

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be
2 placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to
3 be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive
4 record.
5

6 **IN THE COMPETITION**
7 **APPEAL**
8 **TRIBUNAL**
9

Case No:1673/7/7/24,
1408/7/7/21
1378/5/7/20

10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP
13

Friday, 14th March 2025

14
15 Before:
16 The Honourable Mr Justice Morris
17 Bridget Lucas KC
18 (Sitting as a Tribunal in England and Wales)
19

20 BETWEEN:
21 **Professor Barry Rodger**

Class Representative

22
23
24 - And -
25

26 **Elizabeth Coll**

Class Representative

27
28
29 - And -
30 **Epic Games, Inc. & Others**

Claimant

31
32
33 - V -
34

35 **Alphabet Inc. & Others**
36 **Google LLC & Others**

Defendants

37
38 **A P P E A R A N C E S**
39

40 Robert O'Donoghue KC, Daniel Carall-Green & Bethanie Chambers on behalf of Professor
41 Barry Rodger (Instructed by Geradin Partners)

42 Ronit Kreisberger KC & Sarah Bousfield on behalf of Elizabeth Coll (Instructed by Hausfeld
43 & Co. LLP)

44 Colin West KC & Daisy Mackersie on behalf of Epic Games, Inc & Others (Instructed by
45 Norton Rose Fullbright LLP)

46 Josh Holmes KC & Thomas Sebastian on behalf of the Defendants (Instructed by RPC)
47

48 Digital Transcription by Epiq Europe Ltd
49 Lower Ground, 46 Chancery Lane, London, WC2A 1JE

50 Tel No: 020 7404 1400

51 Email:

52 ukclient@epiqglobal.co.uk

Friday, 14 March 2025

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

(10.32 am)

MR JUSTICE MORRIS: Good morning. I just want to read out the customary notice. Some of you are joining us on live stream on our website so I must start, therefore, with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court. Thank you very much.

Good morning, everybody. Good morning, Mr West. Can I just start by making a few observations and then obviously, we will want to hear from you.

This is a joint case management conference in relation to three sets of proceedings brought against Google: a class action brought by Ms Elizabeth Coll, a claim by Epic and a further class action brought by Professor Barry Rodger, which has recently been certified.

We are grateful for the skeleton arguments filed by each of the parties and we have obviously read them in detail. As is clear, and as the parties are well aware, management of proceedings, these proceedings, raises competing considerations in circumstances where, as here, there are substantial common issues but where proceedings are at a different stage of preparation.

Those considerations include the risk of inconsistent decisions on common issues, considerations of expedition or delay, fairness to the parties, the efficient use of the Tribunal's resources and the resources of the parties, and we include in that avoiding, if possible, witnesses being required to give evidence on more than one occasion concerning common issues.

Professor Rodger, in the lead up to this hearing, has put forward four options for the case management of the three proceedings and none of these options fully meets all

1 the relevant considerations. We ourselves have raised a further option with a number
2 of possible variants.

3 To date, we have had two specific objectives uppermost in our minds. First, that there
4 should not be two trials, each of which addresses the issues of overcharge and
5 pass-on. And secondly that, if possible, there should be a trial of some kind in October
6 this year. And with those two objectives in mind, we had come up with some
7 suggestions as to how they could be met. We should add that we are also conscious
8 that the issue of Ms Coll's costs should be factored in.

9 However, in the light of this morning's letter from Professor Rodger and Epic, we think
10 that we should hear first from the parties as to the up-to-date position, rather than us
11 enumerating the options or thoughts we had in mind.

12 Can I add this, that if option two were to be adopted, the Tribunal could accommodate
13 a trial commencing at the end of April next year, which I think would be our preference,
14 or in October next year. That's the result of the enquiries we have made this morning.
15 With those introductory remarks, Mr West, you wanted to go first.

16

17 Submissions by MR WEST

18 MR WEST: Indeed. Given that there are now effectively three parties applying for
19 consolidation and one resisting, I thought it made sense for one of the three to take
20 the lead on this side.

21 As the Tribunal is aware, there have been four options identified. And the Tribunal will
22 also be aware that at the previous consolidation hearing between Epic and Coll,
23 a solution was reached to cover Coll's additional costs by Epic providing an indemnity
24 in relation to them. That was recorded in an order which is at tab 41 of the bundle.

25 And as the Tribunal has seen just this morning, and I'm sorry for the fact that it didn't
26 come earlier, Epic and Rodger have made a joint proposal, and I hope that the

1 members of the Tribunal have that letter from this morning before you.

2 MR JUSTICE MORRIS: I have left something in the --

3 MR WEST: That proposal is, as you will see from the terms of the letter --

4 MR JUSTICE MORRIS: I've got a blue file in the room next door, if you could bring it
5 in. Thank you very much. Yes. Thank you.

6 MR WEST: To offer up to £1.5 million on behalf of each of Professor Rodger and Epic
7 and the letter clarifies that that's on top of the funding to which Epic has already
8 committed in relation to the consolidation, the partial consolidation, in respect of
9 Ms Coll's additional costs.

10 The joint position of Epic and Rodger, according to that letter, and I understand also
11 Google at this hearing, is that this offer resolves what appears to be the principal
12 blockage between the parties, which is preventing Coll from agreeing to the option two
13 solution of adjourning the October trial and having a single trial at which all or
14 substantially all of the issues are resolved, which is the issue of Coll's costs. But
15 I understand that Coll has not agreed to the proposal and insofar as the ground for
16 that failure to agree concerns the level of the offer, I wonder if I could just briefly
17 address you about that.

18 Ms Coll's position on the evidence and in the skeletons is that her additional costs of
19 consolidation are higher than the £3 million which have now been offered.

20 MR JUSTICE MORRIS: Yes.

21 MR WEST: That's Ms Christoforou's witness statement, tab 54, page 1090,
22 paragraph 25b.

23 MR JUSTICE MORRIS: Can you give me the bundle reference?

24 MR WEST: Tab 54, page 1090.

25 MR JUSTICE MORRIS: 54?

26 MR WEST: Tab 54, page 1090 of the bundle.

1 MR JUSTICE MORRIS: Just give me a moment, thank you. Sorry, what's the page
2 number?

3 MR WEST: 1090.

4 MR JUSTICE MORRIS: Thank you. Yes.

5 MR WEST: And you will see this is at paragraph (b) beginning on the previous page
6 but towards the end of the paragraph - Ms Christoforou provides a figure at the end
7 there of between £5.895 million and £6.4 million and that's been calculated, as she
8 explains a few lines above, by taking the current run rate of her monthly costs of the
9 proceedings of £900,000 and dividing by two and the basis for that is an assumption
10 that her costs of consolidation going forward will be about half of the current run rate
11 of her monthly costs and multiplying that by the number of months. So, assuming
12 12 months, one gets to the figure there set out.

13 MR JUSTICE MORRIS: Yes.

14 MR WEST: But in my submission, there is no real logic to that calculation because,
15 of course, the run rate of Ms Coll's costs refer to her own costs of her own trial, and
16 there's no reason to believe that the additional costs of consolidation will be anything
17 like 50 per cent of the monthly costs of Ms Coll running her own trial, or anything like
18 it. And indeed, in relation to her costs of consolidation with Epic, Ms Christoforou
19 explains, back at page 1088, paragraph 24(a) --

20 MR JUSTICE MORRIS: £70,000 per month.

21 MR WEST: It's £70,000 per month; total costs of consolidation with Epic. Now,
22 I accept that consolidation with Epic is only partial because it's happened on the facts
23 but not in relation to the expert evidence. But that's clearly a much less significant
24 figure than the one which Ms Coll identifies for consolidation going forward.

25 And so in my submission, rather than take this approach of monthly costs, it's
26 necessary to think a bit more clearly about what additional work would actually be

1 required in the event of a full consolidation. And of course, so far as concerns Epic's
2 disclosure and factual evidence, there are no such additional costs because
3 consolidation in relation to that has already happened.

4 MR JUSTICE MORRIS: Except would there not be Epic expert evidence?

5 MR WEST: Yes. So let me take it --

6 MR JUSTICE MORRIS: Sorry, you carry on.

7 MR WEST: If we start with disclosure and factual evidence for Epic --

8 MR JUSTICE MORRIS: Oh, disclosure.

9 MR WEST: -- we can forget about that. We then have any additional costs to Coll of
10 disclosure and factual evidence from Rodger's proceedings. But in my submission,
11 it's rather unlikely that there will be very much by way of disclosure or factual evidence
12 of costs arising from consolidation with Rodger.

13 Professor Rodger is, of course, a class representative. It's unlikely that he has any
14 documents or very many. It may also be doubted whether he is likely to be able to
15 produce much in the way of witness evidence because that would, of course, require
16 individual developers to put their heads above the parapet and take on Google.

17 Now, that is, of course, precisely what Epic has done. But Epic has a rather greater
18 ability to act independently than some other developers do, because we of course
19 develop Fortnite, which has nearly a billion account holders worldwide and a huge
20 commercial success of that kind does enable one to act rather more independently
21 from Google as one might otherwise be able to do.

22 So I don't rule out that they may be able to find someone, but it's likely to be pretty
23 limited, in my submission. And that evidence will not necessarily call for a response
24 from Coll because on liability, Coll and Professor Rodger are on the same side. So
25 it's really limited to Coll just reading the documents.

26 And in relation to disclosure, whilst Rodger will be seeking disclosure from Google,

1 I anticipate that Google's position will be, "Well, you should have the same documents
2 we've already given to Epic and to Coll", and there may again be some specific further
3 requests, but those are likely to be, in my submission, fairly limited.

4 Turning then to expert evidence.

5 MR JUSTICE MORRIS: Yes.

6 MR WEST: Both Epic and Rodger would of course be entitled to their own expert
7 evidence, but the Tribunal will, of course, expect the parties to liaise to avoid
8 duplication between the expert evidence. And there are a number of ways in which
9 that could be achieved.

10 One would be to limit Epic and Rodger to, as it were, supplemental reports, i.e. not
11 trespassing on anything Coll has covered if they agree with Coll. There is potentially
12 an issue about that, which is what happens if Coll settles and the expert evidence
13 that's left for Epic, for example, doesn't cover all of the ground. So that may not be
14 ideal. But nevertheless, to the extent that the other experts agree with Coll, they can
15 be expected to have at least shorter reports than might otherwise be the case.

16 And again, the costs for Coll which are generated by that are really just the costs of
17 reading the material. It's not clear that Coll needs to reply to much of any of that, with
18 the possible exception of pass-on where there is a conflict between Coll and
19 Professor Rodger. But Coll's pass-on expert evidence will already have been served
20 by the summer of this year. So again, I don't rule out that some further point might
21 emerge that Coll may wish to engage with. But again, that should be very limited.

22 And that just leaves the costs of trial, which would involve perhaps an extra
23 three weeks of trial moving from the current nine-week estimate to perhaps twelve.

24 That's not something Coll has sought to put a figure on to date.

25 So in my submission saying that all of that is likely to add up to something like
26 £6 million of costs is a vast overestimate, particularly when one bears in mind that the

1 lawyers are likely to be acting on conditional fee agreements with reduced monthly,
2 sorry, reduced hourly rates pending the trial.

3 Coll has also faintly raised one or two other objections. One is delay. She says, "Well,
4 it's unfair for my claim to be delayed" but if Coll ultimately succeeds and recovers
5 damages, she will recover interest on those damages and indeed on the costs. And
6 Coll's claim, although it's a public interest claim in the sense that it's a collective claim,
7 it is ultimately all about money.

8 MR JUSTICE MORRIS: Yes.

9 MR WEST: Coll has also suggested that there might be difficulties about the
10 availability of her counsel team in the event of an adjournment, but she hasn't actually
11 adduced any evidence about that. We don't have counsel's diaries. So again, that's
12 a rather faint suggestion.

13 So members of the Tribunal, those are my brief submissions on the proposal that has
14 been made but obviously a lot of other points in the case, but I would propose if this
15 would suit members of the Tribunal to sit down and allow others to address the
16 proposal.

17 MR JUSTICE MORRIS: Yes. Thank you very much.

18 Yes, Mr O'Donoghue.

19

20 Submissions by MR O'DONOGHUE

21 MR O'DONOGHUE: Sir, Madam, Mr West has aptly made a number of points (several
22 inaudible words). I intend to be even briefer than I intended.

23 As a starting point, the aggregate £3 million offer is not simply plucked from thin air; it
24 is a realistic estimate of reasonable upper bound on any costs associated with
25 adjournment. Now, if one takes a step back which, in my submission, is always
26 important for these kinds of things, in a sense, Coll can't have it both ways. They can

1 say on the one hand, but the adjournment is a terrible thing because they're practically
2 ready for trial. And on the other hand, if there's a delay, it's going to cost them more
3 than £6 million. Both of those things cannot be simultaneously true. Either they're
4 ready for trial, or they are not.

5 Second point, their original budget for the entire claim was £11.29 million. And again,
6 as a matter of impression, the suggestion that more than half of that again, would be
7 incurred at a point where they say they're ready for trial, we say, is unrealistic in the
8 extreme.

9 And finally, Sir, Madam, something which you will be familiar with in other contexts,
10 for a party in a normal commercial trial to incur a total cost of more than £6 million
11 would itself be a striking figure. So if one takes a step back and looks at this figure of
12 £6.4 million, it doesn't make sense in any shape or form.

13 Now, if one then disaggregates to the next level, in my submission, it is with respect,
14 pie in the sky. The total figures Mr West outlined, they allude to £6.4 million, we say
15 it's an in terrorem submission or catastrophising. We will obviously not be seeking
16 disclosure from Coll; they have none, they're device users. Coll has served no factual
17 evidence whatsoever in the proceedings, including in response to Epic and Google.
18 And again, this is unsurprising, they are UK device users. They will not have primary
19 evidence to give. We don't therefore understand the suggestion in Ms Christoforou's
20 witness statement, 25(b), that Coll will need, and I quote it, "a significant volume of
21 work to address factual evidence".

22 MR JUSTICE MORRIS: Which paragraph are you reading from?

23 MR O'DONOGHUE: It's 25(b), it's the second bundle.

24 MR JUSTICE MORRIS: No, I've got it open. I just want to --

25 MR O'DONOGHUE: 25(b) she refers to both expert and factual evidence, "significant
26 volume of work to address factual evidence" and (overspeaking) --

1 MR JUSTICE MORRIS: Got it, yes.

2 MR O'DONOGHUE: Well, we don't understand what work would be done on the
3 factual side. They've done no work again to date on Epic or Google's evidence, so on
4 what intelligent basis in relation to Rodger, is it being suggested that it suddenly be
5 a deluge of factual evidence or indeed any evidence?

6 Now, as Mr West indicated, Coll has served all of its expert evidence, apart from the
7 responsive evidence to Google's evidence, served last week. But those costs would
8 need to be incurred in any event; they're not being generated incrementally by
9 Professor Rodger.

10 So, we say at base, Coll has completed the heavy lifting in its case. And again, the
11 suggestion of a further £6.4 million is unrealistic in the extreme.

12 Now, as Mr West alluded to, the assumption, it is an assumption, is that a run rate to
13 date of £900,000 per month would be replicated, at least to the extent of 50 per cent
14 going forward. And again, if one looks at Ms Christoforou's witness statement, 25(b)
15 at the bottom.

16 MR JUSTICE MORRIS: Yes.

17 MR O'DONOGHUE: The basis for the continued heavy run rate is what she calls
18 "heavy work on expert evidence". But in circumstances where they've effectively
19 completed their expert evidence and at best, there might be a responsive report on
20 the question of pass-on, in circumstances where they've already put in their evidence
21 on pass-on -- and we understand that you're applying to Google on pass-on -- so the
22 suggestion that on a third bite of the cherry on pass-on, in terms of expert evidence,
23 that that amounts to heavy lifting, giving rise to anything of the order of millions of
24 pounds, we say is fanciful.

25 And again, Sir, if you have the end of paragraph 11.

26 MR JUSTICE MORRIS: Just give me a moment, please, sorry. (Pause)

1 Paragraph 11?

2 MR O'DONOGHUE: Yes, Sir, Madam, you will see that Coll has already served ten
3 expert reports from six separate experts. If we go back to Ms Christoforou's "heavy
4 lifting" or "heavy work" that has already been done on any view.

5 And even on pass-on, Sir, Madam, it is important to make clear from the outset that
6 Coll's pleaded case is the pass-on is not 100 per cent. It's at paragraph 176 of the
7 claim form. They say, I quote:

8 "... consumer incidence is significant, with a conservative estimate of around 40%,
9 and a range of between 30-50%."

10 Now, I understand in the light of recent evidence, they may have bid themselves up
11 a bit on that, but on pass-on, it is not the case that Coll is claiming that it is
12 100 per cent. And indeed, parenthetically, it might be thought, pausing there, that if
13 we succeed in this claim, Google frankly doesn't really care whether it pays app
14 developers and/or device users. And there may well, given the Coll starting point is at
15 pass-on, maybe something at 30, 40, 50 per cent, that may be something which is
16 capable of agreement between the experts. So I fly that kite with some tentativeness
17 at this stage. But it is not self-evident that pass-on needs to be resolved in
18 a consolidated trial; if we had a finding of liability and a counterfactual commission rate
19 that, based on Coll's (inaudible) case, ought to be capable of being resolved.

20 MR JUSTICE MORRIS: Okay.

21 MR O'DONOGHUE: So at best Coll may, having filed two reports on pass-on, need
22 to have something supplemental in response to Rodger on pass-on, given that they've
23 done the heavy lifting on their case, which is the parasitic case on developers having
24 passed on to them, we apprehend that work should be tractable and again, is not
25 a seven-figure sum.

26 A couple of final points before I hand over to Mr Holmes, I think. We queried the

1 £6.4 million figure and asked for an explanation. That's at tab 128 response of the
2 case management bundle, it's at tab 128.

3 MR JUSTICE MORRIS: I'm not sure I've seen this.

4 MR O'DONOGHUE: Yes, so it was a letter on, I think, Wednesday. So it is a late
5 addition.

6 MR JUSTICE MORRIS: Yes. No, I've got it here.

7 MR O'DONOGHUE: 12 March.

8 MR JUSTICE MORRIS: Yes, I have the letter.

9 MR O'DONOGHUE: At 2(c), it's the CFA point. So this seems to be a discounted
10 rate. Now, let's assume for the sake of argument, it's 50 per cent. At that discount,
11 £6.4 million buys you twice as much time as the fully uplifted rate. So, the £6.4 million
12 figure, in fact, is even more surprising on this basis. If these are CFA rates, the notion
13 that the true uplifted cost might be as much as double is, with respect,
14 phantasmagorical.

15 Are we really to believe that Coll, having prepared its own case, on the cusp of trial,
16 would spend between £6 and £10 million essentially doing nothing on the Rodger
17 claim, that is very similar to its own? It really makes no sense.

18 Coll seems to have forgotten that Coll, Epic and Professor Rodger -- we face
19 a common enemy in Google. One would be forgiven for thinking, in reading their
20 submissions, there was some sort of antagonism in terms of the substance of this
21 case, save for the narrow point on pass-on, where in fact there is a measure of
22 agreement, we are on the same page as Coll.

23 So the notion they would spend £6.4 million dotting i's and crossing t's, and dealing
24 with Professor Rodger, doesn't make an iota of sense.

25 Two final points. First of all, the point that Google makes in its skeleton. Of course,
26 if, as they must assume they will, Coll succeeds in their claim, they will of course

1 recover their costs from Google. So it is primarily we say, a question of cash flow.
2 I don't want to trivialise that, and we offered a substantial six figure sum to meet that
3 concern, but it is primarily -- not exclusively -- a question of cash flow.
4 Now, the final point is, there is a history, we say, of somewhat exaggerated estimates
5 in the context of Coll. In the consolidation application before you, Madam, about a year
6 ago, the figure put forward at that stage for full consolidation with Epic was £2.2 million.
7 Sorry, Madam, that's at tab 53, paragraph 15. That's the witness statement of
8 Ms Wessen, who was then a partner at Hausfeld.
9 But we know, as Mr West showed you, at 24(a) of the most recent statement from
10 Ms Christoforou that the actual cost, albeit a partial consolidation, as of January 2025,
11 is £558,000. I would suggest that the £558,000 gives a far more realistic sense of the
12 true costs involved. Indeed, the figure going forward ought to be less now, because,
13 as she keeps saying, Ms Coll is basically ready for trial. In any case, Ms Coll's
14 estimates of full consolidation with Epic last year was £2.2 million: how on earth do we
15 get to £6.4 million for Professor Rodger? It really makes no sense.
16 So we say, on that basis, the offer we've put forward is realistic, indeed generous.
17 I am bound to say that if Coll has started with a budget of £11.29 million, that, based
18 on virtually every CPO I'm aware of, was a very, very slender budget to begin with.
19 We understand from Ms Christoforou's evidence that they have had to go back to the
20 funder at least once, it is a commercial funder. We do have a concern that some of
21 the figures being put forward now are, in part, a function of an inadequate budget to
22 begin with, and that, we say, is a further factor that is relevant in terms of context. So
23 this is a realistic, generous offer in the circumstances and, with respect, Ms Coll ought
24 to grab it with both hands.
25 MR JUSTICE MORRIS: Okay. Thank you very much.
26 Yes, Mr Holmes.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Submissions by MR HOLMES

MR HOLMES: Sir, I propose for now to address you only on costs and the proposal.

MR JUSTICE MORRIS: Yes.

MR HOLMES: You've seen from our skeleton argument, we think there are compelling reasons in favour of a joint trial, and I would wish to address you on those subsequently, as needed. The more that we looked at this in preparing for this hearing, the greater the need for such consolidation appeared to us, and we think that there are really substantial risks that this litigation could come off the rails in a way that could create very significant difficulties, absent full consolidation down the line.

But focusing for now on Ms Coll's concerns.

MR JUSTICE MORRIS: Yes.

MR HOLMES: We accept that they need to be weighed in the balance, but clearly they can't be determinative. This is a situation where the Tribunal needs to exercise a delicate and difficult case management balancing exercise, weighing all the considerations in the round, and no one party can have a veto on the possibility of a joint trial.

As regards funding and costs specifically, we welcome Epic's and Rodger's offer. It seems to us a fair arrangement in circumstances where Epic and Rodger will have the benefit of Ms Coll's expert evidence and will be able to achieve substantial cost savings by serving only supplemental expert evidence, to the extent needed. So some cost sharing makes sense against that backdrop. We think that the offer should address Ms Coll's concern, and that is so for five reasons.

First, Ms Coll's estimate of between £5.9 and £6.4 million is, at best, a crude ballpark figure, and seems to us well in excess of what is likely. It assumes that for each additional month, as a result of consolidation, the run rate for Ms Coll's team will

1 remain at nearly £500,000 per month, although the main round of expert evidence has
2 already been prepared and served.

3 Moreover, if the trial is earlier than October 2026 as you floated, Sir, in your initial
4 comments, on Ms Coll's methodology, one could assume -- even if that estimate were
5 correct -- that it would be reduced substantially. Indeed, assuming a trial in April, it
6 would be halved, by my calculation.

7 MR JUSTICE MORRIS: Yes, it would meet the figure roughly.

8 MR HOLMES: Exactly.

9 Third, it seems to us that Ms Coll is likely also to enjoy some efficiencies and benefits
10 from consolidation, which need to be set alongside the additional costs. There will be
11 three claimant teams following consolidation, with scope to share the burden. If the
12 claimants co-operate sensibly, that could generate savings for Ms Coll, as well as for
13 the other two, alleviating the burden on her team in ways that could unlock cost
14 savings.

15 Fourth, even if the substantial sum which has been put on the table by Rodger and
16 Epic were considered below the full amount of additional costs, we say that there is
17 no evidence before the Tribunal that Ms Coll's funder would not be prepared to fund
18 some part of the increased costs. This is a billion-pound claim. If it succeeds, the
19 funder will be generously remunerated. Indeed, the greater the funding outlay, the
20 greater the return.

21 Any cost burden is temporary, subject to final allocation based on the outcome of the
22 litigation. The costs already incurred by Ms Coll are not in evidence, but they are likely
23 to be very substantial. Against that backdrop, any shortfall -- which is likely to be
24 minimal, for the reasons that I've set out, in terms of additional cost -- is not
25 unreasonable to put at the door of Ms Coll's funder.

26 Fifth, there is, in any event, a contingency of £4.78 million in Ms Coll's updated

1 litigation budget, dated 18 October 2024. There is no evidence as to whether this has
2 been spent, but assuming some or all of it remains, it provides a cushion for
3 contingencies.

4 Now, Ms Coll may say that it isn't this particular contingency that she had in mind, but
5 with respect, a contingency is a contingency: it's there to deal with the vicissitudes of
6 litigation. It's a sensible step in any big commercial litigation. Like any other private
7 party, there's always the possibility there will be other overlapping claims, and there is
8 always the possibility that they will come, for compelling reasons of case management,
9 to be heard together. We say that this is a contingency on which Ms Coll could
10 appropriately draw.

11 So for all of those reasons, we say that this £3 million now on the table from Epic and
12 from Rodger should be sufficient to break the logjam; it removes the one substantial
13 element which weighs against full consolidation. You have my submission that there
14 are substantial reasons that weigh in favour of full consolidation, which I propose to
15 develop subsequently and as needed.

16 MR JUSTICE MORRIS: Yes. Thank you very much, Mr Holmes. Thank you. Yes,
17 Ms Kreisberger, when you're ready.

18

19 Submissions by MS KREISBERGER

20 MS KREISBERGER: Thank you. Thank you, Sir. Well, I have, a room full of eminent
21 silks lined up against me, so I may, if you'll indulge me, take a little bit longer, I think,
22 just to step back --

23 MR JUSTICE MORRIS: Yes.

24 MS KREISBERGER: -- and, start, if I may, with the principles. Sir, I'm very grateful
25 you've set out the key shape of the balancing exercise that you must perform. If I may
26 just spend a moment on that, and then I'll take you to the way in which I say that

1 balancing exercise should be applied here in relation to any adjournment, whether that
2 adjournment is partial or full, in taking account of the offer letter today.

3 Now, Sir, Madam, I'm sure you're familiar with the Kent ruling. One might say it's not
4 the first rodeo for Professor Rodger's legal team, having made a very similar
5 application on behalf of Dr Ennis in those proceedings. If I could just ask you to take
6 up the authorities bundle, could I just ask are you working with hard copies?

7 MR JUSTICE MORRIS: I'm working with hard copy.

8 MS KREISBERGER: In which case, it's the first volume.

9 MR JUSTICE MORRIS: Yes.

10 MS KREISBERGER: And it's tab 16. This is the Tribunal's ruling in what was a very
11 similar application.

12 MR JUSTICE MORRIS: Yes, I have read it.

13 MS KREISBERGER: So it's tab 16. Grateful. I'm grateful. It's page 312.

14 MR JUSTICE MORRIS: Yes.

15 MS KREISBERGER: Madam, I think you're on the electronic.

16 MS LUCAS: Yes, I'm in the 21st century.

17 MS KREISBERGER: Yes, I am normally, but today (overspeaking).

18 MR JUSTICE MORRIS: Thank you very much.

19 MS KREISBERGER: I'll be working hard to --

20 MR JUSTICE MORRIS: Can we rise for a few moments?

21 MS KREISBERGER: I'm very, very grateful for that. So, if I could ask you to turn to
22 paragraph 23 -- we'll start with paragraph 2, just very briefly, on page 312. Sorry, that
23 should be 314.

24 MR JUSTICE MORRIS: Yes, I have it.

25 MS KREISBERGER: That really summarises the two conflicting considerations,
26 which, Sir, you began with, very helpfully, this morning. So it's avoiding the risk of

1 inconsistent decisions, so far as possible, weighed against the need to ensure that
2 cases are conducted fairly and expeditiously in accordance with the overriding
3 objective.

4 Now, usefully, for our purposes, the Tribunal summarised in that ruling the relevant
5 principles -- the applicable legal principles. If we move to paragraph 27 on page 321,
6 you see there that the Tribunal must be "guided by the governing principles" and the
7 need to "ensure that each case is dealt with justly and at proportionate cost". And the
8 Tribunal must "stand back and take a view of what is sensible and proportionate in the
9 interests of justice to all parties".

10 Each situation must be judged, of course, on its own facts, that's obviously right.

11 Then you see at paragraph 28 that the Tribunal endorsed Mr Justice Coulson's
12 explication of the applicable principles, and they are that the court should have regard
13 to:

14 "(a) The parties' conduct and the reason for the delays;

15 "(b) The extent to which the consequences of the delays can be overcome before trial;

16 "(c) The extent to which a fair trial may have been jeopardised by the delays;"

17 And then lastly -- it's not relevant here -- but:

18 "(e) The consequences of an adjournment for the [parties]."

19 Now, if we go forward to paragraph 36, you see there how the Tribunal applied those
20 principles in that very similar application. I think in the interests of time, could I ask
21 you just to cast your eyes over -- you may be very familiar with them.

22 MR JUSTICE MORRIS: 36?

23 MS KREISBERGER: Paragraph 36 to 40.

24 MR JUSTICE MORRIS: Yes.

25 MS KREISBERGER: I'm very happy to summarise the key points crisply.

26 MR JUSTICE MORRIS: Yes. Summarise, but I have read it already.

1 MS KREISBERGER: I'm grateful.

2 MR JUSTICE MORRIS: I mean, I can't keep it all in my mind now, but I have looked
3 at it this week. So if you want to summarise it.

4 MS KREISBERGER: Yes. Fine. So the points I'd like to draw out from that is that in
5 that case they found that there was a risk of inconsistency of outcomes, in particular
6 on pass-on, which could cause injustice.

7 MR JUSTICE MORRIS: Yes.

8 MS KREISBERGER: But there is no rule that inconsistency must be avoided by a joint
9 trial of the common issues.

10 "When proceedings are far apart in time."
11 That's the language used there.

12 "The aim of achieving consistency [must] yield to the [governing principle of] dealing
13 with cases expeditiously and fairly."
14 That's the Tribunal's language.

15 MR JUSTICE MORRIS: Where is -- could you --

16 MS KREISBERGER: That's paragraph 37. It says it "may have to yield".

17 MR JUSTICE MORRIS: "May have to yield".

18 MS KREISBERGER: Yes, it's that last sentence there. So it's not an absolute rule; it
19 may have to yield. I'm sorry, I think I misspoke.

20 MR JUSTICE MORRIS: That's all right.

21 MS KREISBERGER: "May", not "must".

22 MR JUSTICE MORRIS: No, that's all right.

23 MS KREISBERGER: So of course it's discretionary.

24 MR JUSTICE MORRIS: Yes.

25 MS KREISBERGER: The Tribunal commented on the fact that Kent was on the eve
26 of trial, whereas just as is the case here, Dr Ennis's proceedings had barely started.

1 Then I did want to draw out this point: the Tribunal held, over the page, that the main
2 prejudice to the Kent class is delay.

3 Now, that's paragraph 38 going over the page -- sorry, paragraph 39, and then goes
4 down to 40.

5 "Although we consider that delay is the main prejudice to the Kent class --"

6 Now, we sort of jumped in the middle this morning, if I may submit that, Sir; we've gone
7 straight to costs. Costs are very important, and I will, of course, address you on them,
8 but it was put by Mr West that costs are the main issue, and if we can deal with costs,
9 the problem goes away. The problem doesn't go away, because the main prejudice
10 to the class, just as in Kent, is delay to having their claims determined.

11 MR JUSTICE MORRIS: Can you expand on what you mean by that?

12 MS KREISBERGER: Yes. So I'm going to adopt, if I may, the Tribunal's language,
13 and then I'll come, if I may in a moment to prejudice to the Coll class.

14 MR JUSTICE MORRIS: Yes, take it in whatever order you wish, but I'd like to
15 understand a little better what -- leaving to one side the costs issue -- what is meant
16 by prejudice to the class by delay.

17 MS KREISBERGER: Yes.

18 MR JUSTICE MORRIS: But carry on in your own order.

19 MS KREISBERGER: I'll gratefully adopt the Tribunal's language, which is that the
20 class -- there the Kent class, here the Coll class -- is entitled to have their claims
21 determined without indefinite delay. I'll come on, Sir, to address you on the timeline
22 here. It will have been a wait of four years before they even get to trial, let alone
23 judgment.

24 I will also address you on the speculative nature of the delay that is going to be faced,
25 in my submission, in these proceedings. I don't accept what's been said to you this
26 morning as to how quickly this can come on for trial, but I will come back to that.

1 MR JUSTICE MORRIS: Okay.

2 MS KREISBERGER: But it is very clear -- and it was held in Kent -- that the main
3 prejudice is the delay to the class in having their claims for compensation determined.
4 Ms Coll's class has been waiting very patiently since 2021.

5 The Tribunal also held that the inconvenience to Apple's witnesses in attending two
6 trials is not a compelling reason for adjourning the Kent trial. Of course, that objection
7 doesn't even get past the first hurdle here because, on any view, there are going to be
8 two trials. If there's a trial in October, there will be a second trial in Epic. At the
9 moment, Epic is bifurcated across two years, so that doesn't arise.

10 MR JUSTICE MORRIS: Yes, yes.

11 MS KREISBERGER: Another important point that arises in our situation is the Tribunal
12 criticised Dr Ennis because he had given no explanation there as to why it took him
13 over two years after the Kent proceedings started to bring his claim, and the Tribunal
14 says, in terms, he must be considered to bear responsibility.

15 MR JUSTICE MORRIS: Yes, got that. Paragraph 39.

16 MS KREISBERGER: That's the one. I'm grateful.

17 Also highly relevantly, the Tribunal said it's doubtful whether Dr Ennis's timetable was
18 ever realistic. Now, that is going to be squarely in my submissions to you on
19 Professor Rodger's timetable here.

20 The Tribunal also took account of the fact that Dr Kent's costs would be increased,
21 self-evidently, and I'll give you the reference at the end of paragraph 40.

22 "More significantly, proceedings involving three parties would significantly increase
23 Dr Kent's costs of preparing for and attending trial."

24 That's in addition to the wastage of sunk costs of briefings and so on. But
25 inevitably -- I'm going to come back to this -- in our case, we're currently listed for
26 nine weeks later this year; Professor Rodger, in his skeleton, predicts an inflation of

1 three weeks, a third. That's already moved in the schedule to 14 weeks. That's an
2 additional five weeks. That's more than 50 per cent inflation to a nine-week trial. So,
3 that's very substantial.

4 I should say at the outset, none of that is accounted for in the £6.6 million estimate
5 because that excludes briefings as Ms Christoforou explains. There will be a huge
6 cost associated with that.

7 Whilst we're in the judgment, could I just also draw your attention to paragraph 34,
8 where the Tribunal held that any separation of pass-on and infringement wouldn't be
9 workable because the same issues arise in relation to --

10 MR JUSTICE MORRIS: Sorry, just --

11 MS KREISBERGER: Paragraph 34 on page --

12 MR JUSTICE MORRIS: Yes, which sentence -- the pass rate or is it potential -- which
13 sentence are you referring to?

14 MS KREISBERGER: At the bottom of page 323, "It became apparent, however, that
15 this was not a workable suggestion."

16 MR JUSTICE MORRIS: Yes, because of the difficulty --

17 MS KREISBERGER: The difficulty, yes.

18 MR JUSTICE MORRIS: Well, that's what they said. I mean, that's a point if we ever
19 get to it that I would want to hear a bit more about --

20 MS KREISBERGER: Yes, we say the same.

21 MR JUSTICE MORRIS: -- because I'm not sure I understand that, to be honest, at
22 the moment.

23 MS KREISBERGER: Perhaps we can come back to that and we can help you on that
24 if that arises.

25 MR JUSTICE MORRIS: I understand that that is why, in that case, they ruled out the
26 possibility of excluding pass-on and having a separate trial.

1 MS KREISBERGER: That's exactly right.

2 MR JUSTICE MORRIS: And that, I think, is something that we've raised earlier this
3 week in a letter, but I'm not sure at the moment we need to deal with that. But if we
4 get to that stage, we may want to hear everybody on that issue.

5 MS KREISBERGER: Well, I'd obviously be grateful for the opportunity to address you
6 on that if that's in play.

7 MR JUSTICE MORRIS: Yes, okay.

8 MS KREISBERGER: Thank you, Sir.

9 So, that is the backdrop. It's not right, I'd say with respect, to jump straight into costs.

10 MR JUSTICE MORRIS: Yes.

11 MS KREISBERGER: We've got to look at the overall balancing exercise. We say
12 here it lies firmly in one direction and I'm going to adopt, if I may, the general framework
13 in Kent and address you on not just costs but all of these considerations.
14 What I propose to do is just say a brief word on where we are in Coll. I'm conscious
15 that this will be very familiar territory, Madam, to you --

16 MR JUSTICE MORRIS: Yes.

17 MS KREISBERGER: -- and so it certainly won't be news and I'll keep it crisp.
18 Secondly, I'd like to address you on Professor Rodger's conduct. You saw from
19 Mr Justice Coulson that is relevant to the assessment. I'll just introduce the point
20 which I'll then develop briefly. He has delayed and then made a last-minute, really an
21 11th hour pivot to adjournment of Coll. It's highly unsatisfactory. I'll show you how
22 that developed.

23 My third point is the prejudice to the Coll class and I'll develop my points on delay and
24 potentially jeopardising a fair trial.

25 Finally, I'd like to address you on the limited nature of the overlap on pass-on. It's
26 a point that hasn't come out yet; it's actually a very important point because you'll see

1 that you've had some very generalised submissions on risk of inconsistency. When it
2 comes to the key issues --

3 MR JUSTICE MORRIS: I'm aware that there is a core of overlap and then there
4 are -- I understand why it's not a full overlap because of the different buyers and sellers
5 effectively.

6 MS KREISBERGER: Yes.

7 MR JUSTICE MORRIS: And I'm aware that there are different positions amongst the
8 parties as to how significant that lack of overlap is to the case. I think that there are
9 some people who say that the core overlap is sufficient, and that makes it a common
10 issue and you will be saying that it doesn't. But I'm aware of that issue.

11 MS KREISBERGER: I'm grateful for that and I hope I can assist a little further on that.
12 So, if I may start with the key steps taken in Coll. As I say, it won't be news to you,
13 but if it's helpful, we do have a hand up and it just sets out a chronology of the
14 procedural dates --

15 MR JUSTICE MORRIS: I suspect it would be useful for me.

16 MS KREISBERGER: -- for convenience, and --

17 MR JUSTICE MORRIS: You prepared this with me specifically in mind, perhaps?

18 MS KREISBERGER: Yes. You'll see it's nearly three pages long, reflecting the
19 journey that some of us have been on in these proceedings. (Handed)

20 MR JUSTICE MORRIS: Thank you very much.

21 MS KREISBERGER: There may be some sharing on the front row. I'm sorry if that's
22 alright.

23 It's an uncontentious timetable.

24 MR JUSTICE MORRIS: Yes.

25 MS KREISBERGER: So the points I'd like to draw out for you both are these two.
26 We're in the final stages of a very lengthy process, and that is a process which has

1 | been the subject of careful and active case management by the Tribunal, for which
2 | we're grateful.

3 | Now, just to highlight some of the key stages in the case, the claim was, as I think you
4 | know, issued in July 2021; it was certified the following year, July 2022. There have
5 | been five CMCs since certification. Partial consolidation with Epic's proceedings were
6 | ordered in May 2024. So, at that stage, we were 19 months before trial and we're now
7 | in the endgame to trial.

8 | MR JUSTICE MORRIS: Can I just --

9 | MS KREISBERGER: Yes.

10 | MR JUSTICE MORRIS: My colleague will know this. When the consolidation order
11 | was made, was it then that this trial date was set?

12 | MS KREISBERGER: Was it at the same time?

13 | MR JUSTICE MORRIS: No, it was later.

14 | MS KREISBERGER: Yes, the trial date was set and the point was made then that
15 | there were still 19 months to go.

16 | MR JUSTICE MORRIS: Oh, so it was settled? It was --

17 | MS KREISBERGER: It had been fixed, yes. It had been listed. And it --

18 | MS LUCAS: I can't recall, I think it was -- was it fixed shortly after even the --

19 | MR JUSTICE MORRIS: March hearing.

20 | MS LUCAS: -- second CMC?

21 | MS KREISBERGER: I will check with those.

22 | MS LUCAS: It was done quite early.

23 | MS KREISBERGER: It would have been in the timetable, 16 December 2022.

24 | MS LUCAS: Yes.

25 | MS KREISBERGER: It's something like the sixth entry in the timeline.

26 | MR JUSTICE MORRIS: Oh, right, okay.

1 MS KREISBERGER: First available date.

2 MR JUSTICE MORRIS: So that never moved, effectively?

3 MS KREISBERGER: It never moved.

4 MR JUSTICE MORRIS: What happened was that Epic had an earlier date.

5 MS KREISBERGER: That's right.

6 MR JUSTICE MORRIS: And this all came back because of an application by Epic to
7 adjourn, I think, or move. Anyway, doesn't matter, I have a reasonable picture of the
8 history.

9 MS KREISBERGER: I think the point I'd like to draw out from that is that that was
10 highly relevant when Epic applied for the consolidation, that there were 19 months to
11 go, and that's why this compromise position was arrived at, as you may recall, where
12 there would be partial consolidation on the factual points. But even then, even
13 19 months to go to trial, there wasn't full consolidation ordered. That has been a fixture
14 for coming up to three years.

15 So, as I say, we're now in the end game in terms of where we are as we stand today.
16 You'll see on the back page, we've highlighted future steps. Google filed its evidence
17 around a week ago, its expert evidence.

18 MR JUSTICE MORRIS: Yes.

19 MS KREISBERGER: Reply reports are due on 9 May.

20 MR JUSTICE MORRIS: Yes.

21 MS KREISBERGER: So that's around the corner. Joint expert reports are due by
22 20 June. PTR is set for July and then the trial in October.

23 MR JUSTICE MORRIS: Yes.

24 MS KREISBERGER: And so that's been a four-year process to get there.

25 MR JUSTICE MORRIS: Yes.

26 MS KREISBERGER: Now, a key reason why it's taken so long to get there is that -- it's

1 of course complex litigation, but the documentation is really voluminous. As a result
2 of that, disclosure has been managed in stages. As of last month, there were 30
3 tranches of disclosure; the first one in May 2023, the last took place in January of this
4 year and then there was a 31st tranche, which arrived without notice on 5 March; that's
5 last week.

6 MR JUSTICE MORRIS: So, you just gave me a date in January that's not in the -- can
7 I just write that in?

8 MS KREISBERGER: We do --

9 MR JUSTICE MORRIS: You said the last --

10 MS KREISBERGER: I can give you another handout, which records the date of every
11 tranche, just for information.

12 MR JUSTICE MORRIS: Well, let me just write in here what you --

13 MS KREISBERGER: 8 January 2025 was tranche number 30 and, as I said, tranche
14 number 1 was May 2023.

15 MR JUSTICE MORRIS: Yes.

16 MS KREISBERGER: And 28 tranches in between those dates --

17 MR JUSTICE MORRIS: No, I don't want those.

18 MS KREISBERGER: -- and then one on 5 March that arrived without notice; we didn't
19 know it was coming.

20 MR JUSTICE MORRIS: Okay.

21 MS KREISBERGER: So, it's been a weighty process.
22 Now, Ms Christoforou addresses this in her evidence.

23 MR JUSTICE MORRIS: Okay.

24 MS KREISBERGER: She explains and illuminates really the magnitude, the scale, of
25 this disclosure.

26 MR JUSTICE MORRIS: Okay, just give me a moment while I find her ... Can you

1 remind me where --

2 MS KREISBERGER: It's tab 54 of the second bundle.

3 MR JUSTICE MORRIS: Yes, got it.

4 MS KREISBERGER: And the page is 1080. I'm afraid I'm on an unpaginated version.

5 MR JUSTICE MORRIS: Yes, if you give me the paragraph number.

6 MS KREISBERGER: It's paragraph 13, which is internal page 4, 1084.

7 MR JUSTICE MORRIS: Yes.

8 MS KREISBERGER: She refers to these 30 separate tranches and the recent one.

9 Then, she says that altogether, 2.3 million electronic documents have been served,

10 plus 12TB of transactional data on two hard drives, which is a lot. I think that's the

11 technical term.

12 MR JUSTICE MORRIS: I can define that as "a lot".

13 MS KREISBERGER: She also explains that the expert evidence runs to thousands of

14 pages. As I just set out, we're not there yet; we haven't got to reply reports. An

15 estimated number of pages is 3500, again, a lot.

16 MR JUSTICE MORRIS: Yes.

17 MS KREISBERGER: So, voluminous. I'm going to come back to this in relation to the

18 stages of Professor Rodger's now proposed timetable, which I'll do in a moment. I'm

19 conscious of the time; would now be convenient for a transcriber break? I'm very

20 happy to press on.

21 MR JUSTICE MORRIS: Yes. No, let's have a ten-minute break now. Thank you very

22 much. Thank you.

23 (11.29 am)

24 (A short break)

25 (11.45 am)

26 MR JUSTICE MORRIS: Yes, Ms Kreisberger.

1 MS KREISBERGER: Thank you. So that's where we are on the Coll proceedings.

2 MR JUSTICE MORRIS: Yes.

3 MS KREISBERGER: With that, I was going to move to Mr Justice Coulson's first
4 consideration in the list, which is conduct. I make three broad points about
5 Professor Rodger's conduct. Just like Dr Ennis before him in Kent, my submission is
6 he's been dilatory in pursuing these proceedings. That is highly unsatisfactory, given
7 his original litigation plan in these proceedings, which I'll show you.

8 He adopted then and continues to adopt now an unrealistic timetable. I will take you,
9 if I may, to his proposed timetable and draw out some problems with it.

10 MR JUSTICE MORRIS: Yes.

11 MS KREISBERGER: He's given absolutely no justification to the Tribunal for this
12 delay. So, my overall submission is that conduct should weigh heavily in the balance
13 against adjournment, given the disruption and prejudice on the other side caused to
14 the Coll class.

15 MR JUSTICE MORRIS: Just pause a moment, please. Thank you. (Pause) Yes,
16 thank you.

17 MS KREISBERGER: Thank you. And Professor Rodger himself refers to
18 unacceptable disruption in the schedule, insofar as he said there's an unacceptable
19 disruption.

20 So, first of all, delay. You have the timetable in Coll. There have been multiple trigger
21 points when Professor Rodger could have brought his claim. They stretch back at
22 least four years. The first key date was 29 July 2021 when Ms Coll lodged her claim.
23 It was widely reported in the media at the time. So, that was obviously a key trigger
24 for a developer action, given the bringing of the consumer action. So, that's the first
25 one.

26 Then in 2022, there was the first CMC and also the certification hearing in January

1 and then July that year. Again, that would have been a sensible moment for a party
2 looking to bring an overlapping claim to raise their hand at that stage. Of course, the
3 transcripts were on the website, and it was widely publicised by Ms Coll's website.
4 Again, 10 June 2022 is when the CMA opened its investigation into Google Play,
5 which covered the billing time.
6 I showed you that in Kent, the Tribunal was critical of Dr Ennis for waiting two years
7 after Dr Kent had issued her claim. It was critical of the two-year delay; here we have
8 a three-year delay.
9 It's also notable, I'd say, that Professor Rodger waited over a year after Dr Ennis
10 issued his claim in the Kent proceedings in July 2023, again on behalf of app
11 developers, in that case against Apple.
12 Now, it is pertinent that it's the same legal team because, as you know, in collective
13 actions, the choice of lawyers is a relevant consideration at certification, given the
14 critical role that the legal team play in supporting the class representative and in
15 a carriage dispute, it can become highly pertinent and we've seen that.
16 So, given that the same legal team lodged against Apple in the summer of 2023, it
17 becomes harder to justify Professor Rodger's further delay of another year after that;
18 as I said, it wasn't their first rodeo. So, plenty of opportunity to bring his claim, plenty
19 of prompts.
20 That brings me to my second point, which is that there are a few references in the
21 schedule to us "being here today through no one's fault". I'm afraid that's not our
22 position. Professor Rodger bears a heavy responsibility for the delay because his
23 stated litigation strategy at certification, which has of course just happened, was to
24 consolidate with Coll; that was front and centre. If I could just ask you to turn up his
25 litigation plan.
26 MR JUSTICE MORRIS: Yes.

1 MS KREISBERGER: That's in the bundle. It's tab 16 of the first bundle. Page 655 is
2 where it begins, so this is August 2024.

3 MR JUSTICE MORRIS: Give me a minute. (Pause)

4 Yes, I think I've looked at this.

5 MS KREISBERGER: So, the litigation plan itself doesn't have a date, but of course, it
6 came with the CPO which was lodged on 22 August last year. The relevant paragraph
7 is on page 660. It begins on page 665.

8 MR JUSTICE MORRIS: Yes.

9 MS KREISBERGER: Paragraph 51.

10 MR JUSTICE MORRIS: Yes.

11 MS KREISBERGER: "A provisional timetable for these proceedings is set out below.
12 The timetable is expedited ... He preliminarily suggests that the Tribunal ought to
13 exercise its case management powers so as to avoid the three cases being
14 determined entirely separately from each other (i.e., so as to avoid the risk of
15 inconsistent outcomes)."

16 So, that's what he was proposing. Then, if we just go over the page to paragraph 55,
17 he says:

18 "The below provisional timetable suggests that these proceedings catch up with Coll
19 in June 2025, when the CMA is due to make its observations in advance of the trial in
20 Coll listed for October 2025. The precise issues on which the PCR in the present case
21 should participate in that trial can be decided at a CMC earlier that year."

22 In March, he suggests.

23 MR JUSTICE MORRIS: Yes, and here we are.

24 MS KREISBERGER: Here we are. Here we are. Then paragraph 56 is the timetable.
25 Could I ask you, in the interests of time, to cast your eyes over that timetable leading
26 up to a 6 October trial this year?

1 MR JUSTICE MORRIS: Yes.

2 MS KREISBERGER: I'm not going to spend long on this, and I will take you to the
3 currently proposed timetable, but this timetable was always fanciful. It doesn't allow
4 any proper time to review the vast amount of disclosure from Google, no time to seek
5 fresh disclosure -- I'll come back to that -- no time to digest the voluminous expert
6 reports. It was always, frankly, detached from reality. Professor Rodger accepts that
7 now; he accepts it's now unworkable.

8 But the point I'm making for today's purposes is that he sought certification from you
9 on the basis of catching up with Coll and joining the trial. So based on his litigation
10 strategy, on the basis of which he sought certification, he needed to act expeditiously
11 to make that happen. He didn't, as you saw, he's allowed years to elapse, and we
12 have no explanation for this extended delay, which is entirely of his own making. His
13 team know that Dr Ennis was criticised for a two-year delay, and it seems that lessons
14 were not learned and a further year went by.

15 Now, moving forward, then --

16 MR JUSTICE MORRIS: Just remind me, what date was the ruling in Ennis v Kent? It
17 was the end of last year, wasn't it?

18 MS KREISBERGER: December.

19 MR JUSTICE MORRIS: Yes.

20 MS KREISBERGER: Right.

21 MR JUSTICE MORRIS: Yes. December last year, a few months ago. So they weren't
22 aware of the criticisms?

23 MS KREISBERGER: No. Until -- that's fair, until the end of last year.

24 MR JUSTICE MORRIS: Yes. Okay.

25 MS KREISBERGER: But they were aware of it before today's hearing.

26 MR JUSTICE MORRIS: Yes.

1 MS KREISBERGER: Now, having realised far too late that his timetable was, in his
2 words, unworkable, Professor Rodger has now pivoted to other options, and we have
3 them before us, and we're currently debating the second one.

4 But he's pivoted to adjournment, again, far too late, and that should weigh in the
5 balance. I'd like to show you, because it is an important point given the intense
6 prejudice that this causes the Coll class, how this developed.

7 Now, I'm not going to go to it, but there was no mention of adjournment in
8 Professor Rodger's skeleton for the CMC in his proceedings in December last year,
9 which has been shared with Ms Coll. So in December last year, he specifically
10 addressed consolidation with Coll.

11 MR JUSTICE MORRIS: Yes.

12 MS KREISBERGER: No mention of adjournment.

13 Now, Ms Coll's solicitors wrote to Professor Rodger on 18 February, after this CMC
14 was listed, asking for his proposals. That's in the bundle, if you'd like to cast your eyes
15 over it.

16 MR JUSTICE MORRIS: Yes.

17 MS KREISBERGER: It's the second bundle.

18 MR JUSTICE MORRIS: Could you give me the tab number?

19 MS KREISBERGER: Tab 79, and it's page 1163.

20 MR JUSTICE MORRIS: Did you say 79?

21 MS KREISBERGER: 79, yes.

22 MR JUSTICE MORRIS: It's in my fourth bundle.

23 MS KREISBERGER: Ah, just to confuse matters, I'm sorry.

24 MR JUSTICE MORRIS: Oh, no, it's not. No, it's in my third bundle.

25 MS KREISBERGER: If I won't read it out; if I could just ask you to cast your eye over
26 it. You see paragraphs 2 and 3 asking for proposals; explaining it's incumbent on

1 Professor Rodger to do so, but nudging him.

2 MR JUSTICE MORRIS: Yes, okay.

3 MS KREISBERGER: No response was forthcoming.

4 So if we go over the page to tab 80, they wrote, again, on 26 February, on page 1165:

5 "The Joint CMC has now been scheduled for 14 March 2025 and the Tribunal is
6 seeking detailed information from the parties. Given the Joint CMC is scheduled for
7 a little over two weeks away, please provide the Proposal as soon as possible." [as
8 read]

9 You can imagine this is causing some disquiet.

10 MR JUSTICE MORRIS: Yes.

11 MS KREISBERGER: There's a reply the next day, on 27 February, but no mention of
12 any proposals; it just encloses some documents. Then, as I think you know, the
13 proposals came on 3 March. That's Monday last week.

14 MR JUSTICE MORRIS: Yes.

15 MS KREISBERGER: And that was the very first time that Ms Coll's team heard of
16 what is in substance a very serious application to adjourn her trial, albeit no formal
17 application was put in. That, in my submission, is not an orderly approach to litigation,
18 to the attempted derailing of a trial just a few months away that the team have been
19 working towards for four years. And as I say, particularly given his legal team have
20 been here before, and this is after the Kent ruling.

21 So you have a consistent strategy since August of catching up with Coll, and then last
22 week, a pivot to adjournment of October. I should say -- and I think it is relevant to
23 say -- this has placed a lot of pressure on the Coll team, because they have just
24 received Google's expert evidence. We're dealing with reply reports in a very short
25 window, 9 May, and trial is imminent.

26 MR JUSTICE MORRIS: Yes.

1 MS KREISBERGER: So it's put a lot of pressure on the team having really no proper
2 notice of this development, given its seriousness. And still -- and I'm conscious I've
3 made this point -- no explanation from Professor Rodger as to the delay.

4 MR JUSTICE MORRIS: Yes.

5 MS KREISBERGER: No evidence from him or his team explaining why it's being
6 pursued at the 11th hour in this disorderly way.

7 Now, final but important point in relation to his conduct and the way this has come
8 about. If I could ask you to turn up Professor Rodger's skeleton for today. I hope
9 that's in the first bundle.

10 MR JUSTICE MORRIS: Yes, I have my skeletons in a separate file.

11 MS KREISBERGER: And I apologise, mine aren't paginated.

12 MR JUSTICE MORRIS: With reference.

13 MS KREISBERGER: I'll be relying on others.

14 MR JUSTICE MORRIS: Professor Rodger's skeleton.

15 MS KREISBERGER: It's page 80.

16 MS LUCAS: 80.

17 MR JUSTICE MORRIS: 80. Let me just bring it up. I don't know if you have the same
18 tabs, it's tab 4 in the bundle.

19 MS LUCAS: I think if you could give us the internal page numbers.

20 MS KREISBERGER: The internal -- yes, that's much easier for me. That's page 14,
21 thank you.

22 MR JUSTICE MORRIS: Page 14.

23 MS KREISBERGER: Page 14.

24 MR JUSTICE MORRIS: Yes.

25 MS KREISBERGER: And paragraph 19. This is where Professor Rodger turns to his
26 proposed timetable for option two: the adjournment.

1 MR JUSTICE MORRIS: Yes.

2 MS KREISBERGER: So his timetable sets out a timeline of 18 months to trial in
3 October 2026. You see that on page 16.

4 MR JUSTICE MORRIS: Yes.

5 MS KREISBERGER: Paragraph 19.11. Now we say this is absolutely not realistic
6 based on the Kent timeline of four years, and I'm going to develop that point given its
7 importance.

8 Now, so you have it, my submission is that the timetable is naive in its assumptions
9 about the various stages, and it's detached from the practical realities of this complex
10 litigation against Google, even taking account of the degree of free riding that
11 Professor Rodger hopes to achieve on the back of Coll v Epic proceedings. I'll develop
12 that point as well.

13 Now, I'm just going to give you some of the highlights from this timetable, and then if
14 I may, draw out some of the problems and as I say, the naive assumptions.

15 Starting on page 14, if we turn over the page, 19.2.2, Professor Rodger would like
16 disclosure, he says, "in the coming weeks". I think that's on the previous page, the
17 bottom of page 14.

18 MR JUSTICE MORRIS: Yes.

19 MS KREISBERGER: "Of all the documents disclosed in Epic and Coll." [as read]

20 So he wants all disclosure in a matter of weeks. Pleadings then happen almost at the
21 same time -- April/May, depending on how many "coming" means. You see, just so
22 you have it, 19.3, "defence by the end of April". [as read]

23 MR JUSTICE MORRIS: Yes.

24 MS KREISBERGER: The next month, reply. Following month, then critically, 19.5,
25 "further disclosure". I'm going to address you on that. Sorry, 19.5. So he seeks further
26 disclosure; in other words, that's his disclosure request; he envisages a single round.

1 It's a one-shot game on this basis, seeking disclosure one month after he's put his
2 reply in, he's going to have all his disclosure requests.

3 This is around three months after he's got the 2.3 million documents and two hard
4 drives and so on, because they're meant to come across in a matter of weeks.

5 MR JUSTICE MORRIS: Pause a minute, please.

6 MS KREISBERGER: So you all have had about three months with Google's
7 disclosure, you will have dealt with the reply and be able to put in a one-shot game of
8 disclosure request.

9 MR JUSTICE MORRIS: Okay. Can you just pause a moment, please? (Pause)

10 Yes. Okay.

11 MS KREISBERGER: He then envisages that Google will give its disclosure in
12 response to those requests in a neat single tranche three months later, in
13 October 2025 -- that's 19.7.

14 Two months after that, he's going to put in his factual statements -- 19.8. Expert
15 evidence by Easter -- 19.9. That's about five months or so after receiving disclosure.
16 So those are the sort of headline stages that Professor Rodger envisages.

17 MR JUSTICE MORRIS: Yes.

18 MS KREISBERGER: Now, we say that's unrealistic. First point -- and critical point -- is
19 he just hasn't built in enough time to review the sheer volume of disclosure that he's
20 going to get from the Coll and Epic proceedings. It's vast. We say the time to review,
21 analyse and digest that material should be measured in a year, not in months. It is
22 going to take at least a year.

23 First of all, a Confidentiality Ring Order, CRO, needs to be established. That's proven
24 extremely tortuous, and Madam, I see you, you have experience.

25 MS LUCAS: Yes, you see my slightly wry smile on that confidentiality order point.

26 MS KREISBERGER: I may not need to develop that point; you have it. The process

1 of seeking third-party approvals has been tortuous. It's also completely unrealistic that
2 he could simply make one set of disclosure requests -- that one-shot game -- and get
3 one tranche of disclosure back.

4 Professor Rodger -- now, it was said this morning by my learned friend -- I think it was
5 Mr West for Epic -- that he can't see Professor Rodger requiring much additional
6 factual material, but Professor Rodger --

7 MR JUSTICE MORRIS: Factual material disclosure, you mean?

8 MS KREISBERGER: Disclosure, well, and statements. What Professor Rodger says
9 in his skeleton is that the Coll disclosure won't, in his view, be sufficient. And he says
10 in terms -- and Mr O'Donoghue may wish to enlighten us -- says:

11 "Prof Rodger makes a range of factual allegations that are not advanced in either
12 Epic's or Ms Coll's case." [as read]

13 So aside from any piggybacking on the existing proceedings that will require new
14 disclosure, those factual allegations, we don't know what they are. That also
15 means -- which is simply not possible in the timeline I just showed you -- that
16 Professor Rodger's team will need to review the existing disclosure to work out what
17 else is required to meet the new allegations. These are complex --

18 MR JUSTICE MORRIS: One minute. (Pause)

19 Yes. Okay, thank you.

20 MS KREISBERGER: This, again, may be familiar territory to you, Madam, but
21 Ms Coll's experience of disclosure in proceedings against Google is that it is a highly
22 iterative process. The disclosure needs to be reviewed by the legal team, and also by
23 the experts, and it's then the subject of supplementary requests. I'm going to come
24 back to this, but Professor Rodger says he doesn't yet know who his experts even are.
25 They need to be in place to review disclosure.

26 Now, it is no understatement to say that Ms Coll's legal team have exchanged literally

1 hundreds of letters with Google, just on the scope of disclosure alone, and missing
2 materials and so on. There is no reason to think that Professor Rodger's experience
3 will be any different, particularly in the light of these new factual allegations that we're
4 told are coming.

5 Other points that haven't been addressed: setting up a disclosure platform takes time;
6 just the sheer data processing alone is time consuming, before you get to human
7 involvement.

8 Google, in a somewhat Delphic way, says, that disclosure will be, determined by
9 reference to that already given in *Coll v Epic*. Well, two points on that: if what they
10 mean is actually limited to existing disclosure -- and there was some suggestion of
11 that this morning -- well, that is unlikely to be something that Professor Rodger can
12 agree to without undermining his own duties to his class, given what he says about
13 the nature of the case and that it's wider. So it can't be limited.

14 If it's not limited to the existing disclosure, then you need to review the existing
15 disclosure before you can get to the stage of working out what else is required. That
16 is not built into the timetable which he proposes, as I just showed you; nowhere near
17 enough time to get on top of all this material and work out what extra is needed whilst
18 pleadings are ongoing, then, you know, be straight into factual statements as he
19 seems to think could take place.

20 Professor Rodger, I should say, himself admits, at 16.2 of the skeleton, which is
21 internal page 12, that it will take months to review and decide what further evidence is
22 required. So I'd say that even on his own assessment of the size of the task, he hasn't
23 built in enough time, but his assessment is not sound; it is massively undercooked,
24 this.

25 You will have seen that Epic and Google are still fighting over disclosure and pleading
26 amendments, and that is going to lead to further delay in their proceedings.

1 Now, another point that you don't see in Professor Rodger's timetable, rather an
2 assumption -- one naive assumption is that none of this is going to be contested on
3 disclosure, but that may not be the case. So if disclosure is contested, as was the
4 case in the Epic proceedings, then we may need a hearing and you can see how the
5 delay builds up from there. So he's pretty seriously underestimated the scale of the
6 task, the mountain that lies ahead of him on disclosure alone.

7 My submission is Ms Coll shouldn't have to wait whilst he scales that mountain.

8 Now, factual evidence: I showed you the two months' time lag he envisages to
9 statements of fact after getting disclosure. That's also wholly unrealistic. He has
10 factual evidence. You remember in January --

11 MR JUSTICE MORRIS: Are we at 19.8?

12 MS KREISBERGER: 19.8. So you see, 19.7 is the October date, 19.8 shortly after
13 New Year for statements of fact.

14 MR JUSTICE MORRIS: I'm interested to know what that might comprise.

15 MS KREISBERGER: Well, he tells us he hasn't decided whether to adduce evidence
16 from the class. So based on the skeleton, he doesn't know. If he wants to adduce,
17 say, survey evidence from class members, I mean that alone could take months to
18 prepare. We haven't been enlightened on any of that.

19 MR JUSTICE MORRIS: Well, he might be able to --

20 MS KREISBERGER: And you'll see if you look at the timetable, there's no provision
21 for Coll, Epic and Google to serve reply factual evidence; it hasn't been built in.

22 Then turning to his 19.9 on expert reports by Easter next year, there are multiple
23 problems with that. We say it's unrealistically short timetable to, timeline, review the
24 disclosure, have it reviewed, analysed by the experts -- he doesn't know who the
25 experts are, apart from his economist -- and prepare reports.

26 In his litigation plan, I can just give you the references. It's CMB 1, first bundle, tab 16,

1 | page 663. We can turn it up if helpful. But what he says in the litigation plan is he's
2 | only going to have one expert; he only refers to one expert. He names
3 | Professor Fletcher to give economic evidence. Well, now he says, at 19.9, he doesn't
4 | know but he provisionally expects that in addition to Professor Fletcher's evidence, he
5 | may need expert evidence on accounting/finance, IT security, payment systems and
6 | the development/ distribution/monetisation of apps.

7 | MR JUSTICE MORRIS: I'm right in saying, aren't I, that in Coll --

8 | MS KREISBERGER: Yes.

9 | MR JUSTICE MORRIS: -- experts on those topics have been served?

10 | MS KREISBERGER: Yes, that's right. It's (overspeaking) --

11 | MR JUSTICE MORRIS: Okay. So they're already in place.

12 | MS KREISBERGER: So we have five disciplines in Coll.

13 | MR JUSTICE MORRIS: Yes.

14 | MS KREISBERGER: Now, he also fairly raises the problem, at paragraph 22 over the
15 | page, that Professor Fletcher has unavailability issues that could derail matters,
16 | whether in April or October next year. And that could be quite a big problem. We
17 | haven't heard further about that today.

18 | Again, like facts statements, if we go back to the timetable, 19.9, he seems to envisage
19 | a single date, which means simultaneous exchange of expert reports, whereas it's
20 | sequential in Coll. As I said, we're looking at reply reports now, we're preparing them.
21 | So sequential exchange. He's got no provision -- sorry, sequential for the initial round
22 | in Coll -- here it's simultaneous -- and no provision for reply reports. No provision for
23 | joint experts' statements. No provision for CMA intervention. (Pause)

24 | MR JUSTICE MORRIS: Yes.

25 | MS KREISBERGER: 20.2, he says this:

26 | "Prof Rodger's review of the disclosure would be assisted if Epic, Ms Coll and Google

1 | could act very quickly and be very proactive about identifying and providing documents
2 | that they consider will be relevant at trial."

3 | I'd like to make two points about that. The first is, to the extent that this is feasible, it's
4 | a good indication that combining the claims would place a significant burden on
5 | Ms Coll, that is what Professor Rodger is asking for, with all the attendant cost
6 | repercussions of that. But also, Ms Coll doesn't know what's important for
7 | Professor Rodger and his experts and certainly can't be relied on to point them to the
8 | documents that matter for their case. It's rather a big ask and not a feasible one.
9 | I've got a final point.

10 | MR JUSTICE MORRIS: Just give me a moment, please.

11 | MS KREISBERGER: I'm grateful.

12 | MR JUSTICE MORRIS: I'm just picking up on the sentence at 20 above that, which
13 | recognises it "impose a significant burden ... and may well limit the evidence that he
14 | is able to adduce."

15 | I'm just noting that in passing. I don't know whether that's an offer to limit the evidence.
16 | But anyway, no doubt I'll hear from Mr Donoghue on that. Yes. You were going to
17 | make a final point.

18 | MS KREISBERGER: A final point in relation to this timetable and the ambitious nature
19 | of the October 26 trial date now being proposed, or an earlier one which has been
20 | floated as well, April. Obviously the logic of my submissions is that that's even less
21 | achievable.

22 | But something that hasn't yet been mentioned is that Professor Rodger asked for an
23 | opt-out class of businesses -- app developers.

24 | MR JUSTICE MORRIS: Yes.

25 | MS KREISBERGER: Now, that's obviously an animal of a very different stripe from
26 | a consumer opt-out claim and the two aren't obviously well-suited bedfellows. If I may

1 | just give the Tribunal a flavour of the issues that could arise: the Supreme Court is
2 | considering the suitability of opt-out claims for businesses in the FX litigation, that's
3 | being heard next month. Were the Supreme Court to deprecate them, one might see
4 | a challenge from Google to certification in Professor Rodger's proceedings.

5 | Another recent development was in the Bulk Mail CPO, last week. Now the Tribunal
6 | held then, you may be aware, that large entities in the class that have large claims
7 | might need to be more actively involved in the proceedings and mechanisms that were
8 | floated there were being part of the consultative panel or membership of a customer
9 | user group. And I believe in that CPO they've actually set up a customer user group.

10 | MR JUSTICE MORRIS: Yes.

11 | MR O'DONOGHUE: We had a similar discussion last week.

12 | MR JUSTICE MORRIS: Yes. This was raised in --

13 | MS KREISBERGER: Yes, and I understand it was raised here as well so I'm taking
14 | account of that, as you know, given that Professor Rodger has, I think it's two to
15 | three per cent of class members have claims of over £1 million. So that could add
16 | a further layer of complexity and have timing implications if consolidated with Coll and
17 | if Coll acts for consumers.

18 | So drawing the threads together -- just on Professor Rodger's conduct, his proposed
19 | timetable -- my submission is none of this has been carefully thought through and the
20 | consequences of that are two.

21 | My submission is this is not a sound basis on which the Tribunal could even
22 | contemplate adjourning Ms Coll's trial just a few months away, after years of very
23 | careful and active case management by the Tribunal to get to this point. I would also
24 | ask the Tribunal to treat, with the greatest of scepticism, the parties' claims lined up
25 | against me today that the trial will be delayed by only a year.

26 | As I said, Professor Rodger says at paragraph 7 of his skeleton, it's no one's fault that

1 we're in this position, but you have my submission; he does bear the responsibility for
2 the way this has been brought before the Tribunal.

3 Now, with that --

4 MR JUSTICE MORRIS: One minute, please.

5 MS KREISBERGER: I'm sorry, paragraph 7.1 of his skeleton.

6 MR JUSTICE MORRIS: "... through no one's fault", 7.1.

7 MS KREISBERGER: "... through no one's fault" and we say no, he bears the
8 responsibility because we're having this discussion now at the eleventh hour because
9 of the choices he has made which we say are highly unsatisfactory, given his original
10 litigation plan, his stated strategy of catching up.

11 Now, if I may with that, turn to the prejudice -- so this is my next heading, when I set
12 out my points which is the prejudice --

13 MR JUSTICE MORRIS: You did. Just give me a moment. I'm just going to -- yes, it's
14 heading 3, I think, technically.

15 MS KREISBERGER: It's heading 3. So we've had (overspeaking).

16 MR JUSTICE MORRIS: Yes.

17 MS KREISBERGER: "Professor Rodger's --"

18 MR JUSTICE MORRIS: Yes, yes, yes. Okay.

19 MS KREISBERGER: "-- conduct" and now, "prejudice to the class" and that in turn
20 has three elements and you're very familiar with them: delay, costs and funding and
21 other disruption.

22 MR JUSTICE MORRIS: Funding and what was the third?

23 MS KREISBERGER: Funding and other disruption. I'll set that out, funding being by
24 far and away the most important, funding disruption.

25 MR JUSTICE MORRIS: Okay.

26 MS KREISBERGER: I showed you that, in Kent, the Tribunal took the view that the

1 main prejudice to the Kent class was delay. We say that the same applies here. It's
2 a core governing principle in this Tribunal, as it is in the High Court, that proceedings
3 must be progressed expeditiously. Now, I use the term advisedly in proceedings that
4 have taken four years to get to trial, but that really is, you know, a consequence of the
5 nature of the litigation, the heaviness of the disclosure and so on.
6 The Tribunal held in terms in Kent that the class is entitled to have their claim
7 determined without an indefinite period of delay.
8 MR JUSTICE MORRIS: Can you just remind me -- can I just have Kent open?
9 MS KREISBERGER: That's very useful. Thank you, Sir. So it's authorities 1.
10 MR JUSTICE MORRIS: We've been there.
11 MS KREISBERGER: And it's at the back of the bundle.
12 MR JUSTICE MORRIS: It's in my authorities 2, tab 16.
13 MS KREISBERGER: Your two, so it should be (overspeaking).
14 MR JUSTICE MORRIS: Yes, I've got it marked up. I just want to --
15 MS KREISBERGER: It's paragraph 39 at page 325.
16 MR JUSTICE MORRIS: Just let me -- I mean, it is the case that in paragraph 40, the
17 first sentence says, "is the main prejudice".
18 MS KREISBERGER: Yes.
19 MR JUSTICE MORRIS: But then they say, "We accept that Dr Kent would be further
20 prejudiced by the impact of an adjournment on costs."
21 MS KREISBERGER: Yes.
22 MR JUSTICE MORRIS: But then they go on and say, then they deal with the funder
23 backed issue, and then they say, "More significantly, proceedings involving three
24 parties would significantly increase Dr Kent's costs." I mean, one doesn't necessarily
25 have to construe paragraph 40 as a statute, but there's sort of a -- it's not entirely clear
26 what they're saying the main factor is there.

1 MS KREISBERGER: Might I suggest how I would read that. Paragraph 39 sets out
2 the prejudice in relation to delay and they dwell on that. That's paragraph 39.

3 MR JUSTICE MORRIS: Okay. Let's identify what they say the prejudice --

4 MS KREISBERGER: I think it is helpful to go through that. So, they reject Apple's
5 argument that adjournment won't result in delay because of appeals; so they reject
6 that. They then, in the second sentence, reject Apple's argument that any prejudice
7 to members of the Kent class is relatively inconsequential because, essentially, these
8 are small amounts of damages per class member. They say, well, that's not relevant:
9 "In our view --"

10 MR JUSTICE MORRIS: Yes.

11 MS KREISBERGER: "-- the members of the Kent class are entitled to have their claim
12 determined without an indefinite period of delay. We accept that there would be
13 inconvenience..." but, you know, that's life, essentially
14 And they refer to the fact that Dr Ennis gave no explanation and, you know, when I say
15 lessons weren't learned, here we are today with no explanation. They continue to
16 criticise him for his unrealistic timetable. And then they make clear, at the start of
17 para 40, that prejudice is the main (overspeaking) --

18 MR JUSTICE MORRIS: One might read that first sentence as carrying on from 39.

19 MS KREISBERGER: Yes.

20 MR JUSTICE MORRIS: "We consider that the delay we have outlined above is the
21 main prejudice, dot, dot, dot." Yes, right. Because you initially took us just to 40.

22 MS KREISBERGER: I'm so sorry. Yes, that's helpful.

23 MR JUSTICE MORRIS: No, no that's not -- no, I've read 39 before but that puts that
24 first sentence in context.

25 MS KREISBERGER: Yes.

26 MR JUSTICE MORRIS: Okay.

1 MS KREISBERGER: No, I rely heavily on 39 --

2 MR JUSTICE MORRIS: Okay.

3 MS KREISBERGER: -- as it were. That's the reasoning.

4 MR JUSTICE MORRIS: Yes.

5 MS KREISBERGER: 40 refers back to 39. Sir, just to address you on your question
6 about "more significantly". The way I read this paragraph, is that the main prejudice
7 is delay, but costs is a further prejudice.

8 MR JUSTICE MORRIS: Yes.

9 MS KREISBERGER: Refer to the fact that it's funder-backed, far advanced; an
10 adjournment would involve some wastage of sunk costs such as briefings. That arises
11 here as well.

12 MR JUSTICE MORRIS: Yes.

13 MS KREISBERGER: And the "more significantly" relates to the wastage of sunk costs.

14 MR JUSTICE MORRIS: Yes.

15 MS KREISBERGER: So sunk costs is one problem but the much greater problem --

16 MR JUSTICE MORRIS: "More significantly" is to be read in the context of the overall
17 impact of an adjournment on costs. And within that the most significant is the last
18 sentence. That's how you -- okay. Having said we weren't going to construe the
19 paragraph, I think we've probably done that now.

20 MS KREISBERGER: I think that's helpful --

21 MR JUSTICE MORRIS: All right.

22 MS KREISBERGER: -- given the parallel nature of the application.

23 So, here we say the same thing. I take this crisply because I think you have my
24 submissions. It's taken four years to get to trial in October; a delay of only one year,
25 we say, to accommodate Professor Rodger is hopelessly optimistic, and it's
26 unjustified. It's for Professor Rodger to justify this application for an adjournment and

1 | it's unjustified because of his conduct and this eleventh hour move to derail Coll.

2 | Ms Coll, on the other hand, is blameless. She's pursued this litigation diligently, having

3 | brought it years ago, and she shouldn't and her class should not be prejudiced by

4 | Professor Rodger's choices in dragging his feet. (Pause)

5 | MR JUSTICE MORRIS: One minute. Yes, carry on.

6 | MS KREISBERGER: Turning then to my second point on prejudice costs.

7 | MR JUSTICE MORRIS: Yes, thank you.

8 | MS KREISBERGER: There was much discussion of the approximately £6 million

9 | figure.

10 | MR JUSTICE MORRIS: Yes.

11 | MS KREISBERGER: There are wasted costs here, and we set out in the skeleton that

12 | some brief fees have been incurred, so those are wasted costs. So that is relevant.

13 | But the two, to adopt the Tribunal's language, more significant elements are: the delay

14 | for however long that delay may be to get to a trial; and ordering an expanded trial,

15 | a three-way trial, three claimants, will substantially increase Ms Coll's costs of

16 | attending and preparing for trial.

17 | Now, just a word on that second point, and then I'll come back to the first.

18 | Professor Rodger, in the schedule, as I mentioned in opening, now envisages

19 | a 14-week trial. So, that's a more than 50 per cent extension.

20 | MR JUSTICE MORRIS: Yes, okay.

21 | MS KREISBERGER: Also raises, you know, tractability issues. But on costs, that's

22 | very significant.

23 | Now, the up to £6.4 million excludes the costs of the trial. Those will be very significant

24 | in terms of brief fees, refreshers, experts attending a much substantially longer trial.

25 | None of that is in the assessment by Ms Christoforou --

26 | MR JUSTICE MORRIS: Yes.

1 MS KREISBERGER: -- so it's conservative to that extent.

2 So, that's the expanded trial and the impact it will have, not even accounted for as yet.

3 In terms of the costs leading up to trial, first of all, you saw that Professor Rodger
4 envisages a really rather proactive role by the existing claimants, Coll and Epic. To
5 the extent that's even possible, that involves a cost.

6 Now, of course, Ms Christoforou's assessment has to be back of the envelope to some
7 degree, but can I just show you the letter which Hausfeld, lawyers to Ms Coll, sent on
8 this point to the other parties.

9 MR JUSTICE MORRIS: This will in the last bundle?

10 MS KREISBERGER: Yes, it's in the last bundle.

11 MS LUCAS: Is it the 12 March letter you're looking for? Tab 128.

12 MS KREISBERGER: I'm very grateful, tab 128. Yes. Thank you. So that's a recent
13 letter, and if I could ask you to turn to paragraph 3 of that letter.

14 "Our client considers that this estimate is conservative due to the extensive additional
15 work that she would be required to undertake... At a minimum, this ... includes: the
16 review of further pleadings, additional inter-partes correspondence [which is not for
17 the faint-hearted], consideration of further requests for disclosure from Google by your
18 clients, review of that same disclosure, attendance at further case management
19 conferences, review of additional expert evidence from both your client and Google (
20 and potentially further factual or industry expert evidence) and preparation of a further
21 expert report on incidence in response to Professor Rodger's expert report."

22 MR JUSTICE MORRIS: Yes.

23 MS KREISBERGER: What I'd like to do is link that paragraph to the submissions
24 I made this morning on the proposed timetable. You see, there were many steps that
25 have been underestimated, but I would, with respect, ask the Tribunal to treat some
26 of the submissions you heard this morning with a degree of scepticism.

1 Professor Rodger hasn't even allowed for reply reports, reply factual statements. As
2 I say, this is a very naive approach to this sort of litigation, naivety not shared by
3 Ms Coll and her team who bear the scars of the last few years, all of which comes with
4 a great deal of cost.

5 So, the submissions you heard that this can be addressed easily and simply, and it's
6 just a little piggybacking on to Coll/Epic is extraordinarily naive and it's not informed
7 by experience.

8 We say, given that there will be an awful lot of extra work to do, and it may well be that
9 the roughly £6 million figure is an underestimate. I should say it also includes the ATE
10 premium for an extra £5 million in ATE. That accounts for around or just under
11 a million of that £6 million figure. That's a very substantial component. And you have
12 my point that it doesn't include the costs of the expanded trial.

13 Could I also pick up a point that was made by my learned friend Mr O'Donoghue that
14 said, "Well, it's just a measure of cash flow". Ms Coll needs to go to the funder to
15 secure the additional funding. With respect, it is not a mere detail of cash flow; it
16 threatens the viability of the trial and I'll come back to that. So, all of those steps that
17 I took you through will involve Ms Coll and come at significant cost.

18 Just so you have the reference to Ms Christoforou's statement on the sunk costs which
19 are wasted, just as in the Kent proceedings arose, that's paragraph 26(d) on internal
20 page 12 of her statement, "The first two tranches of Leading Counsel's brief fees for
21 Trial have fallen due".

22 MR JUSTICE MORRIS: Okay.

23 MS KREISBERGER: Those are my submissions on the costs. I turn then to my third
24 point, funding disruption.

25 MR JUSTICE MORRIS: One minute. Yes.

26 MS KREISBERGER: So you have it, that's addressed by Ms Christoforou at

1 paragraph 26(b).

2 MR JUSTICE MORRIS: Sorry, can you remind me what tab she's in?

3 MS KREISBERGER: 54.

4 MR JUSTICE MORRIS: And you were going to go to paragraph?

5 MS KREISBERGER: 26(b), internal page 11.

6 MR JUSTICE MORRIS: Can I just read that?

7 MS KREISBERGER: Yes, thank you. (Pause)

8 MR JUSTICE MORRIS: Okay.

9 MS KREISBERGER: So, where we are on the basis of that is there isn't any certainty
10 as to funding. It would need to go before the investment committee. It was said
11 against me this morning that there's no evidence on the funding. Well, one can't give
12 evidence of something that's uncertain. The funder would need to put the request for
13 additional funding before --

14 MR JUSTICE MORRIS: Can I just understand this -- this is my lack of understanding,
15 I'm sure, possibly the only person in the room. Are you talking about any shortfall
16 between what is being offered by way of either indemnity between that and what's
17 needed?

18 MS KREISBERGER: Yes.

19 MR JUSTICE MORRIS: So, if they offer the £6 million, for example, you wouldn't be
20 going to the funder?

21 MS KREISBERGER: Well, we need --

22 MR JUSTICE MORRIS: Or would you get consent from the budget? Sorry, carry on.

23 MS KREISBERGER: I will just check with those behind me so I don't misspeak, but
24 the offer on the table as we understand it is offered on the same terms as in the Epic
25 consolidation --

26 MR JUSTICE MORRIS: Yes, tell me what happened there.

1 MS KREISBERGER: -- which is costs -- and we can go to it perhaps in
2 a moment -- which aren't to Ms Coll's benefit, advantage, are borne by Epic. So, it's
3 not all costs; it's costs which aren't to her advantage. So it's not --
4 MR JUSTICE MORRIS: You still have to go --
5 MS KREISBERGER: -- quite as straightforward. One would need to go to the
6 investment committee in any event.
7 MR JUSTICE MORRIS: All right.
8 MS KREISBERGER: But there is in addition to that caveat, the shortfall --
9 MR JUSTICE MORRIS: Okay.
10 MS KREISBERGER: -- and as I said, the extended costs of the trial. I'm told that's
11 correct.
12 MR JUSTICE MORRIS: Okay. All right.
13 MS KREISBERGER: So, they need to take this to the committee. And of course, the
14 committee's attention would need to be drawn to all the uncertainties which I've laid
15 out for you this morning, in particular on the timing of a combined trial and how realistic
16 is it really that this is going to happen in a year's time. So, they'll have to look at all of
17 that, and that introduces doubt as to the future of Ms Coll's litigation.
18 MR JUSTICE MORRIS: Okay.
19 MS KREISBERGER: Could I just show you subparagraph (c) of Ms Christoforou's
20 statement on the same page, page 11. That's on the ATE cover. (Pause)
21 MR JUSTICE MORRIS: I've read it.
22 MS KREISBERGER: So that additional ATE cover is, as I said, a significant
23 component of the assessment of costs.
24 MR JUSTICE MORRIS: That's within the £6 million?
25 MS KREISBERGER: Yes.
26 MR JUSTICE MORRIS: Okay.

1 MS LUCAS: I think you said that was £1 million; is that right?

2 MR JUSTICE MORRIS: Yes.

3 MS KREISBERGER: Yes.

4 MR JUSTICE MORRIS: Okay.

5 MS KREISBERGER: So, when we come back to Mr Justice Coulson's criteria, we say
6 the disruption to funding could jeopardise the possibility of a fair trial for Ms Coll's
7 class.

8 MR JUSTICE MORRIS: Yes.

9 MS KREISBERGER: Just a word on other disruption. Counsel availability will be
10 thrown into doubt. Competition litigation claims are booming, and people are very
11 busy, diaries are difficult. That would be a prejudice, having to switch teams. And
12 Tribunal availability, although I'm grateful for your indication this morning, but you saw
13 this fixture has been in the Tribunal's diary for a very long time.

14 MR JUSTICE MORRIS: Yes.

15 MS KREISBERGER: My final topic, which I think I can complete before lunchtime, is
16 the question of inconsistency. The other side of the scales. So, you have my points
17 on prejudice.

18 MR JUSTICE MORRIS: Yes.

19 MS KREISBERGER: Now, I showed you that the Tribunal said, well, the risk of
20 inconsistency may have to yield where claims are far apart in time. Here, it's really
21 important they're not overstated.

22 Now, it's right to say that of course there is an overlap; no one's denying that. Its
23 precise scope can't be known until pleadings have closed in Professor Rodger's
24 proceedings. But the key area everyone agrees, where there's a risk of inconsistency
25 is pass-on. Now, I have three points on why that is a problem that shouldn't be
26 overstated. I should say the correct terminology in our proceedings is "incidence".

1 MR JUSTICE MORRIS: Yes.

2 MS KREISBERGER: I have a Venn diagram to hand up, if I may, which I hope will
3 assist.

4 MR JUSTICE MORRIS: Yes. Some of us went to school before what was called
5 modern maths. I think I may be the only one in the room, but I know it was something
6 my brothers did, but I never did, so I might have to have it explained to me.

7 MS KREISBERGER: Well, that is bad news for me, but I hope it's self-explanatory.

8 MR JUSTICE MORRIS: I might cope. Thank you.

9 MS KREISBERGER: With thanks to those behind me who are more adept at maths
10 and produced this. Could we start -- I'll just wait a moment for everyone to receive
11 this. It's a two-sided document, so you have two.

12 So, if we could begin with the page headed "Potential overlap between Coll and
13 Rodger proceedings". Now, if I may just set out my submission and then I'll show you
14 how it arises on the diagram.

15 The point, and I think you already have it, is that the effective sales of apps in each of
16 the classes for which each class is claiming largely do not overlap. So, the effective
17 sales for which overcharge is claimed are largely not overlapping. Any overlap is
18 actually, I think, fair to say, tiny. So, that's the material overlap.

19 Now, on this page you see that Ms Coll --

20 MR JUSTICE MORRIS: Can I just say, you're looking at "potential overlap between
21 Coll and Rodger proceedings" as opposed to "Rodger class"?

22 MS KREISBERGER: That one, yes, and I'll come to the other one. So, here you have
23 the big grey circle.

24 MR JUSTICE MORRIS: Yes.

25 MS KREISBERGER: That represents the sales at issue in Coll. Now, Ms Coll acts
26 for just under 20 million UK device users; those are the consumers -- Madam, this will

1 be very familiar to you -- and they are users who bought apps, or content within apps,
2 from Google Play Store -- I think it's now called Google Play -- from the UK storefront.

3 MR JUSTICE MORRIS: Yes.

4 MS KREISBERGER: So, it's UK consumers with a phone or other device downloading
5 apps through the Google Play Store, the UK storefront, effectively, and that's the
6 20 million.

7 So, the apps that can be bought on the UK app store can be provided by developers
8 anywhere in the world. That's the point.

9 MR JUSTICE MORRIS: Yes.

10 MS KREISBERGER: Now, I'll come back to this one, but if we turn over the page,
11 Professor Rodger acts for 2200 UK app developers, as you know.

12 MR JUSTICE MORRIS: Yes.

13 MS KREISBERGER: They're UK app developers who sell to consumers anywhere in
14 the world.

15 MR JUSTICE MORRIS: Yes.

16 MS KREISBERGER: What this Venn diagram is showing you is that he's acting for
17 a tiny proportion of worldwide app developers. There are lots more.

18 If we go back to the first Venn diagram, the material overlap is the section between
19 the two circles. The reason I say it's tiny, the only overlapping sales, affected sales,
20 is limited to UK consumers who have bought an app or in-app content from the UK
21 storefront of Google Play from a UK-domiciled developer.

22 MR JUSTICE MORRIS: Yes.

23 MS KREISBERGER: That's why, materially, it's tiny.

24 MR JUSTICE MORRIS: Yes, okay.

25 MS KREISBERGER: Now, then it's further confined by different time frames for the
26 claim periods. So, you see there, Ms Coll's claim is from 1 October 2015 to March last

1 year; Professor Rodger's claim period starts in August 2018 and runs to August last
2 year. That means the relevant period that straddles the two is August 2018 to
3 March 2024. So, that's a further restriction.

4 MR JUSTICE MORRIS: Yes. Five and a half years.

5 MS KREISBERGER: Yes.

6 MR JUSTICE MORRIS: Okay.

7 MS KREISBERGER: So that's highly relevant because inconsistency is limited to the
8 overlap section on the Venn diagram.

9 MR JUSTICE MORRIS: Here, you're talking about the volume of sales, presumably?
10 You're not talking about the level of the overcharge?

11 MS KREISBERGER: The affected sales. Now, of course, it's right to say -- and we
12 can come back to this after lunch if it's helpful -- that Ms Coll's expert has modelled
13 pass-on rates for UK consumers; he has not modelled pass-on rates --

14 MR JUSTICE MORRIS: Okay, so you're now moving to pass-on? Okay.

15 MS KREISBERGER: Well, simply because you mentioned, "Well, only in terms of
16 volume of sales". Well, it's the actual affected sales. That's right.

17 MR JUSTICE MORRIS: Right, so sorry, Coll's experts modelled only pass-on rates --

18 MS KREISBERGER: For UK consumers in that circle.

19 MR JUSTICE MORRIS: Right.

20 MS KREISBERGER: There's no reason to think that pass-on rates are the same for
21 consumers in other territories, which is so much of Professor Rodger's class.

22 MR JUSTICE MORRIS: Okay. So that goes to ... respond to the risk of inconsistency
23 on pass-on, you're talking about, not on overcharge. By overcharge, I mean the
24 counterfactual level of the commission effectively, or the service fee --

25 MS KREISBERGER: Yes.

26 MR JUSTICE MORRIS: -- before you take into account pass-on or incidence.

1 MS KREISBERGER: Yes.

2 MR JUSTICE MORRIS: Okay. All right.

3 MS KREISBERGER: Then, a final point -- I make it lightly given the stage we're at
4 and we're still working on expert reports: while it's right to say that the interests of the
5 two classes in Coll and Rodger are unlikely to be aligned on the question of incidence,
6 it isn't Ms Coll's case -- and I think it's fair to point out that 100 per cent of the
7 overcharge is borne by the user, by the consumer, so I set that out for
8 completeness -- her expert estimates that there's a range of incidence between
9 around 50 and around 90 per cent. So, it may be, particularly when one looks at the
10 lower end of the range and I'm certainly not making submissions on this, that the
11 experts aren't so far apart. Certainly, Google's claims of double recovery in their
12 skeleton, we would say, have been exaggerated.

13 MR JUSTICE MORRIS: I think that was the point that Mr O'Donoghue made earlier
14 that sorry.

15 MR O'DONOGHUE: If it's 90 per cent, we are far apart.

16 MR JUSTICE MORRIS: Yes. Okay. Well, I recognise the figures were different but
17 the point that they may not be so far apart, the general point that it might resolve itself
18 on the scope of it I think was a point that you made as well. Okay.

19 MS KREISBERGER: I'm grateful for that. I've got three final points. So, those are
20 my submissions on why risk of inconsistency on the other side of the scales has been
21 vastly overstated, we say. We say it's a small risk here. Having made that submission,
22 to the extent that there is overlap, I make three final points in addition to everything
23 I've said this morning.

24 First of all, the Tribunal is well used to ensuring consistency between different claims
25 arising out of the same infringements in separate proceedings. Kent is the most recent
26 example of that and most relevant one, but it's not the only one. Of course, the

1 Tribunal will bring its particular expertise to bear using creative approaches where
2 they're called for, such as common panel members, as has been the practice so far.
3 That's a real merit of the Tribunal; it has far greater latitude and expertise than the
4 High Court in these more innovative approaches, particularly as a function of using
5 panels. So, we would expect the Tribunal to bring its expertise to bear.

6 Nonetheless, perfect is the enemy of the good. It's often said we, in this situation,
7 must live with some imperfection.

8 But again, a difference from Kent: Google is already attending two trials, given as
9 matters stand today, Epic has a trial, we're told, likely to take place in 2026. You saw
10 the Tribunal didn't place much, if any, weight on the inconvenience to Apple's
11 witnesses in Kent, but Google has less to complain about and that ship frankly has
12 sailed.

13 If there are efficiencies to be realised through consolidation, joining together the app
14 developer trials is the obvious efficiency. It's a far less disruptive way forward, involves
15 no prejudice to Ms Coll's class, and it is, we say, the proper and orderly approach here.

16 MR JUSTICE MORRIS: So join together the app developers trials ...

17 MS KREISBERGER: The app developers, Epic, and --

18 MR JUSTICE MORRIS: Oh sorry, yes, Epic. Yes.

19 MS KREISBERGER: Yes, and leave the consumers to carry on as they are.

20 MS LUCAS: So when you say that, are you envisaging Epic backing out of the trial in
21 October 2025?

22 MS KREISBERGER: Well, that's really a matter for Epic, but that is certainly an option.
23 We can see the attraction of that; it's much cleaner. So Epic could be decoupled from
24 October and Epic and Rodger, it has a very clear logic if then the app developers go
25 forward together. I should say, the October trial is already pretty congested in the
26 nine weeks, so it would relieve a little pressure on the trial timetable as well, and make

1 that more manageable.

2 MR JUSTICE MORRIS: Yes.

3 MS KREISBERGER: Finally, you have my core submission: Professor Rodger is
4 a party who, if you'll excuse the pun, came late to the party, whereas Ms Coll has
5 pursued her claims diligently -- expeditiously. The only fair outcome, given
6 Professor Rodger's conduct, is for his claims to be determined after Ms Coll's class. It
7 is Professor Rodger who must live with the risk of inconsistency, because it is
8 created -- it is a creature of his conduct.

9 Drawing the threads together, my submission is it would be anathema to the demands
10 of overall fairness for Ms Coll's class to suffer the prejudice of delay, the attendant
11 costs, and the risks to its funding, as a result. (Pause)

12 Unless I can be of any further assistance.

13 MR JUSTICE MORRIS: Thank you. That's fine, thank you very much. (Pause)

14

15 Housekeeping

16 MR JUSTICE MORRIS: Okay. What I just wanted to mention, so that you can think
17 about it over the lunch adjournment, was just the other thoughts that we had had,
18 which we were going to raise as possibilities. The first and main one was for the trial
19 in October this year to be retained and for it to determine for all three claimants' issues
20 of abuse, market definition/dominance -- abuse, and then also include in that trial
21 overcharge.

22 That might mean modifying directions insofar as Epic is concerned for the October
23 trial, and also would involve a consideration by Professor Rodger as to what evidence
24 they would need to be able to participate in that trial, both as to, in particular, expert
25 evidence over and above that which is already in the case.

26 So that was, an option with a second trial, as soon as practicable next year on pass-on

1 and overcharge, if overcharge could not be dealt with in the October trial.

2 A second option would be for a trial on the basis I've just described, in other words,
3 October trial, but with pass-on effectively taken out, but to have that early next year
4 rather than in October, on the basis that that would give Professor Rodger a little more
5 time to prepare.

6 Those were the two options that we had considered. The third one was the one we've
7 been considering so far, which is effectively option two, taking into account, in
8 particular, Coll's position on costs. We've heard the arguments on that. I just wanted
9 to give you those thoughts to think about.

10 MR HOLMES: (Overspeaking) And I'm sure that we all will. Can I just raise a slight
11 concern that I have about timing?

12 MR JUSTICE MORRIS: Timing.

13 MR HOLMES: Ms Kreisberger has made very extensive submissions.

14 MR JUSTICE MORRIS: She has.

15 MR HOLMES: And a number of them, I must say, are contentious, and I shall wish to
16 respond to them.

17 MR JUSTICE MORRIS: Yes.

18 MR HOLMES: I am concerned that, that together with the case management
19 business, will be difficult. So I merely flag that with you. I don't know whether a short,
20 abbreviated adjournment might be sensible, and also how long the Tribunal is able to
21 sit.

22 MR O'DONOGHUE: So it won't surprise you to hear the (inaudible)
23 Professor Rodger's reports. I've got quite a lot I wish to say as well.

24 MR JUSTICE MORRIS: Are we confident that if we have a shorter lunch and
25 we -- I mean, how late would we sit? I mean, I think the position is -- obviously, as is
26 always the case, one would want to check with the court staff. In principle, I think we

1 would obviously be prepared to extend the hearing, either having a shorter lunch or
2 both a shorter lunch and to extend later. As long as you are confident, or we are
3 confident, that we will get to the end of the submissions by the end of the day.

4 MR HOLMES: There is a lot to cover. (Overspeaking).

5 MR JUSTICE MORRIS: Yes, no, I know there is, and I understand that.

6 MR HOLMES: Yes.

7 MR JUSTICE MORRIS: If you reasonably think that we're not going to finish today,
8 then can you let us know? Because I mean, then we will have to think whether there
9 are other options to have a second day of hearing, and what those options are.

10 MR HOLMES: Sir, would you be content to see where we get to? I hope that we can
11 finish today.

12 MR JUSTICE MORRIS: Well, are we suggesting half an hour? Forty minutes? Are
13 we suggesting starting at, say, 1.45 pm?

14 MR HOLMES: Yes, yes.

15 MR JUSTICE MORRIS: Okay, start at 1.45 pm, and subject to court staff, we'll sit till
16 at least 5.00 pm, and then we'll see where we get to.

17 MR HOLMES: I'm grateful.

18 MR JUSTICE MORRIS: Yes. Okay. Thank you very much. Thank you.

19 (1.06 pm)

20 (The short adjournment)

21 (1.47 pm)

22 MR HOLMES: Sir, we're grateful to the Tribunal for curtailing its adjournment. We've
23 discussed amongst ourselves, and my learned friends on our side of the argument
24 have agreed that I might go first.

25 MR JUSTICE MORRIS: Okay.

26 MR HOLMES: I'll take about 40 minutes.

1 MR JUSTICE MORRIS: Okay.

2 MR HOLMES: I think Mr O'Donoghue has slightly longer than that, potentially, but
3 we'll see where we get to. But we are hopeful that we can conclude the business
4 during the course of this afternoon.

5 MR JUSTICE MORRIS: We must stop at 5.00 pm.

6 MR HOLMES: We understand.

7 MR JUSTICE MORRIS: And possibly, in an ideal world, we might want to allow a few
8 minutes at the end for Ms Kreisberger to respond if she wants to. She may not wish
9 to, but --

10 MS KREISBERGER: I'm grateful for that, particularly if we're debating the alternatives,
11 Sir, that you suggested before lunch.

12 MR JUSTICE MORRIS: Yes, so can you bear that in mind. If you can finish between
13 you at 4.45 pm, say, that would be good.

14 MR HOLMES: I'll go as crisply as I can.

15 MR JUSTICE MORRIS: No, I'm sure you will.

16 MR HOLMES: I'm going to (overspeaking).

17 MR JUSTICE MORRIS: I'm sure that everybody appreciates the time constraints.

18

19 Submissions by MR HOLMES

20 MR HOLMES: Yes. So, Sir, you'll have seen from our skeleton argument that our
21 preference is for full consolidation.

22 MR JUSTICE MORRIS: Yes.

23 MR HOLMES: That remains the case, having heard Ms Kreisberger's submissions.

24 MR JUSTICE MORRIS: Yes.

25 MR HOLMES: In light of your comments at the outset, Sir, we think that it can and
26 should be done earlier than October 2026. We think, from our perspective at least,

1 that it can be done by April, in the first window that you suggested. We don't accept
2 the in terrorem submissions that there is no manageable timetable to get there, and
3 I'll address you about that.

4 MR JUSTICE MORRIS: Yes. Okay.

5 MR HOLMES: Now, Ms Kreisberger began her submissions by standing back and
6 considering the principles. On that, at least, there is common ground. She stressed
7 that what is involved is a balancing exercise, bearing in mind the governing principles;
8 the need to proceed expeditiously and justly. We agree with that.

9 Each case is, of course, its own balancing exercise, and for our part at least, we would
10 caution the Tribunal about placing too much significance on the basis of the Kent
11 decision, which was one balancing exercise in one case by one Tribunal.

12 You can approach matters based on your consideration of the balance, and we are
13 mindful of a number of differentiating factors between this case and the case that was
14 being considered in Apple.

15 First, there are not two but three sets of proceedings, with the potential risk -- and as
16 I shall submit, substantial risk -- of multiple trials covering duplicative ground, and with
17 the substantial risk of inconsistencies at each stage, as a result of new and different
18 evidence. We say that the three overlapping sets of proceedings is a differentiating
19 factor.

20 There has also been some consideration of consolidation, and there has been
21 a decision to attempt a form of consolidation in the Coll and the Epic proceedings, for
22 reasons that we say were sensible.

23 MR JUSTICE MORRIS: Yes.

24 MR HOLMES: We say that in order to make that consolidation workable now that
25 a third party has joined the throng, we need to go further. We're one step across the
26 stream already, but now, only full consolidation will work to achieve effective case

1 management, in view of considerations of efficiency, overlap and fairness.

2 Thirdly, we have in this case a substantial costs offer on the table to mitigate the
3 additional burden on Ms Coll as a result of the adjournment that will be required for full
4 consolidation. That is a key differentiating feature, in my submission.

5 So with those points in mind, can I turn to the balancing exercise that you face in this
6 case. May I begin with the problem, as we see it. The starting point is that the three
7 sets of proceedings now before you are very closely interrelated.

8 On liability, the claims advance almost identical cases. Indeed, they have drawn
9 closer over time. Epic now alleges exploitative as well as exclusionary abuse, aligning
10 in that respect with Ms Coll and Professor Rodger.

11 On remedy, the claims likewise raise the same core questions while proposing starkly
12 different answers, a point which I will return to. There are, of course, some
13 differences, but we say that they do not detract from this very substantial overlap.

14 Now, for example, Rodger and Epic plead out some points in more detail than Coll,
15 and take some additional peripheral points. But we say that they are very much
16 variations on the same central theme. Indeed, because of the closeness between the
17 allegations they advance and those advanced by Ms Coll, we think they will be
18 substantially already covered by the disclosure given. So they are not an impediment
19 to consolidation.

20 Equally, on relief, there are differences, but we say not ones that remove the
21 commonalities. Now, Ms Kreisberger placed considerable emphasis on the fact that
22 Rodger's claim covers UK developers' sales to users outside as well as within the UK.
23 We accept that's the case. That does mean that there is an element of direct
24 overlap -- pound for pound overlap -- an argument over the same alleged overcharge,
25 insofar as Ms Coll's claim includes purchases by her class members from UK-based
26 developers.

1 This table, or this figure that you were handed, to be clear, is purely indicative; it
2 doesn't give any indication of the true scale in terms of commerce of that overlap. You
3 don't have evidence before you about that.

4 We say the point goes much wider than that specific category of overlap, and that is
5 because the questions of overcharge --

6 MR JUSTICE MORRIS: Yes.

7 MR HOLMES: -- and of pass-on are not specific in their consideration to the UK
8 context. There's no reason to think that pass-on would be any different in the UK than
9 it would anywhere else in the world. And --

10 MR JUSTICE MORRIS: Just remind me, sorry, I thought Ms Kreisberger said that the
11 Coll evidence on pass-on -- I'm just getting clear in my mind. The Coll evidence and
12 pass-on was confined to UK.

13 MR HOLMES: Yes, that we don't accept, Sir. We've looked at the evidence over the
14 short adjournment.

15 MR JUSTICE MORRIS: Okay.

16 MR HOLMES: Ms Coll's expert, Mr Singer relies on an EEA decision, Spotify, as
17 relevant to his estimation of pass-on.

18 MR JUSTICE MORRIS: Okay.

19 MR HOLMES: He also bolsters his analysis with an analysis of US data.

20 MR JUSTICE MORRIS: Okay.

21 MR HOLMES: There's nothing to suggest that --

22 MR JUSTICE MORRIS: Okay. Yes. Okay, there are two slightly different points,
23 aren't they. One is what pass-on is actually being estimated in the report, and the
24 other is what data is being used to get to that figure. In relation to the latter, you're
25 saying that the expert goes wider than the UK, and there's no reason to think that it
26 would be any different?

1 MR HOLMES: He relies on a number of elements --

2 MR JUSTICE MORRIS: Yes.

3 MR HOLMES: -- which suggest --

4 MR JUSTICE MORRIS: Yes.

5 MR HOLMES: -- that what is good for an analysis of pass-on here is equally good for
6 an analysis of pass-on in another jurisdiction.

7 MR JUSTICE MORRIS: Yes, okay.

8 MR HOLMES: Now, the overlap in relation to relief doesn't end with pass-on; it
9 extends to overcharge.

10 MR JUSTICE MORRIS: Yes.

11 MR HOLMES: While Epic's claim is for injunctive relief --

12 MR JUSTICE MORRIS: Yes.

13 MR HOLMES: -- it does seek as part of that injunctive relief to impose a level of
14 service fee going forward, which turns on the same counterfactual exercise as the
15 debates about overcharge.

16 MR JUSTICE MORRIS: Okay.

17 MR HOLMES: I'll expand on it, but the point is that Epic proposes a level of
18 counterfactual service fee which differs from that for which Ms Coll is contending at
19 the first trial.

20 MR JUSTICE MORRIS: Okay, I think -- yes, I understand that.

21 MR HOLMES: Now --

22 MR JUSTICE MORRIS: So it's not strictly in terms of, "It's just what it is said to be the
23 counterfactual level of service fee".

24 MR HOLMES: Yes.

25 MR JUSTICE MORRIS: Okay.

26 MR HOLMES: Indeed. Which is based --

1 MR JUSTICE MORRIS: And that's different from Coll.

2 MR HOLMES: It differs materially from Coll.

3 MR JUSTICE MORRIS: Okay.

4 MR HOLMES: Now, we say that without further consolidation, the Tribunal faces the
5 prospect of consecutive trials at which it will be called on to determine the same issues
6 on multiple occasions, each time on the basis of different evidence.

7 MR JUSTICE MORRIS: Yes.

8 MR HOLMES: The risk of multiple trials on the same matters is not a slight one; we
9 say it is the most likely outcome, and that gives rise to severe risks that need to be
10 confronted now: risks of substantial inefficiency, direct inconsistency of outcome, and
11 resulting unfairness.

12 This is not a case in which the first trial, currently scheduled for October 2025, can be
13 expected to break the logjam and lead to a resolution of the other two. On the contrary,
14 and whatever the outcome of that first trial, there is a very high chance that two or
15 three further trials will be needed, and that can be seen by considering the possible
16 outcomes of the first trial in Coll.

17 MR JUSTICE MORRIS: Okay. Yes.

18 MR HOLMES: If Google wins on liability, Ms Coll's claim will fail, but that will not put
19 an end to the other two claims. Epic and Rodger both make clear in their skeleton
20 arguments, understandably, that they want their day in court as well. They will want
21 to fight on and advance their cases based on other evidence not heard at the Coll trial.

22 This will include Epic's expert evidence, currently slated to be heard at the second trial
23 in the latter half of 2026. It will also include factual and expert evidence in Rodger's
24 claim; Rodger has said that he may lead factual evidence from developers --

25 MR JUSTICE MORRIS: Yes.

26 MR HOLMES: -- evidence of obvious and significant relevance on the question of

1 pass-on, in particular. Rodger will also call expert evidence of his own, so fresh factual
2 and fresh expert evidence.

3 Rodger also wants the opportunity to cross-examine Google's witnesses, who will
4 already have been heard at the first Coll trial, which will generate additional evidence
5 from them.

6 MR JUSTICE MORRIS: Yes.

7 MR HOLMES: Now, none of that material -- the Epic expert evidence, the Rodger
8 factual and expert evidence, or the fruits of Rodger's cross-examination -- will have
9 been heard or considered by the Tribunal when deciding the Coll claim. So we say
10 a win for Google is unlikely to be the end of the matter.

11 What if Google loses? An event, which I should say, we obviously consider unlikely,
12 but let's for a moment entertain the possibility that Google loses. In that case, the Coll
13 judgment will need to decide on the level of any overcharge, based on its assessment
14 of the counterfactual service fee that would have prevailed absent the conduct that is
15 found to infringe.

16 MR JUSTICE MORRIS: Yes.

17 MR HOLMES: It will also need to decide on the level of pass-on from developers to
18 the Coll class.

19 MR JUSTICE MORRIS: Yes.

20 MR HOLMES: This reflects, of course, the point that you're well aware of: the Coll
21 class and the Rodger class are at different levels of the market.

22 MR JUSTICE MORRIS: Yes.

23 MR HOLMES: Coll claimants are indirect purchasers, and they don't pay the service
24 fee themselves; developers do that. So Coll's claim depends on showing that
25 developers passed on any overcharge in the prices paid by class members.

26 MR JUSTICE MORRIS: Yes.

1 MR HOLMES: Without such pass-on, any loss will have been suffered by the
2 developers and not by the Coll class.

3 MR JUSTICE MORRIS: Okay.

4 MR HOLMES: Coll seeks £1 billion or more in damages based on counterfactual
5 service fees of between 10 and 20 per cent and a pass-on rate that was the basis for
6 that estimate of over 90 per cent. So nearly complete pass-on. That's Dr Singer's
7 estimate.

8 The essential point on these questions of overcharge and pass-on is this: whatever
9 decision the Tribunal reaches about them in Coll, there is every prospect that Epic or
10 Rodger will wish to relitigate them subsequently. The reason for that is clear: the
11 cases that Epic and Rodger advance are quite different from, and are starkly
12 inconsistent with, the one which Coll is advancing.

13 Starting with Epic, it seeks injunctive relief, requiring Google to charge a 0 per cent
14 service fee for in-app purchases on apps distributed via the Play Store, at least where
15 Google Play billing isn't used, so it's assuming no service fee at all. And you'll have
16 well in mind that in-app purchases are the lion's share of the commerce here. That's
17 where all the money is.

18 MR JUSTICE MORRIS: Okay.

19 MR HOLMES: I won't show you now the Epic pleadings unless you'd like me to, but --

20 MR JUSTICE MORRIS: No, I think that's all right.

21 MR HOLMES: -- it's at 0 per cent.

22 So, distribution for free is what Epic claims the counterfactual service fee would be
23 and that's very much lower than is alleged by Ms Coll's expert, Mr Holt. His
24 counterfactual for in-app purchases is 15 per cent for both apps and in-app purchases,
25 or between 10 and 20 per cent with 15 per cent the most likely.

26 If Coll succeeds in showing a counterfactual of 15 per cent, I ask rhetorically, would

1 Epic accept that without a further fight? Its business objective is to prevent Google
2 from charging any service fee on in-app purchases at all, at least where another billing
3 system is used. That's how Epic hopes to distribute its products via Google Play,
4 paying nothing for such distribution.

5 Epic, as Ms Lucas will have well in mind, is an extremely well-resourced litigant with
6 a powerful axe to grind. In my submission, it is highly unlikely to desist from pursuing
7 its claim following the Coll case to obtain the outcome that it desires. So, the second
8 trial for next year on the same questions of relief is, we say, a racing certainty.

9 Turning to Rodger, the starkest divergence is, unsurprisingly, in relation to pass-on.
10 Rodger alleges a pass-on right at the other end of the spectrum from Coll. His case
11 is that there is virtually no pass-on, a rate of 5 per cent or less, and he stakes his claim,
12 also for up to £1 billion, on exactly that assumption: that any loss is occasioned to the
13 developers and not to their customers. That's the basis on which these estimates are
14 calculated.

15 MR JUSTICE MORRIS: Yes.

16 MR HOLMES: So, if the Tribunal awards any substantial damages to Coll, Rodger will
17 wish to relitigate that question based on factual and expert evidence of his own, factual
18 evidence from developers about how they price, a matter of obvious relevance to
19 pass-on.

20 Again, there is therefore a very real prospect of a further Rodger trial to decide pass-on
21 afresh based on new and different evidence which, importantly, may include direct
22 relevant evidence from developers.

23 So, that's the impending consequence of allowing the cases to proceed without further
24 consolidation: the prospect of multiple trials of the same issues based on different
25 evidence.

26 MR JUSTICE MORRIS: Does it follow that there would be three trials?

1 MR HOLMES: That depends.

2 MR JUSTICE MORRIS: Rather than two? I mean, maybe it doesn't matter, but --

3 MR HOLMES: It depends whether one could somehow bolt on the Rodger trial at the
4 end of the Epic trial in the course of 2026.

5 MR JUSTICE MORRIS: Yes, and then --

6 MR HOLMES: But it relates to a quite different subject matter. Although they're both
7 developers, the focus of that trial is really upon pass-on, which is a matter that does
8 not concern Epic at all. Moreover, if we stick with the current model of
9 (overspeaking) --

10 MR JUSTICE MORRIS: No, that I understand.

11 MR HOLMES: -- you have different factual premises.

12 MR JUSTICE MORRIS: Well, yes. I picked up on those points in the skeletons. That
13 was option three, I think --

14 MR HOLMES: Yes.

15 MR JUSTICE MORRIS: -- and there were all sorts of complications, which I think
16 actually Professor Rodger in their skeleton accepted, paragraph 29 of the skeleton.

17 MR HOLMES: He suggested that there might be ways --

18 MR JUSTICE MORRIS: Ways around it, but it gets very complicated.

19 MR HOLMES: It's a mess.

20 MR JUSTICE MORRIS: Yes. All right.

21 MR HOLMES: It's a real mess.

22 Now, we say that that's highly inefficient. It involves months of wasted court time,
23 literally months. It also involves large additional costs for the parties. The claimants
24 are required to duplicate their efforts in fighting the same points again at separate
25 trials, when they could co-ordinate their efforts on points of common interest.

26 Google, for its part, must carry the cost of defending multiple claims as they proceed

1 on different tracks. More importantly, it also generates the risk of inconsistent
2 outcomes, and that is the case whether or not the same Tribunal panel or some similar
3 composition hears all three cases. On (overspeaking) --

4 MR JUSTICE MORRIS: The same panel might take the same approach to certain
5 issues, but it will be faced with different evidence.

6 MR HOLMES: Exactly. It has to decide each case on the evidence before it, doing
7 the best it can, and it might need to draw inconvenient conclusions if it finds the
8 evidence differs.

9 MR JUSTICE MORRIS: Yes.

10 MR HOLMES: And so we say, in those circumstances, it's perfectly plausible that the
11 Tribunal hearing Rodger, with the benefit of evidence from developers and fresh data
12 work, will reach a different conclusion on pass-on than was found at the Coll trial.

13 Now, such inconsistency is inherently undesirable. In this case, it also has the
14 potential to lead to very substantial unfairness indeed. There are now two damages
15 claims before you, each valued, and it's worth pausing to emphasise it, at £1 billion
16 each, but based on diametrically opposed assumptions about pass-on.

17 MR JUSTICE MORRIS: Yes.

18 MR HOLMES: They can't both be right. If one is right, one gets the whole pot,
19 regardless of whether it's the same pot, if you see what I mean; if the other's right, the
20 other gets substantial damages.

21 MR JUSTICE MORRIS: Yes.

22 MR HOLMES: If you proceed with two trials on different evidence, Google could end
23 up picking up the bill --

24 MR JUSTICE MORRIS: Twice.

25 MR HOLMES: -- twice. Even if that risk is viewed as only, you know, a material but
26 not the most likely outcome, it's not one that this Tribunal should be prepared to

1 entertain.

2 MR JUSTICE MORRIS: Yes.

3 MR HOLMES: Risk of massive over-recovery and injustice. Now, that's the largest,
4 but by no means the only uncomfortable aspect of proceeding without consolidation.

5 Another unfair feature of the litigation without further consolidation is the duplicative
6 cross-examination of the same Google factual witnesses on several occasions. Now,
7 that's not an outcome that the Tribunal should readily entertain. It is oppressive and
8 disruptive of their lives and it is also unfair. It allows a party to take a second bite at
9 the evidential cherry, seeking to improve the evidential picture by revisiting the live
10 evidence given at a previous trial.

11 MR JUSTICE MORRIS: Yes.

12 MR HOLMES: Now, the Tribunal worked very hard to avoid this outcome by combining
13 factual evidence at a single trial in both Coll and Epic. But with the arrival of Rodger,
14 the problem of repeated cross-examination of the same factual evidence rears its head
15 again, and that shouldn't be entertained.

16 There is a further difficulty with the present arrangement which raises wider concerns
17 of inconsistency and unfairness. The Tribunal has just considered another case, Kent,
18 which concerns analogous but not identical issues to the present case arising in
19 relation to Apple's App Store.

20 The Coll claimants rely on the same cast of experts as the Kent claimants. Same law
21 firm, same experts. In total, five of their six experts are the same people: two
22 economists, Derek Holt and Hal Singer, the security expert, the payments expert and
23 the accounting expert. The analysis deployed by those experts is in many respects
24 very similar across the two cases. The economic experts in particular have repeatedly
25 relied on the same methodology in both cases.

26 The judgment in Apple will therefore inevitably be a highly relevant reference point for

1 the parties and the Tribunal when considering these proceedings, a judgment which
2 considers the same analytical methods applied by the same experts. It would clearly
3 be preferable, if it were possible, for that judgment to be available to the parties and
4 the Tribunal a reasonable period before the trial in Coll, so that they could properly
5 digest its contents. But the current arrangement of the timetable allows little, if any
6 time for this.

7 MR JUSTICE MORRIS: Yes.

8 MR HOLMES: The Kent trial has just concluded, and a judgment is likely at best to
9 arrive in the final run up to the Coll trial. There is even some risk that it could arrive
10 during the course of the trial, which would be hugely disruptive. In my submission,
11 that also is a point that should weigh in the balance when considering when and how
12 the cases should be heard, although I don't suggest it's decisive by comparison with
13 the other points.

14 MS LUCAS: I mean, to be fair, if I recall rightly at the CPO hearing, the reason Coll
15 was fixed for October was to allow for the judgment to come out from Kent. So, I think
16 it was anticipated at that time that it might be available in sufficient time for the hearing.

17 MR HOLMES: I take that point, but of course, at that point we had not seen the expert
18 evidence in both sets of proceedings, and we did not appreciate how closely aligned
19 the analysis is. So, that's brought the point into sharp relief for us, having seen the
20 Apple evidence which has since been mentioned in open court, we've obtained it, and
21 having seen also the evidence that's come across the fence from Ms Coll.

22 MS LUCAS: Yes.

23 MR HOLMES: But I accept the point you're making. My broader submission, standing
24 back, is just that none of this, if we were starting from a blank sheet, is where we would
25 end up, with three trials proceeding on separate tracks or partially separate tracks and
26 with that close time difference likely between the judgment in Kent and the start of the

1 Coll proceedings.

2 Now, we say that the obvious solution would be to hear the three cases together in
3 a single trial in the interests of efficiency, consistency and justice. The trial would not
4 be unmanageably long or excessively complex. An October 2026 or an April 2026
5 listing would achieve a more rational spacing between Apple and Google.

6 Now, we accept, of course, that you're not starting from a blank sheet. There's already
7 a trial listed which would need to be adjourned, and there are costs. Undoing that will
8 cause some delay to the resolution of the Coll claim and will also cause some increase
9 to Ms Coll's costs. Now, those need to be weighed in the balance.

10 Starting with delay, the points we would make are these. Firstly, the delay, if you go
11 for the April 2026 option, would not be substantial. It would be six months.

12 It is also the flipside of achieving consistency. The cost of a speedier determination is
13 the substantial risk of compensation on an incompatible footing, and a combined trial
14 would be more likely to achieve a stable and authoritative outcome for everyone. The
15 Coll class, if they are shown to be suffering loss, would be compensated in interest.

16 Moreover, it is a relevant consideration in my submission, notwithstanding what was
17 said in Kent, that the sums at stake are not life-changing as they would be in, say,
18 a personal injury claim in some circumstances. We're looking here at between £17
19 and £47 per class member with interest based on the initial estimate of damages.

20 Now, as regards the costs to Ms Coll, you've already heard what I have to say about
21 this, but in my submission, the £3 million does make a difference, a really substantial
22 difference, combined with the point about contingency, which Ms Coll didn't address.
23 The £4.7 million in the budget is to allow precisely for contingencies.

24 MS LUCAS: Am I right in thinking there were no costs on the table in Kent; is that
25 right?

26 MR HOLMES: Yes, that's right. That is a key distinction. I think the Tribunal put it

1 that there was deafening silence.

2 MR JUSTICE MORRIS: I think that was actually mentioned in the ruling, I think. Yes.

3 MR HOLMES: It was mentioned in the ruling. We can find you the reference.

4 MR JUSTICE MORRIS: It's all right. Yes.

5 MR HOLMES: Now, another point which is made concerning Ms Coll's counsel team.

6 I don't think I need to spend long on that. There's no evidence before you of any

7 difficulty. If there were a difficulty, we would perhaps have heard some chapter and

8 verse about it. To say that there might be a difficulty really leaves the matter at large.

9 In any event, there's a very large counsel team on Coll's side. I think -- is it 12? There

10 are 12 counsel in the confidentiality ring and one would hope that there would therefore

11 be some continuity that would not create a difficulty. But absent more information

12 about any difficulty, it's very difficult to address that.

13 Now, Ms Coll also alleges that consolidation should be refused because of delay on

14 Professor Rodger's part in bringing his claim. We don't accept that there is any real

15 basis for censuring Professor Rodger in this way, but that's really a matter for him. I'll

16 leave that for him to address.

17 What we do say, however, is that the Tribunal needs to decide on what is best for the

18 litigation as a whole. This isn't like the Fitzroy case, which I think was cited in Ennis,

19 two-party litigation in which one party has been hugely dilatory, you know, so that, you

20 know, matters were left for an adjournment application, I think, a matter of a week

21 before trial.

22 MR JUSTICE MORRIS: And this isn't a two-party adjournment application.

23 MR HOLMES: No.

24 MR JUSTICE MORRIS: It's more complex than that.

25 MR HOLMES: It's a massive piece of complex, multi-sided litigation which needs to

26 be managed in an efficient way for the sake of other court users and all the parties

1 involved. In that view, even if Ms Coll's criticisms were viewed as partly correct, they
2 cannot be viewed as decisive. The claims are on foot. Professor Rodger's claim will
3 continue, and it will give rise to all of the difficulties that I've identified.

4 MR JUSTICE MORRIS: Yes. Can I just raise -- I had a thought, and it may be wrong,
5 in the course of my reading in advance of the hearing in relation to the Fitzroy case.

6 MR HOLMES: Yes.

7 MR JUSTICE MORRIS: Although it was cited in Ennis, Kent, I may be wrong, did
8 I come across it being referred to in any of the other cases in the Tribunal where
9 a different view was taken of it, or a slightly more nuanced view? You don't need to
10 answer immediately, but I have in the back of my mind -- I may be wrong.

11 MR HOLMES: We'll take a look at that. It might be just worth turning up, extremely
12 briefly, the facts of Fitzroy, though, so that you can see what a very different scenario
13 it is. It's in the authorities bundle at tab 5, page 44.

14 MR JUSTICE MORRIS: Yes.

15 MR HOLMES: If you just look on page 45 --

16 MR JUSTICE MORRIS: Yes.

17 MR HOLMES: -- underneath point 6 of the "Held"; you get a potted summary of the
18 facts: a four-day quantum hearing starting 17 December 2009, PTR on 20 November.
19 "On 19 November the defendants applied to adjourn the trial. The defendants had
20 served their quantum pleadings on 28 September and the claimants had served their
21 pleadings on 20 October. The defendants did not serve a reply. Their counsel sought
22 permission at the hearing on 20 November to put in a reply but permission was
23 refused. On 20 November the parties' experts had not met, had not exchanged reports
24 and had not produced a joint statement. This was contrary to an (amended) order that
25 the meeting should commence no later than 4 November, that reports should be
26 exchanged by 10 November and the joint statement by 16 November. It appeared

1 that the defendants' expert had not been instructed to take part in any such meeting"
2 I mean, this is foot-dragging of a totally different order of magnitude in two-party
3 litigation.
4 MR JUSTICE MORRIS: Yes.
5 MR HOLMES: You know, really, at the eve of the trial, a matter of weeks before it.
6 It's not, we say, a close analogy on the facts.
7 So there were several other -- I should just briefly address you on the other options
8 that you raised. The first one you suggested was perhaps breaking off, overcharge
9 and pass-on.
10 MR JUSTICE MORRIS: Certainly breaking off pass-on.
11 MR HOLMES: So, sorry.
12 MR JUSTICE MORRIS: Certainly breaking off pass-on, possibly trying to keep
13 overcharge but --
14 MR HOLMES: Yes, I see. So you would do liability and overcharge at a first trial in
15 the October 2025 window.
16 MR JUSTICE MORRIS: And then do pass-on.
17 MR HOLMES: Yes.
18 MR JUSTICE MORRIS: Yes.
19 MR HOLMES: Yes. So, we say that's not a desirable option for four reasons. There
20 is, first the point which weighed with the Tribunal in Kent. Although it sounds slightly
21 counterintuitive, I think, to a competition lawyer, there is actually a difficulty in this case
22 in separating out overcharge and pass-on because of the methodology that Ms Coll's
23 expert has employed. And it was the same methodology that was employed in Kent.
24 MR JUSTICE MORRIS: So this is Mr Singer, is it?
25 MR HOLMES: Yes. Exactly. One of the ways in which Mr Singer has sought to
26 estimate overcharge is on the basis of modelling, I think, it's called Rochet/Tirole

1 modelling. I'm afraid I can't enlighten you as to it, but it involves --

2 MR JUSTICE MORRIS: Those names ring a bell from a long time ago.

3 MR HOLMES: It's a sort of a feedback effect because one of the ways in which you

4 consider counterfactual pricing in a different market, under different market conditions,

5 is to consider the extent to which prices would be passed on and therefore demand

6 would be affected. I think that's the long and short of it.

7 MR JUSTICE MORRIS: Is that the same as volume effects or not?

8 MR HOLMES: I really I don't want to put a foot wrong.

9 MR JUSTICE MORRIS: I think Professor Fletcher refers to the volume effect aspect

10 of pass-on.

11 MR HOLMES: The consequence in any event is that an input into the determination

12 of the overcharge, which Ms Coll's expert relies on, is the expected rate of pass-on.

13 MR JUSTICE MORRIS: Okay.

14 MR HOLMES: So that makes a difficulty in separating them, the two, and I think that

15 was pressed by the Hausfeld team in the Kent proceedings.

16 MR JUSTICE MORRIS: It is certainly a point that I've picked up on as a point as

17 having been made. I wasn't, in my mind, clear how that point arose and logically, one

18 might think on a very naive and basic level that the two would be distinct. And I slightly

19 got that from Mr Holt's report, which seemed to sort of delineate the two elements

20 separately. But there we are.

21 MR HOLMES: I see.

22 MS KREISBERGER: I would not rise to disagree. I'm rising only to agree, this much

23 is common ground, I thought it might be helpful to say. We agree that this would be

24 a problem with carving out pass-on.

25 MR JUSTICE MORRIS: Okay.

26 MR HOLMES: I'm grateful to my learned friend.

1 The second point is also one with which Ms Coll may agree. Her concerns relate to
2 increased cost and delay and a split trial along the lines suggested would not assist
3 with that. In many ways, it would be the worst of all possible worlds. It doesn't give
4 any true efficiency.

5 MR JUSTICE MORRIS: Okay.

6 MR HOLMES: And that is because no recovery would be achieved for Ms Coll's class,
7 assuming success --

8 MR JUSTICE MORRIS: At the first trial.

9 MR HOLMES: -- at the first trial, until after the outcome of the second trial. So we'd
10 be in the same boat in terms of delay.

11 MR JUSTICE MORRIS: All right.

12 MR HOLMES: The third point --

13 MS LUCAS: So you're saying it's a really bad idea, basically?

14 MR HOLMES: The difficulty is I think it does raise all the same problems that Ms Coll
15 is bringing before you today in relation to a full consolidation.

16 The third point is two separate trials would be more expensive than full consolidation.
17 It would involve preparing twice two sets of brief fees, two times expert attendance.
18 And our, certainly the experience of those behind me, is that having a trial truncated
19 in this way adds to the overall cost by comparison with a single (overspeaking) --

20 MR JUSTICE MORRIS: Your fourth point? I'm just looking at the clock.

21 MR HOLMES: I'm sorry.

22 MR JUSTICE MORRIS: No, you've been fine, but --

23 MR HOLMES: Yes. So, the fourth point is that it would also place great pressure on
24 the Rodger team to be able to catch up in order to participate in October 2025,
25 meaningfully, in relation to matters of overcharge.

26 MR JUSTICE MORRIS: Okay.

1 MR HOLMES: But that's a matter for them, really. It's simply a concern that struck
2 us. So the only advantage is consistency but at greater cost and delay and risk of
3 finding that the alternative of funding than the alternative of a consolidated trial. So
4 for our part, we wouldn't support that.

5 Another possibility that was floated by my learned friend, Ms Kreisberger, was undoing
6 the consolidation that was achieved back in March to May of last year. We say that
7 that is simply unfeasible at this point. The expert evidence relies on the Epic evidence
8 centrally; that evidence needs to be heard at the same trial as the Coll expert evidence
9 and it would not be fair -- it would be simply untenable to unpick that. Now, quite apart
10 from the unfairness that would then arise in terms of multiple cross-examination of
11 Google's witnesses. So we say that's not a runner.

12 So standing back, we think that the best outcome, although it will be tight and although
13 it will require parties to work efficiently and hard, is the April 2026 window. We think
14 that that is achievable because this is very well-tilled ground by now. The in terrorem
15 concerns about disclosure dragging on forever, we say, are just not tenable at this
16 point because we've already given very substantial disclosure. There won't need to
17 be, in our submission, any further disclosure in the Rodger proceedings.

18 Moreover, it's clear from the Rodger pleading, which is extremely detailed, that they
19 have paid very close attention to the proceedings that have gone on in other
20 jurisdictions around the world, where documents have already surfaced that will define
21 the core relevant parameters of the trial. So not only will disclosure be manageable
22 within an April 2026 time frame, but digestion of that disclosure to participate in
23 April 2026 will be feasible, in our submission, by Rodger, and it can be done.

24 Final point, we say 12 weeks. We don't think 14 weeks. We think it can be readily
25 done within 12 weeks, which, assuming an April start, could be done before the
26 summer adjournment.

1 MR JUSTICE MORRIS: Okay. Maybe that Mr O'Donoghue will address this a bit
2 further about the details of what Rodger thinks they can achieve.

3 MR HOLMES: Yes.

4 MR JUSTICE MORRIS: More than you, I think. I'll leave that to him.

5 MR HOLMES: I'm grateful.

6 MR JUSTICE MORRIS: I think that is an area which we will want to understand about
7 what is actually realistically achievable in a time frame, either to April or to October.
8 But I think that really lies in Professor Rodger's --

9 MR HOLMES: Unless you have anything else, those are my submissions.

10 MR JUSTICE MORRIS: No, thank you very much, Mr Holmes.
11 Yes, Mr O'Donoghue.

12

13 Submissions by MR O'DONOGHUE

14 MR O'DONOGHUE: Sir, Madam. Mr Holmes's submissions have made my task a bit
15 easier and as a good omen for the future, I will deduplicate to the maximum extent
16 possible.

17 For the Tribunal's pain, I'm going to cover four topics. I'm going to start with where
18 I started this morning, which is on the question of the additional costs Coll claims would
19 be incurred. I'm then going to move on to timetabling questions. There was some
20 criticism of our timetable for October 2026. I will then deal with a handful of more
21 substantive points on things like overlap and the test we are considering. And then
22 finally, Sir, to your question, I have renamed the Tribunal's options as options five and
23 six, five being October 2025, six being April 2026 and I will respond --

24 MR JUSTICE MORRIS: Yes. Is your option six the version of option five that goes to
25 October or is it -- sorry, I've got confused -- to April or is this -- are you -- let's assume
26 full consolidation.

1 MR O'DONOGHUE: Yes.

2 MR JUSTICE MORRIS: Are you going to address whether it's possible to do it by April
3 next year, as well as by October next year? Or alternatively.

4 MR O'DONOGHUE: Yes, well, option five was October of this year.

5 MR JUSTICE MORRIS: No. Option five is not having full consolidation. Option five
6 is maintaining October 2025 but with a variation. It's a variation of option one, actually,
7 your original option one by carving out.

8 MR O'DONOGHUE: Yes.

9 MR JUSTICE MORRIS: I then mentioned another option which was a variant of
10 option five.

11 MR O'DONOGHUE: Yes, five (inaudible).

12 MR JUSTICE MORRIS: Yes. Okay. The reason I raised it, I'd like to hear you in
13 particular after I've heard you on why this is achievable by next October, by
14 October 2026, whether it could be achievable, as Mr Holmes has just suggested,
15 earlier than that by April 2026.

16 MR O'DONOGHUE: Yes.

17 MR JUSTICE MORRIS: Okay. All right. Carry on.

18 MR O'DONOGHUE: Okay. Now, starting with the question of costs and in my
19 respectful submission, the point of Ms Kreisberger had to meet is there any intelligent
20 or rational basis for supposing that at least £6.4 million of costs would be wasted
21 because of an adjournment of about 12 months?

22 My respectful submission, you didn't lay a glove on the point. Now, she had an
23 interesting turn of phrase. She said the £6.4 million-figure was "the back of an
24 envelope calculation" and with respect that dignifies it more than it probably deserves.
25 The fundamental point is she agrees with Professor Rodger that it is extremely
26 unlikely, we say it simply will not happen, that there will be factual evidence emanating

1 from Coll in response to Professor Rodger. She took you to Coll's letter of 12 March
2 which, in my submission, helps me because in that letter, the only thing concrete they
3 could identify by way of further heavy lifting was the possibility of a third report on
4 pass-on. That is the only concrete indication that the Tribunal has been given to justify
5 this extraordinary figure. And again, if one thinks about that for about ten seconds,
6 the idea that a third bite of the cherry would lead to a substantial seven figure sum in
7 terms of additional costs is not realistic.

8 She then mentioned the question of ATE insurance premia increasing. We simply
9 don't understand that point. In a world where consolidated trial moves from potentially
10 two paying parties to three, Ms Coll's exposure reduces from 50 per cent to
11 33 per cent. So, in fact, that is a point against what Ms Kreisberger says, not a point
12 in favour.

13 We say that fundamentally, there is no good basis for the Tribunal today to suppose
14 that the cumulative total of £3 million would not meet all, or certainly the lion's share,
15 of any suggestion of wasted costs in connection with the consolidated proceedings.

16 Now, there was a very faint hint to the suggestion that, well, the funder might walk
17 away. The evidence on this was very carefully curated. It was put in terms of, and
18 I quote, "There is no certainty that the funder would necessarily continue". Now, my
19 primary response to that is that with the £3 million composite payment, there is no
20 need for them to go back to the funder in any event.

21 MR JUSTICE MORRIS: That was my point that I -- Yes.

22 MR O'DONOGHUE: My secondary response is -- it's a point that Mr Holmes touched
23 on this morning -- we are talking about one of the biggest funders in the world. I saw
24 they have more than \$6 billion of claims funded globally. The idea that in respect of
25 a £1 billion claim, which is on the threshold of the trial, that they would throw their toys
26 out of the pram and defund the entire claim and caboodle and leave that some cost of

1 spilled milk sitting there, is uncommercial in the extreme.

2 It was perfectly open to Coll, as happens in CPO cases all the time, to say, well, to put
3 in a witness statement from the funder -- you will recall, Sir, that last week we had
4 a witness statement from Mr Chopin of Bench Walk on certain funding issues. It was
5 perfectly open to Ms Coll to put in a witness statement funder saying, "We have funded
6 X. If it goes to Y, that may be a bridge too far". There is nothing of that kind. And
7 with respect it is not an answer to that, to say, well, this is all contingent and you can't
8 quantify uncertainty. So we say, as a secondary provision, the suggestion that they
9 would simply walk away, doesn't make any commercial sense.

10 And indeed, you would have picked up from Ms Christoforou's evidence -- I mean, it
11 links to the point I made this morning on the inadequacy of the budget to begin with.
12 So the initial budget was £11.29 million. We understand from Ms Christoforou's
13 witness statement that has already been increased at least once.

14 It is strongly suggested, in my submission, that the initial budget was on the light side.
15 In our submission, that should not be something to be prayed in aid of budgetary
16 problems going forward. So that is what we say in terms of cost implications. We say
17 fundamentally, there is no good answer to the point that £3 million in the real world is
18 more than adequate to deal with any contingencies. Quite apart from the fact that
19 Mr Holmes says there is an existing contingency of an excess of £4 million.

20 And again, to come back to where I started, the suggestion that with an £11 million
21 budget for the entire proceedings, more than half again would be needed for this
22 hiatus.

23 MR JUSTICE MORRIS: Yes, okay.

24 MR O'DONOGHUE: It doesn't make any sense.

25 MR JUSTICE MORRIS: Okay.

26 MR O'DONOGHUE: So that's on cost and so on timetabling.

1 MR JUSTICE MORRIS: Yes.

2 MR O'DONOGHUE: There was a lot of parsing and criticism of the timetable we've
3 put forward. But again, one has to take a step back on questions like this. We say
4 that standing here today we have an 18-month glide path to a consolidated trial in
5 October 2026. And the suggestion that with two substantial claims up and running,
6 that a third claim which is in material but not complete respects overlapping, could not
7 catch up in an 18-month period, in our submission, makes no sense.

8 The Tribunal does not need me to tell them that there are countless examples in this
9 Tribunal, and indeed in the High Court of formally or informally expedited matters
10 which have come to trial in a time frame of 18 months. I'm not simply talking about
11 the fast-track procedure in this trial. There are non-fast-track cases which have been
12 successfully expedited in about the timeframe that we are considering here.

13 So the suggestion at base that there is no hope of us being ready for October 2026,
14 again, is unrealistic. I'm not underplaying the pain that would be inflicted on
15 Professor Rodger in particular -- some of it will be shared by other parties -- but it is
16 tractable and doable. We'll come back to that in relation to April, where I have slightly
17 less warm and cuddly feelings.

18 But in relation to October 2026, we say with cooperation, active case management
19 and a bit of goodwill and a bit of luck, it is doable in the real world. So in a sense that
20 is my answer to the excavatory exercise on our timetable.

21 MS LUCAS: It may have been slightly flippant on your part, but the reference to luck
22 is slightly concerning.

23 MR O'DONOGHUE: Yes. Well, there's many a slip between cup and lip, was what
24 I was trying to say. But we do think that active case management -- for example,
25 Madam, you'll be well aware of this, in other cases, things have been dealt with on
26 paper; there have been remote hearings. It was a terrifying prospect, I think, of 8 am

1 | hearings at one stage.

2 | MR JUSTICE MORRIS: Yes.

3 | MR O'DONOGHUE: The Interchange cases.

4 | MR JUSTICE MORRIS: Yes.

5 | MR O'DONOGHUE: It will require a lot of hard work and for things to work out well,
6 | but we think it's achievable and I may have been flippant in my part, I don't think we'll
7 | be in the realms of chance or luck. I think there is a fairly well-drawn path for
8 | something of this kind, being practical in the timeframe we're talking about.

9 | And of course, the duplication point is fundamentally important. We have zero interest,
10 | if there is a good and true wheel in front of us, we have zero interest in reinventing that
11 | wheel. For example, there is commonality in terms of the market definition and the
12 | dominance assessments between Coll, Epic and Rodger. There is a third potential
13 | (inaudible) payment processing we're not concerned with. But in other respects, these
14 | are fungible.

15 | Now, if we apprehend that their experts have done a stellar job on market definition
16 | dominance, we have no incentive whatsoever to blow some of our budget on
17 | reinventing that wheel; it would be utterly pointless. We want to focus our bucks or
18 | our pounds and shillings and pence on where we can add value and to spend that
19 | wisely. We have no interest in replicating things for the sake of replication or neatness,
20 | none.

21 | Now, it was also suggested that there was a considerable difficulty with the
22 | confidentiality arrangements, and I know, Madam, that avenue of pleasure has been
23 | a contentious issue in these proceedings, and we have limited visibility on that to some
24 | extent. But what I would say at this stage is that in circumstances where that is up
25 | and running, there is a ring - the suggestion that further disclosure to a third party in
26 | the same consolidated proceedings into the same ring is going to be the straw that

1 breaks the camel's back, or tip over the applecart. Again, it is not realistic, but we say
2 that seems to have been resolved. It sounds like it was rather painful, and we think
3 that replicating that for a third party, with respect, should not be the end of the world
4 or a Sisyphean task.

5 Then there was a discussion of our witness evidence. Again, if one takes a step back,
6 we are now in March; the suggestion that it would be impossible for us to be ready on
7 our witness statements in the new year --

8 MR JUSTICE MORRIS: Factual witness evidence?

9 MR O'DONOGHUE: Factual witness evidence.

10 MR JUSTICE MORRIS: Yes.

11 MR O'DONOGHUE: -- is an unrealistic submission. Of course it's possible. Now, of
12 course we can start work on that today, or I think more realistically, tomorrow or
13 Monday. We don't have to sit around on our hands waiting for things to do with witness
14 evidence. So to your point, what will you bring to the table? We had a, I think, an
15 amuse bouche of that last week on the certification, but, two points:

16 First, you will recall, Sir, that the modalities of this are important for us because I think,
17 as Mr West adverted to, a small developer putting his or her head above the parapet
18 in relation to Google --

19 MR JUSTICE MORRIS: Yes.

20 MR O'DONOGHUE: -- is not a trivial thing.

21 MR JUSTICE MORRIS: Yes.

22 MR O'DONOGHUE: There may be a need to discuss the modalities of how that would
23 work, but something to that point, which is important -- what we hope to bring to the
24 table, we have before the court, Epic, which is an enormous developer, a very, very
25 successful one -- I think more than \$5 billion of turnover -- 77 per cent of our class has
26 a claim of £10,000 or less.

1 MR JUSTICE MORRIS: Yes.

2 MR O'DONOGHUE: And what we would hope to do is to bring small, medium and
3 somewhat larger developers to the table to complement the evidence from the
4 behemoth that is Epic.

5 MR JUSTICE MORRIS: Yes.

6 MR O'DONOGHUE: In my submission, if that is achievable with the modalities, that
7 would be of considerable benefit to the Tribunal, and indeed indirectly to Coll. So that
8 is our objective.

9 MR JUSTICE MORRIS: Right.

10 MR O'DONOGHUE: As I told the Tribunal last week, Sir, we are in discussions with
11 a number of developers. There is a concern as to publicity; these are not sort of jam
12 tomorrow people; these are people we're in active discussions with.

13 MR JUSTICE MORRIS: Yes.

14 MR O'DONOGHUE: And that's what we would like to bring forward. But again, over
15 9 or 10 or 11-month period, that is practical, and it is unrealistic to suggest it couldn't
16 possibly be done.

17 Now, of course, on all of this, this is a timetable that we have put forward; it's not set
18 in stone, it has to work back from October 2026. We will have to cut our cloth to
19 measure it, and there will be tangible trade-offs with Professor Rodger in terms of
20 balancing, in an ideal world, his desire for the most perfectly formed and constructed
21 case, and working in a pragmatic fashion to a reasonably proximate trial deadline.
22 Those are the trade-offs we will have to make, and they are matters that we will have
23 to give active consideration to.

24 MS LUCAS: Can I raise something that's a bit of an elephant in the room for me at
25 the moment?

26 MR O'DONOGHUE: Yes, Madam.

1 MS LUCAS: Which is you say that Professor Rodger won't be sitting on his hands,
2 but I mean with respect, there does seem to have been a certain amount of
3 hand-sitting before we've got to this point.

4 MR O'DONOGHUE: Yes, there's been a lot of criticism been said, uncharitably and
5 unfairly, that Professor Rodger hasn't done enough. (Several inaudible words) We
6 think it's a completely overblown, uncharitable (inaudible). The issue today isn't
7 retrospective; it's the prospect of how do we manage things going forward and how
8 does the public (inaudible) going forward. I'm not trying to airbrush the past, I will deal
9 with that head on.

10 MS LUCAS: But if there have been delays in the past, that is a very material thing,
11 when we're looking at the timetable, that we're going to be trying to achieve to get this
12 trial on.

13 MR O'DONOGHUE: Yes.

14 MS LUCAS: So there can't be any delays with these directions.

15 MR O'DONOGHUE: Well, that's a fair point. But in my submission, there is a world
16 of difference between a Tribunal's order with deadlines that we are stuck with -- with
17 approximate trial deadlines -- and the precertification period, where there is no similar
18 Tribunal timetable in place. To put it in blunt terms, I think it would be
19 Professor Rodger's tough luck. He can meet the order's deadlines, and I suspect that
20 anyone up on this roll, coming forward to the Tribunal in the next 18 months seeking
21 either another adjournment or even a material variation to the directions, will get
22 a frosty reception. In a nutshell, we will take that on the chin and we don't accept there
23 has been hand sitting in the past, and in any event, we're now in a different phase,
24 trying to meet deadlines. (Several inaudible words) not compliant.

25 But I will come back to the particular point that pre-certification, Professor Rodger
26 cannot be criticised. It's uncharitable and unfair.

1 Finally, there were a series of what I would call "scraping the bottom of the barrel"
2 points by Ms Kreisberger, and she was really looking for every excuse in the book for
3 where should we find a little bit of delay. We were told, for example, "Well, you know,
4 when there's disclosure, there needs to be a database, and setting up a database
5 takes time". But everybody knows that, that's all hardwired into our timetable; as to
6 quote Ms Kreisberger, this is not our first rodeo. So that is all well understood.

7 The next layer of the onion was the alarmism that there's a Supreme Court case which
8 is pending, which could make some difference, but there are always cases
9 pending -- important cases. To start today on a sort of Eeyore-ish note that because
10 there is a pending case on something to do with collective actions, we should sort of
11 draw stumps now and give up, in my submission, again, is trying to find excuses for
12 delay where there are realistically none.

13 So that's what I want to say on the timetable. I will come back to one point which picks
14 up on something Mr Holmes said, where we don't quite agree. There is a component
15 of our case that is distinct from Epic and Coll, and we say we will need some disclosure
16 on that issue. I'll take you to that in a moment. But again, our timetable is how
17 (overspeaking).

18 MR JUSTICE MORRIS: I don't know if you're moving off timetable, but I just wanted
19 to press you on this question of what further disclosure you are likely to require, and
20 Ms Kreisberger's suggestion that the time period between you getting all the
21 disclosure and you asking for further disclosure was not sufficient, because you need
22 to understand all the existing disclosure to find out what else you might need.

23 I was really looking at, I mean, point 19.5 in your skeleton -- I'd just like you to address
24 us on this question of you'll get the disclosure, the existing disclosure, you'll need to
25 digest that, and what sort of further disclosure you're going to likely to require.

26 MR O'DONOGHUE: Yes.

1 MR JUSTICE MORRIS: I think that was one of the main -- "sticking points" is the
2 wrong word -- bottlenecks that I think Ms Kreisberger suggested.

3 MR O'DONOGHUE: Yes. Well, Sir, the short answer is the sequential approach she
4 outlines is not correct; these can move in tandem. Just to explain what I mean, if we
5 go to our skeleton -- it's in tab 4.

6 MR JUSTICE MORRIS: Yes.

7 MR O'DONOGHUE: It's the annexes at the back, it's table 2. (Pause)

8 MR JUSTICE MORRIS: Yes.

9 MR O'DONOGHUE: So you'll see, Sir, that gives you a sense of the overlaps.

10 MR JUSTICE MORRIS: Yes.

11 MR O'DONOGHUE: It's a bit rough and ready, but --

12 MR JUSTICE MORRIS: Yes, that's right.

13 MR O'DONOGHUE: If we then, for example, look at issues 11 and 12 over page.

14 MR JUSTICE MORRIS: Yes.

15 MR O'DONOGHUE: So that's a pair of issues where there is no corresponding
16 allegation in Epic and Coll. Now, our answer to Ms Kreisberger's point in the first
17 instance is there is no reason why that disclosure can't be executed and commenced
18 immediately.

19 MR JUSTICE MORRIS: Right.

20 MR O'DONOGHUE: So our plan is to get it in dialogue very, very quickly with Google
21 on the non-overlapping points. They do not need to wait for the 2.3 million or however
22 many terabytes of disclosure already given. So there are self-contained categories
23 that we say are tractable that can and should be addressed immediately.

24 MR JUSTICE MORRIS: Okay. That wasn't actually written into your timetable,
25 though -- in your skeleton. I don't think you did. It doesn't matter, I mean ...

26 MR O'DONOGHUE: Well, Sir, it was in the sense that the timetable of

1 paragraph 19 -- is it 19?

2 MR JUSTICE MORRIS: Yes.

3 MR O'DONOGHUE: Paragraph 19 reflects ... perhaps that we've seen them. So,
4 that's the first answer. I think the second answer then, which I think is a more general
5 point: again, starting from March, the suggestion that by the end of October,
6 disclosure, if necessary, could not be completed, again --

7 MR JUSTICE MORRIS: End of October 2025.

8 MR O'DONOGHUE: 2025.

9 MR JUSTICE MORRIS: Okay.

10 MR O'DONOGHUE: Give or take. It might be, for example, Sir, if we didn't, for
11 example, put in a reply, we could gain an extra month on disclosure. So there's a bit
12 of flex -- not a lot, but there's a bit of flex. Again, something of the order of six, seven,
13 eight months, of course, disclosure can be achieved during that period. We're not
14 reinventing any wheels. It will be a relatively small number of self-contained, we say
15 "tractable", categories.

16 MR JUSTICE MORRIS: Well, I can see the 11 and 12 points, and you can get on with
17 that now, is what you're saying.

18 MR O'DONOGHUE: Yes.

19 MR JUSTICE MORRIS: But that doesn't quite marry with how it appeared in
20 paragraph 19. Paragraph 19 appeared that you get the existing disclosure in the
21 coming weeks, i.e. now, and then by the end of June 2025, you'd seek further
22 disclosure, which seemed to suggest -- I'm not holding you to this.

23 MR O'DONOGHUE: I understand. Yes.

24 MR JUSTICE MORRIS: But that seems to suggest that that request for further
25 disclosure would be piggybacking on your assessment of what you would see in the
26 disclosure. Now, obviously, if you can ask for whatever further disclosure you need,

1 as well as 11 and 12, before then, then so much the better.

2 MR O'DONOGHUE: Well, we saw that as a long stop.

3 MR JUSTICE MORRIS: All right. Yes. It says "by the end of". Yes. Okay. All right.

4 MR HOLMES: Sir, just in case it assists, the disclosure came from the US, and we

5 think it's perfectly possible that, actually, these issues are already dealt with by the

6 existing disclosure. But to the extent they're not, we'll --

7 MR JUSTICE MORRIS: Those issues, sorry?

8 MR HOLMES: Yes, exactly.

9 MR JUSTICE MORRIS: 11 and 12?

10 MR HOLMES: Yes. They may have already been ...

11 MR O'DONOGHUE: Again --

12 MR JUSTICE MORRIS: Okay, that's helpful.

13 MR O'DONOGHUE: That sounds like something positive.

14 MR JUSTICE MORRIS: All right. Just to say we are proposing to take a break at

15 about 3.15 pm. Just for your information.

16 Yes, carry on.

17 MR O'DONOGHUE: So we say if one looks pragmatically at our timetable, considers

18 the work already done, considers deduplication, considering that we have no incentive

19 to reinvent any wheels, timetable set out there to October of next year is doable and

20 tractable. We will put some pressure on Professor Rodger, but with respect,

21 Ms Kreisberger's characterisation of the timetable as a whole -- I don't think it was fair.

22 MR JUSTICE MORRIS: Okay.

23 MR O'DONOGHUE: In any normal case, this actually would be a reasonably sensible

24 timetable.

25 MR JUSTICE MORRIS: Okay.

26 MR O'DONOGHUE: So that's all on the timetable.

1 MS LUCAS: So can we just look at your overview of the expert evidence?

2 MR O'DONOGHUE: Yes.

3 MS LUCAS: I'm looking at an overview of expert evidence; table 3, page 29 of your
4 skeleton. (Pause)

5 MR O'DONOGHUE: Yes.

6 MS LUCAS: So we've got the table there. You say:
7 "This expert evidence is likely to be needed in Rodger." [as read]
8 I mean, do you think you'll really need to duplicate on all of these issues?

9 MR O'DONOGHUE: Well, we certainly know -- again, it's back to my "if the will is good
10 and true." We have no incentive whatsoever to duplicate it. I mean, this, I think, is
11 setting out a maximalist position. We hope we don't need to replicate, frankly, any of
12 this, but in a world, of course, Madam, where we have not seen any of the Epic factual
13 evidence, none of the Google expert evidence, there are substantial gaps in our side
14 in terms of our ability to triangulate what we have onto our pleadings, in terms of, "Well,
15 is there actually a gap?" And in some ways, this is really to keep our options open at
16 this stage, because I'm not in a position to say "yay" or "nay" today, but what I can say
17 loud and clear is we have no incentive whatsoever, including the cost of time, to
18 reinvent any wheels.

19 MR JUSTICE MORRIS: Okay, yes. (Pause)

20 MR O'DONOGHUE: That's my second topic. Sir, it may be convenient, while we're
21 on timetable, to put my cards on the table in terms of April.

22 MR JUSTICE MORRIS: Yes. April 2026.

23 MR O'DONOGHUE: Yes. About the only thing I think everyone on the front bench
24 here agrees with is that October 2026 will be, already, a challenge for
25 Professor Rodger, and indeed I think Ms Kreisberger and Mr West go further; they
26 say, "Well, can you do October 2026?"

1 But given the challenges of hitting October 2026, it is obviously even more challenging
2 to try and hit a date of April 2026. So if I (inaudible) the respondents, we think the
3 notion of us catching up in any shape by October 2025, is essentially insane. The
4 prospect of us catching up with consolidated trial October 2026 is doable.

5 MR JUSTICE MORRIS: 2026 October.

6 MR O'DONOGHUE: Doable but tough. If I can put April 2026 as follows: I mean, one
7 thing I should say is, as we said in paragraph 22 of our skeleton, as things stand, our
8 expert is not available in April, so we would almost certainly be applying for a change
9 of expert. I (inaudible) that in one of the boundary fares cases, a change of expert
10 generated quite a lot of heat, because the question is whether the replacement expert
11 should be required to sign up in any shape or form, (overspeaking), and it led to a bit
12 of a delay effect.

13 Now, again, the risk of making myself even more unpopular, on our team, both Mr Beal
14 and I are unavailable as it stands. I won't make too much of that.

15 MR JUSTICE MORRIS: No, but --

16 MR O'DONOGHUE: That is the position as of today. Mr Holmes is right.
17 Ms Kreisberger alluded to possibilities of unavailability. We have an actual, serious
18 unavailability issue of the two leading counsel and Mr Bellinger(?). And unlike Coll,
19 we're not a team of, I think, 12. We have myself, Mr Beal, Mr Carall-Green and Ms
20 Chambers.

21 MR JUSTICE MORRIS: Yes.

22 MR O'DONOGHUE: So it does rather blow a hole in --

23 MR JUSTICE MORRIS: Okay.

24 MR O'DONOGHUE: -- you know, in our composition. So that is an important caveat.

25 MS LUCAS: I'm going to throw out one more line here, and I know you're going to
26 come to it, but in your CPO application, you suggested you could be ready for October.

1 April 2026 is only five months further on. It actually gives you slightly longer than you
2 getting -- I think your original litigation plan looked at getting certification in December,
3 so it actually gives you slightly longer to April 2026. And you say, that's insane. So
4 I'm slightly -- anyway, you're going to have to come to this, I'm afraid, but in due course,
5 because I'm not sure how you can make that submission now and yet say that that
6 was all right for the purposes of your litigation plan.

7 MR JUSTICE MORRIS: I thought he said that October 2025 was insane.

8 MR O'DONOGHUE: Yes.

9 MS LUCAS: Oh, I thought you said April 2026.

10 MR JUSTICE MORRIS: No, no, no.

11 MR O'DONOGHUE: I haven't got there.

12 MS LUCAS: Oh, you haven't got there. Right.

13 MR HOLMES: Doable but tough, doable but tough.

14 MR JUSTICE MORRIS: Did you actually --

15 MR O'DONOGHUE: Well, let me recalibrate.

16 MR JUSTICE MORRIS: And I don't think -- yes.

17 MR O'DONOGHUE: October 2025. Insane.

18 MR JUSTICE MORRIS: Okay.

19 MR O'DONOGHUE: October 2026. Tough but doable.

20 MR JUSTICE MORRIS: But doable, yes. You haven't yet given an adjective -- what
21 is between "tough" and "insane"?

22 MR O'DONOGHUE: It's tantalising.

23 Well, we have availability issues, which is a problem itself. I mean, if I can put it this
24 way; if the only thing available today is halfway, that's better than nothing.

25 MR JUSTICE MORRIS: Okay.

26 MR O'DONOGHUE: But I don't say that with any relish. So, in other words, if the only

1 game in town were April 2026, we'd have to do what we can. But it does, I think, come
2 at a risk of a degree of insanity, or at the very least, that really puts a very substantial
3 pressure.

4 MR JUSTICE MORRIS: But you're saying in April 2026, you're saying, one, you're not
5 available --

6 MR O'DONOGHUE: Yes.

7 MR JUSTICE MORRIS: -- whether it's relevant or not, and two, Professor Fletcher is
8 not or may not be. But there's also --

9 MR O'DONOGHUE: (Overspeaking)

10 MR JUSTICE MORRIS: Yes, but there's also the suggestion in your skeleton that the
11 case that Professor Fletcher is involved in will be moved to October. I don't know --

12 MR O'DONOGHUE: Yes, well, I think the logic was, as of today, that is listed on
13 27 April.

14 MR JUSTICE MORRIS: Okay.

15 MR O'DONOGHUE: There is, I think, a possibility that it might move, but I have no
16 updates on that.

17 MR JUSTICE MORRIS: We just ignore that possibility for the time being or discount
18 it?

19 MR O'DONOGHUE: We have nothing further to add. (Pause)

20 MR JUSTICE MORRIS: Yes, carry on.

21 MR O'DONOGHUE: Sir, if I can put it this way, April, for obvious reasons, is very
22 much not our preference.

23 MR JUSTICE MORRIS: Yes, I understand.

24 MR O'DONOGHUE: If it were the only thing available, we would --

25 MR JUSTICE MORRIS: You'd live with it.

26 MR O'DONOGHUE: -- roll with the punches and do what we can.

1 MR JUSTICE MORRIS: Okay.

2 MR O'DONOGHUE: So that may be --

3 MR JUSTICE MORRIS: Yes.

4 MR O'DONOGHUE: -- potentially, yes.

5 MR JUSTICE MORRIS: Yes, okay, thank you.

6 MR O'DONOGHUE: So, that's what I wanted to say on timetable. I'm about to move
7 to a different topic. I'm in your hands (several inaudible words) not finish this in
8 ten minutes.

9 MR JUSTICE MORRIS: You won't finish the next topic in ten minutes?

10 MR O'DONOGHUE: No, I don't know if we want to break now or continue?

11 MR JUSTICE MORRIS: Yes, we'll keep going. Thank you.

12 MR O'DONOGHUE: Going back to the legal principle, in our submission, there was
13 a rather sterile debate in terms of trying to look at Kent as a deed or a statute.
14 The reality is, as we set out in section 3 of our skeleton, there are a number of cases
15 which support all of the options we've outlined and indeed many, many others.
16 Ultimately, these are case management decisions of a multi-factorial nature.
17 In my submission, if this were, for example, a commercial court, a lot of judges might
18 get quite angry with saying, "Well, in case X, case management decision Y was made
19 and therefore there is some sort of principle basis for that". All of these cases turn on
20 their own particular facts. The competing considerations in one case will typically have
21 very little bearing on other cases.

22 Now, on Kent in particular, there are obviously two quite dramatic differences between
23 Kent and the present. The first, of course, is that there are now three cases as
24 opposed to two in Kent. As I think Keynes famously said, "When the facts change,
25 I change my mind".

26 The other point, of course, is that, unlike Kent, we put, on a composite basis, £3 million

1 on the table to deal with the allegation of wasted costs, contrast to a deafening silence
2 in Kent. These are two rather dramatic differences.

3 But we say, at the level of principle, things are clear. Certainly as a general matter,
4 the Tribunal is keen to avoid the prospect of conflict in related cases; it is keen to
5 decide the same or similar issues consistently where possible; and it is keen to reduce
6 the demands on the Tribunal, including in the interests of other Tribunal users as well.
7 If anything, in our submission, the analogy is not at all with Kent; it actually is more
8 appropriate to analogise this case with Interchange. That was a set of proceedings
9 where the CAT and the High Court, across three different cases, reached radically
10 different conclusions. The Court of Appeal was very critical of that happening, and it
11 made a very, very clear direction that in future, this sort of trifecta or triptych should
12 not be repeated.

13 MR JUSTICE MORRIS: I was looking for that. I mean, that was almost my first
14 thought when I read about this, because I was involved many years ago and it was
15 a very, very stark instance of three different judges deciding lots of different issues in
16 completely different ways. But I couldn't find the actual passages in the Court of
17 Appeal that I wanted to find, but I was aware of it. It struck me as well.

18 MR O'DONOGHUE: Yes, well, was it --

19 MR JUSTICE MORRIS: I know they effectively directed that all cases had to come to
20 the CAT, but I couldn't find what they'd said about the confusion caused by the three
21 different judgments.

22 MR O'DONOGHUE: Well, it was a manifest issue because one case found no
23 restriction; another case found exemption.

24 MR JUSTICE MORRIS: Exemption, yes.

25 MR O'DONOGHUE: There was something for everyone.

26 MR JUSTICE MORRIS: Yes.

1 MR O'DONOGHUE: And in my submission -- Mr Holmes has put this point very well.
2 In this case, the scope for conflict across a range of different issues is very, very
3 substantial.

4 I mean, in a sense, one can encapsulate what Mr Holmes has said in a very simple
5 proposition. What is Google to do if three different levels of overcharge are found in
6 three different cases? What price or fee should they charge? When it is put in those
7 terms, the idea of two or three cases proceeding in silos has nothing to commend it
8 from the perspective of public policy or fairness, even before one gets to the issues of
9 double recovery.

10 MR JUSTICE MORRIS: Yes.

11 MR O'DONOGHUE: In a very formal sense, in this Tribunal, the Umbrella
12 Proceedings practice direction is the culmination of these kinds of concerns. But the
13 concerns themselves, they were and are important in any event.

14 Just quickly to look at what we say in our skeletons, I think it's important to put this in
15 context. We set it out in section III(A).

16 MR JUSTICE MORRIS: Paragraph -- yes, paragraph 13? Yes.

17 MR O'DONOGHUE: You can see Volkswagen?

18 MR JUSTICE MORRIS: Yes.

19 MR O'DONOGHUE: The second sentence of Volkswagen v McLaren is important.

20 "It is important that even if there is no duplication of issue in the technical legal sense,
21 there is consistency of application of competition law."

22 So, in a sense, that goes further than today's proceedings. I mean, today it is
23 essentially the consistent application of competition law in a technical sense within the
24 same --

25 MR JUSTICE MORRIS: Factual.

26 MR O'DONOGHUE: -- set of proceedings, the factual matrix or value chain. This is

1 saying, indeed, one can extrapolate this beyond the Google platform into platform
2 cases in general, for example. Then Interchange -- this is, of course, the
3 Tribunal -- they say that "the courts ...will seek to avoid inconsistency by
4 consolidating ... hearing them together". Again, the last sentence is important:
5 "consistency of outcome in the broader sense of deciding like cases alike" as "it is
6 important to the credibility of the legal system that similar cases have similar
7 outcomes."
8 That's another way of putting Mr Holmes's point. Why should they have to pay or
9 consider the vista of three potentially lawful and unlawful sets of fees?
10 Then over the page, a couple of further authorities, 15.1, again Interchange. It shows
11 the breadth of the principle because in the most recent Interchange cases heard
12 together, the so-called trial 2 proceedings, you'll see at the last sentence that those
13 were heard together even though "there was no temporal overlap between the
14 consumer and merchant claims".
15 Now, we'll go back to Ms Kreisberger's Venn diagram. Mr Holmes has dealt with most
16 of the points; I've got two further points. First, as is often in life, the footnotes tell you
17 a lot about what's really going on. It says, "diagram dimensions are indicative". Well,
18 indeed.
19 But on the temporal period, in my submission, Ms Kreisberger is looking at the wrong
20 end of the telescope. She says, well, we have two and a half years that isn't
21 overlapping. But the correct way to look at the telescope here is there are six years
22 of complete overlap, and in any event --
23 MR JUSTICE MORRIS: I have it as five and a half, but --
24 MR O'DONOGHUE: Five and a half years; it's much bigger than the --
25 MR JUSTICE MORRIS: Yes, yes.
26 MR O'DONOGHUE: -- the non-overlapping period.

1 In any event, where does any of this go? There's a big "so what?" about this. It's not
2 as if Ms Kreisberger had made a substantive point on the back of this and said, "Well,
3 in this early period, there is a set of abuses that have no analogue in the subsequent
4 period". There's nothing behind this. It is literally a temporal point in my submission
5 and not a very good one in any event.

6 Then, you have Mr Holmes's point that, in relation to pass-on, the idea that pass-on in
7 Portugal is radically different to UK pass-on isn't very realistic.

8 Finally, just to round off the cases, 15.2, Hammond and Stephan are very, very
9 interesting from this perspective because there you have two direct and indirect claims
10 in respect of Amazon. The Tribunal says at the bottom of the page:

11 "There are clear efficiencies ... joint case management of proceedings with similar
12 objectives that raise similar issues. Moreover, there is a serious risk of complications
13 if such proceedings were to be considered separately such that certain of the parties
14 become bound by results to which other parties are not."

15 That is Mr Holmes's point, that having achieved some measure of success in Coll,
16 there's then a second and third bite of the cherry for Epic and Rodger, directed at his
17 client.

18 MR JUSTICE MORRIS: Yes.

19 MR O'DONOGHUE: In our submission, Kent, of course, is part of this matrix. But
20 there is a suggestion that there is some binding force in Kent which ultimately is a case
21 management decision and nothing else. I'm sure it's very irritating for Tribunals where
22 counsel say, "Well, there's this case with these particular facts and my facts are sort
23 of similar or interestingly different". In my submission, that goes nowhere. The case
24 management decision is a multifactorial and evaluative one for you. The factors
25 of common ground, where they come out, is a decision for you. To some extent, the
26 compare and contrast between these different proceedings really is a sterile exercise.

1 It doesn't tell you anything.

2 So, would that be a convenient moment?

3 MR JUSTICE MORRIS: Yes. Thank you.

4 MR O'DONOGHUE: I'm almost done, Sir, I think about another ten or 15.

5 MR JUSTICE MORRIS: Right. Okay. Very good. Thank you.

6 (3.12 pm)

7 (A short break)

8 (3.27 pm)

9 MR JUSTICE MORRIS: Yes, Mr Donoghue.

10 MR O'DONOGHUE: Sir, some good news. We've made enquiries with Blackstone
11 Chambers during the short adjournment. Mr Beal is now available from 17 April, so
12 that would be doable. In relation to Dr Fletcher, obviously, in a 12-week trial, she will
13 only be required for a handful of days. We think that with some cooperation with the
14 parties, we could find a way to ensure she could be interposed at a suitable period.

15 MR JUSTICE MORRIS: In April?

16 MR O'DONOGHUE: Yes.

17 MR JUSTICE MORRIS: All right. Well, we've just been discussing that issue and
18 I think the conclusion we came to is that that is something that can be dealt with in
19 terms of timetabling, whichever dates are the trial.

20 MR O'DONOGHUE: Yes.

21 MR JUSTICE MORRIS: Okay.

22 MR O'DONOGHUE: I think we're on the same page.

23 MR JUSTICE MORRIS: All right. Yes. Whether it's April or October, depending on
24 if -- we were considering the potential problem, if her other case got moved to
25 October -- if we went to October and she got moved to October as well, the other case,
26 we were dealing with that.

1 MR O'DONOGHUE: I think the solution works in both directions.

2 MR JUSTICE MORRIS: Yes, yes. Exactly. Okay.

3 MR O'DONOGHUE: So it's their preference for October 2026, April 2026 now
4 doable --

5 MR JUSTICE MORRIS: Okay.

6 MR O'DONOGHUE: Then my final point, Sir, is to pick up on the allegations of delay
7 and conduct. Now, if I can take this in two parts, first, there is the pre-claim period, so
8 the suggestion that Professor Rodger could and should have acted sooner. I then
9 want to deal with the post-claim period where we say emphatically we have proceeded
10 with all reasonable alacrity and in fact the delays which have featured have been
11 caused by Google and indeed the other parties. So, I want to divide it into those two
12 parts.

13 MR JUSTICE MORRIS: Okay.

14 MR O'DONOGHUE: Now, on the pre-claim period, the first point is that again,
15 hindsight is a gilt-edged thing. In this jurisdiction, the first opt-out B2B claim certified
16 was the FX proceedings in 2023. So, if one casts back to that period, the suggestion
17 in 2023 that opt-out in terms of business claims was a viable one in the Tribunal was
18 an untested proposition. So, that is one starting point.

19 Secondly, of course, it is not the point I made to Madam a while ago, it is not
20 suggested, obviously pre-claim that we've missed any court deadline or anything of
21 that kind. What is being suggested is, well, Professor Rodger could and should have
22 got his act together a bit sooner than he did.

23 Now, if I can just unpack that a little. First of all, the point Ms Kreisberger really made
24 was, well, Geradin had Ennis, and therefore there's no excuse for what has happened
25 in Rodger. But the chronology, with respect, is backwards. Ennis was filed, I think, in
26 July or August of last year, or 2023 --

1 MR JUSTICE MORRIS: 2023, yes.

2 MR O'DONOGHUE: Yes. You will recall last week you sought information from
3 Professor Rodger, when was the earliest discussion he had with Geradin and you
4 were informed, I think, in September 2023. So in fact, Ennis and Rodger are very
5 proximate indeed. That is the first point. Now, the second point is that the --

6 MR JUSTICE MORRIS: Well, sorry, there's difference between a discussion and
7 a filing.

8 MR O'DONOGHUE: Yes. The next point then is that the funding takes time to put in
9 place. Funding was not put in place I think until December 2023. As you will know,
10 Sir and Madam, the funders require a lot of convincing. We saw on the Mulheron
11 report the acceptance rate from funders is about 2 or 3 per cent and they're not going
12 to chuck £15 million at any old case.

13 So, there is a highly iterative process of opinion after opinion; the insurers will also
14 require opinion after opinion, so even getting to the funding stage is a time-consuming
15 proposition. Then, once you've secured funding, we have, I think, a 200-page claim
16 form, an economic report of similar length. These are not things which are produced
17 in short order. They are front-loading or upfront demands on claimants in these
18 proceedings that require months of deep preparation.

19 We say, when one looks at it in terms of that sequencing, the suggestion that there
20 has been delay is an uncharitable one.

21 MS LUCAS: The other thing I'd say about that is that Kent and Coll were both issued,
22 I think, at very similar times because they raised very similar issues against obviously
23 the two major corporations in the area. So, to have a year's delay from Geradin in
24 picking that issue up from app developers, it just seems that that's 12 months built in
25 that could have been well spent and would not have presented us with the case
26 management issues we're having now.

1 MR O'DONOGHUE: Madam, these are complex, interlocking things. Of course,
2 finding a suitable class representative is not a trivial thing; this is Professor Rodger's
3 first CPO case.

4 In terms of getting your ducks in a row, it does take time. It is easy with the gilt edge
5 of hindsight to say, well, the second Coll was issued, or shortly thereafter, you should
6 have apprehended that there was a developer claim that could and should have been
7 brought sooner.

8 Indeed, one can flip this around. Of course, one of the points Coll makes is to say,
9 "Well, we did not apprehend the possibility of interaction with developer claims when
10 we issued our proceedings". But of course, the Epic claim was issued before the Coll
11 claim and we say, actually, the interaction with developer claims was entirely
12 foreseeable. Indeed, when one thinks of Interchange, in a lot of these cases, these
13 direct and indirect relationships, they come up time and time again. Their claim is
14 entirely parasitic on pass-on by developers to the device users. We say that, if one
15 looks at this from the other end of the telescope, the vista of interaction with developer
16 claims wasn't simply the vagaries of litigation; it was something that actually was quite
17 foreseeable.

18 But again, of course, in terms of the retrospective, one can always say you could and
19 should have done something a bit quicker. I think it's slightly uncharitable in terms of
20 Professor Rodger and Geradin; it's not easy to get these claims up and running. In
21 reality, a small thing -- Geradin Partners, I think, did not even have a London office
22 until 21 months ago. (Pause)

23 Yes. I mean, Mr Carall-Green reminds me that Coll and Kent actually had the same
24 funders, so one can see how there's a linkage between them, whereas the Rodger
25 claim is a different funder again. Even getting a funder to the table on a new type of
26 claim is not a trivial thing.

1 So, it takes time and effort to get these up and running. Of course, things could always
2 be done a bit quicker, but one I think has to have a degree of realism as to what is fair
3 on the stakeholders involved.

4 So, that's what I wanted to say on what I call the backward-looking period. I made the
5 point earlier, of course, that the issue for the Tribunal today is, well, in one of the least
6 satisfactory sayings in the English language, we are where we are; what do we do
7 going forward? That is a question about the administration of justice and raises other
8 public interest considerations.

9 So, looking forward, we say the case for consolidation and joint case management is
10 overwhelming as a matter of public interest. Delay or alleged delay in the context is
11 a factor, where we say there are many other factors that are powerful.

12 Now, finally, just to deal with the post-claim period. The reality is that at many
13 junctures, Google has sought to slow us down and indeed Coll and Epic have to some
14 extent as well.

15 Now, we've got a chronology which we prepared, and again, I don't want to overly
16 labour the point, but a lot of things have been said in relation to Professor Rodger that
17 I think do need correcting for the record because they're quite unfair to him. (Handed)

18 MR JUSTICE MORRIS: Thank you.

19 MR O'DONOGHUE: Now, I'm not going to go line by line, but if we just take over
20 a handful. If we look, for example, on the second page, on 17 July, you see a letter
21 obviously to Geradin declining to give any substantive response to the letter for action
22 and repeated requests for large amounts of information.

23 Then 30 July, a few rows down, RPC refusing to accept service by email or submit to
24 the jurisdiction of the CAT.

25 Then, over the page, you will see then in September, they do accept service on behalf
26 of all the named Defendants in relation to the CPO.

1 Then you see, on the 26 September, the acknowledgment of service form was served
2 by Reynolds Porter Chamberlain, confirming they intended to contest the jurisdiction.
3 Then over the page, you'll see at 18 October, letter from Reynolds Porter Chamberlain
4 to the Tribunal identifying four separate grounds on which jurisdiction will be
5 challenged, including on the basis of service to which it had consented should be set
6 aside.

7 Then, 29 October, the Tribunal extended the deadline for Google filing an application
8 to contest the jurisdiction, then 21 November, Reynolds Porter Chamberlain said
9 Google objected to a CMC being held during that term in December.

10 Then over the page, 11 December, you have a letter from Reynolds Porter to Geradin
11 declining to say whether they would contest the CPO application. And Sir, as you will
12 be well aware, it wasn't until very, very recently that they got off the fence and said
13 that they were not opposing certification as such, but various grenades were lobbed
14 in our direction on funding.

15 MR JUSTICE MORRIS: Yes.

16 MR O'DONOGHUE: At each and every stage once the claim was up and running, we
17 have done our utmost to try and ensure we can dovetail with the two pending
18 proceedings as best we can.

19 Now, I know the archaeology in sniping is tedious for the Tribunal. There's been a lot
20 of it in Professor Rodger's direction and as is often in life --

21 MR JUSTICE MORRIS: You're going to snipe back.

22 MR O'DONOGHUE: There are two sides to every story.

23 MR JUSTICE MORRIS: Okay. All right.

24 MR O'DONOGHUE: Now then, finally --

25 MR JUSTICE MORRIS: Can I just get it clear in my mind and I should know this. Kent
26 and Coll were issued about the same time; is that right?

1 MR O'DONOGHUE: Coll was earlier.

2 MR JUSTICE MORRIS: Roughly. Kent and Coll -- the initial proceedings -- were
3 issued at about the same time?

4 MS KREISBERGER: Both were issued in 2021.

5 MR JUSTICE MORRIS: But I mean, within close --

6 MS KREISBERGER: A few months. I think Kent was first, followed by Coll.

7 MR JUSTICE MORRIS: Okay. Sorry, Ennis was issued in July 2023.

8 MR O'DONOGHUE: Yes.

9 MR JUSTICE MORRIS: Is that right?

10 MR O'DONOGHUE: Yes.

11 MR JUSTICE MORRIS: And these proceedings -- your proceedings -- were issued in
12 August 2024?

13 MR O'DONOGHUE: Yes.

14 MR JUSTICE MORRIS: So these proceedings, in terms of the gap between the user
15 proceedings and your proceedings, there was a bigger gap than the comparative
16 figure position in relation to Ennis by not quite a year. Roughly right.

17 MR O'DONOGHUE: Yes.

18 MR JUSTICE MORRIS: Yes. Okay.

19 MR O'DONOGHUE: Geradin, (inaudible), Ennis and --

20 MR JUSTICE MORRIS: Well, Geradin's in both. Yes. And the suggestion is, is that
21 if Geradin realised that there was a developer claim in one, they should have realised
22 it was a developer claim in the other. I mean, I take on board all your points you're
23 making, but I'm just getting clear in my mind the timeframe.

24 MR O'DONOGHUE: Yes, but, Sir, that's right, of course. Geradin issued Ennis,
25 I think, in --

26 MR JUSTICE MORRIS: July 2023, I think.

1 MR O'DONOGHUE: 2023. I've taken you through the sequencing that more or less
2 immediately there was a discussion with Professor Rodger; funding was secured later
3 that year.

4 MR JUSTICE MORRIS: Okay.

5 MR O'DONOGHUE: These were dealt with in sequence. And of course, Geradin is
6 a boutique firm. There is a sort of limit to the bandwidth it can be. And again one has
7 to be realistic or live in the real world in terms of -- these claims don't grow on trees
8 and it takes considerable time and effort.

9 MR JUSTICE MORRIS: I've got all these points.

10 MR O'DONOGHUE: And dealing with multiple claims in parallel is a very, very
11 challenging thing.

12 MR JUSTICE MORRIS: I've got all these points but it is also worth observing that in
13 Ennis and Kent, in the ruling, there was a criticism of Ennis and their delay being
14 unexplained. I know you didn't have that judgment, but all I'm saying is, is that --

15 MR O'DONOGHUE: I understand, of course, in litigation and rulings, the dominoes
16 tend to fall in one direction.

17 MR JUSTICE MORRIS: I'm fully aware that it's a different case, but I'm just testing
18 the validity of the criticism.

19 MR O'DONOGHUE: Professor Geradin of Geradin Partners is behind me and can
20 explain the genesis very well if it would assist the Tribunal.

21 MR JUSTICE MORRIS: Okay. Well, I think we probably have enough, don't we? Yes.

22 MR O'DONOGHUE: Now, then I'll finally give you a couple of references. I've shown
23 you the delay from Google and that we have not delayed once the claim is up and
24 running. Then on Epic and Coll, I'll just give you two references. The first is to tab 60
25 of the case management bundle. It's a letter of 25 November. It's page 1115.

26 MR JUSTICE MORRIS: You want me to look at it?

1 MR O'DONOGHUE: Please.

2 MR JUSTICE MORRIS: Tab 60? (Pause)

3 MR O'DONOGHUE: Yes. So 25 November from Coll to the Tribunal, it's paragraph 3:
4 "Notwithstanding this, her position is that, until the Rodger Proceedings are certified,
5 it is premature ... to consider any possible interaction of Professor Rodger's claim with
6 her own."
7 And then a few days later, at the next tab, 4 December from Epic.

8 MR JUSTICE MORRIS: Yes.

9 MR O'DONOGHUE: They essentially said the same thing. It's at paragraph 3 as well,
10 "Epic agrees ..."

11 MR JUSTICE MORRIS: I mean, I recall that this arose in the first CMC, I think, from
12 recollection.

13 MR O'DONOGHUE: With Mr Beal.

14 MR JUSTICE MORRIS: And I think Mr Beal had got that on the agenda and I think
15 we took the view that issues such as disclosure of matters should await certification,
16 I think, from recollection.

17 MR O'DONOGHUE: So you will appreciate the point I'm making, which is we've been
18 told repeatedly, well, it's too early to do anything in terms of interaction until you're
19 certified. Now, we've been told it's too late.

20 MR JUSTICE MORRIS: Yes, but from recollection, there were also on the agenda for
21 that CMC, requests for service of witness statements. I can't remember -- pleadings.
22 I can't remember. Access was given to some but not a lot and I think we took the view
23 that certain things that Mr Beal asked for, we took the view should await. As well as
24 the issue of consolidation, that the issues in relation to being provided with material.

25 MR O'DONOGHUE: Yes. Well, that's fair. And of course, as I said this morning, the
26 reality is we've had none of Epic's factual evidence.

1 MR JUSTICE MORRIS: Yes.

2 MR O'DONOGHUE: No Google expert evidence. So there are very, very substantial
3 gaps in terms of the materials we have, which of course has hamstrung us in other
4 ways in terms of trying to maximise the interaction. So again, it hasn't been a one-way
5 street. There are other sides to the story as well.

6 We say that certainly when the claim is up and running, we have proceeded with
7 maximum expedition and at each and every stage we have had an eye to maximising
8 the Tribunal's potential to deal with these cases in a dovetailed way. So for the last
9 year and a half, without question, there's been no delay whatsoever from
10 Professor Rodger.

11 Sir, Madam, those are my submissions --

12 MR JUSTICE MORRIS: Thank you very much.

13 MR O'DONOGHUE: -- on behalf of Professor Rodger.

14 MR JUSTICE MORRIS: Yes, thank you.

15

16 Submissions by MR WEST

17 MR WEST: Sir, Madam, I'm glad to be able to say that most of the points I'm going to
18 make in response to Ms Kreisberger have already been made by one or the other of
19 my learned friends, so I shall be brief.

20 Responding first to the Tribunal's question before lunch of the parties' position on the
21 various options.

22 MR JUSTICE MORRIS: Yes.

23 MR WEST: Epic's order of preference is as follows. Our first preference would be for
24 a consolidated trial, April 2026. Epic, of course, is already ready for trial in
25 October 2025 on the facts and the disclosure, and we can be ready for April 2026 on
26 the experts.

1 As far as Rodger's position is concerned, I appreciate the clarification over the typist's
2 adjournment about the availability of Mr Beal. That's Rodger's position is now also
3 that that is doable if they cut their cloth in accordance with the time they have in relation
4 to the extent to which they adduce their own factual and expert evidence.
5 Our second preference would be to proceed in October 2025 with a fully consolidated
6 hearing. The question of covering --
7 MR JUSTICE MORRIS: 2026.
8 MR WEST: Sorry, our second preference would be 2025, but I understand that's
9 effectively off the table following my learned friend's --
10 MR JUSTICE MORRIS: I thought you said with -- just repeat what you said.
11 MR WEST: Our first preference is April 2026.
12 MR JUSTICE MORRIS: I've got your first preference. Your second preference is
13 October 2025, with what, sorry? I didn't --
14 MR WEST: The full consolidation, but I understand that's effectively off the table.
15 MR JUSTICE MORRIS: Full consolidation. Okay.
16 MR WEST: Whether pass-on is part of that or not, it doesn't matter to us because we
17 don't have a damages claim. So that would be our second preference but that appears
18 to be largely theoretical.
19 MR JUSTICE MORRIS: Yes.
20 MR WEST: And our third preference would be for a consolidated trial in October 2026.
21 MR JUSTICE MORRIS: Okay.
22 MR WEST: Any of these, in Epic's view, would be an improvement on the current
23 position of partial consolidation. What we refer to at the Epic consolidation application
24 hearing as "semi-skimmed".
25 In relation to Ms Kreisberger's suggestion of decoupling Epic from the 2025 trial,
26 I agree with my learned friend, Mr Holmes on that. It doesn't work, because our

1 disclosure and witness statements are already in that, so we cannot be decoupled.
2 The egg, as it were, cannot be unscrambled now. Plus we have of course, paid
3 £558,000 for the privilege of being in that trial and there was a deafening silence from
4 Ms Kreisberger about paying any of that back.

5 Just addressing briefly the question of the costs. My overall submission is that the
6 £3 million indemnity is amply sufficient, particularly if the trial goes ahead in April 2026
7 which would, of course, even on Ms Christoforou's analysis of a monthly run rate,
8 reduce the additional costs by about half in comparison with her model.

9 MR JUSTICE MORRIS: Yes.

10 MR WEST: Just a couple of brief points on costs. Ms Kreisberger said that the
11 £6.4 million estimate excluded any additional trial costs but Coll has not produced any
12 evidence about what those trial costs would be so the Tribunal cannot really take that
13 into account.

14 She also said that the suggestion that progress in one of the sets of proceedings could
15 be used in the other set of proceedings to expedite progress, what might be called
16 "piggybacking", was naive and she adverted to an unspecified huge amount of work
17 behind the scenes. But of course, the actual experience which we've had of
18 consolidation to date is that between Coll and Epic, and as Ms Christoforou points out
19 in her evidence, the cost of that has been £70,000 a month, which is a very small
20 fraction of the in terrorem figures put before this Tribunal.

21 Ms Kreisberger also suggested that even if there is an indemnity, Coll would have to
22 seek additional funding in any event. And I just have two points.

23 MR JUSTICE MORRIS: Or at least to go back to the funder.

24 MR WEST: You go back to the funder. Just two brief points on that. The first is, could
25 I ask you to turn up tab 86 of the case management bundle, page 1184.

26 MR JUSTICE MORRIS: Just give me a minute. I'm just going to -- I'm in the other

1 bundle. Yes.

2 MR WEST: Reference has been made already in today's hearing to Coll having
3 increased her funding but not, I think, to the figures; none of this is confidential.
4 I believe I'm entitled to read it out. In paragraph 3, it says:

5 "The total funded amount in these proceedings has been increased from £11.2 million
6 to £25.5 million."

7 That was in October 2024, so less than six months ago, they got an additional
8 £14 million-worth of funding. And we do not have any evidence about the extent to
9 which that has already been burned through.

10 MR JUSTICE MORRIS: Yes.

11 MR WEST: And secondly, if the suggestion is that Coll have to fund any consolidation
12 costs from the funding available to them and then recover it back under the indemnity,
13 that is certainly not in my instructions as to how the indemnity works between Epic and
14 Coll. Our understanding is that the costs are incurred and effectively we are asked to
15 pay them rather than them being funded out of the funding available, which is then
16 reimbursed from the indemnity.

17 MR JUSTICE MORRIS: Okay.

18 MR WEST: So there's no need to go to the funder for that reason.

19 Just in general, in my submission, the fundamental problem with Ms Kreisberger's
20 submissions is that perhaps naturally, she looked at everything from Coll's point of
21 view and from Coll's point of view, this is a choice between her trial proceeding in
22 October and some consolidated trial happening later on. And of course, if Coll's trial
23 happens in October, that's the end of her involvement in the litigation. It's once and
24 for all, and she is out of it.

25 But from the Tribunal's point of view, that is not how matters stand. Because even if
26 Coll's trial proceeds in October, the Tribunal will not be able to draw a line under

1 matters in the way that Ms Coll is. It will be faced with either one or probably two
2 further trials of, essentially, the same allegations.

3 MR JUSTICE MORRIS: Yes.

4 MR WEST: Then just finally, my last point is about the Google terms of service. And
5 this is where the temporary alliance of convenience between Epic and Google for
6 today's purposes rather breaks down.

7 Google have confirmed, in their evidence for today, that from the end of this month
8 users will be able to select making payment for in-app purchases via billing providers
9 other than Google. So until now, for in-app purchases on Android, on apps purchased
10 through the Play Store, you have to use Google's billing service. But at the end of
11 March, that's coming to an end, we are told, and users will be able to select other
12 billing services; that's known as "user choice billing".

13 Now, Google's pleading on this point in relation to the allegation that the link between
14 the Google Play Store and Google Billing is an anti-competitive tie, is to say "No, this
15 is a single integrated product; these aren't separate products, just one." And we say
16 that following the introduction of user choice billing, that is unsustainable because
17 customers can purchase the two products separately and independently from different
18 providers.

19 Google have now accepted that they will need to amend their defence in light of this
20 development and they are due to do so in any event, following some recent
21 amendments to the Claim Form on 2 April.

22 Epic has then sought certain further information about the details of user choice billing,
23 including copies of the contracts, the amended contracts with the developers and/or
24 with users, and also details of the funding arrangements -- sorry, the fee arrangements
25 which will apply where users choose to use a third-party billing provider.

26 Once we have that information, Epic is likely to wish to amend its claim further in

1 relation to the question of whether these new arrangements are still abusive on Epic's
2 case. We're not able to take a view on that until we fully understand what the new
3 arrangements are and the new fee arrangements in particular. We have proposed
4 providing a draft amended pleading by the end of April. And once these -- assuming
5 Epic does decide to attack the new arrangements and those are introduced into the
6 pleadings, there will be potentially a need for some further disclosure, not just of the
7 contracts, but of the circumstances surrounding Google's decision to introduce user
8 choice billing now.

9 The reason I mention this is that it is, in my submission, another benefit to moving the
10 trial from October 2025 to April 2026, because otherwise we're still going to be in the
11 realms of having further disclosure and new allegations introduced into the pleadings
12 between now and October.

13 MR JUSTICE MORRIS: Okay.

14 MR WEST: If the Tribunal is minded to move the hearing to April 2026 and make it
15 a consolidated hearing, I do not need any orders about this today. But if we are still
16 proceeding in October 2025, then I would at least like an order in relation to the
17 provision of the contracts and the further information that we have sought.

18 MR JUSTICE MORRIS: In order for the dissemination of further information, did you
19 say, sorry?

20 MR WEST: Yes, I'm sorry. There is a letter about this.

21 MR JUSTICE MORRIS: Yes. No, I'm aware of the issue vaguely.

22 MR WEST: It may not have made it into the bundle because there is a letter setting
23 out Google's position on this dated 12 March, which was Wednesday.

24 MR JUSTICE MORRIS: It's in the bundle?

25 MR WEST: Which is in the bundle, the very last tab, tab 129.

26 MR JUSTICE MORRIS: Did you say 129?

1 MR WEST: 129, page 1498.

2 MR JUSTICE MORRIS: Got it.

3 MR WEST: And you can see over the page at 1499, paragraph 9, the second
4 sentence of that paragraph.

5 MR JUSTICE MORRIS: Yes.

6 MR WEST: This is the point:
7 "We confirm that [this] will be addressed in modest amendments ..."

8 MR JUSTICE MORRIS: Yes.

9 MR WEST: The response to that, I'm afraid, didn't make it into the bundle because it
10 was only sent yesterday after the bundles were filed. But I can hand the copy up.

11 MR JUSTICE MORRIS: I've got two more. What --

12 MR WEST: This is 13 March 2025. (Several inaudible words). The two relevant
13 paragraphs are eight and nine. Eight is what we say we are asking for now, and 9 is
14 what we are likely to be asking for in future.

15 MR JUSTICE MORRIS: Okay. And you say that if the date for the trial remains
16 October 2025, you will want orders along those lines. Is that what you're saying?

17 MR WEST: I'd want an order reflecting eight; that is what I asked for in my skeleton
18 argument. Just eight.

19 MR JUSTICE MORRIS: Yes.

20 MR WEST: Not nine; nine is for the future.

21 MR JUSTICE MORRIS: Okay, can I just mark your skeleton? (Pause) It's right at the
22 back of your skeleton, isn't it? Yes.

23 MR WEST: Yes, it's between 48 and 53. 53 is where we say, this is the order we are
24 asking for.

25 MR JUSTICE MORRIS: Yes, got it. And ... do you want to deal with that?

26 MR HOLMES: Yes, I do very much want to deal with it.

1 MR O'DONOGHUE: Mr Holmes --

2 MR JUSTICE MORRIS: Sorry. Just give me a moment, please.

3 MR HOLMES: Of course. (Pause)

4 MR JUSTICE MORRIS: Yes.

5

6 Further submissions by MR HOLMES

7 MR HOLMES: Sir, I have three things that I want to say --

8 MR JUSTICE MORRIS: All right.

9 MR HOLMES: -- if I may. The first is to give you a correction. I said during my
10 submissions that deafening silence came from the Kent consolidation ruling. It was
11 actually from my learned friend Ms Kreisberger's skeleton argument: the deafening
12 silence as to willingness to assume responsibility for costs in the event of an
13 adjournment. It's not, in fact, to be found in the Ennis ruling. I just wanted to avoid
14 any confusion about that. It was, however, raised by Kent, orally, at the hearing of the
15 Kent consolidation ruling. So it was before the Tribunal, but it's not actually to be found
16 in the (overspeaking) --

17 MR JUSTICE MORRIS: Oh, sorry, I'm just thinking my way back into the point.

18 MR HOLMES: Yes, sorry.

19 MR JUSTICE MORRIS: It's not in the ruling that costs were not addressed.

20 MR HOLMES: No, but Kent had not offered a solution to the costs issue -- or sorry,
21 Ennis had not offered a solution to the cost issue. That submission was made by Kent,
22 but it wasn't, in fact, in the ruling. So I just wanted to correct that, because I suggested
23 otherwise.

24 MR JUSTICE MORRIS: Okay.

25 MR HOLMES: Yes. It's true -- I'm not retracting the submission, but it's just that I had
26 misstated the position as to what was in the judgment.

1 MR JUSTICE MORRIS: One minute. Yes.

2 MR HOLMES: Yes. The second point is in relation to the point just raised by my
3 learned friend in relation to user choice billing.

4 MR JUSTICE MORRIS: Yes.

5 MR HOLMES: This is something that Epic has known about for a very long time, that
6 the user choice billing pilot might be extended to the UK. It was indeed in evidence
7 that was filed in the Coll proceedings on 7 March. Exhibits to that evidence contain
8 answers to the questions which were raised in correspondence yesterday. We will be
9 amending, simply to correct the factual position, but it's certainly not to withdraw our
10 submission that this is an integrated product.

11 My learned friend seems to be proceeding on the misapprehension that the
12 components of a product cannot be available separately in order for them to constitute
13 an integrated product, and that's simply wrong.

14 MR JUSTICE MORRIS: Okay.

15 MR HOLMES: Think of a car and think of tyres.

16 MR JUSTICE MORRIS: Okay.

17 MR HOLMES: So, you know, the submission is just, you know, misplaced, wrong-
18 headed.

19 MR JUSTICE MORRIS: All right.

20 MR HOLMES: We'll be amending our pleadings anyway because we have to address
21 some recent pleading amendments of Epic. We'll make the factual corrections then,
22 because it's convenient to pick them up then.

23 We suggest that Epic goes away and looks at the witness evidence and at what is said
24 there, and if they think there are further questions to raise in the light of that, they can
25 do so, but it's really not business for today.

26 MR JUSTICE MORRIS: Okay.

1 MR HOLMES: Questions that we were told at 7.45 pm yesterday were going to be the
2 subject of an application for an order are really not business which is before your
3 resolution today.

4 MR JUSTICE MORRIS: Okay.

5 MR HOLMES: The third point that I'd like to make is we do have a timetable leading
6 to April 2026, which we're very happy to ventilate with you at a convenient moment, if
7 that will be helpful.

8 MR JUSTICE MORRIS: Okay.

9 MR WEST: Can I just say two sentences about that?

10 MR JUSTICE MORRIS: Sorry? Yes.

11 MR WEST: Firstly, it was in my skeleton argument, so it's not a case of this being
12 raised at 7.00 pm last night.

13 MR HOLMES: Request for information?

14 MR WEST: Yes. Look at that last paragraph.

15 MR JUSTICE MORRIS: I'm not sure -- well ... (Pause)

16 Yes. I'm not sure how much more we want to hear on this. We can see what you've
17 asked for, we can see what Mr Holmes has said in response, we've seen what you've
18 put in the skeleton. It arises if we are sticking with October 2025.

19 MR WEST: Can I just say one sentence? And that's my friend says, this is just like
20 a car and tyres. But imagine the case where a dominant car manufacturer said, "You
21 can only buy the tyres for your car from us". That's effectively the situation we have,
22 and my friend seems to be saying, "Well, nothing wrong with that".

23 MR JUSTICE MORRIS: All right.

24 MR WEST: Okay. Yes.

25 MR JUSTICE MORRIS: Yes.

26 MR O'DONOGHUE: To give Ms Kreisberger a chance, in relation to

1 Geradin Partners' London office, I've been handed the following: they had no UK
2 qualified litigators until June 2022, but the office was actually incorporated in
3 April 2021.

4 MR JUSTICE MORRIS: Okay. Okay. Yes, Ms Kreisberger. We are hopeful that we
5 might finish before 5.00 pm and we were rather hoping to finish by 4.30 pm.

6

7 Reply submissions by MS KREISBERGER

8 MS KREISBERGER: I will do my very best. I don't intend to be long on my feet.

9 MR JUSTICE MORRIS: That's only because it's for everybody's benefit. These
10 things --

11 MS KREISBERGER: I'm fully supportive, and I'll do my best not to be at all repetitive.
12 Having said that, they may not be the most elegant submissions you've ever received,
13 because --

14 MR JUSTICE MORRIS: That's all right.

15 MS KREISBERGER: -- I've three highly expert silks to deal with and their
16 submissions.

17 MR JUSTICE MORRIS: Can you just give me one moment while I have a slight tidy
18 of my various pieces of paper? (Pause)

19 Yes, thank you.

20 MS KREISBERGER: Thank you. Could I begin with this table that Mr O'Donoghue
21 handed up on the chronology, and the submissions he made on the basis of it.
22 Mr O'Donoghue, to paraphrase, said that, "Look, Professor Rodger has done his best,
23 and he said that Google, on the other hand, has delayed at every turn."

24 My submission in reply to that is relying on luck in those circumstances won't do one
25 much good. If the defendant is already not engaging constructively -- that was
26 Mr O'Donoghue's submission, not mine -- then that doesn't give one a very sound

1 basis for thinking that this litigation will be in sufficiently good shape to be determined
2 at an October 2026 trial, still less an April 2026 trial.

3 I would ask the panel to put that together with my submissions about the nature of the
4 process in the Coll proceedings with the voluminous documentation, but the iterative
5 nature of the disclosure process alone -- the nature of this beast. So on
6 Mr O'Donoghue's own case, one doesn't have much hope that this could be sensibly
7 achieved by a trial in October next year.

8 Mr O'Donoghue also said, and I'm quoting, "Geradin is a boutique with limited
9 bandwidth". There you have a further reason for pause and concern and likely
10 prejudice to the Coll class.

11 MR O'DONOGHUE: I'm sorry, but there's a world of difference between saying
12 (inaudible) counsel to (inaudible) Handle multiple CPOs, and the suggestion that
13 Geradin is unable to handle the Rodger's proceeding expeditiously. This case has
14 just been certified with litigation plan; it's quite improper for Ms Kreisberger to make
15 the allegation she does.

16 MR JUSTICE MORRIS: Okay. Carry on, Ms Kreisberger.

17 MS KREISBERGER: Thank you, Sir. I wanted to begin with that. Now, if I could just
18 ask, in the interest of saving time, would the Tribunal like to hear me on the split trial,
19 given that Mr Holmes and I agree? I'm very happy to take you through it.

20 MR JUSTICE MORRIS: No, we don't. That's okay.

21 MS KREISBERGER: I'm grateful. I'll move on in that case.

22 So I'll deal, if I may, with Mr O'Donoghue's other points first, I'll then come to
23 Mr Holmes's and Mr West's points -- those that I'm dealing with in reply, I should say
24 not, not comprehensively.

25 I'm not sure that this was intentional, but Mr O'Donoghue said the only additional cost
26 to Ms Coll is dealing with an extra report. That's not the submission I made. I won't

1 repeat them, but safe to say, that's a mischaracterisation. Ms Coll will be catapulted
2 into a three-way piece of litigation, and her team is being asked to positively identify
3 what disclosure might be relevant to Professor Rodger. Ms Coll's team will have to
4 review all of the additional disclosure.

5 MS LUCAS: Can I just pause you. I don't think the suggestion was that your clients
6 identify relevant disclosure for Mr O'Donoghue's client, but I understood it was more
7 identify what you had already found to be relevant to the proceedings. So without
8 Rodger's spectacles on.

9 MR O'DONOGHUE: There's an October 2025 trial. They must know what's in the trial
10 bundle, quite shortly.

11 MS KREISBERGER: But of course, what's relevant in this to Ms Coll may not be
12 relevant to Professor Rodger.

13 MS LUCAS: Yes, I accept that. So I think what the suggestion is that your first cut
14 would be a good starting point, rather than you do the disclosure exercise for
15 Professor Rodger.

16 MR O'DONOGHUE: I mean, we're expected to co-operate. This is entirely
17 (inaudible).

18 MS KREISBERGER: My submission, Madam, is that there will, of course, be a cost
19 to all of this.

20 MS LUCAS: Yes.

21 MS KREISBERGER: It's naive to think that Ms Coll won't need to be engaged in each
22 of the litigation steps that Professor Rodger will need to take, and to review all of the
23 additional material. There will be a very serious cost to that.

24 Now, I'd just like to turn to the funding position, and then I'll come back to the question
25 about the trial. It is going to be a matter of serious concern to this funder and to funders
26 in general, were the Tribunal to show itself to be amenable to upending funding

1 arrangements at the eleventh hour, where a trial has been in the diary for a number
2 of years, and a party has dragged its feet and then brings a last minute application, in
3 substance, to derail it. Now, it is correct -- much has been said about the ease of
4 funding. There is no magic money tree; it doesn't work that way. This will have to go
5 to the investment committee, that is clear.

6 MR JUSTICE MORRIS: You say "this". What do you mean by "this"?

7 MS KREISBERGER: I'm grateful for that. If the trial date is adjourned, there will be
8 a need for additional funding. Now, can I begin this submission by putting before you:
9 much has been made of the existing Epic indemnity. The exact wording of that
10 indemnity is that the costs which are not borne by Epic are the additional costs that
11 are of material benefit to the class representative in support of her case. Epic does
12 not bear those costs. Epic has indemnified those costs which aren't of material
13 advantage to Ms Coll's case. So before we even get to amounts, the funder is on the
14 hook for additional costs where those costs are incurred and are to Ms Coll's
15 advantage.

16 MR JUSTICE MORRIS: Okay.

17 MS KREISBERGER: So that alone means that Ms Coll needs to go to her funder, and
18 her funder will need to take it to the investment committee. And that's not an
19 exercise --

20 MR JUSTICE MORRIS: Give me some flesh on the bones of what's meant by "costs",
21 which are -- I can't think which way round -- are to Coll's advantage.

22 MS KREISBERGER: Yes. If they're to Coll's advantage, then they're not covered.

23 MR JUSTICE MORRIS: Yes. I'm putting it the other way. Costs which are to Coll's
24 advantage have to be borne by the funder, or the funder has to -- yes.

25 MS KREISBERGER: Yes.

26 MR JUSTICE MORRIS: But can you just illustrate what the distinction might be?

1 MS KREISBERGER: I think I may need to turn to those behind me, if I may.

2 MR JUSTICE MORRIS: Yes.

3 MS KREISBERGER: I think it's something that the parties have to work on
4 constructively to -- you know, it's clearly a qualitative assessment.

5 MR JUSTICE MORRIS: Yes.

6 MS KREISBERGER: So to the extent that there's disclosure that assists on, say,
7 market definition or dominance, that disclosure would be that -- let's say comes from --

8 MR JUSTICE MORRIS: Presumably it might be to the advantage of both parties.

9 MS KREISBERGER: But if it's of advantage to Ms Coll, then Epic will not cover it even
10 though it's to their advantage as well.

11 MR JUSTICE MORRIS: Right. Can I ask you this question? I can't remember
12 when -- the order was made last May?

13 MS KREISBERGER: Yes.

14 MR JUSTICE MORRIS: Have you had to resort to the funder in respect of costs, which
15 are to your advantage, but not to Epic? There's a nod coming. Okay.

16 MS KREISBERGER: Yes.

17 MR JUSTICE MORRIS: And presumably, the funders agreed to date?

18 MS KREISBERGER: To date. Now, could I make a prefatory remark here? Could
19 I just come back to the unsatisfactory way in which this has come about? Not as
20 a general whinge, but Ms Coll has made real efforts to put evidence before the
21 Tribunal for today's hearing, and you have that evidence. To the extent it said, "Well,
22 we don't have evidence for the funder on, you know, a particular point", this has all
23 been done since last Monday. Of course, if the Tribunal wanted further evidence on
24 the funding position, that can be arranged, but Ms Coll has done her utmost for this
25 hearing, and I say that to preface this:

26 The funder -- as I said, one can't predict what the investment committee would do, but

1 | what I can tell you is the kinds of things that a funder will think about. Okay, first of all,
2 | you can't go to the investment committee on a hypothetical basis. So it would only be
3 | on the basis that, you know, adjournments been ordered, and now there are these
4 | additional costs all the way, you know, a further 12 months of costs -- a bigger trial,
5 | and so on. And for the same reason --

6 | MR JUSTICE MORRIS: Just pausing there for a moment. You're saying that this is
7 | beyond the £6 million, is it? Or are you saying that within the £6 million that's been
8 | put in, forget the extra trial costs, a portion of that will not be recoverable under
9 | the -- what we'll call the indemnity?

10 | MS KREISBERGER: A proportion of that won't be recoverable under the indemnity.

11 | MR JUSTICE MORRIS: Okay. So in your case, a proportion of the £6 million is Coll
12 | benefit costs.

13 | MS KREISBERGER: That's correct.

14 | MR JUSTICE MORRIS: Okay.

15 | MS KREISBERGER: Thank you, Sir. I wouldn't want to minimise the significance of
16 | the trial costs as well, and I'll come back to that in a moment.

17 | So the funder will need to put this before its investment committee. Before that can
18 | be done -- and this is just the way these things work, it's not controversial -- ATE needs
19 | to be in place. So that will need to be done first.

20 | The kinds of things that the funder looks at when considering whether to make further
21 | funds available: the funder will look at overall exposure to claims with a similar profile;
22 | its broader portfolio mix; costs incurred to date; wasted costs as a result of the change;
23 | a sudden change in procedure and timing so close to trial, given the trial date has been
24 | set for so long -- these are not things seen as palatable by funders, as you might
25 | imagine; and a material amendment to extend the timetable so soon after a substantial
26 | renegotiation -- that was summer last year and so close to trial.

1 These are things that will colour the funder's willingness. So when Mr West says
2 six months ago, an extra £14 million funding was secured, that is no basis to think that
3 more money may be secured; it's a good reason to think that it may not be. This is
4 not a magic money tree. It's just not how funders work.

5 Could I address also, if I may, the point on contingency. The contingency has been
6 ablated over the course of time. Again, I'm somewhat hampered because this point
7 was made today, and Ms Coll is very happy to put in evidence should that be required,
8 but what I can tell you today -- I'm sorry, I think Mr O'Donoghue wants to say
9 something.

10 MR O'DONOGHUE: No, go ahead.

11 MS KREISBERGER: I can tell you that Ms Coll does not have £4.7 million of
12 contingency left. If you do need evidence on that, we can come back to you, certainly.

13 MR JUSTICE MORRIS: Yes.

14 MS KREISBERGER: Whilst we're on costs and funding, I wanted to make the point
15 that the reason why we haven't been able to yet put evidence before you on the costs
16 of the three-way trial -- substantially longer trial -- is this has been a moving feast.
17 Only last week, when skeletons were served, Professor Rodger suggested 12 weeks.
18 That's moved to 14 weeks, yesterday, in the schedule. This is a jelly that's very hard
19 to grip onto; parties keep changing their minds; this is not an orderly approach to
20 litigation. It's unfortunate that we haven't had a proper application that could be
21 properly dealt with. But again, Ms Coll can go away and provide that evidence and
22 calculate once there's common ground on how long a trial we're talking about. But
23 these will be very significant costs.

24 MR JUSTICE MORRIS: Can I just clarify one point, going back to this point about
25 costs which are not covered. Is it the case -- and I'm looking at Professor Rodger and
26 Epic -- that the offer that is made in the letter today is on the same terms as the

1 indemnity previously? In other words, that it will not cover costs which are to Coll's
2 advantage; is that right?

3 MR WEST: My learned friend's explanation of material advantage provision is flat
4 wrong. If you look at the order at tab 41.

5 MR JUSTICE MORRIS: Well, shall we have a look at that?

6 MR WEST: Tab 41. You'll see paragraph 4 of that order, that's the consolidation that
7 sets out the extent to which the proceedings are consolidated.

8 MR JUSTICE MORRIS: Yes.

9 MR WEST: Paragraph 5:
10 "Epic shall pay the additional --"

11 MR JUSTICE MORRIS: Which paragraph are you looking at?

12 MR WEST: 5, now. So:
13 "Epic has to pay the additional costs of and occasioned by the work done by the Class
14 Representative, pursuant to 1 to 4 above, subject and overall cap of £1 million." [as
15 read]

16 Then 6:
17 "The Class Representative shall maintain a detailed schedule, including a specific
18 description of the work performed and costs incurred, arising from paragraphs 1 to 4
19 above." [as read]

20 So that's the obligation to pay them for the work done arising from the consolidation.
21 "The Class Representative shall request payment from Epic on a monthly basis and
22 provide a copy of a detailed schedule." [as read]

23 MR JUSTICE MORRIS: Yes.

24 MR WEST: Then the wording about material benefit is at the end of (b).

25 MR JUSTICE MORRIS: (c).

26 MR WEST: (b).

1 MR JUSTICE MORRIS: (b).

2 MR WEST: "For the avoidance of doubt, nothing in this paragraph (b) shall prevent
3 Epic from seeking repayment of additional costs in accordance with paragraph 8, to
4 the extent that Epic considers such costs relate to evidence that is of a material
5 benefit."
6 So if it is of material benefit, we can seek repayment --

7 MR JUSTICE MORRIS: Okay.

8 MR WEST: -- under 8, and 8 --

9 MR JUSTICE MORRIS: Let's have a look at 8.

10 MR WEST: "The present order [and then after the parentheses] shall be without
11 prejudice to the Tribunal's discretion pursuant to Rule 104." [as read]

12 MR JUSTICE MORRIS: "Should ultimately be borne".

13 MR WEST: "How they should ultimately be borne". So if they're of benefit to Coll,
14 then when it comes to the end of the case and the Tribunal is deciding how they should
15 ultimately be borne --

16 MR JUSTICE MORRIS: Okay.

17 MR WEST: -- then it may be that Coll has to bear them, but we still have to pay them.

18 MR JUSTICE MORRIS: Right, so you say that whatever costs are incurred,
19 occasioned by the whatever the test is -- the additional costs occasioned pursuant to
20 paragraph 1 to 4, that in the first place that is paid, regardless of whoever it benefits.
21 At a later date, when it all comes out in the wash at the end, then they will have to
22 repay that which was of material benefit.

23 MR WEST: Yes, that's the material benefit. I should just draw your attention to (b),
24 which provides Epic with the right to withhold payment --

25 MR JUSTICE MORRIS: Sorry 8(b)?

26 MR WEST: This is 6(b).

1 MR JUSTICE MORRIS: 6(b).

2 MR WEST: On 894.

3 MR JUSTICE MORRIS: "Reserves the right to withhold approval of payment if it
4 considers ... it has been unreasonably incurred." [as read]

5 MR WEST: "In the event that Epic does not approve the payment request [...] the
6 Class Representative has permission to apply to the Tribunal for a payment on
7 account." [as read]

8 MR JUSTICE MORRIS: That's about the quantum, presumably, unreasonableness.

9 MR WEST: Unreasonableness.

10 MR JUSTICE MORRIS: So that does not take into account whose benefit.

11 MR WEST: Exactly.

12 MR JUSTICE MORRIS: Okay. All right.

13 MR WEST: Thank you.

14 MS KREISBERGER: I'm afraid this has been done on a rather unsatisfactory basis,
15 because you don't have all the relevant material in front of you, but it is right that Epic
16 has refused to pay costs along the way.

17 MR JUSTICE MORRIS: Okay, but --

18 MS KREISBERGER: And the understanding of the parties is that 8(a) -- and of course
19 the funder is exposed because the basis is that the additional costs relate to Epic's
20 disclosure or factual evidence of material benefit to the class representative in support
21 of her case; those are the carved out costs.

22 MR JUSTICE MORRIS: Right, yes, you've lost me now, I'm afraid.

23 MS KREISBERGER: Sir, I'm so sorry. That's on page 895.

24 MR JUSTICE MORRIS: What were you reading from there?

25 MS KREISBERGER: So paragraph 8.

26 MR JUSTICE MORRIS: Yes.

1 MS KREISBERGER: Yes. If we take it from:
2 "For the avoidance of doubt and by way of example, and without prejudice to the
3 generality of the foregoing, an order relating to the additional costs may result in
4 a proportion of the costs paid to the Class Representative by Epic being repaid by the
5 Class Representative, ... including, but not limited to the additional costs which: a. The
6 additional costs relate to Epic's disclosure or factual evidence of material benefit to the
7 Class Representative in support of her case." [as read]
8 MR JUSTICE MORRIS: Right, but this is still all in the context of at the end of the
9 case.
10 MS KREISBERGER: And I've been shown an email where Epic has refused to pay
11 on this basis.
12 MR JUSTICE MORRIS: But refused on what grounds? On what grounds, that it's not
13 to their material benefit, therefore it's unreasonable?
14 MS KREISBERGER: Yes.
15 MR JUSTICE MORRIS: Right. The plot thickens, as it always does at 4.25 pm on
16 a Friday.
17 MS KREISBERGER: It's not a satisfactory basis to do this, but they rely on this. I'm
18 afraid, I can't take it much further.
19 MR JUSTICE MORRIS: Okay, all right.
20 MS KREISBERGER: What I can tell you --
21 MR JUSTICE MORRIS: So you say that -- let me just make a note.
22 MS KREISBERGER: I mean, let me put it shortly.
23 MR JUSTICE MORRIS: No, let me ...
24 MS KREISBERGER: I'm so sorry. I'm sorry. I'm so sorry.
25 MR JUSTICE MORRIS: That's all right. Everybody feels the pressure of time, but
26 let's just ... (Pause)

1 I'm not sure we can resolve this at this minute. I'll have to think about that.

2 All right, so the essential --

3 Go on.

4 MS LUCAS: I was going to say, I think what might be helpful is getting some
5 confirmation from Epic and Professor Rodger as to how this funding is intending to
6 respond, because it sounds like Epic think that the £3 million is basically there to be
7 paid to Coll and to be potentially repaid at the very end when everything's been sorted
8 out, unless there's something that's obviously unreasonably incurred, in which case
9 you can withhold it, but then Coll is entitled to make an application to the Tribunal to
10 deal with that dispute.

11 MR JUSTICE MORRIS: And that the grounds for withholding are something other
12 than the material benefit distinction.

13 MS LUCAS: Yes.

14 MR JUSTICE MORRIS: In other words, "unreasonableness" and "material benefit to
15 the Class Representative" are not the same thing.

16 MR WEST: And of course, if Coll disagrees with the decision on unreasonableness,
17 they have the right to come to the Tribunal.

18 MR JUSTICE MORRIS: Yes.

19 MR WEST: You may see at the beginning of this order, it says, "and by consent it is
20 ordered that", so the parties agreed that.

21 MR JUSTICE MORRIS: Yes, but it may be going forward, regardless of what's in here
22 for that case, that in terms of what's covered by the letter, that this is clarified that
23 you're not going to withhold because we think it's a material benefit to Coll.

24 MS LUCAS: I mean, as we understand it, these costs are on the table to cover the
25 extra work that's going to be involved and the costs incurred, because there's going to
26 be an extra party involved.

1 MR WEST: Yes.

2 MS LUCAS: Yes.

3 MR JUSTICE MORRIS: Yes. And you're not going to run into disputes about saying,
4 "Well, we think this cost is a material benefit to you, therefore we're not paying",
5 because that opens the door to having to then go back to the funder. I think that may
6 be the way to cut through it, or a way to cut through it.

7 MS KREISBERGER: Exactly. The funder isn't given much reassurance by the fact
8 that at the end of the day, they can come back and ask for the money back, because
9 it was to Ms Coll's benefit. I mean, either way, the funder is exposed here. The current
10 indemnity does not give the funder the degree of comfort that would be required.

11 MS LUCAS: If I can put some context on how I understand this order originally came
12 into place: it was because at one stage it was perceived that in the Coll case, there
13 might be an app developer gap in the evidence, because the original parties were
14 Google and consumers, and that left the app developer piece in the middle blank.
15 Now, there's been industry expert evidence, I think, on that. But I think that was the
16 idea of the material benefit provision.

17 Now, your case is nearly ready. I'm just speculating here, if you say your case is
18 ready -- you don't need anything else -- it may be difficult for anyone to say that
19 anything that's done now is to your material benefit, as opposed to the benefit of Epic
20 in Epic's case, or Rodger in Rodger's case.

21 MS KREISBERGER: But again, that is not a great deal of reassurance to the funder
22 at this stage; it's not a basis for the funder to feel that it's not exposed, because there
23 is a great deal of uncertainty as to what --

24 MR JUSTICE MORRIS: As to what will happen at the end.

25 MS KREISBERGER: -- might be reclaimed at the end, as having been said, it was of
26 benefit to Ms Coll.

1 MR WEST: But the costs at the end are not paid by the funder; if there's a loss, they
2 are paid by the ATE insurer; if there's a win, they're paid out of the damages.

3 MS KREISBERGER: Well, not 100 per cent. So that's also another unrealistic point
4 that's been floating around. The idea that Ms Coll is protected. It's also, I should say,
5 utterly ill-thought through; they haven't put a proper proposal on the table; it came in
6 this morning. Again, this is a disorderly approach.

7 Let me give another example. The suggestion is this would be part funded by
8 Professor Rodger -- that must be by the funder who is funding the Geradin claim.

9 MR JUSTICE MORRIS: Yes.

10 MS KREISBERGER: Well, presumably they would want an outlay on that -- a return
11 on that outlay, in the usual way that funders seek a return on their outlay. We have
12 no details of that or how that would work. It's an entirely unsatisfactory, ill-thought out,
13 in a last ditch attempt to get an adjournment of the Coll trial.

14 MR JUSTICE MORRIS: Okay.

15 MS KREISBERGER: And on the topic of being ill-thought out, it may not have escaped
16 your notice that Mr O'Donoghue described his client's litigation plan as "insane".
17 That's the basis, Sir, on which you certified his CPO last Thursday. Three weeks ago,
18 they were making submissions advocating catching up with Coll. I'm afraid -- and it's
19 not something one says lightly -- but there is a certain degree of unreliability or
20 inexperience around this litigant, and that is not a sufficient or proper basis for this
21 Tribunal to adjourn a long fixed trial.

22 MR O'DONOGHUE: It's completely improper (several inaudible words) and
23 disrespectful of the court. You should withdraw those remarks (inaudible).

24 MR JUSTICE MORRIS: Okay, let's try and conclude. We're late in the afternoon.

25 MS KREISBERGER: I see that and I will be crisp.

26 Just to pick up a few points. Now, Mr O'Donoghue took you to issues 11 and 12 on

1 the table.

2 MR JUSTICE MORRIS: Yes.

3 MS KREISBERGER: I'm not going to go back to them, but Mr Holmes said, "Well,
4 those issues might already be in". Well, that rather underlines the need to review the
5 existing disclosure first before Professor Rodger makes requests for additional
6 disclosure and you have my submission as to what that would involve.

7 MR HOLMES: Sir, perhaps we can do that.

8 MR JUSTICE MORRIS: Yes.

9 MS KREISBERGER: Professor Rodger may be a little sceptical, given his
10 submissions on Google's cooperation.

11 Now, much was said about the risks of inconsistency. I would just remind the Tribunal
12 that it's living with that inconsistency in Kent and Ennis. There is a risk of
13 inconsistency; they are entirely untethered to each other, those proceedings. It was
14 already living with that risk in relation to Google, with the Epic and Coll proceedings
15 that were in two separate trials. The answer is not to derail Coll and her funding, given
16 the lateness in the day of Professor Rodger's claim.

17 MS LUCAS: I think there is a bit of a distinction, though, isn't there? Because Epic
18 was seeking injunctive relief rather than damages and it's the damages that gives rise
19 to the pass-on complication.

20 MS KREISBERGER: And it's entirely on all fours with Kent and that is the approach
21 taken in Kent. The same issue arises and the Tribunal said, "Well, you know, life is
22 not perfect". Now, this would have been avoided if Professor Rodger had brought his
23 claim at an earlier stage, not so close to trial. But this is realpolitik, the real world, and
24 the Tribunal has to find the workable way forward, noting the need to deal with the
25 claim expeditiously. If there's a further delay, one is really looking at seven years to
26 a judgment for Ms Coll's class, taking it from 2021 when she lodged.

1 MS LUCAS: But if we take your route, we've already, as you say, got Kent and Ennis
2 and it would envisage three further trials in which we've just heard that the same issue
3 will arise. So, we'll have five potentially inconsistent judgments.

4 MS KREISBERGER: Well, with respect, we don't understand why ... oh yes it is five
5 across two different defendants.

6 MS LUCAS: Yes.

7 MS KREISBERGER: So, when dealing with Google, you have a trial, I don't think it's
8 actually been listed, but it's mooted for October 2026. That's happening in any event.
9 So, you know, coming back to the balancing exercise that the Tribunal has to perform,
10 you saw the Venn diagram. There's a small amount of potential inconsistency, huge
11 prejudice to the Coll class if matters are put off, possible extinction of the claims if
12 funding isn't obtained and, unlike in the Kent proceedings, there is already a second
13 trial in the diary for 2026, so it makes complete sense for Professor Rodger to join that
14 claim. He says he can do it by 2026. Well, there's provision for that, and Coll should
15 be left undisturbed.

16 Now, that brings me to one of my reply points to Mr Holmes. He said that, and his
17 words were, "Epic or Rodger may want to relitigate certain points" -- and this was his
18 inconsistency objection -- but by putting Epic and Rodger together, you see that really,
19 Mr Holmes is seeking to reopen a case management decision that was settled by the
20 Tribunal, which is that Epic will come after Ms Coll. That was 19 months before trial.
21 So, the fact that there may be an inconsistency between Coll and Epic, the Tribunal
22 has already looked at that very carefully, Madam, as you know. That's been
23 considered and that was dealt with and now is not the time, you know, a couple
24 of months before the PTR, to reopen that. It's been carefully calibrated.

25 Mr Holmes also said that having more than one trial would be "oppressive and
26 disruptive of the lives of Google witnesses". Well, you saw the Kent Tribunal

1 essentially placed no weight on that, but also it's not right, because, as I say, Ms Coll
2 was to be heard in October this year, and Epic next year. So, they were going to be
3 called in any event --

4 MR JUSTICE MORRIS: No, that's not right. The factual evidence --

5 MS KREISBERGER: Ah, well on the -- yes, you're quite right to pick me up on that.

6 MR JUSTICE MORRIS: You're talking about -- you said the Google witnesses?

7 MS KREISBERGER: But as I say, in Kent, that was given no weight. Of course
8 Google is facing trials around the world in many different jurisdictions, so it's a vastly
9 overblown objection. What you really see here is the defendant jumping on the
10 bandwagon of the late Professor Rodger's application. I mean, it's no surprise that the
11 defendant would rather push off October 2025, of course it does.

12 MR JUSTICE MORRIS: Okay.

13 MS KREISBERGER: Just a small point. Mr Holmes raised the different facts in
14 Fitzroy and the Coulson criteria. Ms Demetriou made precisely those points to the
15 Tribunal in Kent. And you see from the ruling that the Tribunal wasn't impressed with
16 those points and relies on Coulson for good reason. Mr Holmes didn't attack the logic,
17 the sense behind those criteria, because it's a very basic proposition that if a party
18 comes before you --

19 MR JUSTICE MORRIS: This isn't really an application to adjourn, it's a different beast
20 in a way.

21 MS KREISBERGER: Well, we would say it very much is.

22 MR JUSTICE MORRIS: I know you characterise it as such.

23 MS KREISBERGER: Well, Professor Rodger has brought his claim many years
24 after --

25 MR JUSTICE MORRIS: Well, yes.

26 MS KREISBERGER: -- and he raised adjournment last Monday. Adjournment didn't

1 feature, if I may say --

2 MR JUSTICE MORRIS: If Professor Rodger didn't ask for adjournment, wouldn't
3 Google and/or Epic be asking for it in any event?

4 MS KREISBERGER: Perhaps either way --

5 MR JUSTICE MORRIS: It's a much bigger case -- I don't know, it just strikes me as
6 a wider case. No, that's enough, Mr O'Donoghue. It's just I'm trying to move things
7 on and I don't want to get into an argument.

8 MS KREISBERGER: All I would say is --

9 MR JUSTICE MORRIS: It's not a two-party adjournment case; it's a much more
10 complex situation than arises in standard civil litigation.

11 MS KREISBERGER: All I would say is that the Coulson principles are useful and fairly
12 standard, a standard way for a court to approach.

13 MR JUSTICE MORRIS: Yes. But insofar as you rely on conduct, on
14 Professor Rodger's bad conduct, of course that can't be visited upon the other two.
15 You rely on other factors, but the Coulson criteria include the conduct of the party.
16 Anyway.

17 MS KREISBERGER: Well, I come back to the fact that in the balancing exercise --

18 MR JUSTICE MORRIS: Yes.

19 MS KREISBERGER: -- there can be no debate that we are here because
20 Professor Rodger lodged a claim in August and on Monday last week, he for the first
21 time raised adjournment. From Ms Coll's perspective, it matters not a jot whether it is
22 Professor Rodger who has raised it, but it is the case that he did, or the defendant.
23 But the fact is less than two weeks ago, adjournment was put on the table and Ms Coll
24 has had to respond very, very rapidly. My submission is a late application of this sort
25 should really be rejected.

26 MR JUSTICE MORRIS: Okay. Thank you.

1 MS KREISBERGER: Thank you, Sir. Thank you, Madam.

2 MR JUSTICE MORRIS: Oh, that's it?

3 MS KREISBERGER: Oh, I'm sorry. Unless there's anything further I can help you
4 with?

5 MR JUSTICE MORRIS: No, no, no, sorry, I thought you had a lot more, I might have
6 let Mr O'Donoghue intervene now, if I'd realised you were going to -- no, it's fine. It's
7 a joke.

8 MR O'DONOGHUE: Five seconds?

9 MR JUSTICE MORRIS: Yes.

10 MR O'DONOGHUE: Of course, in December of last year in the CMC, the Tribunal ex
11 officio said, well, look, the joint case management is the elephant in the room. We
12 need to address it. This is the case management.

13 MR JUSTICE MORRIS: Yes, yes, yes.

14 MS KREISBERGER: But of course, no mention of adjournment was given.

15 MR JUSTICE MORRIS: It is the case that I think we were working on the -- well,
16 I think, to be fair, what is in the litigation plan is in the litigation plan. But I remember
17 reading it before this week trying to work out who had said what about what should be
18 done. I got the impression that Rodger put it on the table that they should be joined in
19 some way, but nobody was very clear about what they intended. But you're right that
20 the suggestion that the main trial should be adjourned, I think, did only emerge this
21 last week. I accept that that's of course the case.

22 MS KREISBERGER: I'm grateful. Unless I can assist further --

23 MR JUSTICE MORRIS: No, I don't think you can.

24 MS KREISBERGER: It's 4.45 pm, and I'm very grateful for the additional time.

25 MR JUSTICE MORRIS: Yes, we're grateful to the court staff. (Pause)

26 I think --

1 MR O'DONOGHUE: There's a quick reference. On 6 December, tab 72, 18(c), we
2 did say that adjournment at least shouldn't be ruled out; it should be on the table.

3 MR JUSTICE MORRIS: What date was that?

4 MR O'DONOGHUE: 6 December. It's 1140 of the bundle.

5 MR JUSTICE MORRIS: That was in advance of the first CMC.

6 MR O'DONOGHUE: "The Tribunal should at least be afforded the opportunity, in due
7 course, to consider the possibility of adjournment."

8 MR JUSTICE MORRIS: Okay. Right, thank you everybody very much. You will be
9 hearing from us. Without in any way binding ourselves, what we are likely to do is to
10 give you our decision in a letter with reasons to follow afterwards. Depending on what
11 it says, we may have more in the letter than just saying yay or nay; we may have
12 thoughts about the progress of the action, but I think that's -- we'll try and get that to
13 you as soon as we can in the course of next week, I would have thought, I would hope.
14 Then, we'll take it from there.

15 Thank you, everybody.

16 (4.45 pm)

17 (The hearing concluded)

18

19

20

21

22

23

24

25

26