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IN THE COMPETITION
APPEAL
TRIBUNAL

CaseNo: 1673/7/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 6th – Friday 7th March 2025

Before:

The Honourable Mr Stephen Morris
Tim Frazer
Andrew Taylor

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Professor Barry Rodger

Proposed Class Representative

v

Alphabet Inc., Google LLC and Others

Proposed Defendants

A P P E A R A N C E S

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

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(10.30 am)

Opening remarks

THE CHAIR: Good morning. I just want to read out the standard wording. Some of you are joining us 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.

Good morning, Mr O'Donoghue.

MR O'DONOGHUE: Sir, members of the jury of the Tribunal, good morning.

Sir, the personnel to my left, I appear with Mr Carall-Green, to his left Ms Chambers. For the Tribunal's benefit, Professor Rodger is present in court today, he's in the conspicuous red tie behind me.

THE CHAIR: Good morning, Professor Rodger.

MR O'DONOGHUE: His independent adviser, Mr Bacon, is also in court today, should that assistance be required.

THE CHAIR: Thank you.

MR O'DONOGHUE: I am in your hands.

THE CHAIR: Yes.

MR O'DONOGHUE: In my experience, counsel often overestimate the extent to which their dulcet tones are welcome in terms of tribunal band width. What Mr Carall-Green and I have proposed this morning, given that the centre of gravity today seems to be on the funding side, were intending to deal with that, certainly.

I am obviously content to go through the authorisation conditions, or indeed anything else the Tribunal would find helpful, but I don't want to teach anyone to suck eggs or

1 waste time. We have two days, but that shouldn't be a target, necessarily.

2 Sir, I am in your hands. I was proposing to start with funding.

3 **THE CHAIR:** Okay.

4 **MR O'DONOGHUE:** Perhaps we see where that takes us.

5 **THE CHAIR:** We have obviously given this some thought as well. I suspect it will be
6 covered but what we have in mind was for you to first address us on what I call the
7 Google objections, which are the points that they have made in their most
8 recent -- well, in the correspondence and their most recent letter which replies to your
9 skeleton.

10 **MR O'DONOGHUE:** Yes.

11 **THE CHAIR:** I have a list of them. I think that should be where we start.

12 **MR O'DONOGHUE:** Yes.

13 **THE CHAIR:** That really is the funding mainly.

14 **MR O'DONOGHUE:** Yes.

15 **THE CHAIR:** But I have a list of them. Then, after we have gone through those points,
16 I would have thought that we would have some miscellaneous points for you that we
17 have, outwith the Google objections --

18 **MR O'DONOGHUE:** Yes.

19 **THE CHAIR:** -- which we wish to raise with you.

20 I think that's the way we would like to proceed, so that sort of ties in. I am assuming
21 when you say "we are going to deal with the funding" that it is going to cover that,
22 effectively.

23 **MR O'DONOGHUE:** That is extremely helpful, if I may say so. We have time today
24 and tomorrow, if necessary. It may be that there will be questions we need to consult
25 with Professor Rodger on. Depending on the nature of the questions, whether they
26 were factual or funding, there is, I think are plenty of flex in today and tomorrow for

1 that to take places as necessary.

2 **THE CHAIR:** Can I just give you what I see as the list of the Google points?

3 **MR O'DONOGHUE:** Yes.

4 **THE CHAIR:** I have eight, really. They are not all funding, I don't think:

5 First, clause 3.2 and 7.1(n) and this issue of payment to the funder before the class.

6 Second, level of funder return. Third, termination issue 1, the PCR not following

7 lawyer's advice on settlement. Fourth, termination issue two, commercially viable

8 return although that looks as though that has been resolved, but this is the checklist.

9 Fifth and sixth are the two interrelated points on adverse costs. First, I think, the

10 narrow point that the costs incurred in assessment of costs would not be covered; and,

11 secondly, the funders' indemnity and the structure of the funder and the assets.

12 Then seven, confidentiality and publication. Eight, the consultative panel, in particular

13 remuneration, and that was it, and then I have the issue of costs, but costs we can

14 leave until later.

15 Those are the points that I picked up. Some of those have been more or less resolved,

16 but if we could run through those. Take them in whichever order you wish.

17 **MR O'DONOGHUE:** Yes. Sir, a couple of points, if I may. First of all, I should have

18 made clear from the outset that Ms Terry from Reynolds Porter Chamberlain is in court

19 today. Now, she has informed me she is here in a note taking capacity, she's

20 a trainee, but I thought it courteous and right to inform the Tribunal she is here.

21 **THE CHAIR:** Thank you.

22 **MR O'DONOGHUE:** Sir, on costs, as you picked up, this was on the agenda, and it

23 seems to me slightly cart before the horse in advance of any ruling we deal with costs.

24 Of course, Google is actually not here today. We suggest we would park that for today

25 and deal with this in writing.

26 **THE CHAIR:** Okay, that's fine.

1 **MR O'DONOGHUE:** On the funding issue, the division of labour between
2 Mr Carall-Green and myself is that I had intended to deal with two aspects of funding.
3 One, the principles in the case law and, two, some rather high level points on the
4 particular funding issues in this case. Sir, it does occur to me, in light of your list, that
5 we may as well cut to the quick, and move straight on to the granular issues, in which
6 case I will hand over to Mr Carall-Green.

7 **THE CHAIR:** Okay. There is no doubt that in relation to some of them what has been
8 said in the previous cases is relevant, but yes, do it in whichever way you wish. For
9 example, in the second issue, we have what was said in Ennis, at paragraph 61, and
10 we also have what was said in Neill.

11 **MR O'DONOGHUE:** Indeed. On that basis, what I would suggest is Mr Carall-Green
12 gets into the weeds. I will then sweep up on some of the case law, to the extent I need
13 to.

14 **THE CHAIR:** Yes, thank you.
15

16 **Submissions by MR CARALL-GREEN**

17 **MR CARALL-GREEN:** Sir, can I just check that everything is working with the
18 microphone and we are all set up?

19 **THE CHAIR:** I can hear you at the moment, yes. Okay, carry on.

20 **MR CARALL-GREEN:** As Mr O'Donoghue says, I am going to address you on the
21 funding and the insurance issues. From the sounds of things, I will cover all of the
22 topics that you have placed on the agenda, but not necessarily in that order.

23 **THE CHAIR:** Okay.

24 **MR CARALL-GREEN:** So, Sir, there are four documents in which the parties'
25 positions have been set out. I don't ask you to turn them up, but for your reference
26 there is the letter from Google on 31 January, which is at tab 16 of the bundle. That's

1 | essentially Google's response to the application.

2 | **THE CHAIR:** Yes.

3 | **MR CARALL-GREEN:** Then we have our reply dated 19 February at tab 19.

4 | **THE CHAIR:** Yes.

5 | **MR CARALL-GREEN:** Then, third, we have the letter of last Friday, 28 February,

6 | which is effectively, if you like, in place of Google's skeleton argument, and that's at

7 | tab 28, and then we have Professor Rodger's skeleton argument which you have --

8 | **THE CHAIR:** It is the other way round, isn't it? Their letter of the 28th --

9 | **MR CARALL-GREEN:** It's preceding the filing of our skeleton.

10 | **THE CHAIR:** Did it? Did you respond then to the 28th, in the skeleton?

11 | **MR CARALL-GREEN:** Our skeleton doesn't respond, it came a few hours earlier.

12 | **THE CHAIR:** That's what I thought. My understanding was that the letter of Google

13 | of 28 February has not been responded to by you, effectively. Yes, okay, thank you.

14 | **MR CARALL-GREEN:** I will be taking the topics in this order, which aggregates some

15 | of the points on your agenda, Sir. The first is the order of payment.

16 | **THE CHAIR:** Yes.

17 | **MR CARALL-GREEN:** The second is the step up in the return at the beginning of

18 | trial.

19 | **THE CHAIR:** Yes.

20 | **MR CARALL-GREEN:** That was the topic that you called the level of funder return.

21 | The third is termination, so I think that sweeps up three and four --

22 | **THE CHAIR:** It does, yes.

23 | **MR CARALL-GREEN:** -- and then there is Google's costs protection.

24 | **THE CHAIR:** Yes.

25 | **MR CARALL-GREEN:** I will deal with the consultative panel en route.

26 | **THE CHAIR:** Okay.

1 **MR CARALL-GREEN:** The question of confidentiality and publication, Sir, is more or
2 less a non-issue --

3 **THE CHAIR:** Good.

4 **MR CARALL-GREEN:** -- in the sense that Professor Rodger has made the litigation
5 funding agreement available to Google and is prepared to publicise it, if that is what
6 the Tribunal considers would be appropriate.

7 **THE CHAIR:** We will come back to that at the end. There may be minor issues on
8 that, but, yes, carry on.

9 **MR CARALL-GREEN:** Yes, Sir. Starting then with the order of payment.

10 **THE CHAIR:** Yes.

11 **MR CARALL-GREEN:** The gist of Google's objection to the order of payment
12 provisions is that they require payment to the funder before the class.

13 **THE CHAIR:** Yes.

14 **MR CARALL-GREEN:** There are essentially two answers to that. The first is, that's
15 not what the agreement said.

16 **THE CHAIR:** Yes.

17 **MR CARALL-GREEN:** Second, even if it were, it wouldn't be a problem. I will take
18 those in turn.

19 **THE CHAIR:** Yes. Can you, before you take me to where the LFA is in the bundle?

20 **MR CARALL-GREEN:** It is tab 10, sub-tab 3, starting on page 382.

21 **THE CHAIR:** As you know, I am in hard copy. Okay, thank you. Okay.

22 **MR CARALL-GREEN:** Sir, there are two clauses which you have already identified
23 which are relevant to this; 3.2, which is on page 384.

24 **THE CHAIR:** Yes. Even though there are two 3.2s.

25 **MR CARALL-GREEN:** Yes. 3.2, I think, would be the technical designation of this
26 3.2. If I could take you through that, because there are a few definitions to understand

1 in construing that clause. Clause 3.2:

2 "Subject to the terms of any order or direction of the Tribunal, on each occasion, if any,
3 on which Proceeds are received by the Solicitor, the Class Representative or any
4 connected party, the Class Representative will procure that a portion of those
5 Proceeds equal to the Total Fee be applied in accordance with the Waterfall to pay
6 fees to the Solicitor, Counsel and to the adverse costs insurer and to pay to the Funder
7 the Capital Outlay and Profit Share." [As read]

8 The definitions we need to understand start on 395.

9 **THE CHAIR:** Yes.

10 **MR CARALL-GREEN:** Starting with the fourth definition, which is "Capital Outlay",
11 that is "the aggregate of all amounts paid by the Funder", so that is the funder spend.
12 Then we skip ahead to page 398, because we need to know what "Proceeds" means.
13 That's about halfway down the page. It is pretty obvious "the total amount of damages
14 and costs paid".

15 **THE CHAIR:** Just pointing out there, this is pursuant to an order of the Tribunal or
16 otherwise. This is damages paid, okay. It is not "awarded by" necessarily, is it?

17 **MR CARALL-GREEN:** I beg your pardon?

18 **THE CHAIR:** It includes the settlement. It is not "damages awarded by".

19 **MR CARALL-GREEN:** That is correct. Of course, it is pursuant to an order of the
20 Tribunal or otherwise. Under a settlement, it is arguable it would actually be pursuant
21 to --

22 **THE CHAIR:** No, it would.

23 **MR CARALL-GREEN:** -- because it would have to be approved anyway --

24 **THE CHAIR:** Yes, exactly.

25 **MR CARALL-GREEN:** But the "or otherwise" also clarifies that it would be by way
26 of --

1 **THE CHAIR:** The reason I make that point is if you then, when we get to 7.1(n), 7.1(n)
2 applies only where there are damages awarded by the Tribunal.

3 **MR CARALL-GREEN:** Yes.

4 **THE CHAIR:** Anyway, carry on.

5 **MR CARALL-GREEN:** We then need the definition page 399 --

6 **THE CHAIR:** Yes, "Total Fee".

7 **MR CARALL-GREEN:** -- for the total fee, which is "the Capital Outlay plus the Profit
8 Share". So the funder's spend plus the funder's return, but, subject to a cap, that the
9 total fee can't exceed the portion of the proceeds that have been approved by the
10 Tribunal.

11 **THE CHAIR:** For distribution.

12 **MR CARALL-GREEN:** For distribution to the funder.

13 **THE CHAIR:** Yes.

14 **MR CARALL-GREEN:** The Tribunal has control over what the total fee is. That's
15 important, Sir, because if it is suggested that the requirement to pay the total fee
16 means that the PCR has to reserve the entire amount that the funder is looking for,
17 that's wrong. Because what the PCR has to reserve is the amount that the Tribunal
18 approves should be distributed.

19 **THE CHAIR:** Okay.

20 **MR CARALL-GREEN:** Then if we want to see what the "Profit Share" is -- I have just
21 said that the total fee includes the profit share -- that's on page 404. Sir, this will
22 obviously be relevant later when we come to talking about the step up.

23 **THE CHAIR:** Yes, okay. Yes.

24 **MR CARALL-GREEN:** But we see there in the largest row of that table that the profit
25 share is a return of one times spend up to the CPO date; two times spend up to date
26 of trial; and a four times spend thereafter.

1 **THE CHAIR:** Yes, okay.

2 **MR CARALL-GREEN:** Finally, Sir, we have the definition of the "Waterfall", which is
3 in the row immediately following the row defining "Profit Share", and the waterfall says
4 "As set out in the Priorities Agreement".

5 **THE CHAIR:** Okay.

6 **MR CARALL-GREEN:** Sir, if you wish to see the priorities agreement, then that is at
7 page 408.

8 **THE CHAIR:** Okay. You might want to summarise this.

9 **MR CARALL-GREEN:** I will summarise this very briefly by saying it is simply about
10 payment to the funder, insurers, solicitors and counsel. So the waterfall agreement is
11 not about payment to the class.

12 **THE CHAIR:** Yes. I still then struggle with 3.2. I am sure this is my issue, but a portion
13 of those proceeds equal to the total fee. I am looking at 3.2. The total fee is the
14 funder's money.

15 **MR CARALL-GREEN:** The funder's money.

16 **THE CHAIR:** To "be applied in accordance with the Waterfall to pay fees to the
17 Solicitor, Counsel ..." I don't quite understand how the obligation to pay the total fee,
18 which is only for the funder -- can you just explain the last bit of that clause 3.2: how
19 can the total fee be applied in accordance with the waterfall? In other words, the
20 waterfall sets out the priorities, does it, between solicitors, counsel, adverse costs and
21 funder?

22 **MR CARALL-GREEN:** Yes.

23 **THE CHAIR:** When it says "in accordance with", I am not sure how the total fee is
24 applied in accordance with the waterfall. In other words, you only pay it once? Can
25 you just explain in two sentences how the second half of 3.2 works. In other words,
26 you have to procure that the total fee has to be paid, but as long as you do it in

1 | accordance with the waterfall; is that right?

2 | **MR CARALL-GREEN:** Yes, the point is --

3 | **THE CHAIR:** So it might not be paid.

4 | **MR CARALL-GREEN:** The funder might not get everything it wants insofar as the

5 | waterfall is diverting fees, for example, to the insurer to pay the third premium.

6 | **THE CHAIR:** All right. I think I understand it.

7 | **MR CARALL-GREEN:** Or, for example, counsel or solicitors deferred fees under

8 | a CFA.

9 | **THE CHAIR:** Okay. to "be applied". "Procure that ... the Total Fee be applied". Okay.

10 | So in the end, they might not get the total fee, is that what that's saying effectively?

11 | **MR CARALL-GREEN:** Well, the total fee will be applied in accordance with the

12 | waterfall.

13 | **THE CHAIR:** If the total fee is only sums due to the funder, okay, how can the funder's

14 | sums be applied to solicitor, counsel and adverse costs? Do you see what I am

15 | saying? Let's say the total fee works out at, I don't know, 2 million, 5 million or

16 | whatever, it doesn't matter, okay.

17 | **MR CARALL-GREEN:** Yes.

18 | **THE CHAIR:** That is money. It's not the total fee. It doesn't include the others. By

19 | the time you have paid -- let's assume that the waterfall says that some of those other

20 | categories get paid before the funder -- I am not sure, I have not looked at it, but let's

21 | assume it does -- the total fee would not then be paid if those other bits eat into it. It

22 | is just the wording of it. As I say, it may well be my lack of understanding, and it may

23 | not matter, and maybe you want to come back on it.

24 | **MR CARALL-GREEN:** I think I am being told that you have it right. If I can just

25 | confer?

26 | **THE CHAIR:** Yes, okay.

1 **MR CARALL-GREEN:** Sir, I think the consensus is that you have understood it
2 correctly.

3 **THE CHAIR:** I am not sure what I have understood, but the total fee -- it means that
4 the total fee will not necessarily be paid, ultimately.

5 **MR CARALL-GREEN:** It will be applied in accordance with the waterfall and may not
6 reach the funder, I think is your point, Sir, which we accept.

7 **THE CHAIR:** If it said "Total Fee to be paid in accordance with", I am probably
8 interpreting "applied" as "paid".

9 **MR FRAZER:** Is this right, so the total fee is an amount made up of two sums: the
10 capital outlay and the profit share. But it is not an entitlement. It is simply a calculation
11 of an amount. Once that amount is received, as it were, then that has to be applied in
12 a certain way according to the waterfall. Is that correct?

13 **THE CHAIR:** Fine, got it. Okay, carry on. Anyway, we are dealing with your first
14 point about the agreement doesn't require payment before.

15 **MR CARALL-GREEN:** Yes, so 3.2, and I think -- so we have been dealing with the
16 wording towards the end of that clause.

17 **THE CHAIR:** Yes.

18 **MR CARALL-GREEN:** We are now dealing with the question of whether or not it
19 insists upon payment to the funder first.

20 **THE CHAIR:** Yes. Or first, i.e. before the class.

21 **MR CARALL-GREEN:** Exactly. I am using that as a shorthand to mean "before the
22 class".

23 **THE CHAIR:** Yes.

24 **MR CARALL-GREEN:** Two things to notice about the wording of that clause. The
25 first is -- and this would be true anyway, but it is subject to the terms of any order or
26 direction of the Tribunal.

1 **THE CHAIR:** Yes.

2 **MR CARALL-GREEN:** And as we have already discussed, the definition of total fees
3 is similarly controlled. So both the general principle of a payment and the exact
4 amount of a payment are both within the Tribunal's control and supervision.

5 **THE CHAIR:** Yes.

6 **MR CARALL-GREEN:** As I say, all of this will be true even if the agreement did not
7 so provide, but the point is that the agreement expressly acknowledges that.

8 The second thing to notice is that there is no obligation on the face of the clause to
9 pay the funder first.

10 **THE CHAIR:** Yes. That I spotted, yes.

11 **MR CARALL-GREEN:** The question is where does Google find that obligation to pay
12 the funder first? I suggest that there are two possibilities. The first, it could be
13 something to do with the waterfall, but we have dealt with this. The waterfall does not
14 concern payment to the class. So the waterfall could be -- one could pour water into
15 the top of the waterfall either before or after one had made distribution to the class. It
16 would still function perfectly properly.

17 Second, it could be that what Google is saying is that, in order to comply with its
18 obligation to pay the total fee, it has to ask that the fee be paid first, because otherwise
19 the distribution will erode away the amount.

20 **THE CHAIR:** That is a point I think that is picked up in one of the documents. It's not
21 in the skeletons, but that was the point that I had picked up on. In order to comply,
22 they have to do that. That's the argument.

23 **MR CARALL-GREEN:** The first thing to say is that we have already seen that it is not
24 right to treat the total fee as a monolithic amount. For there to be a total fee, for us to
25 ascertain what that is, the Tribunal already has to have decided the maximum that can
26 be awarded to the funder. So for the agreement to say "we must reserve an amount

1 equivalent to the total fee", what that means is we must return an amount equivalent
2 to the total fee as blessed by the Tribunal. That's in the definition of "Total Fee".

3 This concept of the total fee being eroded away by distribution is not right, the total fee
4 will already be ex ante controlled by the Tribunal.

5 **THE CHAIR:** Okay. Just give me a moment.

6 Okay, yes, thank you.

7 **MR CARALL-GREEN:** A further answer, Sir, is that 3.2 -- we should be construing
8 3.2 in light of 7.1(n).

9 **THE CHAIR:** Yes.

10 **MR CARALL-GREEN:** It is trite law that we construe a contract as a whole.

11 **THE CHAIR:** That is true, but if the plain meaning of one clause is one way, it is more
12 difficult to say, well, another bit of the agreement says this, therefore it can't possibly
13 mean that. I mean, you are saying it's not clear anyway.

14 **MR CARALL-GREEN:** Of course. That's why it was important for me to stress that
15 the obligation to pay the funder first is not there on the face of it.

16 **THE CHAIR:** I have that point, yes.

17 **MR CARALL-GREEN:** Whereas an obligation to pay the funder last, as it were, is on
18 the face of 7.1(n).

19 **THE CHAIR:** Okay.

20 **MR CARALL-GREEN:** If we go to 7.1, which is at page 386 --

21 **THE CHAIR:** Yes. 7.1(n) is at 387.

22 **MR CARALL-GREEN:** Quite right, thank you, Sir. I start with the chapeau, which is
23 on 386.

24 **THE CHAIR:** Yes, covenants.

25 **MR CARALL-GREEN:** "The Class Representative covenants that he will" and then
26 we go to (n) on the following page:

1 "in the event of an award of damages by the CAT, irrevocably instruct the Solicitor to
2 procure and to use his best endeavours to assist the Solicitor in procuring, an order
3 from the CAT directing that a proportion of damages be paid to the Class
4 Representative pursuant to Rule 93(4) of the CAT Rules such that the Total Fee can
5 be paid in full." [As read]

6 That then raises the question, what is rule 93(4) and for that, Sir, you can go to the
7 authorities bundle, tab 30, page 840.

8 **THE CHAIR:** Tab?

9 **MR CARALL-GREEN:** 30.

10 **THE CHAIR:** I think I am familiar with it, but let's go there. Yes, I have it, thank you.
11 Yes.

12 **MR CARALL-GREEN:** We are at paragraph 4.

13 **THE CHAIR:** Yes.

14 **MR CARALL-GREEN:** "Where the Tribunal is notified that there are
15 undistributed damages ..."

16 **THE CHAIR:** Yes.

17 **MR CARALL-GREEN:** And again: it may make an order directing that all or part of
18 any undistributed damages is paid to the class representative, and so on and so forth.
19 The point here is that 7.1(n) imposes a mandatory obligation to apply for an order for
20 payment from undistributed damages.

21 **THE CHAIR:** Yes, so it is damages, so it doesn't fully cover the situation.

22 **MR CARALL-GREEN:** It doesn't fully overlap with 3.2, but there are two things to say
23 about that. The first is, if we are just talking about construction, then 3.2 obviously
24 covers damages as well, it would be wrong to read into 3.2 words which are not there
25 but which expressly contradict 7.1(n).

26 **THE CHAIR:** Insofar as 3.2 deals with an award of damages --

1 **MR CARALL-GREEN:** It can't contradict --

2 **THE CHAIR:** -- it can't contradict 7.1.

3 **MR CARALL-GREEN:** Yes. Why would you then read in those words in a settlement
4 scenario?

5 **THE CHAIR:** Okay.

6 **MR CARALL-GREEN:** That would make no sense.

7 There is a further answer as well, which is that, in a settlement scenario, the Tribunal
8 will know that the structuring of how that can be done is more flexible than the way it
9 can be done under a damages scenario where the statute provides for exactly what is
10 to happen under section 47C.

11 **THE CHAIR:** Can you just bear with me a moment? I just want to find something.
12 I won't be a minute.

13 Carry on thank you.

14 **MR CARALL-GREEN:** Thank you, Sir. There is a further point of construction which
15 is that both provisions that we have looked at, 3.2 and 7.1(n), have to be construed
16 alongside Professor Rodger's duty to act in the best interests of the class. Now, once
17 again, that is something that would be true in any event, even if the contract did not
18 expressly provide for it, but the reality is that the contract does expressly provide for
19 it.

20 **THE CHAIR:** Yes.

21 **MR CARALL-GREEN:** We can see that at clauses 7.1(j) and (l), which are on the
22 same page as (n).

23 **THE CHAIR:** Thank you.

24 **MR CARALL-GREEN:** The true position in sum is that, at least where damages are
25 received, first Professor Rodger must apply for distribution or payment to the funder
26 from undistributed damages; second, payment to the funder first is not prohibited but

1 is possible under clause 3.2.

2 **THE CHAIR:** Yes.

3 **MR CARALL-GREEN:** In any event, all of Professor Rodger's actions are controlled
4 both as a matter of the general law and expressly under the contract by the Tribunal's
5 supervision and his overriding duty to act in the best interest of the class.

6 That's my first submission about what the contract means. Then I have my second
7 submission about whether or not it is, in fact, objectionable at all for payment to the
8 funder to be made first.

9 **THE CHAIR:** Yes.

10 **MR CARALL-GREEN:** My submission is that the state of the law is, as it currently is
11 under Gutmann and Apple, that payment to the funder first is lawful.

12 **THE CHAIR:** Yes.

13 **MR CARALL-GREEN:** I should say, Sir, before I get into it, that that decision is under
14 appeal. The Tribunal will know that the best we can do is apply the law as it currently
15 stands.

16 **THE CHAIR:** Yes.

17 **MR CARALL-GREEN:** I can take you to Gutmann --

18 **THE CHAIR:** I am aware of the passage, I think, but you can take me to it.

19 **MR CARALL-GREEN:** It is authorities bundle, tab 31.

20 **THE CHAIR:** Yes.

21 **MR CARALL-GREEN:** I would invite us to start on page 846.

22 **THE CHAIR:** Yes.

23 **MR CARALL-GREEN:** At paragraph 15. The Tribunal will see that in that case the
24 LFA required Mr Gutmann to apply for an order or approval from the court that the
25 class representative's costs, fees and disbursements will be paid in full from the
26 proceeds prior to the distribution of any proceeds to the class members.

1 **THE CHAIR:** Yes.

2 **MR CARALL-GREEN:** It is worth pausing there to see that there are funding
3 agreements that would do what Google is saying this one does. In fact, it doesn't,
4 because that wording is very clear in Mr Gutmann's LFA that funder first is required.

5 **THE CHAIR:** Yes.

6 **MR CARALL-GREEN:** The point is that the lawfulness of funder first was therefore
7 squarely in issue in that case.

8 The reasoning starts at page 848 --

9 **THE CHAIR:** Yes.

10 **MR CARALL-GREEN:** -- where we see at the bottom of the page the heading, "Is it
11 permissible for an LFA to contemplate payment to the funder from an award of
12 damages?" And what that means is "undistributed damages".

13 **THE CHAIR:** Yes.

14 **MR CARALL-GREEN:** Over the page, at paragraph 24, we see that the Tribunal
15 focused on --

16 **THE CHAIR:** Yes, sorry. Okay, yes.

17 **MR CARALL-GREEN:** So funder first.

18 **THE CHAIR:** Yes.

19 **MR CARALL-GREEN:** On the following page, we see at paragraph 24 that the
20 Tribunal focused on section 47C of the Competition Act.

21 **THE CHAIR:** Yes.

22 **MR CARALL-GREEN:** We can see there the section is set out. It breaks across the
23 page. Subsections 5 and 6 allow for payment out of undistributed damages.

24 **THE CHAIR:** Yes, okay.

25 **MR CARALL-GREEN:** So subsection 5 says "where the Tribunal makes an award ...
26 any damages not claimed ... must be paid to the charity". Then subsection 6 acts as

1 a sort of override to the default position under subsection 5: "In a case within
2 subsection (5) the Tribunal may order that all or part of any damages not claimed by
3 the represented persons ... to be paid to the representative in respect of all or part of
4 the costs", and those costs would include costs of funding. So that is the --

5 **THE CHAIR:** Yes.

6 **MR CARALL-GREEN:** -- undistributed position. Then we see that subsection 3
7 provides for something else. It says:

8 "Where the Tribunal makes an award of damages in opt-out collective proceedings,
9 the Tribunal must make an order providing for the damages to be paid on behalf of the
10 represented persons to (a) the representative, or (b) such other person other than a
11 represented person as the Tribunal thinks fit." [As read]

12 **THE CHAIR:** Yes.

13 **MR CARALL-GREEN:** What I have done there is just to set up the two options.

14 **THE CHAIR:** Yes.

15 **MR CARALL-GREEN:** We can take a quick trip through the Tribunal's reasoning to
16 see that it found that subsection 3 does permit payment to the funder first.

17 **THE CHAIR:** Yes.

18 **MR CARALL-GREEN:** Starting on page 852, if I could suggest that you read
19 paragraphs 31, Sir, and 33.

20 **THE CHAIR:** I think I read them, actually, before we came in.

21 **MR CARALL-GREEN:** I am grateful. The only other paragraph I would suggest is
22 overleaf at paragraph 35, where the Tribunal concludes.

23 **THE CHAIR:** Yes.

24 **MR CARALL-GREEN:** The basic reasoning is that subsection 3 permits payment to
25 the funder before the class.

26 **THE CHAIR:** Yes.

1 **MR CARALL-GREEN:** The state of the law at the moment is that funder first is lawful.
2 The conclusion I invite the Tribunal to derive from that is that, insofar as
3 Professor Rodger's LFA does provide payment to the funder first, that's
4 unobjectionable.

5 **THE CHAIR:** Provide for either as a matter of construction in the sense of requires,
6 or permits.

7 **MR CARALL-GREEN:** Or permits. I say it permits.

8 **THE CHAIR:** You say it doesn't require, but you do say it permits. But you say that
9 even if it requires, it would be lawful?

10 **MR CARALL-GREEN:** Precisely.

11 **THE CHAIR:** Yes. All right, just let me check my notes on that issue.
12 Are you leaving this issue now or are you moving on?

13 **MR CARALL-GREEN:** There are a few more things that Google said about it.

14 **THE CHAIR:** That is what I had in mind.

15 **MR CARALL-GREEN:** Would you like to know what we say about those things?

16 **THE CHAIR:** I have in my notes what is your response to what they say in paragraphs
17 11 to 13 of their most recent letter. You may have already covered it.

18 **MR CARALL-GREEN:** Yes, I will come onto that.

19 **THE CHAIR:** Fine, good.

20 **MR CARALL-GREEN:** Let me try to sweep up the rest of the things that Google has
21 said.

22 **THE CHAIR:** Yes.

23 **MR CARALL-GREEN:** Google has implicitly at least invited the Tribunal to depart
24 from Gutmann by submitting that payment to the funder first is not allowable under the
25 legislation.

26 **THE CHAIR:** Okay.

1 **MR CARALL-GREEN:** To that I will just say a few things. First of all, the appeal is
2 on foot and nothing is served by this Tribunal departing from its existing statement of
3 position while the Tribunal's reasoning in Gutmann is already going to be analysed by
4 the Court of Appeal.

5 Secondly, it is not appropriate for the Tribunal to depart from its previous reasoning
6 when Google is not really here to explain why it should do that. It hasn't put in any
7 written submissions and isn't here to make oral submissions on why the Tribunal
8 should depart from its existing position.

9 **THE CHAIR:** Yes.

10 **MR CARALL-GREEN:** Third, if the Tribunal accepts my submission that
11 Professor Rodger must apply for payment of damages from -- payment to the funder
12 from undistributed damages, but only may apply for a funder first, then the proper time
13 at which to assess the lawfulness of such an application would be if and when it is
14 made, not now at a hypothetical stage when the circumstances of the application are
15 not known.

16 **THE CHAIR:** Yes, yes, that was one of the points. My final point is: is this really
17 a matter for scrutiny at a later stage?

18 **MR CARALL-GREEN:** Exactly.

19 **THE CHAIR:** Okay, all right.

20 **MR CARALL-GREEN:** Now, Google has a point that payment to the funder might be
21 objectionable on the facts of this particular case, but in a sense I have already dealt
22 with that, because the facts of this particular case have to include the facts surrounding
23 the application if and when it is made.

24 **THE CHAIR:** Yes.

25 **MR CARALL-GREEN:** The facts are not even known today that would allow the
26 Tribunal to make an informed decision about whether such an application should be

1 | allowed.

2 | Second, the fact that Google points to -- and if I can just remind the Tribunal what
3 | Google says. Google says we have a relatively small number of class members and
4 | a relatively large alleged claim value per member, meaning that a high level of
5 | distribution might be expected.

6 | **THE CHAIR:** Yes.

7 | **MR CARALL-GREEN:** Now, these facts, in my submission, actually illustrate why
8 | Professor Rodger might sensibly take the view that payment to the funder first is
9 | sensible. I am not saying that he will, I am just saying that he might. It would be
10 | a reasonable course open to him.

11 | **THE CHAIR:** Yes.

12 | **MR CARALL-GREEN:** Suppose, for example, that a settlement is reached contingent
13 | on the use of a distribution method for which we can expect a very high level of uptake
14 | so that there would be a minimal amount left over after that distribution method had
15 | been effected.

16 | If we were in a world where the funder could only be paid out of undistributed
17 | damages, ex hypothesi very little, one might expect the funder to object to such course
18 | of action and we have seen that happen in very recent history.

19 | **THE CHAIR:** Yes.

20 | **MR CARALL-GREEN:** We don't have a judgment in the Merricks case yet, so we
21 | don't know how that would be handled, but the PCR surely is able to take that into
22 | account as a risk.

23 | **THE CHAIR:** Yes.

24 | **MR CARALL-GREEN:** In such a situation, would it be unreasonable or contrary to
25 | the interests of the class for Professor Rodger to consider paying the funder at least
26 | some amount first so as to secure agreement on all sides?

1 Again, I commit to nothing at this stage, but the point is that Professor Rodger is best
2 able to act in the best interests of the class if all the options are open to him.

3 **THE CHAIR:** Okay, thank you.

4 **MR CARALL-GREEN:** Then to that Google has a further response which is to say
5 "all right, let's suppose that Professor Rodger has a choice, how is he going to make
6 that choice?" Sir, I hope I have just given a flavour of the kind of thing that might be
7 relevant because at the heart of that question is an over-simplification or
8 a misunderstanding, because Google essentially wants to say that a funder being paid
9 first is always bad for the class. It is always contrary to the best interests of the class.
10 Whereas payment to the funder from undistributed damages is always good for the
11 class.

12 But, as I hope I have illustrated, that's an over-simplification, it might well be in the
13 best interests of the class to agree at least some payment to the funder first, for
14 example in order to secure the funder's agreement to a particular settlement or
15 a particular distribution method.

16 It might be asked: those are the factors, what is the process? Is there a robust
17 procedure that Professor Rodger has put in place in order to help him go about making
18 such a decision about whether to make an application for funder first, funder last; what
19 would it be?

20 In that regard, Sir, I just want to draw attention to four things. The first is that
21 Professor Rodger has from the outset had independent advice from Mr Bacon, who
22 Mr O'Donoghue introduced earlier. Mr Bacon is independent counsel on questions of
23 costs and funding or costs of funding.

24 **THE CHAIR:** Yes.

25 **MR CARALL-GREEN:** Now, of course, his advice is privileged, but Mr Bacon is
26 separate from the team that is presenting the case on Professor Rodger's behalf.

1 That's Mr O'Donoghue, me and Ms Chambers. Mr Bacon is there to give a separate
2 and independent view and has every intention for Mr Bacon to continue in that role -- I,
3 of course, make no promises on his behalf, but there is every intention for him to be
4 there, so can in principle --

5 **THE CHAIR:** That is good news for him, presumably.

6 **MR CARALL-GREEN:** -- we sought on any applications to be made for payment to
7 the funder.

8 **THE CHAIR:** Yes.

9 **MR CARALL-GREEN:** Second, Professor Rodger has the benefit of his consultative
10 panel.

11 **THE CHAIR:** Yes.

12 **MR CARALL-GREEN:** That's made up of Sue Prevezer KC, Professor Richard
13 Whish, KC honorary, and Mark McLaren, who is an experienced class representative.

14 **THE CHAIR:** Yes.

15 **MR CARALL-GREEN:** The panel is another source to which Professor Rodger can
16 turn to for advice, especially on matters such as payment to the funder, because the
17 panel has no interest -- no skin in the game, no interest one way or the other, and so
18 is perfectly well positioned to give independent advice on what would be strategically
19 in the best interests of the class.

20 Now, Google has complained -- I think, Sir, this is part of an agenda item that you put
21 further down the list, but if I can deal with it partially now -- Google complains that the
22 panel has been set up too late. The short answer to that is that the panel is there now,
23 and in advance of the CPO hearing.

24 **THE CHAIR:** Yes.

25 **MR CARALL-GREEN:** It was set up before certification, and Professor Rodger has
26 already met with the panel, although of course the content of the discussion is

1 privileged as well.

2 **THE CHAIR:** Yes.

3 **MR CARALL-GREEN:** In any event, the issues that we are concerned with here are
4 issues having to do with settlement and distribution, so they are really issues that arise
5 further down the line. They are about the end of the proceedings, not its beginning.

6 **THE CHAIR:** Okay.

7 **MR CARALL-GREEN:** The suggestion that the panel needs to be set up from the
8 very get-go is, in my submission, unreasonable and rather unrealistic.

9 **THE CHAIR:** Yes, thank you.

10 **MR CARALL-GREEN:** That's the second thing I draw attention to in terms of the
11 decision making.

12 The third thing I want to draw attention to is the relationship with the funder.
13 Professor Rodger has a collaborative relationship with his funder, and we of course
14 accept that ideally any decision to settle ought to be, if it can be, a consultative
15 process, in which an element of consensus building would take place.

16 I should say, S, that we have in mind the gist of what Mr Hodge Malek KC sitting as
17 a chair of the Tribunal this week said in relation to the Bulk Mail claim about bringing
18 the funder along in the event of a possible settlement. It is fully Professor Rodger's
19 intention to do the sort of thing that Mr Malek has in mind.

20 **THE CHAIR:** Okay.

21 **MR CARALL-GREEN:** I don't commit to any particular process at this stage because
22 it depends on exactly what the circumstances are at the time, but we fully accept that
23 the funder ought to be brought along if it can be.

24 Even if it can't be -- and this is important -- if the funder ultimately does disagree, there
25 is no obligation on Professor Rodger to do everything that the funder says.

26 **THE CHAIR:** Okay.

1 **MR CARALL-GREEN:** For this, Sir, we should get back into the LFA --

2 **THE CHAIR:** Yes.

3 **MR CARALL-GREEN:** -- because this poses questions that will become relevant later

4 when we come to termination.

5 **THE CHAIR:** Go on.

6 **MR CARALL-GREEN:** If we can go back to page 387 of the hearing bundle, the first

7 thing I would like to point out is that the funder has covenanted not to interfere. I am

8 at clause 7.2(b).

9 **THE CHAIR:** Yes.

10 **MR CARALL-GREEN:** "The Funder covenants that it will: not seek to influence the

11 Solicitor, or any other representative of the Class Representative in the Claim, to cede

12 control or conduct of the Claim to the Funder." [As read]

13 **THE CHAIR:** Okay.

14 **MR CARALL-GREEN:** Even if the funder does seek to prevent Professor Rodger

15 from seeking the order that he considers will be in the best interests of the class, there

16 are contractual protections in place to help settle that disagreement. For that, could

17 we go, please, to the definitions section which we were in earlier, at page 395?

18 **THE CHAIR:** Yes.

19 **MR CARALL-GREEN:** The last definition on that page is a "Class representative

20 Default", and under limb (b) that includes "a material breach of any term of this

21 Agreement".

22 Then if we go up to page 389, Sir, clause 10.1: the existence of a Class

23 Representative default, i.e. a material breach, triggers the dispute resolution

24 procedure.

25 **THE CHAIR:** Okay.

26 **MR CARALL-GREEN:** Sir, the definition of that is back on page 397.

1 **THE CHAIR:** Yes.

2 **MR CARALL-GREEN:** It is a binding referral to an independent KC for adjudication.

3 **THE CHAIR:** Just on this particular point, just take me through the steps of how you

4 envisage this will arise.

5 **MR CARALL-GREEN:** Well, Professor Rodger would be entitled to settle the case.

6 **THE CHAIR:** Yes. But we are talking about payment before or payment after, aren't

7 we, more or less?

8 **MR CARALL-GREEN:** Yes, and I have in mind that the settlement will come with

9 some kind of proposal or structure as to what payments are to be made to whom in --

10 **THE CHAIR:** Yes, in what order.

11 **MR CARALL-GREEN:** In what order. The point I make is that is Professor Rodger's

12 decision to make and insofar as --

13 **THE CHAIR:** Okay. The funder disagrees.

14 **MR CARALL-GREEN:** Yes.

15 **THE CHAIR:** How does this become a breach?

16 **MR CARALL-GREEN:** Well, the funder will have to find -- I don't say that it would be

17 easy for the funder to do this, but the funder will have to find a way of accusing

18 Professor Rodger of being in material breach. I would suggest that what it might

19 say -- I don't want to -- I am now arguing against myself, but I suggest what it might

20 say is that that settlement is not in the best interests of the class.

21 **THE CHAIR:** Yes, okay.

22 **MR CARALL-GREEN:** So it is a breach of your general duty that is provided for

23 implicitly and explicitly, so I am going to trigger the dispute resolution --

24 **THE CHAIR:** It is a breach of 7.1(j), for example?

25 **MR CARALL-GREEN:** For example. There may be other scenarios that could be

26 cooked up.

1 **THE CHAIR:** All right, fine, okay.

2 **MR CARALL-GREEN:** Just to reorientate ourselves, I am dealing here with the
3 procedural protections around Professor Rodger deciding to make an application for
4 payment to the funder first or last.

5 **THE CHAIR:** Yes.

6 **MR CARALL-GREEN:** We have had independent advice from a leading silk, we have
7 had independent advice from the consultative panel, we are now in contractual
8 protections around the ability to make an independent decision. The final thing I will
9 say on this, to bring you back full circle to the beginning of my submissions, is
10 Professor Rodger also has the protection of the Tribunal's supervision.

11 **THE CHAIR:** Yes, okay. Thank you.

12 **MR CARALL-GREEN:** So payment to the funder is disciplined on four sides --

13 **THE CHAIR:** Okay.

14 **MR CARALL-GREEN:** -- independent advice, consultative panel, contractual
15 protection and the Tribunal.

16 **THE CHAIR:** Okay, thank you.

17 **MR CARALL-GREEN:** Now, Sir, that is, I think -- or I hope -- that I will have dealt with
18 the point that was in your notes.

19 **THE CHAIR:** Yes. It is point 1, effectively.

20 **MR CARALL-GREEN:** Sir, before I leave this topic -- and I promise this is the longest
21 one because I know it is now going on for a while -- Google does also seek to draw
22 a parallel with the recent case of Riefa.

23 **THE CHAIR:** Yes.

24 **MR CARALL-GREEN:** I am in the Tribunal's hands about whether or not it would be
25 assisted by submissions on the differences between this case and Riefa.

26 **THE CHAIR:** At the moment, I think not. Unless either of my -- no, I think we are fine,

1 thank you.

2 **MR CARALL-GREEN:** Of course it is in writing in case the Tribunal wishes to refer
3 back to our letter.

4 **THE CHAIR:** Yes, yes, I have read a bit. I have read Riefa. Yes, thank you.

5 **MR CARALL-GREEN:** In that case --

6 **THE CHAIR:** One moment. (Pause) - I think we are all right. We may come back
7 to it, but carry on.

8 **MR CARALL-GREEN:** I am grateful.

9 Sir, we are now on the two times --

10 **THE CHAIR:** I call it level of return point.

11 **MR CARALL-GREEN:** The level of return.

12 **THE CHAIR:** Yes.

13 **MR CARALL-GREEN:** This is a shorter point, although we can go to the authorities.
14 As we've already seen in the documents -- it was on page 404 -- this is about a return
15 from two times to four times starting on the first day of trial. Google objects to this and
16 asks for the funder's return to step up as trial approaches.

17 The short answer to that is Professor Rodger doesn't want to do that because he does
18 not consider it to be in the best interests of the class to increase the costs of funding
19 to more than it already is.

20 **THE CHAIR:** Yes.

21 **MR CARALL-GREEN:** The deal he has struck with his funder keeps the funder's
22 return actually to a comparatively modest level by market standards as long as the
23 trial has not started. That is good for the class because it makes settlement cheaper
24 to the class insofar as the funder will be looking for a particular return, not determined
25 by but at least indicated by the level of return that is provided for in the agreement.

26 **THE CHAIR:** Okay.

1 **MR CARALL-GREEN:** The other point I make is that, in fact, if we are talking about
2 incentives, the incentive -- it increases an incentive to settle before trial because
3 Google will know this point, Google will know that settlement will be cheaper before
4 trial.

5 **THE CHAIR:** Okay.

6 **MR CARALL-GREEN:** Now, of course I accept, Sir, it would have been possible
7 hypothetically to structure the funder's return in a different way. In my submission,
8 that is not the only way of doing it, Google's suggestion is not the only way of doing it,
9 and the way Professor Rodger has done it is not unreasonable, and it has some
10 advantages for the reasons that I have given.

11 Sir, can we go to some of the authorities? They are cited.

12 **THE CHAIR:** Isn't the point -- you are probably going to go there -- pretty well covered
13 by Ennis at 62?

14 **MR CARALL-GREEN:** Yes, the submissions I just made are very similar to the
15 submissions I made to the Tribunal in Ennis on this point.

16 **THE CHAIR:** Is that where you are going to go first, or are you going to go to Neill
17 first?

18 **MR CARALL-GREEN:** I was going to go to Riefa first.

19 **THE CHAIR:** Okay, you take me where you want me to go to. It is all in the same
20 volume, I think.

21 **MR CARALL-GREEN:** All in the same volume.

22 **THE CHAIR:** Yes.

23 **MR CARALL-GREEN:** Tab 25, page 783.

24 **THE CHAIR:** Yes.

25 **MR CARALL-GREEN:** I take this from Riefa because Riefa is, as it were, the high
26 watermark of the Tribunal's willingness to step in and conduct a microscopic

1 examination of what has happened between a PCR and a funder.

2 **THE CHAIR:** Yes.

3 **MR CARALL-GREEN:** Even in this case the Tribunal says, at paragraph 110:

4 "We agree that the Tribunal should be reluctant to venture into an assessment of the
5 commercial terms of the LFA unless they are sufficiently extreme to warrant calling
6 out." [As read]

7 That, in our submission, is a common sense position: LFAs are the result of
8 commercial negotiations, there is a confidential process that goes on between PCRs
9 and funders, and of course the Tribunal will interfere if there is something that has
10 gone grossly wrong.

11 **THE CHAIR:** Yes.

12 **MR CARALL-GREEN:** But this is not one of those cases. There is not something
13 that is grossly wrong here.

14 **THE CHAIR:** Yes.

15 **MR CARALL-GREEN:** That really is the point of principle. Then Google raises Neill
16 and Ennis by way of example. If we can go to Neill, Neill is at tab 17, which is at -- the
17 relevant passage starts at page 528.

18 **THE CHAIR:** Yes.

19 **MR CARALL-GREEN:** We see here paragraph 140(1). This is the offending -- the
20 Tribunal's description of the offending clause:

21 "The insertion of a clause (clause 11.4) which provided that the multiple applied under
22 11.1 or 11.2 would increase "by one times (1x)" on the date four years after the date
23 of the first application for a CPO in the proceedings, and by the same amount again
24 each year thereafter." [As read]

25 Sir, you can immediately see the problem because the Tribunal thought there was
26 going to be a runaway increase. So we start on, let's say, 3.75x, which is the figure

1 that is given later. That then goes up to 7.5, to 11.25, to 15 on the Tribunal's analysis.
2 So one can see how the funder's return achieves escape velocity.

3 **THE CHAIR:** Yes.

4 **MR CARALL-GREEN:** If we go down to page 539, we see how this was dealt with.

5 **THE CHAIR:** Yes.

6 **MR CARALL-GREEN:** At 168, the Tribunal then explains its concern. At 169: "We
7 invited the PCR to discuss the matter further with the funder ... " [As read]

8 **THE CHAIR:** I think the point that Google are making is that they rely on 168 and 168
9 seems to suggest that the Tribunal didn't like that steep -- I mean, pre-clarification they
10 didn't like the steep increase, and they didn't go on about -- they didn't in 168 object
11 that it was going to happen thereafter: "We were concerned that this provided for an
12 arbitrary and steep increase in the multiple after four years". [As read]

13 I think that is their response to your response. You say that what happens thereafter,
14 that because it was -- in fact they interpreted it was a different multiplier on the facts.

15 **MR CARALL-GREEN:** Yes.

16 **THE CHAIR:** But I think they say, don't they, that really assuming the facts were as
17 they are in 168, then the Tribunal would have objected.

18 **MR CARALL-GREEN:** It doesn't appear that there was any substantial argument on
19 this point, or indeed a decision on it, because the way that it was resolved was that
20 the PCR simply said "well, that wasn't our intention" and then made some clarificatory
21 amendments to reflect the position.

22 **THE CHAIR:** Yes.

23 **MR CARALL-GREEN:** Sir, it would be wrong, in my submission, to draw from Neill
24 an authority or a decision to the effect that this perverse incentive is objectionable.
25 Even insofar as it does stand as that kind of authority, one needs to look at the context:
26 an increase in multiple from 3.75 to 7.5 -- so bigger to bigger -- in comparison to our

1 increase smaller to smaller, 2 to 4, our final multiple is not really materially higher than
2 the multiple that was the lower multiple in Neill.

3 **THE CHAIR:** Okay, yes. But I am right, aren't I, that their riposte to your point on this
4 was that they were pointing specifically at 168, I think.

5 **MR CARALL-GREEN:** They would, Sir --

6 **THE CHAIR:** You have answered why. Yes. Then --

7 **MR CARALL-GREEN:** If we go on to --

8 **THE CHAIR:** -- 171 are you going to go on to --

9 **MR CARALL-GREEN:** Yes, 171 is making the point that I made earlier which is that
10 the way this was resolved is that the PCR made some clarificatory amendments and
11 then the Tribunal's concern was allayed. So what we don't actually have in this
12 judgment is substantive submissions on whether or not the supposed unhelpful
13 incentives were really problematic and we certainly don't have a decision on the point.

14 **THE CHAIR:** Okay. Are you going to go to Ennis now?

15 **MR CARALL-GREEN:** Ennis, which is tab 24, page 743.

16 **THE CHAIR:** Yes.

17 **MR CARALL-GREEN:** Sir, I think I can do little better than ask you to read
18 paragraph 61 and say that that is right.

19 **THE CHAIR:** Yes.

20 Yes. Just remind me, what was the actual increase in that case?

21 **MR CARALL-GREEN:** If I could just turn my back.

22 **THE CHAIR:** That's fine, yes.

23 **MR CARALL-GREEN:** Sir, 3 rising to 4 --

24 **THE CHAIR:** Okay.

25 **MR CARALL-GREEN:** -- at trial.

26 **THE CHAIR:** Yes. That's the point that Google make, well that was only a 33 per cent

1 increase and yours is a 100 per cent increase.

2 **MR CARALL-GREEN:** The response to that is why should we be required to make
3 the funding more expensive for our class? Again, I return to this point: one could
4 struck -- any way of reflecting risk and return, mechanically in a contract, is going to
5 be imperfect.

6 **THE CHAIR:** Okay, all right. Thank you very much.

7 **MR CARALL-GREEN:** Just by way of coda on this, Sir, I was just teeing up something
8 that I think Mr O'Donoghue is going to come on to later, depending on whether the
9 Tribunal will find this of any assistance, but what the Tribunal is looking at here is
10 a good deal for the class. A two times or four times return -- and I hinted at this
11 earlier -- is comparatively in the market a very good deal.

12 **THE CHAIR:** Okay.

13 **MR CARALL-GREEN:** It's not something that requires the Tribunal to step in.

14 **THE CHAIR:** All right, thank you.

15 **MR CARALL-GREEN:** Sir, would it be appropriate now to go on to the termination
16 questions?

17 **THE CHAIR:** Yes.

18 **MR CARALL-GREEN:** There are two issues within this.

19 **THE CHAIR:** Yes.

20 **MR CARALL-GREEN:** The first is Google says that the funder can terminate the LFA
21 if Professor Rodger does not follow his lawyer's advice in respect of settlement.

22 **THE CHAIR:** Yes.

23 **MR CARALL-GREEN:** The second is that Google complains about the commercially
24 viable return. I am not sure to what extent I need to deal with the second point, the
25 Tribunal has indicated that it is largely resolved now --

26 **THE CHAIR:** We will deal with that at the end. We do have some questions on this,

1 the first issue. We have looked at the provisions. Everybody assumes that the dispute
2 resolution procedure applies in the event that the PCR does not follow the lawyer's
3 advice. Okay? We, I think, would like to be clear that it does apply. Okay? Can you
4 remind me, is it 7.5(c)?

5 **MR CARALL-GREEN:** 7.5(c).

6 **THE CHAIR:** Okay. 7.5(c) describes this, the failure to follow is a material and
7 irremediable breach, yes?

8 **MR CARALL-GREEN:** Yes.

9 **THE CHAIR:** My question for you is how that qualifies as something which can go to
10 the dispute resolution procedure in circumstances where that defines things as
11 material adverse change or class representative default or -- I don't --

12 **MR CARALL-GREEN:** You are almost there, Sir. We looked at it earlier.

13 **THE CHAIR:** Let's have look. Can you just explain to us how this issue would be
14 justiciable by the independent KC?

15 **MR CARALL-GREEN:** Yes. class representative default --

16 **THE CHAIR:** Where is that?

17 **MR CARALL-GREEN:** It is on page 395.

18 **THE CHAIR:** Yes.

19 **MR CARALL-GREEN:** Subparagraph (b): the class representative is in material
20 breach.

21 **THE CHAIR:** Yes.

22 **MR CARALL-GREEN:** 7.5(c), where we have just been, says: this shall be treated as
23 a material breach.

24 **THE CHAIR:** And irremediable.

25 **MR CARALL-GREEN:** Yes. But if it is not a material breach, then it cannot be
26 irremediable.

1 **THE CHAIR:** We are just wondering whether that -- what does the word "irremediable"
2 add, and are there any other provisions that provide for a material and irremediable
3 breach, okay? And are there other provisions which refer to simply a "material
4 breach"?

5 In other words, is this definition of the failure to follow as a material and irremediable
6 breach in some way a special category and different? It may not be intended to be,
7 but it may be that it needs to be clarified.

8 In other words, it may be that it needs to be absolutely clear, as a first stage, that this
9 failure to follow the advice is something that is susceptible of being dealt with by the
10 independent KC.

11 Our second point, whilst we are on it -- it may cut it short -- is that we also do think
12 there is some force in Google's submission that whether or not the failure to follow the
13 advice was reasonable, or unreasonable, was not something that is within the purview,
14 as currently drafted, of the independent KC. In other words, does some wording need
15 to be inserted or covered by "unreasonably failed to follow"? Those are our two points.

16 **MR CARALL-GREEN:** Could I take instructions?

17 **THE CHAIR:** Yes.

18 **MR CARALL-GREEN:** Sir, I have a proposal which might coincide nicely with a short
19 adjournment.

20 **THE CHAIR:** Yes.

21 **MR CARALL-GREEN:** I suggest some amended wording, subject to confirmation that
22 it can be agreed with the funder.

23 **THE CHAIR:** Of course, I understand that.

24 **MR CARALL-GREEN:** Then it helps, because if the Tribunal is minded in principle to
25 accept that change, then we can put it to the funder.

26 **THE CHAIR:** Yes, okay.

1 **MR CARALL-GREEN:** I am looking now at the wording of 7.5(c).

2 **THE CHAIR:** Yes. Let me just -- yes.

3 **MR CARALL-GREEN:** "Where the Class Representative receives advice from the
4 Solicitor or Counsel that it is reasonable to make or accept an offer for partial or full
5 settlement of the Claim, but ..."

6 Insert "unreasonably fails", so the word "unreasonably" appears:

7 "... fails to follow that advice, such failure shall be treated as a material [strike 'and
8 irremediable'] breach of this Agreement by the Class Representative."

9 Then, Sir, we could additionally add a sentence. It may be surplus to requirements
10 now we have dealt with the irremediable point, but we could add a sentence at that
11 point to say:

12 "For the avoidance of doubt, any disagreement as to whether a material breach has
13 occurred shall be referable to the Dispute Resolution Procedure".

14 **THE CHAIR:** Yes, that's fine. Yes, that covers it, I think, as far as we are concerned.
15 Obviously we quite understand that you need to take instructions and clear that. I think
16 that does deal with our concern about the point, I think.

17 I think that deals with that issue, doesn't it?

18 **MR CARALL-GREEN:** I think it deals with that issue in totality.

19 **THE CHAIR:** Yes.

20 **MR CARALL-GREEN:** Sir, would it be convenient then to take a brief break now. We
21 might then be able to confer with the funder about whether or not we can make that
22 change.

23 We can continue if the Tribunal prefers.

24 **THE CHAIR:** I think we will carry on. I would have thought we would have probably
25 concluded by lunchtime, but I am happy for you to enquire over the lunch adjournment
26 or even when we finished.

1 | Let's press on, I think.

2 | **MR CARALL-GREEN:** In that case, I think we are on commercially viable return.

3 | Does the Tribunal have a view on this, have I understood correctly?

4 | **THE CHAIR:** My understanding is that you have agreed to amend to remove

5 | reference to "commercially viable return" if we have doubt, and I think we think that

6 | that amendment should be made.

7 | **MR CARALL-GREEN:** Very good. To clarify, that would be a commercial -- I think

8 | the offer was "commercially viable return in respect of the Solicitor".

9 | **THE CHAIR:** The solicitor and the PCR, I thought.

10 | **MR CARALL-GREEN:** And the PCR.

11 | **THE CHAIR:** Can you just take me to the clause?

12 | **MR CARALL-GREEN:** Yes. Page 397.

13 | **THE CHAIR:** Yes.

14 | **MR CARALL-GREEN:** It is the definition of "Material Adverse Change".

15 | **THE CHAIR:** Yes. So you would delete the words "Solicitor or Class Representative",

16 | yes?

17 | **MR CARALL-GREEN:** Yes, Sir.

18 | **THE CHAIR:** That's fine, yes, thank you.

19 | **MR CARALL-GREEN:** Very good.

20 | **THE CHAIR:** Then we move on to adverse costs, as you say.

21 | **MR CARALL-GREEN:** Then we move on to adverse costs.

22 | Preliminarily, Sir, I need to deal with the legal test.

23 | **THE CHAIR:** Yes.

24 | **MR CARALL-GREEN:** That is because Google's complaints are focused on its ability

25 | to recover costs in relation to its assessment of costs.

26 | **THE CHAIR:** Yes.

1 **MR CARALL-GREEN:** So a very tail end issue. If we could go to the authorities
2 bundle at tab 28 --

3 **THE CHAIR:** Okay, just give me a minute.

4 **MR CARALL-GREEN:** I beg your pardon, I have given you a duff reference, it is
5 tab 5.

6 **THE CHAIR:** Tab 5?

7 **MR CARALL-GREEN:** Yes.

8 **THE CHAIR:** Trucks?

9 **MR CARALL-GREEN:** Trucks.

10 **THE CHAIR:** Yes.

11 **MR CARALL-GREEN:** Paragraph 109 at the top of the page: "Where the Tribunal
12 finds that ..."

13 **THE CHAIR:** Paragraph 109, page?

14 **MR CARALL-GREEN:** I beg your pardon, page 121.

15 **THE CHAIR:** Yes.

16 **MR CARALL-GREEN:** "Where the Tribunal finds that there is no other reason to
17 refuse authorisation of a class representative under rule 78, we consider that the
18 proper approach to such a very high costs case is to determine that the class
19 representative has at the outset the ability to pay a substantial level of adverse costs
20 ..." [As read]

21 **THE CHAIR:** Yes.

22 **MR CARALL-GREEN:** "... which should be sufficient for at least a significant part of
23 the proceedings." [As read]

24 **THE CHAIR:** Yes.

25 **MR CARALL-GREEN:** So the point I make, Sir, is it is not a 100 per cent cover that
26 is required.

1 **THE CHAIR:** Yes. You will then say that this is going to be very much a minor --

2 **MR CARALL-GREEN:** This is very minor in the overall context.

3 **THE CHAIR:** Yes.

4 **MR CARALL-GREEN:** In fact, Sir, the concern is in any event misplaced, because
5 Google's cost protection comes from two different sources. We have actually given
6 double protection in this instance. The first is that it comes from the funder's indemnity
7 and we see that from the LFA at page 385, if you wish to turn it up, Sir.

8 **THE CHAIR:** No, that's all right.

9 **MR CARALL-GREEN:** The first layer of protection is that the PCR has an unlimited
10 indemnity from the funder --

11 **THE CHAIR:** Yes.

12 **MR CARALL-GREEN:** -- and the Tribunal will have seen the witness statement from
13 Mr Chopin --

14 **THE CHAIR:** Yes.

15 **MR CARALL-GREEN:** -- which is at tab 19 of the bundle, in which he explains how
16 the funder gets its money and why it should be regarded as creditworthy.

17 **THE CHAIR:** Yes.

18 **MR CARALL-GREEN:** He explains that the obligations of the funder have been
19 assumed by a Delaware fund; that it has reserved and will continue to reserve
20 commitments in relation to this case, and that its investors have never failed to meet
21 a capital call. So it is a creditworthy funder that has given an unlimited indemnity.

22 **THE CHAIR:** Yes.

23 **MR CARALL-GREEN:** Then we have a secondary layer of protection which comes
24 in the form of the insurance policy which we have seen on page -- again, the Tribunal
25 may or may not wish to turn this up, but it is at page 1158 of the bundle.

26 **THE CHAIR:** Yes, the amended version?

1 **MR CARALL-GREEN:** The amended version.

2 **THE CHAIR:** Yes.

3 **MR CARALL-GREEN:** The policy is in favour of the funder and covers the funder in
4 respect of the adverse costs indemnity, as a defined term, and is up to an amount of
5 15 million.

6 **THE CHAIR:** Yes.

7 **MR CARALL-GREEN:** That layer of protection is afforded to Google via the
8 anti-avoidance endorsement, which is endorsement number 9. If the Tribunal wishes
9 to see that, it is at page 1183.

10 **THE CHAIR:** That's the new revised version?

11 **MR CARALL-GREEN:** The revised version.

12 **THE CHAIR:** Yes.

13 **MR CARALL-GREEN:** The Tribunal will see from that that at paragraphs 2 and 5 it
14 did give Google a direct right to enforce against the insurer.

15 **THE CHAIR:** Yes.

16 **MR CARALL-GREEN:** Paragraph 4 gives Google notification rights about any
17 changes that would reduce the level of cover and requires that no changes are to take
18 effect until 30 days after notification. The point of that, Sir, is that Google can then
19 receive notification. If it considers that there is some kind of problem, it will make an
20 application --

21 **THE CHAIR:** Yes.

22 **MR CARALL-GREEN:** -- either for costs or security for costs.

23 **THE CHAIR:** Yes, yes.

24 **MR CARALL-GREEN:** Then paragraph 7 gives Google a similar run-off period to this
25 30-day period in which to make an application in respect of termination, if the policy is
26 terminated.

1 **THE CHAIR:** Okay. On that, from my reading of the exchanges between the parties,
2 there was at one stage a particular concern from Google that whilst termination was
3 covered, reduction wasn't.

4 **MR CARALL-GREEN:** That's now dealt with.

5 **THE CHAIR:** Can you just show me how that or -- reduction is now covered.

6 **MR CARALL-GREEN:** Let's do that.

7 **THE CHAIR:** Is this going to that endorsement?

8 **MR CARALL-GREEN:** Yes.

9 **THE CHAIR:** I think it is right at the end of the hearing bundle, isn't it?

10 **MR CARALL-GREEN:** It is.

11 **THE CHAIR:** Yes, tab 27. Just explain to me --

12 **MR CARALL-GREEN:** Yes, tab 28 --

13 **THE CHAIR:** It is tab 27, I think.

14 **MR CARALL-GREEN:** It is page 1183.

15 **THE CHAIR:** That's what I have.

16 **MR CARALL-GREEN:** Paragraph 4 deals with material changes. You see that in the
17 first line:

18 "... notify the Defendant of any material changes to the Policy which reduce the scope
19 of the cover ..." [As read]

20 **THE CHAIR:** Yes.

21 **MR CARALL-GREEN:** Then that only takes effect after 30 days.

22 **THE CHAIR:** Okay, yes. Was that a change from before, or was that always there?

23 **MR CARALL-GREEN:** The change, Sir, was the last sentence, so the introduction of
24 the last sentence:

25 "No change may be made to the Policy which reduces the stated Limit of Indemnity".
26 [As read]

1 **THE CHAIR:** Okay. That, therefore, met the original --

2 **MR CARALL-GREEN:** It met the concern.

3 **THE CHAIR:** -- concern. Okay, all right, thank you.

4 That deals with that point.

5 **MR CARALL-GREEN:** That deals with that point, Sir.

6 Now, I think I have therefore dealt with the four big categories.

7 **THE CHAIR:** I have one question. I have one point of detail --

8 **MR CARALL-GREEN:** Yes, Sir.

9 **THE CHAIR:** -- that might be regarded as overdetailed. If you go to

10 Professor Rodger's statement at paragraph 16 -- and this statement was made some

11 time ago, wasn't it, yes. I was a little -- well, I noted that at paragraph 16.1 the

12 explanation of the understanding of who the funder is and what the cell is didn't quite

13 chime with what Mr Chopin said. It may be just badly drafted.

14 **MR CARALL-GREEN:** It may be, Sir.

15 **THE CHAIR:** I don't know if you spotted that, but that second sentence -- the second

16 and third sentence is not right, I don't think.

17 **MR CARALL-GREEN:** I am told by the funder, that --

18 **THE CHAIR:** Yes. Because in that sentence he defines the funder as the cell -- the

19 GPS funding cell who are the --

20 **MR CARALL-GREEN:** No, the protected cell company is the Guernsey --

21 **THE CHAIR:** Yes, exactly, so the funder isn't the protected cell company.

22 **MR CARALL-GREEN:** No, the Guernsey company is a protected cell company.

23 **THE CHAIR:** Yes, I understand that. But the funder, as defined there, right,

24 is -- I thought that the funder as defined there is GPS UK funding cell.

25 **MR CARALL-GREEN:** But this is a -- Sir, I should say at this stage that I am about to

26 make submissions on the law of Guernsey, so I make these submissions for my own

1 understanding, but subject to that caveat -- (overspeaking) --

2 **THE CHAIR:** All I am saying is -- and then it says "the cell". It depends who is being
3 defined as the funder there.

4 **MR CARALL-GREEN:** Exactly, Sir. An important point to understand is that the GPS
5 UK funding cell is not a separate person.

6 **THE CHAIR:** No, I understand that. It's not a legal person. The legal person is
7 Guernsey PC blah, blah, blah. But I got the impression from that and from -- and it
8 may be my mistake -- Mr Chopin's, more extensive explanation which I have read and
9 could have told that the funder is actually the Delaware fund who is the GP -- yes, the
10 cell through which -- it may be that the word "Funder" there should actually be applying
11 to the Guernsey company.

12 **MR CARALL-GREEN:** Sir, I think the way it is being used is that the "funder", means
13 the whole thing, i.e. the Guernsey company contracting on behalf of the cell. Because
14 insofar as the Guernsey company contracts on behalf of another cell, it has different
15 assets and different liabilities because Guernsey law permits this arrangement
16 unknown to English law, whereby a company can sort of inhabit different stacks of
17 assets and liabilities --

18 **THE CHAIR:** I understand.

19 **MR CARALL-GREEN:** -- (overspeaking) --

20 **THE CHAIR:** Anyway, you might want to -- I raised the point. It may not be an error,
21 but it was the wording of the definition of "the Funder" which I took to mean to be the
22 cell and not the company. But as I told you, it was a pernicky point.

23 **MR CARALL-GREEN:** As I say, I think the intention is to refer to --

24 **THE CHAIR:** Both as one.

25 **MR CARALL-GREEN:** -- on behalf of the cell all in one thing.

26 **THE CHAIR:** All right.

1 **MR CARALL-GREEN:** Because referring to the cell would be effectively a category
2 error because there is no such separate legal person as the cell.

3 **THE CHAIR:** I suppose the point is that as long as Professor Rodger, with the benefit
4 of his expert advice, fully comprehends the arrangements, then that's what we need
5 to be satisfied about.

6 **MR CARALL-GREEN:** Again, if I can just put that to bed.

7 **THE CHAIR:** Please do.

8 **MR CARALL-GREEN:** If one goes to the witness statement of Mr Chopin at
9 page 986 --

10 **THE CHAIR:** Right. 986. I have marked it actually. I have it. I had a piece of paper
11 with some manuscript scribbles with lots of lines and boxes and a little chart. But, yes,
12 go on.

13 **MR CARALL-GREEN:** I confess I did as well, Sir.

14 **THE CHAIR:** Okay. I bet yours was neater than mine.

15 **MR CARALL-GREEN:** One can see at paragraph 1, Mr Chopin also says, when he's
16 defining "the Funder", he also uses that long expression, i.e. --

17 **THE CHAIR:** Again, I had interpreted the "Funder" to apply to the funding cell. But
18 I see what you are saying.

19 **MR CARALL-GREEN:** Yes. Then what he then goes on to explain later is that the
20 Delaware fund stands behind the credit of the Funder, capital F.

21 **THE CHAIR:** Let me just have a look.

22 He uses the phrase "the Funder" in paragraph 16.

23 **MR CARALL-GREEN:** Yes.

24 **THE CHAIR:** Again, I read that as meaning the funder is GPS UK funding cell, rather
25 than cell plus company. I mean, I may be dancing on the head of a pin.

26 **MR CARALL-GREEN:** It is a little fiddly because in 16 the Delaware fund is separate

1 from the funder, i.e. separate from the Guernsey company --

2 **THE CHAIR:** Yes.

3 **MR CARALL-GREEN:** -- on behalf of the cell, which is true. Then we say the
4 Delaware fund has undertaken directly that it will put the GPS UK funding cell in funds.
5 One says "Why not the Guernsey company?" The answer to that is this point about
6 Guernsey law, which is it is not giving its funds to any other funding cell that that
7 Guernsey company might be running, because those are separately hived off and
8 available only for the purposes of the investment for which those cells are committed.
9 So when the Delaware fund commits its funds, it commits them, yes, to the protected
10 cell company, but specifically to the cell --

11 **THE CHAIR:** Allocated to the cell, okay.

12 **MR CARALL-GREEN:** -- in these proceedings.

13 **THE CHAIR:** It is a definitional thing. To the extent that I may have implied a criticism
14 of the initial witness statement, I may gently withdraw.

15 **MR CARALL-GREEN:** I am grateful.

16 **THE CHAIR:** It is helpful to understand it. Let me just have a look at my own personal
17 diagram, just to remind myself.

18 I have taken fully on board the extent of Mr Chopin's witness statement, and the
19 backing to the funder. Yes.

20 Okay.

21 **MR CARALL-GREEN:** Sir, I think, if I am looking at your list, there might be one thing
22 to sweep up, which is having to do with the consultative panel.

23 **THE CHAIR:** Yes. We may have a couple of points on the consultative panel, but
24 yes, go ahead.

25 Can we just deal with confidentiality?

26 **MR CARALL-GREEN:** Yes, Sir.

1 **THE CHAIR:** You have undertaken to publish the LFA on the website, or you are
2 happy to do so.

3 **MR CARALL-GREEN:** We have not made any undertaking --

4 **THE CHAIR:** No.

5 **MR CARALL-GREEN:** We are in the Tribunal's hands.

6 **THE CHAIR:** My question for this is: to the extent that you are willing to do that, do
7 you wish to make any redactions when you put it on the website? If so, what
8 redactions?

9 **MR CARALL-GREEN:** I will take instructions, Sir.

10 **THE CHAIR:** Thank you.

11 **MR CARALL-GREEN:** Sir, the only redaction would relate to insurance premiums.

12 **THE CHAIR:** Okay.

13 **MR CARALL-GREEN:** Which in previous instances have been recognised as being
14 potentially covered by privilege in any event, because of the sense that they give of
15 the risk weighting that's been applied to the case.

16 **THE CHAIR:** Say that again, because of the percentage?

17 **MR CARALL-GREEN:** Because of the sense that they give --

18 **THE CHAIR:** The sense they give of the risk.

19 **MR CARALL-GREEN:** -- of the risk that has been allocated to the case.

20 **THE CHAIR:** Yes. I recall that from a case I did right at the beginning, that I was
21 involved in the Kent v Apple case originally and I remember it came up then. I think
22 that is fine.

23 I think that will be fine. If you are content for it to be otherwise published, then we are.
24 We would ask for that to be done.

25 That deals with confidentiality. You want to deal with consultative panel.

26 **MR CARALL-GREEN:** Yes, the consultative panel. I think that was on your list.

1 **THE CHAIR:** Yes. A couple of issues. The panel comes in relatively later, and this
2 issue about the extent to which it is covered by the budget and the remuneration.
3 That's the first point.

4 We also wonder whether -- we understand at the moment the proposal is that, as far
5 as requirement is concerned, it would meet twice a calendar year. I don't have it
6 immediately in front of me, but I think there is a suggestion that there would be
7 consultation on an ad hoc basis as well. I think we feel that maybe the consultation
8 should be of a greater frequency than twice a year, particularly in the light of the
9 possibility that things are going to move pretty fast in the next twelve months and we
10 might want something to be more formalised on that basis. Perhaps we were thinking
11 at least quarterly, I think. At least. It may be that the terms of that need to be
12 considered.

13 There is also a related issue, which isn't a consultative panel but I will raise it now,
14 which is we -- I think in the recent case this week as well, we are wondering whether
15 the observations made -- I think it is at paragraph 39 of Professor Rodger's statement
16 about informal consultation with class members, whether something more formal
17 should be put in place in relation to that, and whether there should be a class member
18 representative group that should be set up on a more formal basis.

19 I know it is not quite -- we are not suggesting that they should be part of the
20 consultative panel, I think we are suggesting they should be something separate from
21 that and I believe that that was raised in the Bulk Mail case this week.

22 You may want to take instructions on all those things. You might want to make some
23 submissions on the remuneration point, I don't know.

24 **MR CARALL-GREEN:** I can deal with the remuneration point now.

25 **THE CHAIR:** Yes.

26 **MR CARALL-GREEN:** Then perhaps take instructions on the remainder.

1 **THE CHAIR:** Yes.

2 **MR CARALL-GREEN:** The budget, Sir, is at page 529.

3 **THE CHAIR:** Can I go to that? Yes, thank you.

4 **MR CARALL-GREEN:** Now, Sir, at each stage the consultative panel would need to

5 be remunerated out of the disbursements column.

6 **THE CHAIR:** Yes.

7 **MR CARALL-GREEN:** The disbursements column has a total figure of 3.336 million.

8 **THE CHAIR:** Yes.

9 **MR CARALL-GREEN:** I can say on instructions that a proportion of that has been

10 allocated to the consultative panel. The proportion being £316,615.38.

11 **THE CHAIR:** 316,000 --

12 **MR CARALL-GREEN:** £615.38.

13 **THE CHAIR:** 38 pence?

14 **MR CARALL-GREEN:** Yes.

15 **THE CHAIR:** Okay.

16 **MR CARALL-GREEN:** I believe that was a percentage.

17 **THE CHAIR:** I am assuming it was rather than --

18 **MR CARALL-GREEN:** There hasn't been chosen --

19 **THE CHAIR:** So you have an allocated amount?

20 **MR CARALL-GREEN:** There is an allocated amount and then the panel members

21 are being remunerated on an hourly rate, the kind of rates you would expect in this

22 field.

23 **THE CHAIR:** Yes.

24 **MR CARALL-GREEN:** So the budget is ample, in my submission.

25 **THE CHAIR:** All right.

26 **MR CARALL-GREEN:** If the Tribunal has any concerns, I can take you through the

1 way that the budget can be expanded or --

2 **THE CHAIR:** No.

3 **MR CARALL-GREEN:** My primary submission is that there is an allocation there, and
4 it is enough.

5 **THE CHAIR:** But that allocation has been made post -- has been now made, once
6 the consultative panel was formed in January. It was January, wasn't it? I just
7 wondered whether that eats into anything else.

8 **MR CARALL-GREEN:** Inevitably it takes up some of what is in the disbursements
9 column, but the point is it has been agreed by the parties as being sort of --

10 **THE CHAIR:** That's fine, thank you.

11 **MR CARALL-GREEN:** I am instructed that there was effectively space in the budget.

12 **THE CHAIR:** Fine, okay, so that deals with --

13 **MR CARALL-GREEN:** That's to say nothing about the contingency budget, of course.

14 **THE CHAIR:** Yes.

15 **MR CARALL-GREEN:** That's the budget. If I could take instructions on the other two
16 points.

17 **THE CHAIR:** Yes, of course. Shall we press on and you take instructions when we
18 have a break on that?

19 **MR CARALL-GREEN:** Very good. I can hold those two over.

20 **THE CHAIR:** Yes, along with the other thing. We can make a list, because we have
21 one or two other points. I think we have probably covered all the points in the terms
22 of what I call the "Google objections".

23 **MR CARALL-GREEN:** Very good.

24 **THE CHAIR:** We have one or two other points. I am wondering whether it is best for
25 us to cover all the ground. We may then have a break at lunchtime and come back at
26 2 o'clock or whatever, if that is convenient to you.

1 Okay. You have the point about a possibility of having a class member's group. You
2 will take instructions on that. Let me just -- I think the first issue -- I am just going to
3 run through some points and then I think Mr Frazer might have a point. We will come
4 to that in a moment.

5 The litigation timetable is now, obviously, out of kilter and we think it will require
6 updating, but it may, obviously, depend on what happens, assuming we certify, next
7 week. It may be that you must make a note to update it, but I don't think you can do
8 that now. Is that the way forward on that?

9 **MR CARALL-GREEN:** Yes. An amendment now would be --

10 **THE CHAIR:** Yes.

11 **MR CARALL-GREEN:** The triumph of hope over expectation, I suspect.

12 **THE CHAIR:** Yes.

13 We have a question about the litigation budget which in fact we opened a moment
14 ago. What we don't have is we don't have the hourly rates for solicitors and counsel,
15 which frequently do appear in this situation. We wonder whether you would be content
16 to give us an idea of the hourly rates so we can have a look at the budget.

17 **MR CARALL-GREEN:** Yes.

18 **THE CHAIR:** You might want to take instructions on that as well.

19 **MR CARALL-GREEN:** I presume that will be something that will need to be supplied
20 in writing.

21 **THE CHAIR:** Sorry, yes. Yes. But let's come back to that.

22 I think the final point before Mr Frazer's -- before I hand over to him, is I think we would
23 welcome some explanation as to the genesis of the case and the involvement of
24 Professor Rodger from the outset in terms of his involvement from the beginning and
25 his, you know, whether he was involved in the LFA from the outset. I suppose in a way
26 we are raising these questions in the light of the Riefa case. You can do that on

1 instructions, after we break, if you want, but I think we would find that helpful.

2 I should say that by raising that, we are not suggesting that there are any problems,
3 and what has been set out has been set out very clearly, but I think it would help us
4 just to know the genesis of how it came about.

5 **MR CARALL-GREEN:** Very good.

6 **THE CHAIR:** I think that was all, other than Mr Frazer wanted to just raise some
7 questions about the model, really.

8 **MR FRAZER:** Yes, we at this stage of course need to ensure -- need to reassure
9 ourselves that there is a road map in relation to methodology to get to the trial. We
10 are, of course, at the very early stage, so I would not expect it to be overly populated.
11 I looked through Professor Fletcher's witness statement -- her expert report, which is
12 interesting and helpful. There are a lot of things in there which are not dealt with, and
13 which would certainly need to be dealt with as the matter came to trial, depending on
14 what is decided, assuming certification, what would be decided at the CMC in relation
15 to how the trial is going to be conducted.

16 There are elements in there that hadn't been considered or hadn't been considered
17 sufficiently. I wanted to make sure that we had some plans for how they are going to
18 be covered.

19 For example, just at random, the pass on is going to be extremely important here.
20 I couldn't see a lot of work on how that is to be measured, whether it is, for example,
21 going to be supported by developer evidence, through industry experts, through
22 theoretical models only, or some combination of them, because clearly that's going to
23 be an issue which is of very great significance in this case.

24 There is the question in relation to the level of charges made and whether those are
25 unfair or exceed what we would have expected in a competitive environment; there is
26 the question and the difficulty of measuring ROCE in an innovative industry such as

1 this, and the level where you might expect marginal costs, for example, to differ by
2 reference to a non-innovative industry, or whether there were perhaps not so many
3 intangible assets involved; there is the possibility that the markets are constrained by
4 either a systems market approach or where there is competition between Android
5 devices and non-Android devices, for example.

6 There is also, I think, I noticed instinctively some surprise at the size of the group,
7 which seemed instinctively to be very small. That might be correct, but what
8 reassurance we had in relation to that, and whether at all that would affect the
9 methodology going through or the relevance of the data we had.

10 In addition to that, just to finish my long shopping list, in order to answer those
11 questions, what thoughts had been given to additional expertise at an expert level or
12 at an industry level or at a facts level to be able to make the methodology road map
13 a feasible one.

14 **THE CHAIR:** Thank you. Again those maybe things you want to take time and take
15 instructions on.

16 So I think that has covered everything from our point of view. Mr O'Donoghue, I don't
17 think if you want to make any more general points or you have been done out of a job
18 this morning?

19 **MR O'DONOGHUE:** Yes, for once. Sir, I am not sure, in view of Mr Carall-Green's
20 comprehensive submissions, that it will add much. So I suggest on the other issues
21 Mr Frazer very properly raised, we would like to time to take instructions on.

22 **THE CHAIR:** Yes, so I think we should rise. We can start again at 2 o'clock if you
23 want. Yes, I think that will be better.

24 Just on a checklist, there are obviously Mr Frazer's points at the end; there is the
25 change of the wording in relation to 7.5(c), is it, the material breach and irremediable;
26 there is the issue of whether we could have some form of formalised class member

1 consultation process; there is the issue of hourly rates for counsel and solicitors which
2 I think you will provide in writing. I think that was all, was there? And the issue of the
3 genesis.

4 **MR CARALL-GREEN:** I am not sure if you covered it, but the meeting frequency of
5 the consultative panel.

6 **THE CHAIR:** Frequency of meeting of the consultative panel, yes. Fine.

7 Unless there is anything else, we will rise until 2 o'clock. Thank you very much indeed.

8 **(12.12 am)**

9 **(The luncheon adjournment)**

10 **(2.00 pm)**

11 **THE CHAIR:** Thank you.

12 **MR CARALL-GREEN:** Sirs, if I could start with some good news items.

13 **THE CHAIR:** Oh dear, that sounds ominous.

14 Yes.

15 **MR CARALL-GREEN:** The discussed amendments to clause 7.5 --

16 **THE CHAIR:** Yes.

17 **MR CARALL-GREEN:** -- have been approved.

18 **THE CHAIR:** Okay. Yes.

19 **MR CARALL-GREEN:** I think that deals with that item.

20 The question about the frequency of the meetings of the consultative panel,
21 Professor Rodger is very willing and enthusiastic about meeting with the consultative
22 panel on a quarterly basis, as suggested.

23 **THE CHAIR:** Yes.

24 **MR CARALL-GREEN:** At least.

25 **THE CHAIR:** At least, yes, okay.

26 **MR CARALL-GREEN:** In fact, as you pointed out, Sir, the current terms of reference

1 say "at least twice".

2 **THE CHAIR:** Yes, but if we can have that at least four times or at least quarterly,

3 I think that would assist, yes.

4 **MR CARALL-GREEN:** Then the question about the hourly rates, which will be

5 supplied in writing.

6 **THE CHAIR:** Okay.

7 **MR CARALL-GREEN:** That, I think, deals easily -- I am reminded, the amendment

8 about commercial viability.

9 **THE CHAIR:** Yes. I think that was agreed anyway, but yes, thank you.

10 **MR CARALL-GREEN:** Yes. I will now deal with the genesis of the case, and

11 Mr O'Donoghue is going to address you on the remaining items on the shopping list.

12 **THE CHAIR:** Okay.

13 **MR CARALL-GREEN:** On genesis of the case, I will be slightly careful about what

14 I say because many of the discussions in this context will be privileged.

15 **THE CHAIR:** Yes, of course.

16 **MR CARALL-GREEN:** But I can give you an idea of the timeline, which I think might

17 be instructive. It was September 2023 when Professor Rodger was approached by

18 Geradin Partners with the idea for the case. At that stage, there was no LFA in place.

19 Sir, I do want to make the point that that model or that pattern of behaviour is the

20 standard one. It might help if I hand up a document to make good that point.

21 **THE CHAIR:** Okay.

22 (Handed)

23 **MR CARALL-GREEN:** This document is a report drawn up by the Class

24 Representative Network, which talks about the way in which these cases are incepted.

25 **THE CHAIR:** Yes.

26 **MR CARALL-GREEN:** It is from September 2024. I just draw attention first of all to

1 | page 4.

2 | **THE CHAIR:** Yes.

3 | **MR CARALL-GREEN:** Under "Method", the second paragraph -- I should start with
4 | the paragraph at the beginning:

5 | "The objective of the research is to undertake a factual inquiry into the approach taken
6 | by class representatives in ongoing competition collective actions". [As read]

7 | **THE CHAIR:** Yes.

8 | **MR CARALL-GREEN:** Then under the heading "Method", second paragraph, if I can
9 | invite you to read that. This refers to a particular class representative who is described
10 | as the only class representative known to the author who formulated the legal basis
11 | for the claim, effectively without the assistance of a law firm.

12 | Then the other data point that I would draw attention to is on page 6.

13 | **THE CHAIR:** Yes.

14 | **MR CARALL-GREEN:** This pie chart shows the answers to the question:

15 | "At the point when you became involved in your case [that's a question addressed to
16 | the class representative] had your legal team already identified a prospective funder?"
17 | [As read]

18 | The normal answer out in 10 out of 14 cases is, yes, they had identified a prospective
19 | funder. So the position obtained in this case, which is that the law firm approached
20 | the proposed class representative and at that point had a prospective funder in mind,
21 | but not an LFA executed, is the standard position.

22 | **THE CHAIR:** Had a prospective funder in mind, but no LFA in place?

23 | **MR CARALL-GREEN:** Correct.

24 | **THE CHAIR:** Yes.

25 | **MR CARALL-GREEN:** From that stage forward I can say -- and again without
26 | intending to or waiving privilege -- that Professor Rodger had a substantive input into

1 the case from that time and helped the development of the case as one would expect
2 from somebody in his position, a professor of competition law.

3 In October -- so the following month -- he received initial advice in relation to funding.

4 **THE CHAIR:** Yes.

5 **MR CARALL-GREEN:** I beg your pardon, initial advice on the claim.

6 **THE CHAIR:** Yes.

7 **MR CARALL-GREEN:** In November, initial advice on the draft funding agreement.

8 Then you will have seen that the funding agreement is signed in December.

9 **THE CHAIR:** Yes.

10 **MR CARALL-GREEN:** Then after that substantive work on the drafting of the claim
11 form and the associated documents began at the beginning of 2024.

12 That is a brief trip through the inception of the case.

13 **THE CHAIR:** Yes.

14 **MR CARALL-GREEN:** I hope that assists.

15 **THE CHAIR:** Yes, thank you very much.

16 **MR CARALL-GREEN:** Thank you, Sir. With that I will hand over to Mr O'Donoghue.

17
18 Submissions by MR O'DONOGHUE

19 **MR O'DONOGHUE:** Sir, I will be going to pick up two points. One, the Tribunal
20 suggestion that there might be more of a direct role for the developers, whether in the
21 form of a committee or something less formal.

22 **THE CHAIR:** Yes.

23 **MR O'DONOGHUE:** Then to pick up on Mr Frazer's handful of helpful points which
24 he raised.

25 On the first point, there is an important point of some delicacy that I want to raise at
26 the outset.

1 **THE CHAIR:** Okay.

2 **MR O'DONOGHUE:** Google, of course, is a gatekeeper for a large number of
3 developers in this jurisdiction and elsewhere, and it is a matter of public record that
4 developers, justified or otherwise, have a legitimate fear of reprisals by Google in that
5 gatekeeper role. I will just give you a reference on that, there was an insert into the
6 authorities bundle at tab 34 which went in, I think, overnight --

7 **THE CHAIR:** Can I just first of all tidy up my desk and see if I have it?

8 **MR O'DONOGHUE:** Yes.

9 **THE CHAIR:** Volume 3 of the authorities bundle, yes?

10 **MR O'DONOGHUE:** Yes. Mine is bursting at the seams --

11 **THE CHAIR:** Tab 34, yes.

12 **MR O'DONOGHUE:** There should be a cover page and then a single page.

13 **THE CHAIR:** Yes. Correct. This is a US Senate --

14 **MR O'DONOGHUE:** US Senate into digital practice. It is internal page 185, which is,
15 I think, the only page you have.

16 **THE CHAIR:** Yes.

17 **MR O'DONOGHUE:** You will see, about a third of the way down, it says "In interviews
18 with the Subcommittee ...". So there is a discussion of arbitrary and unaccountable
19 enforcement of Play Store policies, and then the quotation, "When apps allegedly
20 violate Google Play Store standards, Google does not ever explain how ..." and so on.
21 Further down you will see a reference to further developer feedback.

22 **THE CHAIR:** Are you in the next paragraph?

23 **MR O'DONOGHUE:** Yes. You will see a reference to a firm called Callsome:
24 "Callsome believes it was banned because of its partnership with a StartApp, which –
25 at the times– was widely considered a nascent but rising rival to Google in the Russian
26 search market." [As read]

1 Then at 3, the final paragraph (inaudible):

2 "... that said Google has abused its control of the Play Store by using rule violations
3 as a pretext for retaliatory conduct." [As read]

4 One delicacy associated with the developers putting their heads above the parapet is
5 a legitimate fear of reprisals.

6 **THE CHAIR:** Okay.

7 **MR O'DONOGHUE:** That's point one. The second point on a more constructive note
8 is Geradin Partners, as indeed the Tribunal will expect, are in active contact with
9 developers. We have indicated in correspondence to Google that there is obviously
10 a realistic possibility that we will have developer witnesses in due course. That's the
11 second point.

12 The developers are very much front and centre of our thinking, set against the
13 backdrop of this delicacy I mentioned. That's the second point.

14 The third point built into the notice and administration plan are express provisions
15 which provide for developer and other input, both precertification and, if certification is
16 granted, post certification. I must quickly show you those.

17 **THE CHAIR:** Please do.

18 **MR O'DONOGHUE:** Volume 1 of the CMC bundle, tab 10, the cover page is on
19 page 460. The notice of administration started at 460. There are two clauses I want
20 to show you. 6.17 which is on page --

21 **THE CHAIR:** It is physical volume 2 for me, I think.

22 **MR O'DONOGHUE:** Tab 10, page 460. The first clause is on 475 -- 6.17 is pre-CPO.

23 **THE CHAIR:** You want to go to 475?

24 **MR O'DONOGHUE:** Yes, the first clause.

25 **THE CHAIR:** Paragraph?

26 **MR O'DONOGHUE:** 6.1.7.

1 **THE CHAIR:** Yes.

2 **MR O'DONOGHUE:** You will see there is functionality in-built into the website
3 whereby interested parties can submit questions through a contact form, and there is
4 also an email facility and FAQ and so on.

5 **THE CHAIR:** Yes.

6 **MR O'DONOGHUE:** Then post certification the counterpart is at page 480, paragraph
7 7.26.

8 **THE CHAIR:** Yes, okay.

9 **MR O'DONOGHUE:** There is already facility whereby developers and other interested
10 parties can play an inputting role, if I call it that.

11 **THE CHAIR:** That's questions, isn't it, really from their point of view? Is that the same
12 as an inputting role? Maybe it is.

13 **MR O'DONOGHUE:** Yes.

14 **THE CHAIR:** It is inquiries. Carry on.

15 **MR O'DONOGHUE:** It is iterative. There are questions, responses, FAQ and so on.

16 **THE CHAIR:** Yes.

17 **MR O'DONOGHUE:** Then, Sir, of course, from our perspective there is a potential
18 concern that if there is to be, say, a developer committee of some kind it needs to be
19 representative. As you may have picked up from the class membership issues, about
20 75 per cent of the class have claims, we think, of £10,000 or less. So there will be
21 some smaller developers -- there are obviously some well-known big
22 developers -- and various shapes and sizes in between.

23 **THE CHAIR:** Yes.

24 **MR O'DONOGHUE:** I think if we were to go about this, it would need to be
25 a representative sample and that I think will take a bit of time and effort. Of course,
26 we would absolutely want to avoid, if there was any conflict or, dare I say, hijacking of

1 | this committee, by someone who was unrepresentative.

2 | Sir, for those handful of reasons, we think this is quite a delicate point that needs
3 | further thought. What we would respectfully suggest is that we take this away, we
4 | speak to the developers we are in touch with, there may be further feedback if the
5 | claim is certified pursuant to the clauses I have shown you. We digest all of that and
6 | we come back to the Tribunal at the next substantive CMC -- or perhaps this can be
7 | dealt with on paper -- with a concrete proposal or set of proposals as to how this might
8 | be taken forward.

9 | **THE CHAIR:** Okay.

10 | **MR O'DONOGHUE:** To put it another way, Sir, we are reluctant for the reasons I have
11 | given to hardwire anything in today, so it needs a condition of certification. We think
12 | it is something that needs to be taken away, thought about in an integrated way, and
13 | then we come back to you in consultation with Google --

14 | **THE CHAIR:** It is not a condition of certification, you are saying?

15 | **MR O'DONOGHUE:** But we will use best endeavours to take this forward and see
16 | what is achievable and indeed fair, both to the individual developers and the
17 | developers as a class.

18 | **THE CHAIR:** Yes, okay, all right.

19 | **MR O'DONOGHUE:** That's all I want to say on that.

20 | **MR FRAZER:** Just on that point, I think the last point you made is a really very
21 | important one. That's to say there are significant differences, I anticipate, between the
22 | developers, some of them being very, very large --

23 | **THE CHAIR:** Yes.

24 | **MR FRAZER:** -- games publishers and some being really rather small, and
25 | developers whose interests may well differ throughout the matter. So the need to
26 | make it representative in some way in order to provide a range of views will be

1 a significant quality.

2 **MR O'DONOGHUE:** Yes, it is about as big a spectrum as you can imagine. Epic, of
3 course, is multi-million and global and I suspect some of these people are someone in
4 a garage or somewhere, someone above a corner shop or something of that kind. So
5 we will want to try to ensure it is not tilted in any particular direction, and is as
6 representative as it can possibly be.

7 The point is well taken. From our perspective, given this is a developer class, we want
8 on various planes their input. There is a question as to how that is brought to the fore.

9 **THE CHAIR:** Does your first concern which you raised, does the identity of the
10 members of such a body, if there is to be such a body, have to be revealed?

11 **MR O'DONOGHUE:** Well, Sir, Google of course is not here. We put cards on the
12 table --

13 **THE CHAIR:** What I am saying is that you are concerned about the issues that are
14 raised -- you call them reprisals -- it may well be -- I understand the point you are
15 making, but if there was to be some form of representative group, would the identity
16 of the members of that group need to be disclosed (a) to the Tribunal and (b) more
17 generally?

18 **MR O'DONOGHUE:** Sir, that is one of the issues we would want to raise.

19 **THE CHAIR:** I don't know. I am just raising that. You take it away and think about it.

20 **MR O'DONOGHUE:** Yes.

21 **THE CHAIR:** I am just thinking aloud about whether it does need to be.

22 **MR O'DONOGHUE:** Sir, both in terms of gatekeeper and in terms of adversarial
23 fairness, it might be said to Mr Frazer's point that you need to be satisfied that
24 whatever representation there is --

25 **THE CHAIR:** Is representative.

26 **MR O'DONOGHUE:** Is representative. It seems to me quite difficult to do that without

1 understanding who are these people and where they fit.

2 **THE CHAIR:** Unless we take your word for it, or you could anonymise them, but
3 anyway.

4 **MR TAYLOR:** You can just give us details of what size business they have or
5 something -- (overspeaking)

6 **MR O'DONOGHUE:** Yes, we could sort of give descriptors at a high level. All this
7 really is to reinforce my point that we need to take this away --

8 **THE CHAIR:** I understand, I understand.

9 **MR O'DONOGHUE:** -- to understand the mechanics, because they are not trivial and
10 there are competing considerations.

11 **THE CHAIR:** Yes. Okay. That is helpful, yes.

12 You want to deal with the second area.

13 **MR O'DONOGHUE:** Yes, through on the list of Mr Frazer's greatest hits.

14 The short answer is these points are well taken. We have them well in mind. They
15 are very, very familiar points to those of you who have sat through the recent Kent
16 trial. It may be a reflection of PTSD or something similar.

17 From our perspective, just I will come to the individual issues, but from our perspective,
18 one thing which is very important to bear in mind is this has not been an orthodox
19 certification process in the sense that we have not had any substantive response at
20 any stage from Google. In the ordinary course of events, there would have been
21 a response to Fletcher 1 by way of response to the certification application, then
22 leading to Fletcher 2. I suspect the short answer to your question is had that
23 happened, it would have been ventilated in Fletcher 2. Now that didn't happen for
24 various reasons. So that is one point.

25 Now, the second point, before I see the question, I will come to the individual issues,
26 but what we say at this stage is we have set out at the very least a coherent position

1 on each of them, and the ball, therefore, would be in Google's court to set out to what
2 extent they disagree, if indeed they do disagree.

3 Just to take one example, Sir, you quite properly raised the question of pass on. We
4 have asked Google to set out a position on pass on, which of course in our case is
5 their defence to the claim, or part of it, and they have not. Of course one can see with
6 Coll looming why they may be on the horns of a dilemma in terms of pass on from
7 developer to device users, but rightly or wrongly they have not set out any position on
8 pass on, and there is, of course, therefore a limitation on the extent to which we can
9 at this stage pre-empt different permutations.

10 Now, as I show you, we do have a section on Fletcher 1 on pass on. It has a slightly
11 different avatar, but we have these points well in mind. In my submission, it is really
12 a question of sequencing, but if the question is today is there some gaping hole that
13 cannot be bridged or plugged at the certification stage, my answer is emphatically no.
14 It is a sequencing point. But the points are well made --

15 **MR FRAZER:** I didn't open there would be a gaping hole, I just wanted to make sure
16 that road was sufficiently tarmacked, as it were. If you are going to start with pass on,
17 of course, Google is not going to be able to help you too much with pass on in the
18 sense that the information on pass on is going to be mainly with the developer.

19 **MR O'DONOGHUE:** Yes.

20 **MR FRAZER:** So you may, for example, have anticipated acquiring developer
21 evidence to fill that in, or industry expertise to fill that in, as well as the usual modelling
22 that I would expect.

23 Just for the avoidance of doubt, I will say I am not reading these things across from
24 Kent, of course, because Kent is on completely different facts. Just reading the
25 Fletcher report, these are the things which occurred as things being likely.

26 **MR O'DONOGHUE:** Even leaving aside Kent, of course, it is well known, for example,

1 that ROCE/WACC return on sales, when it gets to intangibles, there may be separate
2 questions as to the valuation of intangible assets.

3 Now, from our perspective, so on the profitability, Dr Fletcher relies on the ROCE. She
4 has an alternative return on sales measure. Both of those have been approved as at
5 least reasonable measures by the Court of Appeal in the Phenytoin case and of
6 course, Sir, you will remember -- maybe not fondly -- the pharmaceutical cases.

7 **MR FRAZER:** Very fondly.

8 **MR O'DONOGHUE:** That the same metrics came up again and again on the CMA
9 side.

10 **MR FRAZER:** It is a very different industry, though.

11 **MR O'DONOGHUE:** The intangibles perhaps play less of a role in the context of
12 generics, I see that point.

13 Now, Dr Fletcher has made the point that the CMA in its Mobile Ecosystems Market
14 Study did apply a ROCE and WACC analysis. What they did in terms of intangibles
15 was to say, "well, we will have a separate valuation component for those, but even if
16 you accumulate that with the other profitability findings, the level of profitability is so
17 off the charts it doesn't make any difference".

18 Sir, the point is well taken. There will be a vigorous debate on which measures of
19 profitability are suitable.

20 **MR FRAZER:** It is certainly not something you need to do now. My anxiety was just
21 that there was a sufficient plan in place to be able to acquire this information and how
22 you are going to take that through to trial.

23 **MR O'DONOGHUE:** Yes. The short answer is we have it well in mind. We are most
24 familiar with your point, familiar at least in conceptional terms, but we do have to see
25 which way Google jumps on some of this.

26 **MR FRAZER:** Nonetheless it is your case to prove. I don't want to believe that you

1 are simply relying on Google to come back and say something else.

2 **MR O'DONOGHUE:** Yes.

3 **MR FRAZER:** Certainly on things like pass on, certainly I can see why a lot of the
4 cost data is going to be, as it were, in Google's court and you would need to look at
5 that in order to be able to determine the accuracy of your estimations. On things like
6 incidents and pass on, et cetera, it might be that they will not be of much use to you.

7 **MR O'DONOGHUE:** I think that is fair to a good extent. Of course one of the things
8 Dr Fletcher does mention in the context of pass on, it is at 6.3 of her report, is there
9 have been some adjustments to commission over time and I will, on the Google side
10 of the ledger, allow for some natural experiments to be concerned in terms of what
11 impact that has, and that will require disclosure on their side. All of that is really for
12 another day.

13 On the profitability, we say at this stage we have set out something which is at least
14 reasonable. It is probably a racing certainty that Google will come back and say "hang
15 on, what about intangibles", but they have not actually said that yet and if and when
16 they do we will contend with it in the way that the CMA did in the Mobile Ecosystems
17 Market Study including in the case of Google.

18 I don't want to get into the weeds on a lot of this today, as you know, Sir, from Kent,
19 one can spend many, many weeks on these fascinating topics, but we do have the
20 issues well in mind.

21 Broadly, Sir, the same is true in respect of your systems point. For your note, Sir,
22 section 4.3.1.2 of Fletcher, she does deal with the possibility of non-Android
23 competition. So it is certainly something on her radar. Of course, like always, more
24 can be said and done, but I don't think it is a point she's sort of trying to magic away.
25 It is something we are very alive to.

26 Then, Sir, two final points you raised. One concerning the size of the class.

1 I apprehend some of us may be at the vestiges of what arose in Ennis, whereby initially
2 the class representative in that case, I think it was a class size of a similar size to this
3 case.

4 **THE CHAIR:** Yes.

5 **MR FRAZER:** It was.

6 **MR O'DONOGHUE:** When we got the transaction level data, it turned out it was five
7 or six times bigger. That seems a realistic possibility in this case as well. But sitting
8 here today, we have, based on public statistics, come up with the number we have
9 come up with. It actually took quite a lot of leg work. It may well be that, when we get
10 the transaction level data, it is bigger or considerably bigger, or roughly the same size,
11 but at this stage we can't say something concretely more than what we have been
12 able to interrogate in public terms. So that point is well in mind.

13 Again, putting on the certification lens, we have done all we humanly can at this stage
14 to interrogate that point and it is something which is almost certainly going to evolve
15 as we move forward.

16 Then, Sir, finally you raised a very fair point on the constitution of the expert evidence
17 and whether, for example, we will be needing finance and accounting experts,
18 valuation experts perhaps, or indeed industry experts.

19 Now again, Sir, that is something which we have well in mind. As you will well know,
20 Sir, from sitting on a number of unfairness cases, you have numerous parties who will
21 have a single economist who deals with all of these issues; you will have cases where
22 a party has a hardcore economic expert, a finance expert, and an accountant, and
23 indeed sometimes an industry expert, and you will have variations in between.

24 At this stage, we say no more than there is a realistic possibility that it may not just be
25 economic evidence, but there may, for example, be finance and accounting evidence.

26 To some extent again I don't wish to punt everything off to Google for another day, but

1 the Tribunal can see, of course, that if we are faced with a responsive accounting and
2 finance expert, we will then, I think, come under some pressure to fight fire with fire,
3 or at least there will be a more difficult question as to whether economic expert will
4 feel comfortable in terms of band width or expertise in dealing with all of these different
5 matters.

6 Sir, you are absolutely right that there is a real possibility that it may not just be
7 economic evidence that it may expand, but in terms of our budget plan, the assumption
8 we have made at this stage is that the costs of that exercise, whether it is economic,
9 finance, accounting or some mixture of all three, they are already included within our
10 budget figure. So it will be a question of disaggregating, if necessary, that figure into
11 two or more experts.

12 To that extent, we have the point --

13 **MR FRAZER:** I am sorry to interrupt. That has been calculated at a level where you
14 may be facing a significant body of witnesses from the other side? Because it may
15 well be the case, for example, that you would need experts in order to face witnesses
16 of fact which might be put forward by Google, rather than their own experts, as it were.

17 **MR O'DONOGHUE:** Indeed.

18 **MR FRAZER:** That needs to be anticipated.

19 **MR O'DONOGHUE:** Yes, of course. What I think Mr Carall-Green alluded to is we
20 have a 16.5 million budget, but there is a facility in clause 4 of the LFA for that to be
21 adjusted later. If advised at this stage (inaudible) such a need. Of course these things
22 can and do evolve.

23 **MR FRAZER:** Right.

24 **MR O'DONOGHUE:** Sir, again, one could spend a lot of time on the issues you
25 helpfully raised. I hope that gives you at least an indication that we are alive to the
26 points. They are well taken. We have factored a number of them into the budget as

1 things stand and these will be issues to be kept under vigilance as we move forward.

2 **MR FRAZER:** That's helpful. I was just also looking through Professor Fletcher's
3 report. There is quite naturally a heavy reliance on the recent CMA report.

4 **MR O'DONOGHUE:** Yes.

5 **MR FRAZER:** I anticipate that that would simply be because you don't have the
6 evidence at the moment that you would anticipate getting, and you wouldn't
7 necessarily be seeking to rely on that because its status is rather odd. It's not
8 evidence, as it were, that is open to cross-examination.

9 **MR O'DONOGHUE:** Sir, yes. As you will have picked up in Kent and other cases,
10 the defendant's position typically is that these are inadmissible, or if admissible should
11 be accorded no or next to no weight. But there will be debate on that in the course --

12 **MR FRAZER:** Of course, thank you.

13 **MR O'DONOGHUE:** You hit the nail on the head, when one is putting together these
14 reports pre-certification you are stuck with public materials and you use what is
15 available and seems on point to the question of degree and bindingness and so on.
16 That's for later.

17 **MR FRAZER:** Thank you. That's helpful.

18 **THE CHAIR:** I think that covers everything that we wanted to cover.

19 We will rise for a few moments and come back with our decision. Thank you very
20 much.

21 **(2.33 pm)**

22 **(A short break)**

23 **(2.48 pm)**

24

25 **RULING**

26 **THE CHAIR:** There is before the Tribunal an application to certify collective

1 proceedings brought by Professor Barry Rodger. Having heard oral argument today
2 and the written materials and written representations of Professor Rodger and from
3 the Proposed Defendants, the various Google companies, we have decided to certify
4 the proceedings subject to the following points.

5 These are in summary. First, amendment to clause 7.5(c) of the Litigation Funding
6 Agreement.

7 Secondly, amendment to the definition of "Material Adverse Change" in Annex 1,
8 concerning, I think, subparagraph (b), dealing with commercially viable return. I don't
9 specify the precise wording of the amendments, but I think they have been adequately
10 canvassed.

11 Thirdly, amendment to the arrangements for the meetings of the consultative panel
12 such that they will be meeting at least quarterly rather than every half year.

13 Fourthly, provision in writing of the hourly rates of counsel and solicitors in relation to
14 the litigation budget.

15 Fifthly, publication of the litigation funding agreement on the claim's website, subject
16 to redaction of the insurance premium.

17 Finally, Professor Rodger has undertaken to revert to the Tribunal with proposals for
18 a more formalised basis for consultation with class members, although that is not
19 a condition of certification.

20 We also ask for Professor Rodger to provide the Tribunal with the revised Litigation
21 Funding Agreement with the changes as suggested, or as required, as soon as
22 possible. We will give our written reasons for our decision in due course, and we will
23 at that stage, subject to any suggestion from Mr O'Donoghue, also decide the issue of
24 costs, unless it is thought that further written submissions are required on that issue.

25 Mr O'Donoghue, I am asking you: do you want the opportunity to make further
26 submissions on costs, or is what we have enough? I think you are asking for your

1 costs of responding to Google's -- well, you were -- objections; and Google were
2 asking for their costs of the objections.

3 **MR O'DONOGHUE:** May I put it this way, at least we have the possibility of within
4 seven days of your written reasons to put in something in writing.

5 **THE CHAIR:** I will make provision for, probably, seven days for each party. I don't
6 think they need to be sequential, do they? No, we will have written submissions on
7 costs within seven days of the written reasons, so the written reasons won't deal with
8 costs.

9 Any other matters arising? No, thank you very much indeed.

10 Obviously, in the light of that decision, we will see you, or some of you, on the 14th,
11 a week tomorrow. Thank you very much.

12 **(2.53 pm)**

13 **(The hearing concluded)**