and maybe -- they're clearly not the same thing and if that's the point, I accept
3 that, but I think perhaps you are overlooking the isolated position that the Class
4 Representative is in. The Class Representative may well have lots of lawyers, funders
5 and all sorts of other people she can discuss the case with, but that's not the same,
6 really, as being in an environment where you can talk to somebody who doesn't have,
7 if you like, that other interest and has an interest which is about the case and about
8 the collective proceedings.

9 That's the whole point of the advisory group, the Consultative Group. I am not saying
10 it is a like-for-like situation, but I do think there is some degree of analogy to be drawn.
11 The question really becomes -- I think it goes back -- I don't think it is anything different
12 from the discussion we were having before the short adjournment, which is there
13 clearly is a policy consideration of having an effective consultative group which is
14 going to have people who know about the industry, and therefore you run into this
15 problem that the Tribunal wants the Class Representative to have access to the
16 Consultative Group and to have the benefit of their experience to provide the sort of
17 support that an organisation might provide if it was the claimant, and yet is not able to
18 do that because of the confidentiality problem.

19 I am not sure anything that has been said here is wildly different from the conversation
20 we are having, but I think the point I would draw out which comes out of that
21 paragraph 39(2) is the distinction between restrictions on confidentiality before trial
22 and at trial. It wasn't, I don't think, a point that was aired this morning, we are clearly
23 moving -- and I think it is made clear by Lord Justice Floyd -- we are clearly moving
24 into a different phase of this as we get into the trial phase.

25 I think that does make it a bit harder for you or your client and a bit easier for the Class
26 Representative because in a way the justification has to be all the more robust.

1 **MR KENNELLY:** It is in view of the fact that we are moving into trial that we propose
2 to shorten the period of time we would require to address any request under
3 paragraph 7 to relax the order for particular documents.

4 The point you make, sir, I entirely understand, and, in fact, it is because of that external
5 perspective, that recourse that the Class Representative can have to the consultative
6 group, that makes them unlike an employee or an officer of a party, but that's not to
7 say their role isn't important. Of course it is, and the courts have stressed the
8 importance of the role, but the way the balance is struck is using them -- by expecting
9 the Class Representative to make use of them by reference to the very large amount
10 of non-confidential material, and that's the real question when it comes to striking the
11 balance. So what extent is it necessary in the interests of justice for these two
12 members of the consultative panel to see the particular highly sensitive commercial
13 and competitively sensitive information which is within the protection of the Ring?

14 That's where in my respectful submission the Class Representative struggles,
15 because they say that "There may be an instance where we need to go to them with
16 something sensitive and urgently", but that is unlikely in the context even at trial where
17 the Class Representative has and must have industry expertise dealing with those
18 very questions to which he or she can have recourse urgently.

19 **MR TIDSWELL:** Let me give you a hypothetical and this is obviously a hypothetical.
20 Let's say in the course of trial a particular document which is very much subject to the
21 Confidentiality Ring becomes very material in the cross-examination of one of your
22 witnesses and as a result of that you feel the need to make an offer to settle the case.

23 **MR KENNELLY:** Yes.

24 **MR TIDSWELL:** The Class Representative -- I would have thought that's one of the
25 occasions in which the Class Representative would want to lean most heavily on the
26 consultative group. Now it may well be infeasible even with a three-day period for that

1 to work and the Class Representative can't go and talk to the experts. That's no help
2 at all. They need to go and talk to the consultative group and to be able to explain to
3 them what has happened, why it has happened and therefore to make a judgment
4 about whether it justifies the offer that your clients made in the hypothetical.

5 Now, you know, who knows whether anything like that might happen in this case or
6 any other, but that's the sort of thing I think we need to be alert to.

7 **MR KENNELLY:** Of course. Sir, that makes complete sense to us. In fact, what that
8 demonstrates is that what's needed is not a general permission for these members of
9 the consultative panel to see every confidential document in the case, but that we must
10 be ready rapidly to ensure that, where necessary, they can see individual documents
11 in the case, even if they are confidential.

12 What it means is that in those isolated situations that arise, an application will be made
13 by reference to specific documents and it will be made for a shorter period. It will be
14 in trial, so it will be very easy for them to say, "There are a range of documents we
15 wish to show our consultative group and we need a decision within 24 hours", and in
16 those circumstances the Tribunal will have a much narrower focus.

17 Now we may say, "We would like more information about that", but the Tribunal
18 ultimately will say, "No. This is a narrow scope of documents. It is a matter of urgency.
19 We are told and we can trust the lawyers that it is very important for a particular
20 purpose". You will hear my submissions, but that is a much smaller intrusion into the
21 commercially sensitive information of Apple than what is currently proposed by
22 Dr Kent.

23 **MR TIDSWELL:** That may deal with the hypothetical I gave you. It might not deal
24 with all the potential situations and it may well be that they don't want you to know that
25 they are focused on a particular document and that's entirely understandable too, isn't
26 it? It may be they want to have a conversation about a document without having to

1 disclose to you that that is a key document about which they are having a
2 conversation. They might want to make a settlement offer to you, knowing that
3 something is coming up.

4 So, I mean, it only works to a point. These are all ways of just trying to make the thing
5 work, and the other way of making it work, which I have explored a little bit with
6 Mr Kennedy, is this idea that if we could be given some assurance about the
7 involvement that these individuals have in areas which you are concerned about, that's
8 another way of dealing with it. I don't know how strongly you want to push back on
9 that, but that may well be the easiest answer to this.

10 **MR KENNELLY:** Sir, we read the judgment you sent to us with interest and it seemed
11 to us at least there were two solutions to striking the balance which the Tribunal seeks
12 to do.

13 The first is the one we have just been discussing, which is to rely on the ability to make
14 an application for a shorter period to show these members of the group a specific and
15 limited number of documents, and that is one of the solutions canvassed in the
16 judgment I think at paragraph 77, but I will be told if it is a different -- sorry. It is
17 paragraph 81.

18 The other solution is a solution of these individuals giving undertakings not to be
19 involved, not to participate or advise upon the matters where this information would be
20 of use. We have no objection to those undertakings being given. If those were
21 proposed, we would consider them and, in fact, we could indicate our agreement
22 today, and we would be interested to hear what the Class Representative has to say
23 about that. In this case, the case you sent to us, sir, the undertaking, which the Court
24 of Appeal accepted, was that:

25 "[The individuals in question would] not at any time ... participate in or advise on ...
26 negotiations or ... litigation involving that counterparty."

1 For our purposes it would not be involved in or advising app developers in relation to
2 iOS or persons providing merchant record services to app developers in relation to
3 iOS.

4 **DR BISHOP:** Was any period indicated for how long the undertaking would be in force
5 or last?

6 **MR KENNELLY:** On the face of the judgment sent to us by the Tribunal, no.

7 **DR BISHOP:** In principle, a lifetime.

8 **MR KENNELLY:** That's what the Court of Appeal approved in this judgment that was
9 sent to us by you. So that's one version of a solution. It is really for Dr Kent's team to
10 tell us what they think about that.

11 **MR TIDSWELL:** Are you not going to say anything about timeline? Timeline is
12 important, isn't it?

13 **MR KENNELLY:** The timeline is important, but the problem we have with the timeline
14 is that these are ongoing rules -- Dr Kent calls them restrictions -- in Apple's business
15 model. The confidential information that will be seen is relevant currently and in the
16 future in relation to the conditions of competition that we are discussing. So it is very
17 difficult to say that it will become stale in the short term.

18 Now I may be told what a general deadline might be, but it is not easy to choose one,
19 because the restrictions are current and the problems which I have described,
20 so-called problems, are all current.

21 **MR TIDSWELL:** Obviously I can't force you to put one forward. There may be good
22 reasons why you don't want to. It does mean, I suspect, that you are going to end up
23 inevitably with the next step. If we go down this path, the next step will be that you will
24 get something you won't like, and we will end up having to argue about it.

25 **MR KENNELLY:** (Overtalking). There is lots of activity behind me. It might be up to
26 the Tribunal to bridge that gap. I will be told if there is.

1 **MR TIDSWELL:** I wonder if I can leave that, and if you become aware of that, let us
2 know. I will see if Mr Kennedy has anything to say about that.

3 **MR KENNEDY:** On the question of undertakings, I have not had an opportunity of
4 taking instructions, as you might anticipate.

5 **MR TIDSWELL:** I understand.

6 **MR KENNEDY:** On the question of a fallback obviously we continue to press the
7 application as made, but we think if there is to be some sort of fallback rather than it
8 being us identifying specific documents that we wish to show, we would suggest some
9 sort of alternative whereby if a document that's referred to in the course of a day at
10 trial is one which Apple does not want Mr Walker or Mr Jenkins to see, then they
11 should inform us, but otherwise such documents would become non-confidential within
12 some set period of time. That avoids the problem of us having to show our hand,
13 which I think you are alive to, sir.

14 I have not discussed this with my learned friend. I am speaking off the hoof. Some
15 alternative which reverses the burden we think would be fairer. We are obviously
16 happy to pick that up with them after today, sir.

17 **MR TIDSWELL:** I think that's very helpful, Mr Kennedy. I think probably the answer
18 is we shouldn't be trying to negotiate that here. So I think what we are minded to do,
19 unless, Mr Kennelly, you have anything else to add --

20 **MR KENNELLY:** We will take instructions on that last suggestion from Mr Kennedy.
21 That is something that may work (inaudible).

22 **MR TIDSWELL:** I think it is very helpful. Why don't we leave it on this basis? What I
23 suggest --

24 **MR KENNEDY:** That is to deal with things that are not referred to, so we will need to
25 fold those in and come up with a comprehensive plan.

26 **MR TIDSWELL:** Let me just perhaps draw a line under this now then. So we will not

1 make an order today. I think as we currently are, we would be minded to make
2 an order if we got a satisfactory undertaking from the individuals concerned.

3 Now I am not sure I know what the answer to "satisfactory" is, and clearly you have
4 indicated quite fairly that you don't, and Mr Kennelly has given some indications but
5 not all of them. So, there is a bit of work to do there, but certainly just in terms of where
6 we are, our thinking on it is we would like to see them come into the Outer Ring, if we
7 can make that happen and if we are prepared to make the concessions that are
8 necessary in order to provide some comfort for that.

9 That is a balancing exercise. So, I think we are very alive to the point that they have
10 some reservations about that reasonably, and therefore the length of time that one
11 could sensibly ask them to do that may be quite limited. Equally, of course, there has
12 to be balance on all the points we have talked about.

13 So, if in the meantime there are other ways you can find to cut the cake, then obviously
14 we would be very happy to hear about those as well, but I think we will leave it on that
15 basis for now.

16 **MR KENNEDY:** We will do our best to think creatively, certainly.

17 **MR TIDSWELL:** Obviously you can come back on the papers, and we will deal with
18 it on the papers. If you wish to put something forward, the process should be that you
19 put that forward. Obviously it would be helpful if you discussed it with -- your solicitors
20 discuss it with Apple's solicitors first, and if you can't agree it, then we will decide what
21 we think the answer is, which may be that it is too difficult and not make any order, but
22 it may be making the order subject to whatever we think is the right undertaking if that's
23 on offer.

24 **MR KENNEDY:** We will do that.

25 **MR TIDSWELL:** Thank you very much.

26 Right. Mr Ward.

1 **MR WARD:** I think that takes us to the specific disclosure application. If I may explain
2 our understanding of the position, as you observed this morning, the issue has been
3 narrowed down to just the extract from the Commission's letter of facts that was being
4 sought and dealing with incidence. In respect of that document, yesterday, Apple
5 wrote to say it was prepared to provide it, but on the condition that Dr Kent confirmed
6 she would not attempt to reopen disclosure again.

7 As you will appreciate, my solicitors have written back and said of course they can't
8 accept that condition. They confirm that there isn't currently any envisaged application
9 arising out of the letter of facts. Of course, this kind of sweeping commitment can't be
10 given in the course of a trial.

11 At present I believe there is a draft consent order in circulation, but we haven't yet had
12 confirmation from Apple's solicitors that it is agreed. That's why we hope it is. We are
13 not sure it is, and, of course, if necessary, we can argue the application to the extent
14 that it would assist the Tribunal.

15 **MR TIDSWELL:** Thank you, Mr Ward. Mr Kennelly.

16 **MR KENNELLY:** As the Tribunal anticipated, we are content with the offer that was
17 made in that very last letter from Dr Kent.

18 **MR TIDSWELL:** Which was to the effect they don't have any other disclosure
19 applications in mind.

20 **MR KENNELLY:** In relation to the existing investigation.

21 **MR TIDSWELL:** Yes. So, you are not asking them to --

22 **MR KENNELLY:** Make no more requests ever again.

23 **MR TIDSWELL:** -- sign in blood and never do it again.

24 **MR WARD:** It sounds like it will go away. No doubt, if there is some unforeseen
25 wrinkle, we will write to you.

26 **MR TIDSWELL:** That's fine. Good. That's that. Where does that take us?

1 **MR WARD:** Well, if I may take over the agenda, as it were, we have dealt with under
2 letter (e), the Consultative Group. That's what you have just been hearing.

3 Specific disclosure, that's what we have just disposed of.

4 Re-Re-Amended Claim Form, my learned friend Mr Kennedy dealt with that this
5 morning.

6 Outstanding issues on the joint expert statements is the last one under this head.

7 **MR TIDSWELL:** Yes.

8 **MR WARD:** You will have seen from our skeleton argument that there is an issue
9 which relates to the joint expert statement between Dr Singer and Professor Hitt. We
10 explained in our skeleton that we are seeking permission to file a supplemental
11 memorandum from Dr Singer, and this arises directly out of the joint expert statement.
12 In Professor Hitt's responses, he included some new economic analysis, and I can
13 show you this if it is of any assistance.

14 **MR TIDSWELL:** I think we should look at it. Just so I am clear, this is not something
15 that has come out of the last round of reports. This actually comes out of the joint
16 expert statement?

17 **MR WARD:** Absolutely. If we can turn it up. It is in the expert report bundle.

18 **MR KENNELLY:** May I save some time here and cut across this? We are not
19 objecting to this going in at this stage, but we reserve our rights, pending sight of it, to
20 object to anything that is not material or disproportionate. We are simply reserving our
21 rights to object to it when we see it. We can't say that it is appropriate to adduce it
22 now when we haven't seen it, but we are not saying they are not allowed to put it in.
23 We will reserve our rights as to whether we object to it when we see it.

24 **MR TIDSWELL:** That's helpful. I think we would still like to have a look at the material.
25 I would like to see what's going on. Let's do that, but that's very helpful. Thank you,
26 Mr Kennelly.

1 **MR WARD:** If we turn to the expert bundle at page 3709 I believe, this takes -- sorry.
2 I am slightly amateurishly navigating the electronic version of this in an effort to save
3 a few trees.
4 **MR TIDSWELL:** 3709 did you say?
5 **MR WARD:** I can immediately see that's wrong.
6 **MR TIDSWELL:** It is three pages out I think.
7 **MR WARD:** I wanted to go to row 44. Sir, you are doing better than I am I think.
8 **DR BISHOP:** 3710.
9 **MR TIDSWELL:** And 3713 in the electronic version.
10 **MR WARD:** You will see at row 44 there is some analysis in respect of one
11 retailer -- one developer about substitution. Some new analysis is conducted. I am
12 being rather careful, because I am not sure what's confidential.
13 **MR TIDSWELL:** Why don't we just read it?
14 **MR WARD:** Can you just read it and then I will take you to the other rows that are
15 relevant?
16 **MR TIDSWELL:** We will just read it if you just give us two minutes.
17 **MR WARD:** Thank you. (Pause.)
18 **MR TIDSWELL:** It is Appendix A, exhibit 1. That's the new material, is it?
19 **MR WARD:** It might be helpful -- I have the confidential version. You can see at
20 a glance what it is because it is completely redacted. May I hand it up, please? Just
21 hand that one copy to my friends in case they don't have it. Thank you very much.
22 I obviously don't need to show you the detail of this. You will be able to see at a glance
23 the kind of analysis that it is. (Handed).
24 You can see it is just some new if I can say empirical analysis. We can save time,
25 because you can look at exhibit 2 below, which again is some statistical analysis
26 which -- I am going to show you the origin of that as well in Professor Hitt's answers

1 in a moment.

2 **MR TIDSWELL:** Yes.

3 **MR WARD:** If we can go back to the joint expert statement, the second part, exhibit 2,
4 relates to -- if we go to page 3729 in the electronic copy, it is part of answer I think 88,
5 at row 88. This is Professor Hitt's critique of Dr Singer's logit model. What you can
6 see is he says in the second paragraph in this page, if I just pick it up on the fifth line:

7 "I replicate Dr Singer's logit regression ...",

8 and so on and so forth. He performs a test. Then in addition in the last sentence,
9 looking at the last four lines of that paragraph:

10 "I get qualitatively similar results ... when I exclude the top app by consumer spend
11 ..."

12 The first of those tests relates to the second half of Appendix A. These are three new
13 items in Professor Hitt's analysis that first appeared in the joint experts' statement.

14 These are the things that Dr Singer wishes to address, and he also proposes to correct
15 something that Professor Hitt says about Dr Singer's own regression; in other words,
16 in a sense, a factual point about what Dr Singer did, not an argument about whether
17 or not it was a good idea or economically sound, just a point of correction.

18 So that's the proposed memorandum. Of course, I understand why Mr Kennelly says
19 they need to see it first. At the moment, we are simply seeking permission to serve it.

20 I am instructed that we should be able to do so by close of business next Tuesday,
21 19th November, if that is acceptable to the Tribunal.

22 **MR TIDSWELL:** Mr Kennelly, any concern about the timing?

23 **MR KENNELLY:** No problem with the timing.

24 **MR TIDSWELL:** That is helpful. I think that all sounds fine. Let's proceed and see
25 what happens.

26 **MR WARD:** Thank you very much, sir.

1 The next thing I wanted to deal with, which is not an agenda item -- it is almost under
2 "any other business" -- before we unfortunately have to go into closed session is just,
3 if I may, put a marker down about something that doesn't call for action today at all.
4 You will recall we served an amended reply last Friday. We have had some
5 correspondence with Apple about one paragraph in that reply where we are concerned
6 to ensure there is no misunderstanding about the case we are trying to advance. We
7 will correspond further about that. If necessary, we may seek to make a clarifying
8 amendment. It is just that we made, what was intended to be, an anodyne amendment
9 to make clear that in respect of incidence, as you know, our expert is Dr Singer
10 whereas at the stage of certification it had been Mr Holt. The pleading reflected the
11 way Mr Holt had put the case. We have not generally sought to update the pleadings
12 just because of the evolution of experts' evidence, but the intended amendment was
13 to just reflect the fact it is Dr Singer, not Mr Holt, on incidence. On reflection, we
14 thought there might be a concern that we inadvertently appeared to narrow the case
15 in a way we didn't intend. It is obviously important Apple knows our case. We don't
16 shy away from that responsibility.

17 We will seek to clarify things through correspondence. If that's not sufficient, we will
18 serve an amendment to that paragraph and naturally seek your permission to adduce
19 it. It is simply a question of making sure the pleading accurately reflects the evidence
20 that has been served, not an attempt to introduce any new element.

21 **MR TIDSWELL:** Has that arisen because of a point taken by Apple?

22 **MR WARD:** It is on reflection by us. It is a self-inflicted point.

23 **MR TIDSWELL:** Has it been discussed with Apple yet? Do they know?

24 **MR WARD:** There has been an exchange on this, but I think it is fair to say we want
25 to take it a little further.

26 **MR TIDSWELL:** So, I don't know if you are in a position to say anything about that at

1 all.

2 **MR KENNELLY:** Not at all. We will wait to see what they do.

3 **MR WARD:** That is purely by way of marker, sir. As far as I am aware that is
4 everything that can be dealt with in open session, unless you want me to introduce the
5 non-redaction point openly, but inevitably it involves the detail.

6 **MR TIDSWELL:** Yes, of course. How much of it is there just out of interest?

7 **MR WARD:** There are just two items. The reason we are here really is because of
8 their potential precedent value as much as anything.

9 **MR TIDSWELL:** Precedent in this case or in relation to other matters?

10 **MR WARD:** In this case. Of course, you would know better than I, sir, but there was
11 an informal CMC on de-designation. What I am instructed is that they were largely by
12 way of test cases for de-designation and you ruled on a number of items. These two
13 you left over to be revisited if need be. We are here to revisit them. Obviously, the
14 issue here, as is no doubt common ground, is that in the interests of open justice, the
15 redactions need to be minimal.

16 In this particular litigation, in fact, the expert reports that I have seen do contain a lot
17 of redactions. We do have a concern about the ability to prosecute the case in open
18 court. Of course, we can go into closed session when needed and matters can be
19 withheld from the judgment to the extent necessary, but it is important. As you know,
20 in the Tribunal Guide confidential information is:

21 "Commercial information the disclosure of which [could] significantly harm the [parties']
22 legitimate business interests."

23 So, these are simply test cases about where that line is drawn.

24 **MR TIDSWELL:** Just a practical point, I can't remember what the date was for this
25 trial bundle, and it is not very far away. Are we working on the basis that this is going
26 to involve significant changes to other documents, in other words, is this one of these

1 | points where if we were to rule a particular way, then a lot of other documents need to
2 | be redacted, or is it talking about a relatively discrete category?

3 | **MR WARD:** I don't know the answer to that, sir, frankly. I can find out if it matters.
4 | Obviously, it is not unheard of in the course of trial to find that in practice, the level of
5 | redactions proves too onerous and for the Tribunal --

6 | **MR TIDSWELL:** Absolutely. I am all for trying to avoid, as I hope is clear,
7 | unnecessary redactions. It is just that I would also like to avoid a muddle with the trial
8 | bundle.

9 | **MR WARD:** Of course. I think we are all on the same page in that regard.

10 | **MR TIDSWELL:** Why don't we -- I think we should go into the closed session in that
11 | case if we are going to do that. I don't know whether there is anybody in court who is
12 | not entitled to be here. If so, would they mind please leaving?

13 | I should say unless everybody feels the need to be here, I am conscious of the clock
14 | ticking over and the charges applying. So, people are very welcome to stay, but I won't
15 | be offended if people want to take this opportunity to leave and go and do something
16 | else if they wish to.

17 | **MR WARD:** Nor will I, sir. Eminently sensible.

18 | **MR TIDSWELL:** We will turn off the live stream. I should have asked. There is
19 | nothing else on the agenda anybody wants to raise? Thank you.

20 | **MR WARD:** I am told it is very easy, if need be, to change pages in the trial bundle to
21 | reflect any ruling. That's what I am hearing.

22 | **MR TIDSWELL:** It is just once people start marking them up, that's not quite so
23 | helpful.

24 | **(Tribunal went into closed session**

25 | **for remainder of hearing)**

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?