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IN THE COMPETITION

Case Nos:1673/7/7/24, 1408/7/7/21,1378/5/7/20

APPEAL

TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 1st August 2025

Before:

The Honourable Mr Justice Morris
Bridget Lucas KC
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Professor Barry Rodger

Rodger Class Representative

- And -

Elizabeth Coll

Coll Class Representative

- And -

Epic Games, Inc. & Others

Claimants

- V -

Alphabet Inc. & Others

Google LLC & Others

Defendants

A P P E A R A N C E S

David Scannell KC and Aislinn Kelly-Lyth on behalf of Epic (Instructed by Norton Rose Fulbright LLP)

Antonia Fitzpatrick on behalf of Elizabeth Coll (Instructed by Hausfeld)

Kieron Beal KC and Bethanie Chambers on behalf of Professor Barry Rodger (Instructed by Geradin Partners)

Josh Holmes KC, Thomas Sebastian and Jack Williams on behalf of Google (Instructed by RPC)

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Friday, 1st August 2025

(11.00 am)

MR JUSTICE MORRIS: Good morning. I'll just read the standard wording first.

Some of you are joining us via the live-stream on our website so I must start, therefore, with the customary warning.

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

Thank you very much. Good morning, everybody. Good morning, Mr Scannell. Can I start with just some opening observations and then hand over to you?

This is the third joint case management conference in these three cases. We have the agenda and we have read the skeletons and other material. In order to decide how to approach today's hearing I thought I would just run down the agenda to see where we are with some thoughts that we have as to how we proceed, but obviously then subject to thoughts of counsel.

There are five items on the agenda: expert evidence applications by Epic and Professor Rodger; secondly, factual evidence application by Epic; thirdly, the trial length issues; fourth, disclosure, which we now understand that issue has been agreed, subject to some timetabling issues about the further hearing; and the fifth item was the variation of the Class Representative in the Coll case. That itself has already been resolved by an order of the court we made earlier this week.

It seems to us that it is most likely that the first item will take the most time and, as far as we are concerned, we would be happy to take that first and the factual evidence issue second, but we are open to any suggestion from the parties.

1 Can I just add this, and I think we already informed you, at the moment I don't have
2 a particular idea as to how long we will take, but we do need to finish by 4.30 today.

3 I think you have been told about that.

4 So over to you, Mr Scannell, and anybody else who has any observations on
5 a preliminary basis.

6 **MR SCANNELL:** Good morning, Mr Chairman, Ms Lucas. All of the observations that
7 you have just made, Mr Chairman, sound very sensible to us and we are very happy
8 to just launch into the expert issue now. I should say at the outset that I propose to
9 continue referring throughout my submissions to the "Coll Proceedings" even though
10 strictly speaking I suppose I should be saying the "Sir Gerald Barling" Proceedings
11 now. It is just too confusing and I don't think any of us are used mentally to that
12 nomenclature.

13 **MR JUSTICE MORRIS:** By all means launch into it as long as everybody else is
14 happy we deal with that first. Fine. We are happy to deal with that issue first.

15 **MR SCANNELL:** I am grateful. Epic's application to adduce expert evidence is in
16 Bundle E, tab 4, page 18. I am not asking you to turn it up quite yet. It is made
17 pursuant to the order made following the 1st May CMC that Epic make an application
18 specifying the number of experts it proposes to call, their fields of expertise and the
19 issues it proposes they address.

20 I propose to begin by taking you to the draft order in the application so that you can
21 see at a glance what is sought. That is in Bundle E, tab 5. If I could ask you to turn
22 that up, please.

23 **MR JUSTICE MORRIS:** Yes. Thank you.

24 **MR SCANNELL:** Over the page at page 36 it is convenient to begin at paragraph 2.
25 So in respect of forensic accounting evidence, Epic is content to rely on the evidence
26 that Mr Dudney has given in the Coll Collective Proceedings. That's described in

1 sub-paragraph (a) and it includes any supplemental evidence Mr Dudney may adduce.
2 In respect of payment systems evidence, Epic is content to rely on the expert evidence
3 of Mr Burelli in the Coll Proceedings. That evidence is described in sub-paragraph (b)
4 and again it includes any supplemental evidence Mr Burelli may adduce.
5 Provision, of course, does need to be made for the availability of Messrs Dudney and
6 Burelli's evidence in the event that the Coll Proceedings settle. Epic must in any event
7 be able to give instructions to those experts, in particular to update their evidence so
8 that it is not temporarily confined to the relevant periods in the Coll and Rodger cases.

9 **MR JUSTICE MORRIS:** Yes.

10 **MR SCANNELL:** So that explains paragraphs 3, 4 and 5 of the order.

11 **MR JUSTICE MORRIS:** Yes.

12 **MR SCANNELL:** In respect of the instructions referred to at paragraph 3 Epic has
13 agreed that the instructions it gives Messrs Dudney and Burelli can be joint instructions
14 with Professor Rodger, who has also indicated that he is content to rely on their
15 evidence and not to call separate evidence on those issues.

16 **MR JUSTICE MORRIS:** Okay. Just give me a moment, please.

17 **MR SCANNELL:** Excuse me. I am told that it is only Mr Burelli that that refers to, not
18 Mr Dudney.

19 **MR JUSTICE MORRIS:** Right.

20 **MR BEAL:** Sir, we have an application to rely on evidence from Mr Harman on
21 forensic accountancy.

22 **MR JUSTICE MORRIS:** Yes, I have that. I am just looking. I have a little schedule.
23 In terms of Mr Dudney and Mr Burelli Epic is content to rely on them for accounting
24 and payment.

25 **MR SCANNELL:** Yes.

26 **MR JUSTICE MORRIS:** And my note is that in relation to Professor Rodger, he is

1 content to rely on Mr Burelli, but Mr Harman is accounting. Yes.

2 **MR BEAL:** Supplemental evidence.

3 **MR JUSTICE MORRIS:** Yes. Thank you.

4 **MR SCANNELL:** Looking then at paragraph 1, we seek permission to rely on the
5 evidence of Ms Iona McCall of AlixPartners on market definition, dominance and
6 exclusionary abuse; Mr Matt Hunt of AlixPartners on excessive and unfair pricing and
7 Professor Mark Ryan of Birmingham University on cyber security, privacy and
8 malware. So I will need to address you on those proposed experts.

9 I propose to take that, Mr Chairman, in three steps. First, you will have seen from our
10 skeleton argument that the test you need to apply is whether the expert evidence is
11 reasonably required in the sense that it will be of assistance to you in due course in
12 reaching a conclusion on the issues in Epic's case. I would like to make a few
13 additional remarks on that test.

14 Second, the Tribunal cannot decide whether evidence is likely to be of assistance in
15 resolving the issues arising in Epic's case unless it is aware of those issues and how
16 they are put. So I propose to remind the Tribunal of our pleaded case with a view to
17 highlighting why expert evidence on particular elements of it is very important.

18 Finally, I will address the particular considerations that apply to each of the three
19 experts we seek permission to call.

20 As to the legal test, the Tribunal will have well in mind that what is of assistance to it
21 to resolve pleaded issues will vary from case to case depending on the circumstances.

22 The Tribunal emphasised that point in *Kent v Apple* and Ms Lucas cited the relevant
23 part of *Kent v Apple* in her judgment on expert evidence in *Coll v Alphabet* in 2023,
24 which is in the Authorities Bundle, but we don't need to go there.

25 As to the particular circumstances of this case, it is obviously relevant that expert
26 evidence has already been served by the Coll Class Representative. We don't ignore

1 that. Indeed, all of the experts Epic seeks to call have conscientiously taken account
2 of that evidence in offering their epistolary opinions in support of Epic's application,
3 but the chronology that led to the service of the expert evidence in the Coll
4 Proceedings also cannot be ignored, because it underscores the fact that that
5 evidence remains Ms Coll's evidence in support of the pleaded issues arising in her
6 case. It is not evidence served in the Epic Proceedings and never has been.

7 Epic's case, of course, predates the Coll Proceedings and the Rodger Proceedings,
8 so before either of those collective claims were certified Epic had been given
9 permission to adduce expert evidence from three experts in support of its case. The
10 Tribunal made that order in May 2022.

11 **MR JUSTICE MORRIS:** I think you refer to that in your skeleton, don't you?

12 **MR SCANNELL:** We do. In May last year, by which time the Coll Proceedings had
13 been certified but the Rodger Proceedings had not, the Tribunal then presided over
14 by Mr Justice Marcus Smith made an order whereby Epic's case would be heard
15 together with Ms Coll's case this year but only in so far as the factual evidence of
16 Epic's case was concerned. So Ms Coll's case was due to be heard in full this year.

17 **MR JUSTICE MORRIS:** Yes.

18 **MR SCANNELL:** But only the factual elements of Epic's case were to be heard with
19 it. The expert issues in the Epic Proceedings were split off from the Coll Proceedings
20 and it was ordered that they be the subject of a separate trial next year.

21 Consistent with that, the Tribunal stayed the service of expert evidence in Epic's case,
22 but ordered the Coll Class Representative to get on and produce her expert evidence,
23 which she duly did on 2nd October last year. That is why the Coll expert evidence has
24 been served, but the Epic expert evidence has not.

25 Under the case management provisions I have just described, it was not envisaged
26 that there would be sharing of expert evidence between Ms Coll and Epic. To the

1 contrary, as I have explained, the 2024 order split out the expert evidence into
2 separate trials a year apart. Consistent with that, Epic has had no involvement in the
3 production of the expert evidence in the Coll Proceedings. That evidence was
4 compiled by Ms Coll's experts without regard to any of the pleaded issues in the Epic
5 Proceedings.

6 Things have obviously moved on since then. Many of the provisions of the 2024 order
7 were set aside by the Tribunal in the order it made in March this year. By then the
8 Rodger Proceedings had been certified and pursuant to the March order the Epic, Coll
9 and Rodger Proceedings are being jointly case managed.

10 We, of course, accept the good sense of that March order, but it is important to
11 emphasise two aspects of it that are directly relevant to the application we now make.
12 The first is that the nature, origin and content of the expert evidence Ms Coll served in
13 October last year remains unchanged. That remains her evidence in support of the
14 pleaded issues in her case. It is not evidence served in the Epic Proceedings and
15 never has been.

16 The second point is that the March order did not consolidate the Epic, Coll and Rodger
17 Proceedings, nor could it have done. It merely ordered that they be jointly case
18 managed.

19 **MR JUSTICE MORRIS:** Right.

20 **MR SCANNELL:** So a joint case management order --

21 **MR JUSTICE MORRIS:** Pause a minute, please. I'm just making a note. Did not
22 order consolidation. Joint case management. Carry on.

23 **MR SCANNELL:** There is a difference between joint case management and
24 consolidation. In the Civil Procedure Rules, a Joint Case Management Order is akin
25 or analogous to an order under 3.1.2 (i) of the Civil Procedure Rules that two or more
26 claims be tried on the same occasion. That's distinct from an order under Rule 3.1.2(h)

1 that two or more claims be consolidated so that they proceed thereafter as one claim
2 based on a single set of pleadings and single common evidence.

3 The importance of that distinction lies in the fact that the evidence in Epic's case will
4 have to remain Epic's evidence. It retains its own separate identity as a case. It is a
5 claim based on its own pleadings and its own allegations in which Epic seeks relief
6 from specific abuses it alleges against Google.

7 So all of those --

8 **MR JUSTICE MORRIS:** I should say this was something which crossed our minds
9 this morning in pre-hearing discussion. It crossed our minds we don't know -- we didn't
10 consider the significance of it. We were aware of this issue that if there are three
11 separate proceedings, the evidence in each set of proceedings is the evidence in
12 those proceedings. I don't -- you are obviously making the point you make. I don't
13 know whether in due course further thought needs to be given to that, number one.
14 I am also not up to speed on the position in this Tribunal and my understanding
15 is -- and I will be corrected -- that there are not the same perhaps more rigid approach
16 to that as there is in the High Court, but it is something that's crossed our mind.

17 Mr Holmes.

18 **MR HOLMES:** If it assists, the order that was made following, or drafted following the
19 consolidation hearing provided that evidence in the Coll Proceedings would stand as
20 evidence in the other two sets of proceedings, including expert evidence.

21 **MR JUSTICE MORRIS:** Okay.

22 **MR HOLMES:** So we think that should be borne in mind when considering
23 Mr Scannell's submissions on that point.

24 **MR JUSTICE MORRIS:** Anyway you are making the point you are making. I am
25 telling you it is something that occurred to us that may or may not make a difference
26 and may or may not be something that needs to be grappled with at some stage in the

1 case. We are aware at the moment it is joint case management and trials heard
2 together, but whether there needs to be further provision in relation to that is something
3 that we can address at an appropriate stage.

4 **MR SCANNELL:** Yes. So in relation to that observation, which is extremely helpful,
5 and also my learned friend Mr Holmes' observation, we are, of course, well aware of
6 the provision in the 2024 order that Epic is free to rely on evidence that is served in
7 the Coll Proceedings and the Rodger Proceedings.

8 **MR JUSTICE MORRIS:** The 2025 order. I think you are referring to the most recent
9 order which I haven't got in front of me. Anyway.

10 **MR SCANNELL:** The point I am making is a different point to that. It relates
11 specifically to the question of whether Epic should be allowed to adduce evidence in
12 support of the pleaded issues that it advances in its claim. I don't say that it is
13 a complete answer if that assists you, Mr Chairman. We simply submit that these are
14 relevant considerations when it comes to the question of whether it is just and
15 reasonable to expect that Epic should now adopt effectively all of the evidence that
16 Ms Coll has adduced in support of her claim and adduce no evidence of its own in
17 support of its claim, which is what Google would like you to do.

18 In my submission that self-serving proposal would not actually assist the Tribunal in
19 arriving at a just outcome.

20 **MR JUSTICE MORRIS:** Okay.

21 **MR SCANNELL:** There are three further observations I want to make in relation to
22 what is reasonably required. The first of those relates to the point that I've just made.
23 The first is that there is obviously a difference between the question whether multiple
24 defendants to a single cartel claim should have to rely on the same expert report, on
25 the one hand, and the question whether different Claimants in different claims which
26 have not been consolidated or joined should have to share expert evidence with

1 litigants who are not parties to their case at all.

2 In principle and as a starting point each Claimant should be free to present its case in
3 the way that it wishes, relying on the evidence it wishes to present in support of it.
4 I don't say that there are no circumstances in which shared expert evidence may be
5 appropriate and, of course, it must also be open to Claimants to do so voluntarily, as
6 indeed Epic has done in relation to Mr Dudney and Mr Burelli, but the Tribunal should
7 be slow, in my submission, to impose that approach on a Claimant, particularly in the
8 circumstances I have just described.

9 The second observation, which again I make in the context of jointly case managed
10 proceedings which have not been consolidated, is the question of what is reasonably
11 required cannot be reduced to the simple question of whether a particular issue has
12 already been canvassed by another expert. Mr Thiagamoorthy, one of RPC's
13 solicitors, refers to the concept of duplication 40 times in his witness statement as if
14 that suggestion can bar the application or the admission of reasonably required
15 evidence. I would suggest that that's wrong. It is more nuanced than that. One
16 Claimant's expert may touch upon an issue tangentially, because the issue may be of
17 only tangential relevance to that Claimant's case, but the same issue might be
18 fundamentally important to a different Claimant and to that Claimant's case, and in that
19 situation I would suggest it would be unjust to preclude the latter Claimant from
20 adducing the expert evidence it requires on that issue.

21 **MR JUSTICE MORRIS:** Just bear with me one moment. Yes. Thank you.

22 **MR SCANNELL:** I do apologise both to Ms Thiagamoorthy and to the Tribunal. I said
23 Mr and I meant Ms.

24 The final observation I want to make relates to the identification of gaps in the evidence
25 and what the appropriate response to that is, particularly in the context of jointly case
26 managed proceedings which haven't been consolidated, although I would suggest that

1 | what I am about to say goes beyond this and it is more generally relevant.

2 | At the outset I would say that one must be quite careful referring to gaps in expert
3 | evidence, because what may be a gap for the Claimant in one case may be no gap at
4 | all for the Claimant in another case. The latter Claimant may be disinclined to fill the
5 | gap because he may perceive that there is none in it, that it meets his case perfectly
6 | adequately and he has done his job. Filling in that gap for that expert may be felt to
7 | disrupt the evidence that the expert has already given.

8 | Nevertheless if the Claimant in one case has already adduced evidence on a particular
9 | matter and the Claimant in another case identifies a gap, at least so far as its case is
10 | concerned, there is a natural inclination to ask "*Well, why don't you just call an expert*
11 | *to fill in the gap?*" That might seem like an attractive solution, but I would suggest
12 | again that there is more to it than that.

13 | **MR JUSTICE MORRIS:** You are talking here about calling -- this is the second
14 | Claimant perceives a gap which is not relevant to the first Claimant.

15 | **MR SCANNELL:** Exactly.

16 | **MR JUSTICE MORRIS:** But you are positing the situation of the second Claimant
17 | calling an expert for the purpose of filling in that gap rather than the first expert filling
18 | the gap in on joint instruction.

19 | **MR SCANNELL:** Correct.

20 | **MR JUSTICE MORRIS:** Okay.

21 | **MR SCANNELL:** Correct.

22 | **MR JUSTICE MORRIS:** I have disrupted you. You were saying about why you can't
23 | call -- the second Claimant can't call an expert just to fill in the gap, I think.

24 | **MR SCANNELL:** None of these are bright line submissions so it is not really can't,
25 | but they are relevant considerations.

26 | One difficulty that arises with that is that an invitation to let's call her expert number

1 two, the gap filling expert, to fill in the gap of expert number one, who has already
2 served the evidence is essentially an invitation to expert two to adopt all of the
3 evidence that contains the gap and that is inherently problematic, as I am sure you will
4 appreciate, Mr Chairman. Experts owe duties to this Tribunal. They must give their
5 evidence independently and truthfully and different experts approach issues in
6 different ways. So it's very far from obvious that forcing an expert to accept another
7 expert's evidence in the same field is consistent with those duties.

8 **MR JUSTICE MORRIS:** Okay. That's forcing an expert to accept the evidence.

9 **MR SCANNELL:** That's forcing an expert.

10 **MR JUSTICE MORRIS:** That's different from potentially encouraging the expert to
11 agree/adopt it if expert two does agree with expert one.

12 **MR SCANNELL:** Yes. You have hit the nail on the head there, Mr Chairman. That's
13 obviously not problematic, if expert number two says, *"Look, I have reviewed the*
14 *expert evidence that has already been served. I am content with it so far as it goes*
15 *and I will not duplicate it. I will not repeat that analysis, but there are other points that*
16 *are specific to the client who seeks to call me to give my opinion"*.

17 **MR JUSTICE MORRIS:** Yes.

18 **MR SCANNELL:** So taking all of those considerations in the round, I would suggest
19 that there are bear traps for the Tribunal in relation to the appropriate solution to come
20 up with. I simply draw those to the attention of the Tribunal. I would suggest that what
21 they drive the Tribunal towards is the position overall that the starting point for this
22 application should be that unless Google can come up with a very forceful and
23 compelling reason why Epic should not be able to call expert evidence in support of
24 its pleaded case, the permissions that we seek should be granted. For the avoidance
25 of doubt, we see no such compelling reasons having been presented.

26 **MR JUSTICE MORRIS:** Okay.

1 **MR SCANNELL:** With those considerations in mind could I turn to our pleaded case?
2 This identifies the issues in our pleaded case which are obviously central to all of the
3 applications.

4 **MR JUSTICE MORRIS:** Yes.

5 **MR SCANNELL:** Our pleaded case is a lengthy document, Mr Chairman. We simply
6 don't have time to go through it on a page turning exercise. So what I propose to do
7 is to summarise the key elements of our claim of relevance to the application.

8 **MR JUSTICE MORRIS:** Okay.

9 **MR SCANNELL:** The starting point for Epic is the Licensable Operating Systems
10 market. That's absolutely at the heart of Epic's case. We allege that Google is
11 dominant on that market and we allege it abuses its dominance on that market in very
12 specific ways, each one of which results in market foreclosure and a specific claim for
13 relief.

14 In particular, we point to the fact that Google configures the Android operating system
15 to make it very difficult for apps, including app stores, to be downloaded directly from
16 the internet. We have referred to those as "Technical Restrictions". That makes it
17 very important for app developers to have access to the Google Play Store if they want
18 to distribute their apps, and in that regard Epic's case includes a plea in the alternative
19 that the Google Play Store is an essential facility, that is that it is critically important to
20 have access to it.

21 When it comes to considering the adequacy of Dr Singer's expert evidence for the just
22 determination of Epic's case, it is important to bear that plea in mind because, of
23 course, essential facility is no part of Ms Coll's case and no part of Professor Rodger's
24 case either.

25 So staying on the Licensable Operating Systems market, we point to the agreements
26 that Google concludes with mobile device manufacturers. They are called "Mobile

App Distribution Agreements” or “MADAs”.

MR JUSTICE MORRIS: Yes.

MR SCANNELL: It is very important for app manufacturers to enter into them if they want access to the must-have apps that Google provides, but we say that that agreement -- those agreements contain abuses all of their own. We refer to the GMS Bundle Requirement and the Google Play Pre-install Requirement.

Now the first of those, the GMS Bundle Requirement means that the device manufacturer can't pick and choose which of Google's apps to feature on their devices. They have to take all of them, and the important point is that all of them includes the Google Play Store. The Google Play Pre-install requirement means that device makers have to pre-install the Google Play Store on their devices and they have to ensure that it features prominently on their devices' home screens.

Now our case, which, of course, Google resists, is that the object and effect of each of those restrictions and others that we mention on the Licensable Operating Systems market is to maintain and consolidate the position of the Google Play Store as the overwhelmingly dominant app store within the Android ecosystem. In other words, Google leverages the dominance it has on the licensable operating systems market to create dominance on a further market, which is the market for Android app distribution.

As to Google's abuse on the Android App Distribution market, we plead in particular to the agreements that Google concludes with developers, “DDAs” or “Developer Distribution Agreements”. Again, we say that they contain restrictions all of their own amounting to abuses. We refer to clause 4.5 and we refer to Google's In-App Billing Requirement. As to what they are, clause 4.5 is a clause which effectively prohibits the distribution of app stores in the Google Play Store or indeed any app that facilitates the distribution of apps.

For Epic, just pausing there, what that means is it is caught between Scylla and

1 Charybdis. It has its own app store. It is called the Epic Games Store. It can't
2 distribute it via the Google Play Store because of clause 4.5, and consumers can't get
3 access to it directly outside of the Play Store either because of the Technical
4 Restrictions.

5 Under the Google In-App Billing requirement, developers of apps have to ensure that
6 when users make an in-app purchase they do so using the Google payment system.

7 In other words, Google has tied the use of the Play Store to its payment system and
8 that in turn leads to the final market. It leads us to plead that Google leverages the
9 dominance that it has on the Android App Distribution market to intensify dominance
10 on the Google Play In-App Payment Services market, which is the bottom tier. It is on
11 that market that Google receives, as it were, the payoff for its abuses, because we say
12 that the commissions that Google charges on all of these in-app transactions which it
13 funnels through its payment system are excessive and unfair. It is generally 30% on
14 all purchases of digital content.

15 Now more recently, and apparently in an attempt to avoid regulatory intervention in
16 the UK and elsewhere, Google has seemingly relaxed this tie between the Google
17 Play Store and Google's in-app billing service. It has allowed developers to develop
18 apps that give users a choice whether to use Google's payment system or their own
19 or a third party's billing system or to use only the developer's billing system. We call
20 that "User Choice Billing" and "Developer Only Billing", and we have amended our
21 case to accommodate that development. We make various pleas in relation to the
22 significance of User Choice Billing and Developer Only Billing.

23 That takes us, finally, to the relief that we seek in relation to all of these abuses. For
24 that, and the Tribunal will be grateful to hear only for that, could I ask you to turn up
25 Bundle B, tab 1, page 59.

26 **MR JUSTICE MORRIS:** B, 1?

1 **MR SCANNELL:** B, 1, 59.

2 **MR JUSTICE MORRIS:** We are going near the back presumably.

3 **MR SCANNELL:** We are going all the way to the back and the prayer for relief,
4 Mr Chairman.

5 **MR JUSTICE MORRIS:** Page 59 I have got.

6 **MR SCANNELL:** Yes. I want to make two points in relation to the relief that Epic
7 seeks. The first is that the relief is purely injunctive, so there is no claim for damages
8 in the Epic case.

9 The second, which is really critically important, is that each one of the injunctions that
10 one sees listed in the subparagraphs below, tracks on to specific abuses I have
11 identified in my summary of the pleaded case.

12 So at paragraph (c), just to take one example, you see that Epic seeks an injunction
13 to prevent Google from enforcing clause 4.5 of the Developer Distribution Agreement.

14 **MR JUSTICE MORRIS:** Yes.

15 **MR SCANNELL:** Over the page at sub-paragraph (f), for example, you will see that
16 we seek an injunction to prevent Google from requiring device makers to pre-install
17 the Google Play Store as a pre-condition for getting access to Google apps and the
18 GMS bundle and so on.

19 **MR JUSTICE MORRIS:** Yes.

20 **MR SCANNELL:** So in Epic's case each abuse on each of the three markets we
21 identify is the subject of a specific and individual claim for relief in the form of
22 an injunction, and it all begins with the licensable operating systems market. That
23 mirrors the claim that Epic has brought in the United States incidentally, alleging the
24 same abuses on the same three markets worldwide. Those proceedings have already
25 resulted in the grant of injunctions in the United States and just yesterday the Ninth
26 Circuit Court of Appeals dismissed Google's appeal against the grant of all of those

1 injunctions. So that's Epic's claim.

2 Turning then, finally, to the specific experts, the third of the points --

3 **MR JUSTICE MORRIS:** I have got the point that you make that there are distinct
4 abuses -- three different markets, distinct abuses being reflected in distinct relief
5 orders sought. I am not sure yet I fully understand, and I think in your skeleton you
6 refer to therefore the need to consider distinct counterfactuals I think.

7 **MR SCANNELL:** Yes.

8 **MR JUSTICE MORRIS:** But I would want to understand a little bit better on the
9 assumption that many, if not most of those allegations are made by others, even if
10 they wrap them up as a single abuse ultimately, why the distinction you make matters
11 in terms of expert evidence, leaving to one side separately the issue about whether in
12 any event you should be permitted, given everything you have said so far, to call your
13 own expert. You do make I think quite a play in your skeleton of that difference and
14 at the moment I am not yet clear in my mind as to how that plays out in terms of
15 differences in expert evidence.

16 **MR SCANNELL:** Yes. I am very grateful.

17 **MR JUSTICE MORRIS:** I am sure you will come to that but that's a point that occurred
18 to me.

19 **MR SCANNELL:** I am very grateful. That is what I was about to turn to next.

20 **MR JUSTICE MORRIS:** Okay. Fine.

21 **MR SCANNELL:** Dealing first with the evidence that we wish to call from Ms Iona
22 McCall on market definition, dominance and exclusionary abuse, there are three
23 reasons why we wish to call Ms Iona McCall and two of them I will take shortly and
24 I will focus on the third, particularly in light of the indication that you have just given.

25 So the first is that the relief that's sought by the Coll and Rodger Class
26 Representatives, in both cases damages only, is exclusively referable to Google's

1 historical conduct. In the Coll Proceedings the relevant period ends on
2 1st March 2024 and in the Rodger Proceedings it ends in August last year. Google's
3 historical wrongdoing is obviously relevant to Epic's case, but because Epic only seeks
4 injunctive relief it will be just as important for the Tribunal to consider whether Google
5 continues to act unlawfully; in other words, the Tribunal will have to assess Google's
6 conduct in the two and a half year gap between the end of the relevant periods in Coll
7 and Rodger and the likely date of the Tribunal's judgment.

8 There is no reason in my submission why that evidence should come from Dr Singer,
9 the Coll Class Representative's expert, or for that matter Professor Fletcher, whom
10 the Rodger Class Representative wishes to call in this field.

11 The second reason is that Epic will need to lead expert evidence in support of its
12 essential facility argument and that will have to include evidence as to how that affects
13 the analysis of dominance. Neither Ms Coll nor Professor Rodger has pleaded
14 an essential facility case, so there is no reason in my submission why that evidence
15 should come from Dr Singer or Professor Fletcher. The relevant evidence should
16 logically come from Epic in the form of a report from Ms McCall.

17 But it is really the third reason that I want to focus on, and that is that although, of
18 course, there are points of overlap between the Coll Proceedings and the Epic
19 Proceedings, there are also fundamental differences. I have pointed to two of those
20 differences already, but there is an even more fundamental difference underlying the
21 cases, and that is that the Coll Class Representative perfectly understandably seeks
22 compensation for the aggregate harm suffered by all of the consumers that she
23 represents, and for that purpose what ultimately matters to the Class Representative
24 are the commissions that Google charges on what Ms Coll describes as "Relevant
25 Purchases", that is to say purchases of apps, in-app purchases and in-app
26 subscriptions. That's the pay-off that Google gets for the totality of its abuse, as I have

1 described it.

2 It is obviously important for Ms Coll to establish that, that payoff results from a
3 competition infringement, but her claim is not particularly concerned with breaking
4 down the individuated elements of Google's conduct on different markets in arriving at
5 that competition infringement. Ms Coll in her pleaded case refers to all of the abuses
6 in aggregate. Her words are that they are "mutually reinforcing exclusionary and
7 exploitative practices".

8 Epic's case is fundamentally different from that. As I have shown the Tribunal, Epic's
9 case isolates individual elements of Google's abuse on distinct upstream markets. It
10 then conjugates those abuses all the way down to the bottom market, but it seeks
11 relief at every level in respect of each of the instances of abuse.

12 What that means is that Dr Singer's evidence is unsuitable for the Epic claim in at least
13 two respects: first, market definition, and, second, causation and effects. Now it is
14 causation and effects that engages the counterfactual, so I will get to that in just
15 a moment, Mr Chairman, but on market definition first, if I may, I would suggest that
16 there are three very considerable difficulties that arise.

17 The first is that the licensable -- with the market definition with elements of Dr Singer.

18 **MR JUSTICE MORRIS:** Yes.

19 **MR SCANNELL:** For the avoidance of doubt, there is no criticism here of Dr Singer.
20 He has done a fine job for Ms Coll. This is all just; is it suitable for Epic? That's what
21 I am grappling with.

22 The Licensable Operating Systems market is central to Epic's case. I hope I've
23 emphasised that sufficiently, but it is not of central importance to Ms Coll's case. In
24 fact, it is only of tangential relevance to Ms Coll's case, because it is very distant from
25 the locus of harm that she alleges. Consistent with that, although Dr Singer does, of
26 course, refer to the Licensable Operating Systems market, he does not separately

1 define it in the classic conventional manner beginning with focal products and services
2 that are subject to allegedly restrictive conduct, considering viable substitutes,
3 hypothetical monopolists and what have you, which is the approach that Ms McCall
4 will have to take to define that market.

5 **MR JUSTICE MORRIS:** Sorry. Say that again. Which Epic?

6 **MR SCANNELL:** Which is the approach that Ms Iona McCall of --

7 **MR JUSTICE MORRIS:** Oh, McCall. I heard Coll rather than McCall. Perhaps we
8 ought to refer to Barling.

9 **MR SCANNELL:** Maybe I should. I fear my slightly Irish burr is holding me back in
10 relation to these names.

11 **MR JUSTICE MORRIS:** No, not at all.

12 **MR SCANNELL:** The second market definition difficulty is that Ms Coll's case is
13 a case brought on behalf of consumers and, consistent with that, the focal product that
14 Dr Singer relies on are "Relevant Purchases" by consumers.

15 Ms Iona McCall of AlixPartners confirms that she cannot take the same approach to
16 market definition. She has to consider market foreclosures and the leveraging of
17 abuse to facilitate abuses on downstream markets.

18 The third related market definition difficulty, which I've touched upon already, is that
19 Dr Singer doesn't correlate specific instances of abuse on upstream markets to harm
20 that is suffered on those upstream markets. That contrasts very clearly with Epic's
21 case where Epic identifies abusive conduct at every level and seeks relief on that level.
22 It doesn't wait for anything to trickle down to the bottom level and seek to claim that
23 damage is only suffered there, because that's emphatically not Epic's case.

24 These distinct features of the case compared to the Coll Proceedings make it
25 unsuitable, in my submission, for Epic to have to wear the ill-fitting garment of
26 Dr Singer's evidence. It wants to, and in my submission is entitled to rely on a market

1 definition analysis which is actually tailored to its case.

2 As I have sought to make clear, none of that involves criticising Dr Singer and his
3 analysis. The problem is that his analysis is a garment which is perfectly suited to
4 Ms Coll, but it just doesn't fit Epic and it shouldn't be forced to wear it. The whole
5 purpose of market definition is to facilitate the analysis of abuse. Different allegations
6 of abuse are meant to result in different approaches to market definition. We refer in
7 our skeleton argument to the Paroxetine case in the Court of Justice where the Court
8 of Justice was prepared to take a wholly novel approach to market definition, ignoring
9 all forms of substitutability to arrive at a market definition comprising no more than the
10 Paroxetine molecule in order to assess the particular abuse that was alleged by the
11 CMA in that case.

12 My learned friend and Ms Thiagamoorthy are therefore wrong to suggest that the one
13 size fits all approach will do when it comes to market definition. Ms McCall has
14 confirmed in her letter to the Tribunal in support -- excuse me. It is not a letter to the
15 Tribunal. It's a letter in support of Epic's expert evidence application.

16 **MR JUSTICE MORRIS:** Yes.

17 **MR SCANNELL:** That she will approach market definition differently. In her words
18 she needs to take account of separate relevant markets and how they relate to the
19 relevant individual elements of the conduct as set out in Epic's exclusionary abuse
20 claim.

21 Finally on causation and effects the analysis that Dr Singer has undertaken is again
22 ideally suited to Ms Coll's case. The Coll Class Representative alleges that the losses
23 suffered by class members only crystallise at the point when "Relevant Purchases"
24 are made on apps and in-app purchases and subscriptions. That loss is attributed, as
25 we have already explored, to aggregate abuse in arriving at that point and in support
26 of that case a single counterfactual will do: what commission would have been payable

1 had Google not acted abusively.

2 That is not sufficient, not even close to sufficient for Epic's case. Epic's case claims
3 distinct injunctive relief in respect of each instance of Google's abuse on each market.
4 So a different counterfactual will have to be applied to establish the anti-competitive
5 effects of each one of those instances of abuse. Ms McCall explains that too in her
6 letter in support of Epic's application.

7 To put that into context, the counterfactual in Ms Coll's case, what commission would
8 have been payable had Google not acted abusively, is entirely irrelevant to six of the
9 seven injunctions that Epic seeks in its case. So it couldn't be clearer that a different
10 analysis will be needed by Ms Iona McCall of AlixPartners.

11 So for all of those reasons we submit that that permission should be given to Epic to
12 lead evidence from Ms McCall. It is reasonably required, we say, and we also add
13 that it would be unjust to compel Epic to adopt Dr Singer's evidence in place of what
14 is reasonably required. So that's Ms McCall.

15 **MR JUSTICE MORRIS:** Yes. I have your second economist.

16 **MR SCANNELL:** Yes, that's true.

17 **MR JUSTICE MORRIS:** Sorry, I am not hurrying you along if you had something else
18 to say.

19 **MR SCANNELL:** No, I don't Mr Chairman. I was just going to say for the Tribunal's
20 benefit that my client feels very, very strongly about Ms McCall and the need for her
21 evidence. I am going to deal with Mr Hunt a little bit more shortly. I am going to deal
22 with Professor Ryan more shortly too. So 'we are nearly there' is really the punchline
23 that I want to give you.

24 **MR JUSTICE MORRIS:** Yes.

25 **MS LUCAS:** Can I ask a question about Ms McCall's proposed evidence? Say, for
26 example, she has to address certain restrictions, Technical Restrictions or whatever

1 in the course of her report, but evidence has been given about that elsewhere in
2 Ms Coll's expert reports already. Is it envisaged that we will get another recitation of
3 that or if it is broadly correct, will she be cross referring to it and saying, "*I broadly
4 accept that summary of the restrictions is correct and I therefore proceed to show how
5 that impacts Epic's case and my methodology*".

6 **MR SCANNELL:** The short answer to your question is that risk does not eventuate at
7 all. This is covered in Ms Iona McCall of AlixPartners' letter in support of the
8 application. So she makes it clear in her letter --

9 **MR JUSTICE MORRIS:** Do you want to take us to that?

10 **MR SCANNELL:** I think I should take you to that. That's why I was leaning to my
11 learned junior. It is in Bundle E at tab 6 on page 44. The relevant paragraphs as you
12 can see under the heading "Avoiding duplication" are paragraphs 29 and 30. She
13 notes that:

14 "*The scope of the work will be similar but there will be differences in the analysis, and
15 I hope I have brought those across, but recognising the similar scope of the work and
16 to avoid unnecessary cost and ensure that my report is as concise as possible, I will
17 cross refer to the relevant evidence cited in the Singer report. For example, I note that
18 Dr Singer provides various factual evidence and market data that I can potentially rely
19 on, including -- this list is not intended to be exhaustive; it is merely to provide a few
20 narrow examples.*"

21 Then she sets out concrete examples below. She is not entirely categorical as to
22 further areas but it is too early for her to be so categorical.

23 It is quite clear, and the order can reflect this, she must use best endeavours to avoid
24 duplication where possible. One can see from her letter that is something she is
25 prepared to accept.

26 **MR JUSTICE MORRIS:** I mean, that leads into a more general observation or thought

1 that we had, that is we are aware of the length of the volume of witness statements
2 already. I think I saw a figure of 3,900 pages so far. In purely practical terms we have
3 a concern about numbers of pages, I am going to be directly honest. We have that
4 well in mind at the moment about the number of pages. That is a point that Ms Lucas'
5 point goes to that we don't want large tracts of repetition. Where at all possible
6 *"Dr Singer, at paragraphs X to Y sets out the following facts which I adopt or agree*
7 *and my analysis of those are as follows"*. We have that very much uppermost in our
8 minds in a practical sense.

9 **MR SCANNELL:** That's entirely understandable and something that I am sure we can
10 accommodate.

11 **MR JUSTICE MORRIS:** In a way that is one aspect of duplication. One aspect of
12 duplication is the same expert reaching the same conclusions about the same thing
13 but a sub-set of duplication is just not reinventing the wheel in terms of perhaps
14 uncontroversial material.

15 **MR SCANNELL:** Yes.

16 **MR JUSTICE MORRIS:** Or material that the second witness absolutely agrees with,
17 but anyway that's a general statement.

18 **MR SCANNELL:** Understood and nobody wants to re-invent the wheel.
19 Ms Lucas.

20 **MS LUCAS:** Yes. I am afraid I am very much down in the wheels and nuts and bolts
21 when it comes to things like this. I for one will be very concerned that people adopt
22 sensible definitions that are easily -- if it is okay to use the same definition as one of
23 the other experts, please use it, because otherwise we end up with three or four
24 different terms for broadly the same thing and it makes it impossible.

25 **MR JUSTICE MORRIS:** And there are quite a lot of technical definitions already
26 present in this case and if any further experts that we allow, they must adopt the same

1 definitions or explain why they are not.

2 **MR SCANNELL:** Indeed. All of that is understood and is extremely helpful. I am very
3 grateful to the Tribunal for those instructions.

4 **MR JUSTICE MORRIS:** So you were going on to Mr Hunt.

5 **MR SCANNELL:** I was going on to Mr Hunt. He is a Partner and Managing Director
6 of AlixPartners, and Epic proposes to call him in support of the excessive pricing plea.
7 The Tribunal has already acknowledged in the context of these proceedings that it is
8 fair and appropriate to have separate experts for exclusionary abuse, on the one hand,
9 and exploitative abuse on the other. So the next question here is whether Epic
10 reasonably requires its own evidence in support of its case on exploitative abuse. I
11 should say that not every competition practitioner uses the terms exclusionary abuse
12 and exploitative abuse. If it is easier I will just refer to excessive pricing.

13 **MR JUSTICE MORRIS:** I am aware of the term.

14 **MR SCANNELL:** I am grateful. I occasionally find it a bit confusing to refer to those.

15 **MR JUSTICE MORRIS:** Yes, I understand. Excessive pricing -- we know what we
16 are talking about I think in this case.

17 **MR SCANNELL:** We say that it plainly does require evidence, because Mr Holt's
18 evidence, Mr Holt being the expert on excessive pricing and indeed loss in the Coll
19 Proceedings, relies on excessive pricing and loss arising during the relevant period in
20 the Coll Proceedings. That's obviously what his report is all about. Were Google's
21 prices excessive during the relevant period of the Coll claim?

22 **MR JUSTICE MORRIS:** Can I just interrupt you? In relation to the relief that you seek,
23 what relief do you seek in relation to pricing something? I mean, I have it open here.

24 **MR SCANNELL:** So it is paragraph D, page 59.

25 **MR JUSTICE MORRIS:** Okay. Not to charge excessive pricing. You are not seeking
26 damages, but you are seeking an order going forward controlling their prices.

1 **MR SCANNELL:** Yes.

2 **MR JUSTICE MORRIS:** Okay. All right.

3 **MR SCANNELL:** Immediately I am sure you'll appreciate, Mr Chairman, that when
4 you come to consider whether or not you should grant the injunction, you are going to
5 be very unimpressed if I stand before you and say two years ago Google's prices were
6 excessive.

7 **MR JUSTICE MORRIS:** Yes.

8 **MR SCANNELL:** You are going to say "*That's very interesting, Mr Scannell but only*
9 *in the sense of not being remotely relevant or interesting. Are they excessive today?*
10 *If they are, I will grant the relief but otherwise not*". That's really where we are coming
11 from in relation to this issue.

12 **MR JUSTICE MORRIS:** Okay.

13 **MS LUCAS:** I have kind of a more general point about that. I mean, in one sense if
14 you file any expert evidence now, is it going to be meaningful in a year's time?

15 **MR SCANNELL:** There is an aspect, an element of that that I do appreciate.
16 However, first, the expert evidence won't be served now, as it were. It will come much
17 later in the day. I will be reminded what the date for expert evidence is. That's
18 December as things stand. There is obviously a world of difference between knowing
19 the position in December when you are having the trial and knowing the position that
20 goes all the way back to 2024. It is the best evidence, if you like, is the answer.

21 Of course, also once one has the expert in the seat dealing with the up-to-date position
22 and trying his or her best to grapple with the pricing as it stands today, if there is
23 a major development, then that can be accommodated within the framework of that
24 expert. The expert, with the best will in the world, that Ms Coll has called, for example,
25 the reaction of that expert to any new development would be again very interesting but
26 not really what I am grappling with. All I am saying is that at a particular point in time

1 historically Google's prices were excessive.

2 **MR HOLMES:** I hesitate to interrupt, only to ensure that submissions are dealt with
3 efficiently, but Ms Coll intends to update her class definition ahead of the hearing at
4 the time of the PTR so the claim will be almost current on the part of Ms Coll by the
5 time of the trial and so the matters that will be canvassed --

6 **MR JUSTICE MORRIS:** Hold on a minute. Update the class definition?

7 **MR HOLMES:** Yes.

8 **MR JUSTICE MORRIS:** To extend the period --

9 **MR HOLMES:** Indeed yes. Ms Coll will not be claiming for a different period. She
10 will be claiming for a period that is almost contemporaneous with that of an injunctive
11 claim and that will need to be accommodated within the expert process in any event.
12 I only say this now so that Mr Scannell's submissions count --

13 **MR JUSTICE MORRIS:** I need to get my head round that point. At the moment the
14 claim for damages is in respect of a period in the past, but it is ongoing.

15 **MR HOLMES:** Yes.

16 **MR JUSTICE MORRIS:** And at the point of trial, it will be a claim for damages for
17 excess pricing up to the point of trial.

18 **MR HOLMES:** Yes. The only reason --

19 **MR JUSTICE MORRIS:** Sorry. Let me just understand this. Nonetheless it would not
20 theoretically be a claim for you not to price excessively going forward. Having said
21 that, the only basis upon which the Tribunal could make such a decision about pricing
22 going forward would be on the latest information as at the date of trial.

23 **MR HOLMES:** Exactly so. The only reason why the Class Representative has limited
24 the scope of the definition to a finite period is because of a previous ruling on statutory
25 construction which says that you need to have an ascertainable class. The solution
26 that has been found and adopted in a sequence of cases is simply to amend the class

1 definition immediately prior to trial so that claims for ongoing loss can be sought at
2 trial.

3 **MR JUSTICE MORRIS:** Okay.

4 **MR HOLMES:** It means there will be no temporal difference between the matters that
5 will need to be addressed by Dr Singer and those that will need to be addressed by
6 Epic's economic expert if they are granted permission to call them.

7 **MR JUSTICE MORRIS:** I have the point. Obviously we will take it as it goes.
8 Yes, Mr Scannell.

9 **MR SCANNELL:** I have been interrupted on the basis of something that may or may
10 not happen at some future date. There may be an application to change the temporal
11 period of the Coll Proceedings. Had Mr Holmes been on his feet I would have been
12 interrupting him to say with the best will in the world that is an irrelevant submission
13 and the Tribunal is not going to be assisted.

14 **MR JUSTICE MORRIS:** You are now. You can counter interrupt. I will need to
15 understand this a bit better. Anyway, carry on.

16 **MR SCANNELL:** There are a number of elements to that which render the interjection
17 really quite inappropriate, not just the fact there is no standing application by the Coll
18 Class Representative to do what Mr Holmes is suggesting.

19 **MR HOLMES:** It has already been indicated.

20 **MR JUSTICE MORRIS:** Let's deal with it.

21 **MR SCANNELL:** An indication is not an application, but leaving that aside, even if
22 there were an application we would still be in the position where we have to make our
23 application based on the needs of our case. We need to get on with the task of putting
24 together the expert report. If all that happens is that we trundle along as things stand
25 at the moment and then at the PTR an application is made by the Coll Class
26 Representative to expand the period of the Coll claim, I'm afraid we are going to be in

1 some difficulty because there will not be any time left at that point to introduce all of
2 the expert evidence that we are seeking to adduce now to get on with now and that
3 the Tribunal has this evidence.

4 **MR JUSTICE MORRIS:** I see the point you are making. At the moment -- I mean,
5 I am not up to speed on exactly what the position is but at the moment there is no
6 future/up-to-date claim by Coll. By the time that there is -- by the time it turns out that
7 there isn't, it may be too late for you to call expert evidence.

8 **MR SCANNELL:** Yes.

9 **MR JUSTICE MORRIS:** We will see where we go on that point. That's your initial
10 response to that point.

11 **MR SCANNELL:** Yes. So I was going to --

12 **MR JUSTICE MORRIS:** But is it the case that if there were -- if it was clear that either
13 such an application had been made or, in fact, the claim had been expanded now,
14 would you then still require your own expert to deal with excessive pricing? Let's
15 assume as of now we know that Coll will cover pricing up to the point of trial.

16 **MR SCANNELL:** If there were evidence somehow in the Coll Proceedings which went
17 all the way through to the period that is achievable in the context of the Epic claim,
18 taking on board Ms Lucas' fair point that you can always update all the way up to the
19 day that you are actually making your submissions in relation to this, there would be,
20 I fully accept, a far diminished argument in favour of allowing my client to adduce the
21 expert evidence.

22 The argument I would then make is purely the argument based on the fairness of
23 allowing the evidence.

24 **MR JUSTICE MORRIS:** Yes, I see that.

25 **MR SCANNELL:** But I do accept, Mr Chairman, that what I say about time periods
26 would then no longer carry the same weight.

1 **MR JUSTICE MORRIS:** Okay. That is helpful. Thank you.

2 **MR SCANNELL:** The important point --

3 **MS LUCAS:** Can I just ask about this? It is really the practicality of it. I mean, in one
4 sense even the trial -- you are going to want to know what the position is at the date
5 the remedy is ordered. So I am not --

6 **MR JUSTICE MORRIS:** It won't be the day after the end of the trial.

7 **MS LUCAS:** Unless we have a contemporaneous judgment, which seems somewhat
8 unlikely in this case. I am just wondering how we get a handle on what would be most
9 instructive at the trial and whether or not -- I mean, it might be said, for example, if you
10 do the exercise now, it saves Ms Coll the task of doing it later, but if you do it to
11 December this year, is that enough or should, in fact, the correct approach to this be
12 to include a date in the timetable before trial for an update on the excessive pricing
13 claim?

14 **MR SCANNELL:** There is absolutely no doubt that an order of that sort would
15 be -- would improve the evidence pool available to the Tribunal when it comes to
16 decide these issues. That is clearly correct. It must be. You will have more recent
17 evidence in support of an application for an injunction to stop excessive pricing in its
18 tracks, and, of course, you won't want to do that unless you are convinced that they
19 are excessive when you are making your order. So yes, is the answer to your
20 question. It would be preferable not to freeze this process in December.

21 Sometimes in very large, heavy cases like this it is easy to lose sight of the wood for
22 the trees. One can step back for a moment and just look at the timeline we are looking
23 at. We are down for trial in October 2026. There is time to accommodate things like
24 that into the order. We all get very close to our arguments --

25 **MR JUSTICE MORRIS:** Updating directions, yes. Are there not two strands to this?
26 There is the moving feast of pricing evidence and all the other accounting evidence

1 and (inaudible) in the various accounting as things happen over time, but presumably
2 there are underlying issues of principle in relation to the excessive pricing claim which
3 may not change over time. I don't know, or maybe it is just down to kind of numbers
4 and -- because there must be sort of evidence as to the different approaches and
5 people's -- why different approaches are better than other approaches that may not
6 change over time.

7 **MR SCANNELL:** Yes. We all know from the jurisprudence that we have so far on
8 excessive pricing in this jurisdiction that a number of different analytical approaches
9 can be taken and there is actually no complete answer to that.

10 **MR JUSTICE MORRIS:** Yes.

11 **MR SCANNELL:** All that the Court of Appeal has emphasised to date in respect of
12 that is that where multiple approaches are presented, then multiple approaches have
13 to be considered.

14 **MR JUSTICE MORRIS:** I understand that, but the approach and answer in the case
15 might depend on how you synthesise the different approaches and what those
16 approaches in principle are and then how you populate them with the numbers to put
17 it in very simplistic terms.

18 **MR SCANNELL:** Yes.

19 **MR JUSTICE MORRIS:** And the numbers might change over time but the principles
20 and the synthesisation of the different approaches may not change over time.

21 **MR SCANNELL:** Yes, that's absolutely right.

22 **MR JUSTICE MORRIS:** I don't know, for example, whether -- the extent to which it
23 would be appropriate for you to have separate expert evidence separate from Mr Holt's
24 evidence, isn't it?

25 **MR SCANNELL:** Yes.

26 **MR JUSTICE MORRIS:** On those principles and whether your expert disagrees or

1 agrees.

2 **MR SCANNELL:** Yes.

3 **MR JUSTICE MORRIS:** The point about your temporal issue I think will be largely
4 directed towards the population -- the figures. I don't know. You see what I am saying.

5 **MR SCANNELL:** I do.

6 **MR JUSTICE MORRIS:** It may be you don't require separate expert evidence on the
7 approach, I don't know.

8 **MR SCANNELL:** There are two points that I would comment on in relation to the
9 submission that you made, all of which incidentally I agree with. I think they are
10 absolutely logical thoughts to have in relation to this. The costs and the revenues
11 which are obviously the building blocks that we use for the purposes of this analysis,
12 they do vary from period to period. That's part of the reason why Mr Hunt couldn't
13 simply extrapolate from what Mr Holt has already adduced, an excessive pricing
14 analysis for the additional period. There has to be some considerations, as it were,
15 ab initio, but also there are some features of the Epic claim which feed into excessive
16 price which are not features of the Coll case at all.

17 One of those is alluded to in Mr Hunt's letter to the Tribunal in support of Epic's claim,
18 where he refers to Epic's allegation that Google concludes deals, bilateral deals, with
19 major developers like Spotify, for example, under which Google charges no
20 commission at all. Mr Hunt confirms in his letter that that is highly relevant to the
21 question of whether commissions of, say, 30%, 27% or 26% are excessive and unfair,
22 particularly when Google is not providing any payment services at all in some of those
23 cases because of User Choice Billing and Developer Only Billing. So that is not
24 a point that the Coll Class Representative focuses upon and Mr Holt does not address
25 it, but it is likely to be of relevance to Epic's excessive pricing claim.

26 **MR JUSTICE MORRIS:** Okay. All right.

1 **MR SCANNELL:** Right. I think, in fact, that we have traversed the relevant ground in
2 relation to Mr Holt. We have grappled with the issues --

3 **MR JUSTICE MORRIS:** With Mr Hunt?

4 **MR SCANNELL:** With Mr Hunt and Mr Holt for the Coll Class Representative. I think
5 the Tribunal is aware that our position in relation to this is we want to call Mr Hunt for
6 the reasons I have just identified. That's a combination of the fact that there can't be
7 extrapolation from Mr Holt, that the temporal periods are different, which we have had
8 a debate about as well, and also that there are some elements of Epic's claim which
9 simply don't appear in the Coll claim.

10 **MR JUSTICE MORRIS:** We were going to move on now to your third --

11 **MR SCANNELL:** The third and final, Professor Ryan.

12 **MR JUSTICE MORRIS:** Yes. Just give me a moment. I am conscious -- no, it is all
13 right.

14 **MR SCANNELL:** Security, Mr Chairman, is a central plank of Google's defence in
15 Epic's case. Its answer to almost every allegation of abuse we make against it is that
16 its conduct is justified by security concerns or that it is explained by the cost of
17 providing security measures in the Android ecosystem. That's all set out in Google's
18 Defence.

19 Taking account of the pleadings and the evidence already filed, we say that there are
20 three areas in which evidence from Professor Ryan will be reasonably required.

21 The first is again referable to the different temporal scope of the claim in Coll and
22 Rodger. So a description of the security environment as it stood at an earlier period
23 of time won't suffice for Epic, because in Epic's case what matters when it comes to
24 relief is whether Google's current security provisions justify the abusive conduct.

25 Just on that point Professor McDaniel, who is Google's expert on security matters, has
26 suggested that the evidence that Ms Coll has adduced on security issues from Dr Lee

1 is, in fact, not focused solely on the past. It is focused on the modern position and
2 updating from there.

3 I think it is quite important to disabuse the Tribunal of that particular point, because it
4 is wrong. So just on that point could I ask you to pick up, please, Dr Lee's report? It
5 is in the bundles at Bundle C2 at tab 17.

6 **MR JUSTICE MORRIS:** Might be in C3, 17 because our bundles are different. No.
7 It is in C4 of ours.

8 **MS LUCAS:** If it is any consolation, this is in C2 of mine. It depends on whether they
9 are double sided.

10 **MR JUSTICE MORRIS:** Yes, mine is single sided. Awkward as ever, me.

11 **MR SCANNELL:** The important thing is that we got there.

12 **MR JUSTICE MORRIS:** Yes.

13 **MR SCANNELL:** The page I was going to ask you to turn to, please, is 1369.

14 **MR JUSTICE MORRIS:** Yes.

15 **MR SCANNELL:** At the top of the page I hope that you can see that one of the issues
16 Dr Lee has been asked to opine on is issue 3(b). That relates to sideloading and the
17 important security warnings that Google projects on to computer screens when they try
18 to sideload. At the end of the bold print the question that's put to Dr Lee is:

19 *"What impact does each aspect of this conduct have on the ability of users to obtain*
20 *apps and app stores on GMS..."*- that's Google Mobile Services - *"...devices?"*

21 The Tribunal will appreciate that question is phrased in the present tense. Then at
22 paragraph 195 Dr Lee picks that up. What he says at paragraph 195, paraphrasing
23 him, is "Actually all the Class Representative is concerned about is security in the
24 relevant period, so that is what I am going to address".

25 **MR JUSTICE MORRIS:** Yes.

26 **MR SCANNELL:** He repeats that point on multiple occasions in respect of multiple

1 issues throughout his report at 1385, 1389, 1391 and 1399.

2 So it is not right to say that Dr Lee's evidence addresses the up-to-date position. It
3 just relates to the relevant period in the Coll Proceedings.

4 The second aspect of security on which Professor Ryan will need to opine are the
5 Technical Restrictions that I mentioned in the context of the Licensable Operating
6 Systems market, particularly those which Google imposes in relation to downloading
7 apps directly from the internet.

8 Google says that they are necessary. Epic disputes that and the Tribunal will have to
9 decide who is right and who is not.

10 **MR JUSTICE MORRIS:** And that is not covered by Mr Lee. Is that right?

11 **MR SCANNELL:** Well, Google says it is, but this is one of those cases where one
12 has to be very careful about what one means by duplication, because it is simply
13 an over-simplification to say he has dealt with it in any sort of way that is suitable to
14 Epic's case. It is true that he does deal with it to a degree, but he doesn't address the
15 further question -- and this is really very important -- he doesn't address the further
16 question whether Google could achieve the same security outcomes by adopting far
17 less restrictive and less market foreclosing security solutions.

18 It is perfectly understandable why he would not address that. It is not relevant to
19 Ms Coll's claim. Ms Coll is not concerned with how Google conducts itself on the
20 market or how it should conduct itself on the market. She is only concerned with how
21 it has historically conducted itself on the market and whether that explains the abuse
22 that is relied on.

23 Professor Ryan has written two letters, one in support of the application and a further
24 one yesterday.

25 **MR JUSTICE MORRIS:** Yes, which I have seen and have here, I think.

26 **MR SCANNELL:** Yes. It should be in your Supplemental Bundle 2, tab 5. The short

1 point there, Mr Chairman, is Professor Ryan is of the opinion that there are additional
2 points to be made in that regard, and he has set those out in the letter that he sent
3 yesterday.

4 So, to take one example, in addition to app notarisation, which is one of the security
5 possibilities canvassed by Dr Lee, Professor Ryan suggests that there are multiple
6 other very interesting methods for ascertaining the security of apps, none of which are
7 as restrictive as Google's, and all of which can be reconciled with Google's principles
8 of operation on the Android ecosystem. Obviously no question of duplication arises in
9 relation to that material because it is not addressed by Dr Lee, but the main point is
10 that they are important issues that go directly to a question that doesn't arise from
11 Coll's case but does arise in Epic's.

12 The third area in which further security evidence is reasonably required on an issue
13 that does not arise in the Coll Proceedings relates to Google's professed security
14 concerns around making third party app stores available in the Google Play Store and
15 whether those concerns are legitimate.

16 That's obviously a very important feature of Epic's case and I've explained that Epic
17 has its own Epic Games Store. We seek relief specifically referable to the clause 4.5
18 conduct at sub-paragraph (c) of the prayer for relief, but, of course, that doesn't arise
19 in Ms Coll's case.

20 Again Dr Lee does give some evidence in connection with app stores, but again it
21 doesn't arise in the same way in the Coll Proceedings as it does in our case.

22 Professor Ryan, who incidentally, like all of the experts we want to rely on, has
23 committed not to duplicate and that's made very explicit in his letter to -- letter in
24 support of the application, points to a number of proposals he would like to canvass
25 that would alleviate Google's concerns around the security of third-party app stores.
26 They include the establishment of cryptographic links between apps and developer

1 websites and the possibility of screening through what he calls consortium-based
2 verification. Again --

3 **MR JUSTICE MORRIS:** I am looking at his letter.

4 **MR SCANNELL:** Yes. So again no duplication there, because it is not addressed by
5 Dr Lee.

6 So those are our reasons for seeking to rely on the evidence of Professor Ryan,
7 Mr Chairman.

8 **MR JUSTICE MORRIS:** Thank you very much.

9 **MR SCANNELL:** I think it would be more sensible for me to sit down and allow my
10 learned friend to address you before I go on to facts so you can then have all the
11 expert issues.

12 **MR JUSTICE MORRIS:** Yes, I agree. We were thinking we should take a five-minute
13 break in any event. I am just watching the clock. I am sure you are as well. I don't
14 want to limit everybody. As I said -- I should say this. If we are concerned about
15 time -- maybe we should be okay -- we would take a shorter lunch break if necessary,
16 but I will leave that with you. Thank you very much. 12.25.

17 **(Short break)**

18 **MR JUSTICE MORRIS:** Yes, Mr Beal.

19 **MR BEAL:** Please could I start, Sir, Madam, by sending our good wishes to Ms Coll
20 and welcoming Sir Gerald Barling, who is a legal super-sub in this context.

21 **MR JUSTICE MORRIS:** Yes.

22 **MR BEAL:** The principles to be applied are well known before the CAT. For your
23 note in the Kent case - that's Authorities Bundle page 531, paragraph 6 - this Tribunal
24 recognised exactly the same range of expert evidence was going to be necessary in
25 that case and obviously the Kent case is something of a parallel with this case. The
26 relevant principles are set out at paragraphs 10 to 15 and my learned friend

1 Mr Scannell has averred to them in his submissions this morning.

2 Could I please pass up a document that's in a modified form in the bundle before you.

3 This is the original version of our non-overlapping issues document. The reason for
4 passing this up is to show you the text that we inserted at the beginning of this
5 document before Google inserted some counter text and removed our text from it. It
6 is not a criticism, it is just the way the document developed.

7 Our introduction at page 1 of this document indicates what we are doing. We are
8 seeking to identify non-overlapping issues we have sought to identify 17 points.

9 In the second paragraph down it says:

10 *"In the table below Professor Rodger identifies what he considers to be*
11 *non-overlapping issues on the basis that, firstly, the pleadings have now closed;*
12 *secondly, we have been able to compare the issues in the claim against the issues as*
13 *he understands them from the pleadings in both Coll and Epic."*

14 He identifies 17 points where the Rodger issues do not overlap with Epic or Coll. He
15 suggests search terms should be proposed so that disclosure can be sensibly
16 managed. He identifies that the third column provides references to the pleadings in
17 Professor Rodger's proceedings. So that's telling you where the particular point
18 arises.

19 Then in the fourth column where helpful to do so, Professor Rodger has also identified
20 references to the Coll and Epic pleadings. It may assist in understanding the
21 differences between the claims.

22 So when one comes on to look at pages 2 and 3 and so on at the various different
23 issues, one sees, as advertised, that the third column says in our pleadings where the
24 point arises and then there are references to other pleadings where relevant. Now
25 that fourth column has occasional blank spaces, which means that it doesn't arise.

26 We inserted relevant references to other pleadings because we thought Google might

1 dispute whether or not it was indeed an overlapping issue, because it has referred in
2 more general terms to broader issues in those other pleadings, but we say if you
3 properly engage with the substance of the pleaded case, we see that the issue which
4 we set out is not properly considered to be overlapping, and that's why we have said
5 we are referring to the Coll and Epic pleadings in order to show the differences
6 between the claims.

7 Now, simply because a particular question is raised in very broad terms in the other
8 pleadings does not mean that the same issue is dealt with on our case. We can see
9 an example of that at issue 4, please, at page 5. One of the issues that has arisen is
10 to what extent do a network of other agreements operate to entrench Google's
11 dominant position and therefore foreclose competition.

12 One of the areas concerns anti-fragmentation agreements or "ACCs", as they
13 subsequently became known. We are dealing here in sub issue 4 with a point that
14 doesn't arise in the other proceedings precisely because it is only in our case that
15 Google has chosen to plead that exceptions and exemptions to those policies apply,
16 which mean that they can't be treated in the same way as they otherwise would.

17 So we are saying *"Well, look at this clause of this agreement. It forecloses the*
18 *competition"*. Google say, *"Ah, but that's subject to exceptions and exemptions"*. So
19 that is an example of a different situation arising.

20 **MS LUCAS:** I don't know if you have already made this point, but are those
21 agreements referred to in any of the other pleadings?

22 **MR BEAL:** Some of the agreements are referred to in some of the other pleadings,
23 certainly, yes. So therefore, the effect of those agreements will be a broad issue.
24 What hasn't been dealt with and is not, as we understand it, pleaded anywhere else is
25 this defence that Google is proposing to raise that individually negotiated exemptions
26 and exceptions mean that the agreements can't be said to have the effect that they

1 otherwise might do.

2 To give a further example, in issue 8 we are dealing with the question of restrictions
3 on direct downloading identified by Google as being sideloading, which is another way
4 of saying direct downloading. We see there that we have characterised the issue by
5 reference specifically to other than the features of the Android OS identified at
6 paragraph 124 of Google's Defence in the Rodger Proceedings.

7 So we are dealing with a sub-set of issues relating to restrictions on downloading other
8 than the features of the Android OS identified in the Defence as it stands. So we have
9 deliberately sought to demarcate where our issues are separate from the other issues
10 that are more generally at large between the Epic and Coll Claimant Class and Google.
11 Now it is true that we have also identified here sub issues.

12 **MR JUSTICE MORRIS:** Sorry - I am not fully following this document. I am a bit
13 baffled. I am assuming you are identifying at 4 and 8 an issue which arises in your
14 case and doesn't arise in the others. Each of those has a cross-reference to pleading
15 in the other case.

16 **MR BEAL:** Yes. That pleading in the other case is designed to show that the way
17 that the broad issue of, for example, direct downloading is dealt with in that case is
18 different from the specific way it is pleaded in the claim form in the Rodger case.

19 **MR JUSTICE MORRIS:** Right. Okay.

20 **MS LUCAS:** So we could understand exactly where that goes, could you take us to
21 one of those pleaded examples? I am sorry. It is down in the minutiae a bit.

22 **MR BEAL:** Issue 4 perhaps is a good one to start with.

23 **MR JUSTICE MORRIS:** Just so I can understand it, you are saying that the issue you
24 formulate in 4 is in your case but not in the other case but the paragraphs that are
25 referred to in the far column are areas in the other cases where more generally that
26 issue is touched upon but not this issue specifically.

1 **MR BEAL:** Yes. Issue 4, sub-issue 1, exemptions and exemptions, the defence is
2 going to be in Bundle B, tab 10, paragraph 60, page 580 of the bundle. To pick it up
3 in context, the heading above paragraph 57 is "ACCs and AFAs".

4 **MS LUCAS:** Yes.

5 **MR BEAL:** There is an overall description of what those broadly require. Then in 60:
6 *"The terms of the AFA and ACC are subject to individually negotiated exemptions and*
7 *exceptions. Google will rely on the full terms and context of them for their true meaning*
8 *and effect at trial in due course."*

9 Let's compare that with the Coll defence, which is going to be behind tab -3
10 sorry- -- tab 2 of this bundle.

11 **MR JUSTICE MORRIS:** Your B, tab 2.

12 **MR BEAL:** Bundle B, tab 2. Paragraph 61 is the --

13 **MR JUSTICE MORRIS:** I am not quite there yet. Did you say the Coll Defence? Para
14 61, is it?

15 **MR BEAL:** Coll Defence. It is said to be para 61 in this table. It simply says
16 *"paragraph 80 is admitted".*

17 **MR JUSTICE MORRIS:** 114(b)?

18 **MR BEAL:** 114(b) may be more promising.

19 **MS LUCAS:** That's the Epic Defence.

20 **MR BEAL:** I beg your pardon, that's why I am struggling. Tab 6, please. Page 287.

21 **MR JUSTICE MORRIS:** Yes.

22 **MR BEAL:** We will see the way it is classed is:

23 *"The Claim Form does not particularise any contractual provisions that prevent*
24 *sideloading. There are none."*

25 Then it says it will simply refer to the terms of the ACC that's been in force since 2017.

26 So it is not pleading specifically the exceptions and exemptions.

1 What we then see at 114(d), which is page 312.

2 **MR JUSTICE MORRIS:** Yes.

3 **MR BEAL:** It is stated that,

4 *"these various different types of agreement ensure that apps meet minimum quality*
5 *and security standards and reduce the risk of fragmentation, etc, reducing costs",* and
6 so on, but again the specific exceptions and exemptions are not separately pleaded
7 out.

8 **MR JUSTICE MORRIS:** Is that really a distinct issue? I mean 61 says, *"refer to the*
9 *terms of the ACC"*. Presumably when they - refer to the individually noted with a -tick
10 I don't- know.

11 **MR BEAL:** It is a question of whether or not is it an exemption or exception which is
12 not apparent on the face of the agreement, in which case I fully understand the point
13 being made is that's simply a question of contractual construction, or as it appears to
14 be suggested in paragraph 60 of Google's Defence -- of course, this is their defence,
15 not mine -- they have individually negotiated outside of scope of those agreements
16 separate exceptions and exemptions because it is individually negotiated.

17 **MR JUSTICE MORRIS:** On the assumption that an ACC and AFA is in standard form.

18 **MR BEAL:** That is, I suspect, the assumption we are making.

19 **MR JUSTICE MORRIS:** All right.

20 **MR BEAL:** The reason that is important for disclosure is to -- I am getting my
21 retaliation in first on disclosure because it is not going to be dealt with today, but, of
22 course, the reason why that's important is because if there is a standard form
23 agreement and then there is deviation from it on an ad hoc basis by reference to a side
24 letter, that's one thing. If there are separately drafted types of agreement with
25 developers, then that's another. That's where the disclosure becomes relevant.

26 **MR JUSTICE MORRIS:** All right. We are not dealing with disclosure.

1 **MR BEAL:** As I say.

2 **MR JUSTICE MORRIS:** I am more interested in -- this is the foundation for what?

3 **MR BEAL:** This is our foundation --

4 **MR JUSTICE MORRIS:** For Professor Fletcher?

5 **MR BEAL:** Rather than taking you through our pleadings and showing you our case,
6 I am trying to show you where the specific non-overlapping issues are in our case, and
7 we have identified 17 of them.

8 Happily, the position in respect of Professor Fletcher is more straightforward, because
9 subject to one caveat, it is accepted that her evidence is both admissible and relevant
10 and can therefore subject to the Tribunal's endorsement be adduced by us.

11 **MR JUSTICE MORRIS:** Yes.

12 **MR BEAL:** We have, as our application makes clear -- the Tribunal has it at Bundle
13 E, tab 9, page 55 -- we have emphasised throughout that we have no interest in simply
14 repeating the reasoning and conclusions of other experts, and each of the proposed
15 experts we seek permission to adduce evidence from has been told that in no
16 uncertain terms.

17 As a matter of principle, we say Google accepts that evidence from four different
18 experts is appropriate. I can show you that in the bundle of authorities. That is at
19 tab 12 of the bundle of authorities, page 548, which is the order from the Coll
20 Proceedings.

21 **MR JUSTICE MORRIS:** Google accepts that four -- say that again.

22 **MR BEAL:** Four categories of expert are relevant, an economist, security expert,
23 payment systems and then a forensic accountant. Why do I say that --

24 **MR JUSTICE MORRIS:** You don't need to. I didn't get the word "*categories*".

25 **MR BEAL:** The Coll ruling says it was common ground that this evidence was
26 necessary.

1 **MR JUSTICE MORRIS:** Okay.

2 **MR BEAL:** We say in Rodger's case, as a matter of principle, it remains equally
3 necessary for our case that there is evidence for each of these four categories. The
4 million dollar question then is can we instruct an expert that is separate from the expert
5 evidence that is already there or should we be forced to adopt the evidence that was
6 prepared in the Coll Proceedings, which, as Mr Scannell made clear, was dealing with
7 the Coll issues and not any further issues and was on the basis of instructions from
8 Ms Coll's solicitors to those experts and wasn't directed at the specific features of the
9 Rodger case, which is why I have started with the non-overlapping issues, because
10 there's a number of them. Google may say "*Well, we disagree that these are*
11 *non-overlapping*", but that's by the by. On any view there is a contestable issue as to
12 whether or not we are advancing a separate case.

13 We accept where we can that we have tried to rely upon the existing expert evidence.
14 It is only where we can't rely on that or that we think we have supplemental points to
15 make that we are seeking permission.

16 **MR JUSTICE MORRIS:** Yes.

17 **MR BEAL:** The key issue is therefore whether we should be free to use experts or
18 whether we are compelled to use the experts that have already been selected by Ms
19 Coll, subject to the control the Tribunal will exercise to make sure that there is not
20 unnecessary duplication between expert evidence and the thing can be managed.

21 As a practical matter, all of the existing experts have already settled their reports on
22 the basis of the specific case in which they are retained and on the basis of
23 instructions. Changing the instructions at this stage may well open up the scope of
24 their existing reports. More fundamentally those experts may not agree with the points
25 that our experts are proposing to make. We are all familiar, of course, with experts
26 who may come to the same overall conclusion but have a different path up the same

1 hill. They may have different views about relevance, strength, emphasis, key points,
2 key factors to take into account. They may have different views as to, for example,
3 what the appropriate metric is in a profitability analysis. That's by no means
4 uncommon. The question is whether at this stage this Tribunal can say "*You,*
5 *Professor Rodger, on behalf of your class are constrained to use the view of one*
6 *expert even though you have an indication from another expert that he or she will*
7 *non -duplicatively raise a further or additional point or cover a gap which we are told*
8 *by those experts exists*".

9 Now it may well be, for example, that if faced with two different approaches from two
10 different experts this Tribunal at a substantive trial in which both experts were giving
11 a view would favour the view of the expert that Professor Rodger is proposing to call.
12 By taking the decision now, as Google would have you do, that option is foreclosed to
13 this Tribunal. Your hand is basically forced into a choice between Google's expert and
14 the expert that Ms Coll has instructed.

15 **MR JUSTICE MORRIS:** Yes.

16 **MR BEAL:** Now an easier solution in our respectful submission and a practical one
17 is that Professor Rodger on behalf of his class is entitled to call an expert where he
18 sees that it is appropriate to do so. That expert is told in no uncertain terms "*You must*
19 *adopt where you can and where you feel able to do so consistently with your*
20 *independent duty to the Tribunal, the existing evidence, deal with supplemental*
21 *matters or deal with differences in reasoning by all means, but adopt as much as you*
22 *can*" and then there is the question of practically managing that evidence at trial, to
23 which the answer is this Tribunal has given in Le Patourel -- for your note Authorities
24 Bundle 906, paragraph 17 -- a direction that it doesn't have to be the case that every
25 single aspect of one's case is put to an expert. That direction was also used recently
26 in the Interchange litigation and it meant that you could have a more sensibly

1 controlled set of questions for cross examination. It didn't- require every single avenue
2 to be closed out.

3 The advantage of that, with respect, is that you don't end up with the sort of submission
4 in closing that says, "*Professor so and so wasn't challenged on this. Therefore, the*
5 *Claimant accepts that*", which is a rather frustrating submission to be faced with in
6 a very, very long trial in circumstances where everyone knows full well what the
7 boundaries of the dispute are between the experts and a bit of common sense would
8 simply allow the overall trust of the position to be put and the key points to be put to
9 a witness in circumstances where usually by the end of this very concentrated hot
10 tubbing procedure followed by cross examination over a couple of days, the key fault
11 lines in the expert evidence become more apparent.

12 **MR JUSTICE MORRIS:** Yes.

13 **MR BEAL:** In terms of the settling out problem which was a point that was raised --

14 **MR JUSTICE MORRIS:** The 'what' problem?

15 **MR BEAL:** The settling out problem. It was Ms Lucas KC's point at the last hearing,
16 I think. What do you do, based on experience, if you have a party that settles out and
17 your expert is relying on their expert or you are relying on their expert without a form
18 of joint instruction.

19 **MR JUSTICE MORRIS:** Yes.

20 **MR BEAL:** What we have sought to do here is to have our expert say when they
21 expressly adopt or agree with the conclusions of the existing experts. So they will
22 effectively cross refer to paragraphs and they can be taken as read in.

23 **MR JUSTICE MORRIS:** Yes.

24 **MR BEAL:** The second way we have approached this is to agree to the joint
25 instruction of an expert where possible, subject to instructions now being obtained
26 from Sir Gerald as to the terms of that joint instruction. Mr Burelli is an example of

1 that, the payment systems expert.

2 So Professor Rodger with his advisers has looked at that report and is happy and
3 content to stand behind it.

4 **MR JUSTICE MORRIS:** Yes. Just looking -I understand you -are --as far as billing
5 and payment you are happy to go with --

6 **MR BEAL:** Mr Burelli.

7 **MR JUSTICE MORRIS:** Mr Burelli. Okay.

8 **MR BEAL:** Yes. The third calibration -- in terms of the calibrations I am going through,
9 the first one is we would respectfully suggest it is appropriate for us to have our own
10 expert. Who do we rely on there? Professor Fletcher and there is no objection in
11 principle to her, and Mr Harman where there is an objection and I will deal with that in
12 a moment.

13 The second calibration is simply to stand fully behind an existing expert. That's
14 Mr Burelli. The third calibration is the security expert and the ecosystem expert, who
15 are two experts on the part of Ms Coll.

16 **MR JUSTICE MORRIS:** Lee and Krein.

17 **MR BEAL:** Dr Lee and Dr Krein. We suggest that we jointly instruct them for the
18 material they have deposed to in their expert reports but we have the supplemental
19 points that Dr Paul wants to make. I will come on to explain why those supplemental
20 points are very limited in ambit and can be dealt with in a short fashion and why that's
21 appropriate.

22 **MR JUSTICE MORRIS:** All right. My note says that you were --

23 **MR BEAL:** It has been portrayed as a fallback position. In fact --

24 **MR JUSTICE MORRIS:** And also that you were still in discussion in relation to that.

25 **MR BEAL:** We are still in discussion. I mean no discourtesy, but it has been difficult
26 for the people representing Ms Coll to obtain instructions at the moment. I make that

1 clear in the skeleton argument.

2 **MR JUSTICE MORRIS:** Let's come to that when you come to it.

3 **MR BEAL:** My submission is going to be based on the assumption that we can jointly
4 instruct Krein and Lee and their reports will stand in full for us.

5 **MR JUSTICE MORRIS:** For everything?

6 **MR BEAL:** For everything apart from the supplemental points.

7 **MR JUSTICE MORRIS:** When you say, "*still in discussion*", that doesn't mean in
8 discussion which might lead to you not wanting to instruct -- is it Dr Paul, Mr Paul?

9 **MR BEAL:** Dr Paul.

10 **MR JUSTICE MORRIS:** Dr Paul as well.

11 **MR BEAL:** I am going to make submissions as to why Dr Paul brings something
12 different to the party.

13 **MR JUSTICE MORRIS:** Regardless of those discussions you still want Dr Paul?

14 **MR BEAL:** Of course, Dr Paul can give a report and Dr Krein and Dr Lee can then
15 endorse that report if necessary, and then what we're really looking at is managing
16 cross examination of the witnesses. Ultimately there is no point in cross examining
17 different security experts on the same point if they stand behind the point.

18 **MR JUSTICE MORRIS:** Quite.

19 **MR BEAL:** Just on a practical note, we are not at the position yet where we can
20 categorically say if we were to put these points to Dr Lee, he would agree with them.
21 The suggestion is that there may be a slight divergence of view between experts on
22 certain key things.

23 **MR JUSTICE MORRIS:** As a subsequent issue, if you can persuade us that there are
24 extra points -- I suppose you could say if you put them to him now, he could deal with
25 them, but you are not in that position.

26 **MR BEAL:** We are not in that position.

1 **MR JUSTICE MORRIS:** All right.

2 **MR BEAL:** That's the third way of dealing with things, which is essentially a hybrid
3 approach, but really confining to the absolute minimum the amount of evidence that's
4 put forward.

5 **MR JUSTICE MORRIS:** Okay.

6 **MR BEAL:** That would be reflected no doubt in the length of any report.

7 **MR JUSTICE MORRIS:** Yes, and we would no doubt have comments on that length.

8 **MR BEAL:** We are facing 500 pages from Mr Noble.

9 **MR JUSTICE MORRIS:** Sorry?

10 **MR BEAL:** We are facing 500 pages from Mr Noble.

11 **MR JUSTICE MORRIS:** Well, it won't be 500 pages in response I can tell you.

12 **MR BEAL:** I hope not as well.

13 **MR JUSTICE MORRIS:** Anyway we will come to that. Yes.

14 **MR BEAL:** Can I deal with Professor Fletcher before the short adjournment?

15 **MR JUSTICE MORRIS:** Yes.

16 **MR BEAL:** We have applied to adduce evidence from Professor Fletcher. Her letter
17 to the CAT, which I hope the Tribunal has had a chance to cast an eye over, is at
18 page 68 of Bundle E. Could I invite you to take out Bundle E just very quickly?

19 **MR JUSTICE MORRIS:** Can I ask a basic question? My understanding is subject to
20 some point or minor points that Professor Fletcher's not objected to. Is it intended that
21 Professor Fletcher -- and I should know this and it is probably obvious -- that
22 Professor Fletcher will produce an entirely fresh full report or it will supplement the
23 report -- because at the moment there is her preliminary report filed with the claim
24 form. I don't know what the status of that is.

25 **MR BEAL:** The common practice is for the expert to then write a main report that
26 essentially stands in place of the preliminary report.

1 **MR JUSTICE MORRIS:** That's my question and that's what you have in mind, is it?

2 **MR BEAL:** That's what we have in mind.

3 **MR JUSTICE MORRIS:** That would replace or stand in place.

4 **MR BEAL:** With the following qualification, that Professor Fletcher has indicated that
5 where she agrees with the conclusions of the other experts she is proposing to make
6 that clear.

7 **MR JUSTICE MORRIS:** That's a different point. I would definitely want her to do that,
8 but that goes to the relationship between her evidence and the evidence of effectively
9 Coll's experts, but my question was directed to the inter-relationship between what is
10 now what she's now going to do and what is already there. Basically, it is a main report
11 which will effectively replace the provisional preliminary report.

12 **MR BEAL:** Yes.

13 **MR JUSTICE MORRIS:** Okay.

14 **MS LUCAS:** So if I can go back to my nuts and bolts, if I look at the list of reports on
15 E, 70, for example, is it right to say that all the first reports listed there we ignore or
16 only some of them, but we can ignore some of them? So of the 3,900 pages, are
17 some of those reports preliminary reports that actually we should just be putting to one
18 side?

19 **MR BEAL:** I think with Mr Holt his main report is Holt 3 and his reply report is Holt 4.

20 **MS LUCAS:** Right.

21 **MR BEAL:** Whether or not --

22 **MS LUCAS:** That holds good for everyone else.

23 **MR BEAL:** What usually happens is the person who is proposing the expert is very
24 happy to confine it to the main report and the reply report, but the defendant or the
25 opposing party usually asks for the preliminary report to come in so they can
26 cross -examine on the basis of a perceived inconsistency between the preliminary

1 report and final report, which is --

2 **MR JUSTICE MORRIS:** Further down the line there might be another process
3 involved. Anyway, yes. All right. You want to take us to?

4 **MR BEAL:** Page 73, please. E, 73 behind tab 10.

5 **MR JUSTICE MORRIS:** Yes.

6 **MR BEAL:** What Professor Fletcher does here is identify where she would benefit
7 from additional expert evidence and she identifies in particular technical aspects of the
8 Android ecosystem. This is paragraph 16, cyber security and the profitability of the
9 Play Store. That's based on the proposition in the first sentence:

10 "I consider I do not have sufficient expertise to opine on certain discrete issues."

11 So it is only certain discrete issues.

12 We then see effectively, tracking three areas, paragraph 17 is ecosystem;
13 paragraph 18 is cyber security; and paragraph 19 is profitability. It is a profitability
14 analysis that goes to limb one, the excessive pricing limb of the *United Brands* test.

15 **MR JUSTICE MORRIS:** All she is saying there is she needs other experts. It doesn't
16 address what she is going to do.

17 **MR BEAL:** No. What she is going to do is dealt with at -- because there is no objection
18 to her giving evidence as such what she is going to address is --

19 **MS LUCAS:** Paragraph 21.

20 **MR BEAL:** Thank you. That's a convenient summary.

21 **MR JUSTICE MORRIS:** Okay.

22 **MR BEAL:** She goes through it in slightly more detail earlier on, but that's a very
23 convenient summary.

24 Google does not actually oppose her evidence. See paragraph 15 of their skeleton.
25 The restriction which Google seeks to place on the evidence given by her is that she
26 should not give evidence that duplicates existing evidence.

1 **MR JUSTICE MORRIS:** Can I just -- yes. Paragraph 15.

2 **MR BEAL:** Paragraph 15 of their skeleton.

3 **MR JUSTICE MORRIS:** (Reading sotto voce). Okay.

4 **MR BEAL:** In terms of what Mr Noble actually says, that is dealt with in Bundle E,
5 tab 16, page 169.

6 **MR JUSTICE MORRIS:** Yes.

7 **MR BEAL:** What he says at paragraph 21 is:

8 *"The Rodger application seeks permission to adduce expert evidence from*
9 *Professor Fletcher that addresses market definition, dominance, exclusionary*
10 *conduct, counterfactual analysis, exploitative conduct, etc".*

11 So essentially the expert's report is addressing liability and quantum. That's the
12 constituent elements of an Article 102 claim along with damages. He then says:

13 *"While some areas of overlap exist between Professor Fletcher's proposed evidence*
14 *and the existing Coll evidence, I consider Rodger's case and Professor Fletcher's*
15 *position differ substantially from Coll's in several respects."*

16 So in that circumstance, with respect, it is appropriate that Professor Fletcher sets out
17 a report that covers the economic case that Professor Rodger needs to establish
18 liability for Google's abusive conduct. She has stated she will endeavour to avoid
19 duplication and will set out where she agrees with another expert's conclusions as far
20 as possible. That was in her letter to the Tribunal. She made it clear that was the
21 position she was going to adopt.

22 **MR JUSTICE MORRIS:** Paragraph? The reference?

23 **MR BEAL:** Paragraph 7.

24 **MR JUSTICE MORRIS:** 7?

25 **MR BEAL:** Yes. That's at page 70:

26 *"Having reviewed the experts' reports, I do not expect to adopt the evidence they give.*

1 *However, I do agree with some of the conclusions."*

2 Now part of the reason for that is the obvious one, that if you have a different market
3 definition, which Professor Fletcher does have, from Dr Singer, then necessarily your
4 analysis of dominance in that market will differ. Your analysis of abuse when you are
5 looking at the abusive conduct as a single continuous course of conduct with a number
6 of facets is different and the counterfactual analysis is necessarily different. So, as
7 Mr Noble quite rightly, with respect, recognises, it is a different case.

8 **MR JUSTICE MORRIS:** Yes. Your response -- I will obviously hear from
9 Mr Holmes -- your response to their paragraph 15 gloss, is that Mr Noble
10 says -- doesn't make that point.

11 **MR BEAL:** Yes.

12 **MR JUSTICE MORRIS:** He says --

13 **MR BEAL:** That point, in fact, is only made in Ms Thiagamoorthy's evidence or
14 submission. It depends on how you construe her evidence, but it is wrong. She says
15 Professor Fletcher is planning to duplicate evidence. That is simply not right.
16 Mr Noble in his letter at paragraph 11 has recognised that separate analysis of the key
17 aspects of Article 102 is necessary because of the different way the case is put. For
18 your note that is back at page 167.

19 **MR JUSTICE MORRIS:** Yes, I have it.

20 **MR BEAL:** Again it is a submission without underlying foundation.

21 I am going to move on to Mr Harman. I don't know if now is a convenient moment.

22 **MR JUSTICE MORRIS:** It depends how much longer you are going to be generally.
23 We have Mr Harman and we have -- I can't remember the name of the other.

24 **MR BEAL:** Dr Paul. I am probably going to be 25 to 30 minutes.

25 **MR JUSTICE MORRIS:** Okay. We will rise now for lunch or the short adjournment,
26 as it's called. How are we doing timewise? You are going to be another 25 minutes.

1 I imagine that Coll may not be very long. Mr Holmes, how long do you think you are
2 going to be generally? I am just thinking about whether we should take a shorter
3 lunch. We may not need to.

4 **MR HOLMES:** I would have thought about 45 minutes to an hour. I should say the
5 factual point is a very short one, so it will not detain us very long.

6 **MR JUSTICE MORRIS:** 45 minutes to an hour. If we start at 2.00, 2.30, 3.30. We
7 should be all right, shouldn't we? I mean, obviously there will be a reply.

8 **MR BEAL:** We have to deal with -- disclosure will be very, very brief, where there is
9 a proposed consent order. We have to deal with timetabling to the extent there is time
10 to deal with it.

11 **MR JUSTICE MORRIS:** Timetabling for the disclosure?

12 **MR BEAL:** Ms Coll would like to suggest the trial timetable is shortened and I think
13 Google wants to extend it by three weeks.

14 **MR JUSTICE MORRIS:** I think on that issue our provisional view is that now is not
15 the time to do that. We are fully aware of the arguments about it and we are also
16 aware that one of Google's points certainly on the skeletons was that it is going to be
17 much longer. Therefore, it should affect the decision on expert evidence, but we are
18 aware of that as a general point, but actually the timetabling we don't think we need to
19 deal with. We will take 45 minutes for lunch.

20 **MS LUCAS:** Have you got a copy of the draft order that you were going to take us to
21 on disclosure? We can take that away with us.

22 **MR JUSTICE MORRIS:** I think we have been given one.

23 **MS LUCAS:** Okay. Apparently I have it already.

24 **MR BEAL:** Hot off the press.

25 **MR JUSTICE MORRIS:** Thank you very much. 1.45.

26 **(1.02 pm)**

1 (Lunch break)

2 (1.45 pm)

3 **MR JUSTICE MORRIS:** Mr Beal, before you continue can I just raise one thing for
4 you -- for everybody really? In the event that we were minded to grant permission for
5 one or more of these experts we would be minded to impose a page limit on the
6 reports. Would you and Mr Scannell like to give some thought to what you might think
7 would be the appropriate page limits in respect of each of the experts that you're
8 seeking to rely on?

9 **MR BEAL:** Of course.

10 **MR JUSTICE MORRIS:** You can give them some thought in the course of the
11 afternoon or people behind you can.

12 **MR BEAL:** I can give you an answer immediately for Dr Paul, which is no more than
13 50 pages, but we have thought about that. We have not, with respect, thought about
14 Professor Fletcher or Mr Harman, because we are not proposing that we jointly
15 instruct anyone else. So they would be our standalone expert and, of course, there
16 have not been page limits introduced for Google's experts, but can I take instructions?

17 **MR JUSTICE MORRIS:** Yes, of course. I am not asking for an immediate answer.
18 I wanted to raise it now.

19 **MR BEAL:** Dr Paul is no more than 50. The others please may I confirm?

20 **MR JUSTICE MORRIS:** Okay. Carry on. I can't remember where you were.

21 **MR BEAL:** Mr Harman. Would the Tribunal please be kind enough to go to tab 12 of
22 Bundle E, page 90?

23 **MR JUSTICE MORRIS:** Let me just make sure I have my right bundles. Tab?

24 **MR BEAL:** E, 12, page 90.

25 **MR JUSTICE MORRIS:** Let me just get that. Yes.

26 **MR BEAL:** If we could pick it up, please, at the bottom of page 91.

1 **MR JUSTICE MORRIS:** Yes.

2 **MR BEAL:** Roman capital 1, B3. Mr Harman says:

3 "I understand Professor Rodger is seeking to avoid unnecessary duplication."

4 He then cites directly from this Tribunal's admonition at one of the recent CMCs."

5 **MR JUSTICE MORRIS:** Yes.

6 **MR BEAL:** I, B4:

7 *"Accordingly the scope of my work has been defined to provide expert evidence on*
8 *issues which are relevant to Professor Rodger's case while relying on the evidence*
9 *already adduced in court proceedings where possible and only providing*
10 *supplementary or additional evidence where necessary and subject to your*
11 *permission."*

12 So that is him recognising that the ambit of his instructions explicitly restricts it to
13 supplemental or additional points. True to his word, he then identifies four specific
14 points at page 94. They are under (a), (b), (c), and (d):

15 *"Choice of profitability metrics. Cost of identification and variability.*

16 *Identification valuation and allocation of assets and profitability benchmarks."*

17 He then deals with each of those individually one by one. We see at the bottom of
18 page 94 he starts looking at the profitability benchmark. He explains at the top of
19 page 95 how he is proposing to provide what he describes as additional
20 non-duplicative evidence on the relative merits of different metrics. What he is
21 proposing to do is bring to bear the experience he had before this Tribunal in the
22 *Liothyronine* case where he was acting for the CMA. He is proposing an additional
23 metric of a truncated internal rate of return which he also proposed to give additional
24 evidence on.

25 By the way, in the previous paragraph he has on a provisional, preliminary basis
26 identified Mr Holt as providing the best evidence. So that's an example where he

1 would row in behind Mr Holt where he can and then provide additional, non-duplicative
2 evidence. That's what he is proposing to do.

3 We then see he carries on in a similar vein for each of the other issues. At the bottom
4 of page 95 under sub-paragraph (b) by the second hole punch it says:

5 *"It appears to me that neither Mr Dudney nor Professor Easton has calculated*
6 *alternative economic ..."*

7 **MR JUSTICE MORRIS:** I am not with you. Yes, I have got it.

8 **MR BEAL:** "...has calculated alternative economic allocation methodologies based
9 on a detailed review of Google's LCD models and/or components of the costs."

10 So that's what he is proposing to deal with, a gap in the evidence.

11 We then see that (iv) B3 is framed by reference to Professor Easton having raised the
12 issue of potential intangible assets that may be omitted from Mr Dudney's analysis.

13 What has happened is Professor Easton has said *"This is all very well but, Mr Dudney,*
14 *you have not covered, for example, replacement costs for intangible assets"* which is
15 a feature of some of the CMA's analysis of profitability. So Mr Harman is saying *"I will*
16 *cover that gap"*.

17 **MR JUSTICE MORRIS:** Why is that not something that Mr Dudney -- Mr Dudney has
18 not replied yet. Is that right?

19 **MR BEAL:** Mr Dudney has not indicated at this stage whether he is prepared to cover
20 this. The problem we have with Mr Dudney as a substitute is that, with respect, we
21 are in a position where Mr Dudney may say, *"It is not a gap at all because I don't think*
22 *it is appropriate to look at that issue"*, or alternatively, *"I think I had covered off the*
23 *issue sufficiently in my own evidence"*. So Professor Easton is casting it as a gap and
24 undermining the credibility, no doubt, of Mr Dudney to the extent his client seeks to do
25 so by reference to Professor Easton having identified a gap in the expert analysis.

26 Now Mr Dudney's response may well be, *"I am perfectly entitled to adopt the approach*

1 *I have adopted. I don't think this is a gap*", at which point if we instruct him to say
2 *,"Can you cover this?"*, he is potentially undermining or exposing himself to a cross
3 examination which he is not otherwise exposed to which would seek to make
4 something of this perceived gap. It would be put to him, no doubt, *"You have only*
5 *covered this because you have been instructed by Professor Rodger to do so. You*
6 *don't believe in it, do you?"*. You can see how the questioning might well go. The
7 difficulty is the expert has not covered this already, let's say for the sake of argument.

8 **MR JUSTICE MORRIS:** Slow down. I am not immediately thinking carefully about
9 the sequence of events. Has Dudney done a reply report?

10 **MR BEAL:** Yes.

11 **MR JUSTICE MORRIS:** He has, and he hasn't dealt with it?

12 **MR BEAL:** No.

13 **MR JUSTICE MORRIS:** All right. Okay.

14 **MR BEAL:** This has been identified by Mr Harman as relevant evidence that he thinks
15 can be covered and is not covered by the current material.

16 **MR JUSTICE MORRIS:** Okay.

17 **MR BEAL:** We then see (iv) C3, for example, which is on page 98, he identifies what
18 is said to be -- whether it is a gap or not will have to come out in the fullness of
19 time -- he at least is identifying what he perceives to be a gap between the return on
20 capital employed calculations prepared by Mr Dudney under which only intangible
21 assets are recognised and financial statements are included, and what he describes
22 as an established economic approach which is conceptually endorsed by Mr Holt and
23 Mr Noble under which all relevant and tangible assets should be included in the capital
24 employed. So there is a difference of view there.

25 Now he expressly says this is an economic approach. Mr Dudney is an accountant.
26 Mr Harman is a one stop shop for both economics and accountancy. So he is capable

1 of addressing both points, albeit in the context of forensic accountancy evidence on
2 this profitability analysis. So to the extent that Mr Holt and Mr Noble are saying you
3 should be approaching this with a view of what the economic meaningful value for the
4 capital base is -- see the bottom of that paragraph -- Mr Harman can cover this.

5 **MR JUSTICE MORRIS:** Okay.

6 **MR BEAL:** We then see in section 5 that he is proposing to cover asset allocation
7 and valuation issues, and specifically he is proposing to look at the replacement value
8 of intangible assets. He is proposing to cover the approach that was taken by the
9 CMA.

10 Finally, under section 6 he is dealing with benchmarks, profitability, costs-plus,
11 page 100 and he identifies an issue that has arisen between Mr Holt and
12 Professor Easton in relation to a bottom-up analysis of the WACC. Mr Holt has said
13 in terms he does not think he has the material to be able to do this analysis.
14 Mr Harman is proposing to do this analysis if he can get the relevant material.

15 Finally on comparator companies Mr Dudney came up with some comparator
16 companies to assess profitability. So, I think the ones were IBM, Walt Disney,
17 Coca-Cola and Oracle. Professor Easton in his evidence says, "*I don't like those*
18 *comparators*", for various reasons. Mr Harman is proposing to say, "*If you don't like*
19 *these comparators, I have others*". That will be the scope of his evidence. So, he is
20 dealing specifically with Professor Easton's objections to the existing evidence and he
21 is proposing to provide a response to that.

22 Now Google's response to this is to say, "this is all duplicative of material that could
23 be or is provided by Mr Dudney and Mr Holt". Now dealing with the -- is it covered?
24 The answer we submit is no. Mr Harman has made it clear he is not simply duplicating
25 the existing evidence.

26 What is the basis for this suggestion that it is duplicative? Well, Google relies on

1 a letter that has been written by Professor Easton. Could we please look at that letter.
2 Tab 18 of Bundle E, page 243. Picking it up, please, at the top of page 244, one sees
3 he describes Mr Dudney having previously conducted an assessment of ROCE and
4 he then says:

5 *"Given that Mr Dudney previously addressed the relevance of profitability metrics,*
6 *I would expect that Mr Dudney could address further questions on the relevance of*
7 *these that may arise."*

8 So, he is not saying he has covered them and that this is duplication. He is saying
9 Mr Dudney could do the job rather than Mr Harman.

10 **MR JUSTICE MORRIS:** But he has not done it.

11 **MR BEAL:** Mr Harman. Well, he has covered issues such as ROCE, ROR and ROA.

12 **MR JUSTICE MORRIS:** I know, but he hasn't --

13 **MR BEAL:** He hasn't covered, for example, the truncated internal IRR, which is what
14 Mr Harman is proposing to give additional evidence about.

15 He then says in the third bullet point down -- this is not an allegation of duplication:

16 *"To the extent Mr Harman is suggesting specific expertise and asset light industries is*
17 *necessary to evaluate the relative merits of these metrics, I disagree with this*
18 *assertion."*

19 That's all very well Professor Easton saying he doesn't think Mr Harman is right, but
20 with respect it is rather jumping the gun to suggest that is a reason why this Tribunal
21 at this stage should decide that issue conclusively in favour of Professor Easton over
22 Mr Harman's proposed evidence. We say with respect, if it were open to an opposing
23 expert to object to proposed evidence in that way, competition litigation would be much
24 shorter.

25 We then see --

26 **MR JUSTICE MORRIS:** Sorry. There's a distinction between saying that evidence is

1 duplicative and determining who should give the evidence. It seems to me that what's
2 being said here is that in certain instances some of the things that Mr Harman wants
3 to give evidence about are things which Mr Dudney could and should. So that's the
4 who rather than the --

5 **MR BEAL:** That is the who.

6 **MR JUSTICE MORRIS:** So if you look at --

7 **MR BEAL:** Yes. I mean, that is essentially the point that Professor Easton is making
8 all the way through this letter. He is saying, "*Mr Dudney can do this or Mr Holt can do*
9 *this*".

10 So let me engage with that point, which I suggest is the real complaint that is going on
11 here. Mr Dudney and Mr Holt should do this, not Mr Harman. But, of course,
12 Mr Harman has specifically identified and confined the issues he is proposing to
13 address. They are non-duplicative and we simply don't know whether or not
14 Mr Dudney or Mr Holt would agree with them. We are not in a position to know that.
15 On a practical note, the instructions for Mr Dudney and Mr Holt would have to change.
16 We would need two separate experts' reports rather than one and Mr Harman's
17 experts report per the Tribunal's indication can be confined to a page length, which
18 means they are manageable. To the extent Mr Dudney or Mr Holt agree with it, then
19 we can find a formula by which only one person speaks to a particular point when the
20 experts are giving evidence orally before this Tribunal. So it can be managed.

21 Mr Harman, as I say, offers a one-stop-shop for both economics and accountancy. It
22 is one report rather than two. Cross-examination can be determined.

23 I also add, although I appreciate this is not determinative because of the Court of
24 Appeal's relatively recent decision on joint experts, it puts, with respect, me, if anyone,
25 in a slightly difficult position if I am having to cross-examine Mr Holt on pass on issues
26 and then I am putting him forward as an expert that we have full faith in, if I have

1 criticised him in relation to his pass on analysis. It is not fatal, but it is prickly.

2 Cyber security. Dr Paul. He is the third expert we wish to rely upon. We have adopted
3 the calibrated approach of seeking to instruct Dr Krein and Dr Lee on their existing
4 opinion evidence. Dr Paul has made clear in his letter to the Tribunal --

5 **MR JUSTICE MORRIS:** Which is where?

6 **MR BEAL:** Tab 11, page 82 of Bundle E. There are two letters. This is the first.

7 **MR JUSTICE MORRIS:** Yes.

8 **MR BEAL:** What he says is he has been instructed -- paragraph 3 -- *"to review certain*
9 *relevant evidence and provide a letter setting out the scope of the further evidence*
10 *within the scope of my expertise which I consider necessary."*

11 He then directs his attention to a series of very specific points, page 83 to 84. You will
12 see paragraph 7 is app distribution models and ecosystem comparisons. Paragraph 8
13 is platform capabilities and technical dependencies and paragraph 9, page 85 is
14 security and malware risk.

15 At paragraph 7(c), page 84, he says:

16 *"Dr Lee, Dr Krein and Professor McDaniel have not addressed this historical*
17 *development practice or its implications."*

18 Then at paragraph 8(a) he says that he understands technical aspects of how AAID
19 within Google Play Services and whether alternative stores could replicate this
20 functionality needs to be considered, i.e. hasn't been considered thus far.

21 This is technical --

22 **MR JUSTICE MORRIS:** That ties in with what you pointed out to us in
23 Professor Fletcher's letter about needing --

24 **MR BEAL:** She is saying she would like this. He is saying in terms this technical
25 integration between Google Play Services and ad infrastructure. Pausing there, what
26 does that mean in layman's terms? It means that Google is effectively drawing benefit

1 from an association between its advertising services and its technical services on the
2 mobile platforms, i.e. it is all part and parcel of the Google business model. That hasn't
3 been addressed in the other experts' reports. Professor Fletcher has identified why it
4 is necessary.

5 Again, that's obviously at speed and at high level. The essential answer from Google
6 is that this is duplicative. That is based on a letter from Professor McDaniel on behalf
7 of Google. Tab 17 of this bundle, please, page 172.

8 **MR JUSTICE MORRIS:** Yes.

9 **MR BEAL:** Now a number of points arise in this letter. It is not simply saying this is
10 duplicative and this is why it is duplicative. He goes further. Page 175, please.
11 Paragraph 21. Third line down he refers to what Dr Paul is proposing to deal with and
12 he says:

13 *"I do not agree that such an extensive historical review of all aspects of how mobile*
14 *phones work by comparison with PCs is necessary or helpful in order to understand*
15 *or compare approaches on mobile and PCs regarding sideloading which we call direct*
16 *downloads."*

17 Fine. He doesn't think it is necessary or relevant, but Dr Paul does and, with respect,
18 this Tribunal cannot adjudicate on who is right at this stage beyond identifying the
19 evidence that Dr Paul is proposing to adduce and asking the question, assuming it is
20 right, is it reasonably required by Professor Rodger for advancing his case, because
21 otherwise the Tribunal is based --

22 **MR JUSTICE MORRIS:** Is that right? Is it right that we have to be entirely neutral as
23 to whether proposed evidence is potentially relevant? I thought some of the case law
24 suggests that relevance is quite important.

25 **MR BEAL:** It is, of course. The threshold question of an expert saying it is relevant
26 and an expert saying it is not relevant requires, if I may say so, an analysis of what the

1 nature of the underlying evidence is.

2 **MR JUSTICE MORRIS:** Yes.

3 **MR BEAL:** And is it perceived to be relevant? That's why I took the Tribunal to the
4 Coll order right at the start which has already identified the four categories of expertise
5 that are relevant. So the category of expertise is relevant. IT evidence is relevant.
6 This is Professor McDaniel saying *"I don't agree that the specific aspect of that
7 evidence that Dr Paul is proposing to adduce is relevant"*.

8 Now I am simply recognising that, of course, relevance is for this Tribunal, but this
9 Tribunal is going to be hard put to choose between two experts.

10 **MR JUSTICE MORRIS:** That I can see at this particular juncture. It might be a difficult
11 issue to determine.

12 **MR BEAL:** At paragraph 22 he then says:

13 *"In my view based on the description provided by Dr Paul this is not a security issue."*
14 He says the same thing in 23. i.e. *"I am a security expert. I don't think either of these
15 points are a security issue"*, but, of course, when we looked at Dr Paul's letter to the
16 Tribunal, an application is being made for his evidence to go to ecosystems, mobile
17 ecosystems and security and he can do both.

18 **MR JUSTICE MORRIS:** Yes.

19 **MR BEAL:** Now the third point then is --

20 **MR JUSTICE MORRIS:** Just remind me. He is going to do both?

21 **MR BEAL:** Krein does ecosystem. Lee does security. Again, he is a one-stop-shop.

22 **MR JUSTICE MORRIS:** Okay.

23 **MR BEAL:** Paragraph 24, please, bottom of the page, 175, reference to the
24 connection between the Google Play Store, etc, and Google's advertising. He says:
25 *"I note that Dr Lee and I were asked to opine on the security implications of Google
26 Play Services together with other GMS apps as set out in Annex A."*

1 So, in other words, Professor McDaniel is saying "*I was not instructed to deal with this*
2 *point*". That doesn't mean it is not an issue in our case, given that Dr Paul has
3 identified it as something that is meaningful for both market definition and the
4 allegations of abuse that Professor Fletcher is hoping to cover. So, the fact that it is
5 not an existing issue in an existing proceeding doesn't mean that the evidence isn't
6 reasonably required in order for my client to discharge his case on behalf of his class.
7 Now the other approach that's dealt with generally by Professor McDaniel, page 174,
8 is to look at the proposed area of evidence, and we can see this really in paragraph 14.
9 He sets out the first of the three different topics that Dr Paul is hoping to cover and
10 then we see paragraph 16, for example:

11 "*In relation to points A and A1 Dr Lee discusses open ecosystems platforms in his*
12 *reports.*"

13 The same point is made in relation to that in paragraph 17. He says specifically:

14 "*Dr Lee discusses my observations.*"

15 He gives what might be thought to be quite a large number of references to the Lee
16 evidence.

17 Well, if you fully turn up those paragraphs -- and if I have time, I would do both, but
18 let's just take paragraph 17 for the sake of argument. Please could you turn up in
19 Bundle C tab 20, which I anticipate will be in --

20 **MR JUSTICE MORRIS:** It will be different.

21 **MR BEAL:** For Ms Lucas I suspect it is Bundle 2. For you I suspect it is Bundle 3.

22 **MR JUSTICE MORRIS:** Which bundle did you guess?

23 **MR BEAL:** 3.

24 **MR JUSTICE MORRIS:** 5 for me.

25 **MR BEAL:** My goodness. Think of the trees. Less flippantly, please could we go to
26 page --

1 **MR JUSTICE MORRIS:** What page?

2 **MR BEAL:** 1709. Now this contains paragraphs 323 to 326, which are the provisions
3 in Lee 2 which Professor McDaniel relies upon. Starting, please, at 323, bearing in
4 mind that what Dr Paul is seeking to do, which is to look at the development of software
5 downloads on computers and see how they have evolved over time and what that
6 means for the availability of a sensible way of getting -- downloading software subject
7 to security constraints and ecosystems. What Dr Lee says is in Annex 4, it is geared
8 towards the nature of warnings that are given rather than the underlying ecosystem.
9 What he says three lines down in 323 is:

10 *"Professor McDaniel has noted that users who try to install apps that have not been*
11 *signed and notarised will continue to receive warnings."*

12 He adds:

13 *"In my view the Mac OS warning about an app that is from an unidentified developer*
14 *which has not been notarised is very different from unknown source warning and*
15 *setting on Android."*

16 So, what's being said there essentially is the warning you get on an Apple download
17 is less egregious than the warning you get on the Android because you are deterred
18 from going any further with the Android download. The Apple approach is a less
19 intrusive approach. So it is looking at the security warnings and whether there are
20 deterrent downloads. That is not dealing with the underlying ecosystem.

21 Similarly for Windows. One sees at 324 and 325 there's an issue about warnings. At
22 326 -- 326 is the only paragraph that contains any reference to user account control,
23 which is the very issue that Dr Paul has said he would like to address. What Dr Lee
24 currently says is:

25 *"User account control provides a confirmation prompt at the point of installation which*
26 *provides -- I do not think it is correct to characterise this as a warning.*

1 *If an application is uncertified Windows provides two dialogue boxes, a smart screen*
2 *warning and the user account control. It is correct to call these warnings."*

3 Now Dr Lee on that point disagrees with Dr Paul, because Dr Paul thinks that it is
4 incorrect to call those warnings. He wishes to advance evidence to explain why it is
5 not a warning and he wishes to do so in the context of explaining how in the non-mobile
6 world direct software downloads have been perfectly possible historically without
7 posing a security risk.

8 So that's an example we say not only of a divergence of view between Dr Lee and
9 Dr Paul as to what the proposed evidence would be, but also it clearly isn't something,
10 with respect, that Professor McDaniel is right to say has been fully covered by Dr Lee
11 in existing evidence.

12 **MR JUSTICE MORRIS:** Not right -- yes. Yes.

13 **MR BEAL:** If that is the extent of the evidence about UAC, I can see why Professor
14 McDaniel would be very happy to have the evidence confined to that, because it is
15 one sentence and it is not very difficult to deal with, but, of course, we have Dr Paul,
16 who has said (a) I disagree with that analysis but (b) I think there is an awful lot more
17 to be said, albeit within the confines of 50 pages. He is prepared to give his view that
18 the ecosystems on other platforms are relevant for understanding security risks.

19 I could do the same exercise with paragraph 16 if the Tribunal are (inaudible) wanted
20 to track through those paragraphs. They contain very little actually of any detail
21 whatsoever. They are broad statements. Broad statements as to how things in
22 principle work is not what Dr Paul is proposing to do.

23 Now more importantly, Professor McDaniel's letter also contains contentious
24 statements at paragraphs 28 and 29 about ecosystems and how they work and the
25 functioning of the Microsoft platforms and so on, in particular regarding PCs and
26 sideloading, which Mr Paul disagrees with. We know that -- Dr Paul -- sorry -- Dr Paul

disagrees with because he has provided a second letter to the Tribunal, which is at Supplemental Bundle 1, tab 41.1, page 1678.

MR JUSTICE MORRIS: I am not sure --

MR BEAL: Has this not made its way to the Tribunal's bundle?

MR JUSTICE MORRIS: Right at the back.

MR BEAL: Yes.

MR JUSTICE MORRIS: Yes.

MR BEAL: I'm afraid I don't have time to go through that letter in detail save to give you a bare outline of its bones. One sees at paragraph 6, page --

MR JUSTICE MORRIS: Sorry. 1678.

MR BEAL: 1678 is where it starts. I am going to 1679, paragraph 6, four lines down: *"The point I intend to make is straightforward and narrow. Additional to that already put forward in Coll and set out above, app stores are a relatively recent phenomenon, and much of computing history uses obtained software in physical form or directly via downloads from developers. That model persisted until the 2010s and continues. However, it is understandably not clear from Dr Lee's reports that he shares my view that it is necessary in Professor Rodger's case to situate the current app model market in its historical context."*

He then goes on to talk about, next subheading, a mischaracterisation of his evidence on Windows user account control where there is a difference of opinion as to how the UAC works. He says at the bottom of paragraph 9:

"I understand that it's not a primary focus of the discussion between Dr Lee and Professor McDaniel and I'm not certain what considered positions they may adopt in reply to my opinion on this matter."

He then says his evidence has been mischaracterised by Professor McDaniel and in paragraph 12 he confirms expressly, should it need confirmation, last sentence:

1 *"My intention is not to duplicate existing evidence but to add and where necessary*
2 *update points of fact in a manner that is respectful of the existing experts'*
3 *contributions."*

4 I could go on.

5 **MR JUSTICE MORRIS:** Yes.

6 **MR BEAL:** The entire letter is redolent of that. The conclusion is at 1684. Can I invite
7 you to cast a very brief eye over 28 and 29.

8 **MR JUSTICE MORRIS:** Yes, I will read that.

9 **MR BEAL:** That is his intent.

10 **MR JUSTICE MORRIS:** I notice the word "*succinct*".

11 **MR BEAL:** 50 qualifies in the context.

12 **MR JUSTICE MORRIS:** You suggested 50.

13 **MR BEAL:** Yes.

14 **MR JUSTICE MORRIS:** Including annexes.

15 **MR BEAL:** Well, I am not sure I committed to that.

16 **MR JUSTICE MORRIS:** I think that's what we had in mind. We didn't have in mind
17 50, but the page limit we have in mind includes annexes.

18 **MR BEAL:** Right.

19 **MR JUSTICE MORRIS:** Not least to avoid the danger of people sticking everything in
20 an annex.

21 **MS LUCAS:** I am sure you wouldn't do that.

22 **MR BEAL:** I could not possibly --

23 **MR JUSTICE MORRIS:** I am only thinking by reference to my own practice many
24 years ago.

25 **MR BEAL:** Past performance is no indication of future approach.

26 **MR JUSTICE MORRIS:** No, I should not judge people by my own terrible standards.

1 Can I just read 29? Sorry.

2 **MR BEAL:** Of course.

3 **MR JUSTICE MORRIS:** Okay. I have read those. Thank you.

4 **MR BEAL:** Can I take instructions on annexes and whether 50 still suffices?

5 **MR JUSTICE MORRIS:** Perhaps come back to me on that. Does that conclude what
6 you wanted to say?

7 **MR BEAL:** That is it from me on experts, yes.

8 **MR JUSTICE MORRIS:** For the time being. We will get to the page limit point if we
9 get to it. I just wanted to flag it up early on. I don't need an immediate answer now.
10 I think we will hear from Mr Holmes first on the assumption that Coll doesn't have
11 anything to say at this stage on this.

12 **MR BEAL:** I think Ms Fitzpatrick did want to make one point.

13 **MR JUSTICE MORRIS:** You did. Sorry.

14 **MS FITZPATRICK:** Just one very short point, Sir, Madam. I would also like to begin
15 by thanking the Tribunal on behalf of Ms Coll for granting the variation application on
16 the papers at short notice. I am very grateful.

17 **MR JUSTICE MORRIS:** We have read it and obviously we extend our concern and
18 sympathy to her.

19 **MS FITZPATRICK:** For today's purposes to avoid confusion I am going to continue
20 to refer to the position of the consumer class as, Ms Coll's position. I only have a very
21 short point to make -- two points in fact. The first point is on the matter of principle in
22 dispute between the other Claimants and Google and that's that Ms Coll agrees with
23 the other Claimants that her experts should not be required to give evidence on behalf
24 of the other Claimants which does not overlap with the way that she has chosen to
25 advance her own case.

26 The fundamental reason for that is that she in my submission should be able to

1 advance her case as she wishes. So that's the point of principle. We are rowing in
2 behind the other Claimants in that regard.

3 The second point is really a point of detail in respect of the evidence of Mr Dudney.
4 Ms Coll's position in respect of Mr Dudney's evidence is that it is complete on the basis
5 of the documents disclosed to him. What I mean by that --

6 **MR JUSTICE MORRIS:** It is complete. Could you perhaps speak -- does the
7 microphone amplify? It does, doesn't?

8 **MS FITZPATRICK:** I will just bring it a bit closer. Does that assist?

9 **MR JUSTICE MORRIS:** Mr Dudney's is complete?

10 **MS FITZPATRICK:** It's complete on the basis, subject to these qualifications, on the
11 basis of the documents disclosed to him, which means that he has done all he can
12 and should do with those documents on the basis of his own expertise. Of course, we
13 have heard submissions from Mr Beal, the additional expertise that Mr Harman has,
14 but I just wanted to set that marker down that so far as Mr Dudney is concerned on
15 the basis of his expertise and the documents that he has seen his evidence is
16 complete.

17 Madam, you have been involved in these proceeding, the Coll Proceedings for a very
18 long time and in this regard I would just like to remind you that prior to the Joint Case
19 Management Decision there was an extensive process in the Coll Proceedings
20 involving multiple hearings and supporting witness statements produced
21 by Mr Dudney which were responded to by relevant individuals within Google,
22 whereby Mr Dudney and Ms Coll sought specific disclosure from Google with respect
23 to the issues dealt with by Mr Dudney and his reports as they stand represent the
24 culmination of that process. I just want to set a marker down in the transcript in that
25 regard.

26 Unless there are any further questions for me on expert evidence, that was all I was

1 planning to say this afternoon.

2 **MS LUCAS:** Mine is just an administrative question really. You said that Ms Coll's
3 position was that her expert shouldn't be required to give evidence for the other
4 Claimants. Obviously, there are some discussions going on about when you can
5 jointly instruct and I am assuming you have carved those out. You are happy to enter
6 into discussions about joint instructions.

7 **MS FITZPATRICK:** Of course we are, and the position is as stated in our skeleton.
8 So we are in discussions as regards the joint instruction of Mr Burelli by both Epic and
9 Professor Rodger, Mr Dudney by Epic and Dr Lee and Dr Krein by Professor Rodger,
10 so that position remains as stated in our skeleton.

11 **MS LUCAS:** Thank you.

12 **MR JUSTICE MORRIS:** Thank you very much.

13 Yes, Mr Holmes.

14 **MR HOLMES:** Thank you, Sir. So our primary concern in relation to this is to keep
15 the case within manageable and proportionate bounds. The case is now very large,
16 three substantial and complex claims combined in one trial, and it will need careful
17 and stringent case management to keep it tractable.

18 A key ingredient of that will be effective cooperation between the Claimants and that
19 includes in relation to expert evidence. Epic and Rodger both emphasised when they
20 applied for consolidation that they would take a sensible approach and those
21 assurances were important and were taken into account by the Tribunal in its judgment
22 ordering consolidation. I am sure you have that well in mind, but paragraph 75
23 specifically refers to the assurances given.

24 The scope of cooperation has, however, so far been limited. The Claimants are not
25 proposing any significant sharing of experts. Instead, they seek to call six additional
26 experts over three fields. The result, if accepted, will be a patchwork of overlapping

1 Claimant expert evidence. In the field of security Rodger and Epic both seek leave to
2 adduce separate further evidence, a report each, and that is despite in Rodger's case
3 an intention to jointly instruct Coll's existing security expert, Dr Lee, and her industry
4 expert, Dr Krein, as well.

5 In the field of accounting Epic is content to share Coll's expert, Mr Dudney, but Rodger
6 wants a further expert of his own, Mr Harman. In the field of economics Rodger
7 proposes to call Professor Fletcher while Epic seeks permission for two further
8 economists, Ms McCall and Mr Hunt.

9 Mr Scannell indicated today that the former was of particular importance and he
10 accepted that the latter may not be needed if the temporal scope of Dr Singer's
11 evidence were to be updated. We say that that was an appropriate concession.

12 If all these experts were admitted, it would take the total number which have to be
13 accommodated at trial to 16.

14 Now it is worth pausing over that number. It is easy to become inured to what's being
15 proposed, but the figure is on any view a remarkable one. 16 experts even in joint
16 proceedings, and we say it should give the Tribunal serious pause for thought. In
17 relation to only one area of expertise have the Claimants been able to arrive at
18 a position of full cooperation. That is payment systems where Epic and Rodger have
19 both agreed to share Coll's expert, Mr Burelli. That shows what can and we say should
20 be done. The proposal is for some updating of the relevant experts' evidence to cover
21 matters not so far covered, and we would not oppose that, but with that exception
22 there has been a failure to combine and we say that does need to be explored and
23 explained.

24 It needs explaining in particular, for example, in relation to security, which is a similarly
25 technical area to payment systems and where for our part we had expected full
26 combination behind Dr Lee.

1 In this connection it is not enough to point to mere narrative differences of approach
2 to justify further expert evidence. There would need to be some material new matter
3 that remains to be addressed, and even if there were such a matter, that does not in
4 itself justify a new and additional expert to address it. The payment system expert will
5 be giving updated evidence and we say that could be done also in other areas of
6 expertise.

7 I will come back to the explanations that have been given for individual experts and
8 why we don't find them convincing, but can I first address you on the costs of
9 proliferation and on the relevant principles?

10 **MR JUSTICE MORRIS:** Pause a minute, please. At no stage did we -- I mean,
11 correct me if I am wrong -- did we suggest that people were required to combine, did
12 we?

13 **MR HOLMES:** No.

14 **MR JUSTICE MORRIS:** I don't think we went that far.

15 **MR HOLMES:** You didn't go that far and I didn't mean to suggest that.

16 **MR JUSTICE MORRIS:** I will check back to what we said.

17 **MR HOLMES:** You encouraged.

18 **MR JUSTICE MORRIS:** We encouraged cooperation and we encouraged
19 non-duplication.

20 **MR HOLMES:** Indeed.

21 **MR JUSTICE MORRIS:** I don't think we have ever directed people towards single
22 experts for the three.

23 **MR HOLMES:** No. We fully accept that. The point I was making, though, Sir, is there
24 was significant emphasis on the scope for non-duplication and for co-operation by the
25 Claimants and that undoubtedly did feed into your decision --

26 **MR JUSTICE MORRIS:** Yes.

1 **MR HOLMES:** -- to adjourn and to order consolidation.

2 **MR JUSTICE MORRIS:** Yes. Okay.

3 **MR HOLMES:** We say that one obvious way of achieving efficiency is by combination
4 in relation to a single expert, as the Claimants themselves have recognised through
5 their combination in relation to payment systems experts.

6 **MR JUSTICE MORRIS:** All right. Carry on.

7 **MR HOLMES:** At the risk of stating the obvious, the volume of additional material
8 which the Claimants seek to adduce will produce a substantial increase in the cost
9 and complexity of the proceedings. The proposed number of experts, two
10 accountants, three security experts, and five economists all on the same side will place
11 real pressure on the management of the case. It will lead to a complex joint expert
12 process and an unwieldy set of agree/disagree statements. It will inevitably have
13 an impact on the length of trial. You have our submissions about that. Each of the six
14 further experts will need to state their position and that position in principle and subject
15 to any further constraints you impose, one would expect to need to be tested at trial.
16 At the very least we will need to make an election of what points we consider material
17 and that need to be dealt with and that may extend to the further experts and that will
18 add time to the timetable.

19 Critically it will also place a large additional burden on the Tribunal. You will have to
20 deal with a choir of potentially slightly divergent Claimant expert voices. You will have
21 to pick over multiple reports which could, without limits being imposed run to many
22 pages of additional expert material and we would support, if you are against me on my
23 main submission, some rigorous case management, not limited to stringent
24 page limits.

25 There are already expert materials of 2,300 pages from Coll alone and over 1,500
26 from Google. You can readily see how six further experts could inflate that

1 substantially further unless there are really binding and strict limits imposed that
2 extend certainly not only to the main report but to annexes as well.

3 You will then have the unenviable task of evaluating all the additional material in what
4 is already a complex case.

5 Now to justify the load created by additional expert evidence we say clear and decisive
6 adjudicatory benefits must be shown considering each proposed expert and discipline
7 in turn. Absent such benefits, we say the Tribunal should grasp the nettle and exert
8 the discipline that the parties have not achieved on their own.

9 Now as regards the relevant principle, the starting point is that no party has a right to
10 adduce expert evidence. To the contrary, the Tribunal is under a duty to limit expert
11 evidence and that's clearly set out in the Stellantis judgment of the Court of Appeal
12 cited in our skeleton. It may be worth briefly turning that up for two propositions. It is
13 at Authorities Bundle, volume 2, tab 17, beginning at page 703.

14 **MR JUSTICE MORRIS:** Tab?

15 **MR HOLMES:** Tab 17.

16 **MR JUSTICE MORRIS:** Which paragraph or page?

17 **MR HOLMES:** Start at page 705. You see the first sentence explains the context. So
18 the appeal was from a case management decision of the CAT in a cartel damages
19 case holding that the three groups of Defendants should be required to share a single
20 expert.

21 At page 706, paragraph 10 you see the possibility of a single expert was raised by the
22 Tribunal of its own motion. At paragraph 12 the Tribunal's decision to adopt that
23 course was on case management grounds.

24 The Court of Appeal upheld the decision. Turning to page 710, there's a crisp
25 encapsulation of what we say is the correct approach at paragraph 35:

26 *"Expert evidence is of a different kind from fact evidence and subject to different and*

1 *more restrictive rules than other evidence, given the potential for irrelevance, cost and*
2 *the complexity which can occur with poorly thought through expert evidence it is not*
3 *hard to see why permission is required in either venue. The reason is the need to*
4 *retain a power to control and restrict this type of evidence so as to ensure it is*
5 *reasonably required to resolve the proceedings. That is why both the court and the*
6 *CAT approach expert evidence from the same stance, namely that there is a duty to*
7 *restrict it."*

8 The duty to limit expert evidence to what is really needed we say weighs with particular
9 force in the present case given what was said at the time of adjournment and the
10 ordering of a joint trial where efficiencies were a focus.

11 So we say that the Tribunal must factor in the case management implications and
12 should limit the expert evidence to be given accordingly.

13 The *Stellantis* judgment also shows that even where expert evidence is warranted
14 a party cannot insist on its choice of expert and this is relevant when the Tribunal
15 comes to consider the obvious option adopted in the case of the payment system
16 experts of instructing existing experts to provide supplemental reports.

17 If we could turn on in the judgment to page 716 and look at paragraph 61, please, you
18 see in the middle of the paragraph that the court explains the position in this way:

19 *"The fact a party requires expert evidence to advance its case does not justify separate*
20 *experts. The disability referred to ..."* - that's the disability of a party to advance its
21 *case - "...has to relate to the difference between separate experts and a single expert.*
22 *The experts' overriding duty to help the court means that experts are required to and*
23 *do express views on matters which the party calling them would rather were put in*
24 *a different way or not put at all. That is why the duty is an overriding one. It is not*
25 *a justification for separate experts."*

26 For that reason as well we say that -- we hear what Ms Coll says about

1 non-overlapping points, but we do say that the Tribunal should have the power, if
2 necessary, to direct a sharing of experts in relation to matters which are not adverse
3 to a party, but which go beyond their specific case where there are efficiencies to be
4 achieved by that.

5 As the Court of Appeal noted here experts are required to and do express views on
6 matters which the party calling them would rather were put in a different way or not at
7 all.

8 **MR JUSTICE MORRIS:** This is a suggestion that in respect of issues taking Claimant
9 One's expert that Claimant One doesn't advance specifically, or doesn't need to rely
10 on, that Claimant Two should be required to instruct Claimant One's expert to deal
11 with that issue. Is that the point?

12 **MR HOLMES:** Indeed. The idea I think is to have joint instruction, for example, in
13 relation to the payment system expert and in relation to Dr Krein and in relation to
14 Mr Lee and in relation to Mr Dudney.

15 **MR JUSTICE MORRIS:** This is your submission.

16 **MR HOLMES:** Yes, it is.

17 **MR JUSTICE MORRIS:** So you say -- so there should be joint for security --

18 **MR HOLMES:** No, no. I am sorry, Sir. These are experts where there is already
19 a degree of joint instruction agreed, as I understand the position. I can see vigorous
20 shaking of heads.

21 **MR JUSTICE MORRIS:** Certainly for Mr Burelli there is joint instruction. I don't know
22 if it is joint instruction but it's agreed there will be one expert.

23 **MR HOLMES:** Yes.

24 **MR JUSTICE MORRIS:** In relation to Dr Lee --

25 **MR HOLMES:** Sir, I had understood in relation to accounting --

26 **MR JUSTICE MORRIS:** Accounting, Mr Dudney.

1 **MR HOLMES:** Mr Dudney is giving evidence on behalf both of Epic and of Coll.

2 **MR JUSTICE MORRIS:** Coll, yes.

3 **MR HOLMES:** In relation to security my understanding was -- I stand to be corrected
4 if it is not correct -- that there is evidence to be jointly given by Dr Lee and Dr Krein.

5 **MR JUSTICE MORRIS:** Is evidence jointly given or is it the fact that they are not going
6 to duplicate? I am not sure I understood.

7 **MR SCANNELL:** None of this evidence is jointly given, number one. So it is wrong
8 to think of any of this evidence being given on behalf of Epic, as you just heard. The
9 position in respect of Mr Burelli and Mr Dudney is that Epic is content to rely on that
10 evidence. That's not at all --

11 **MR JUSTICE MORRIS:** Not joint instructions are --

12 **MR SCANNELL:** Going forward we have accepted the instructions that we give to
13 Mr -- not Mr Dudney, Mr Burelli can be joined with the Rodger Proceedings.

14 **MR JUSTICE MORRIS:** Joint instructions going forward in relation to Mr Burelli.

15 **MR SCANNELL:** Correct.

16 **MR JUSTICE MORRIS:** In relation to Mr Dudney your position is that you are going
17 to rely on his evidence to date.

18 **MR SCANNELL:** Yes, and we want the freedom to instruct him going forward in case
19 the Coll Proceedings settle, but it's not agreed by the Rodger Class Representative
20 that those instructions be joined.

21 **MR HOLMES:** We are slightly confused and perplexed by this submission. If we
22 could turn in Bundle E to tab 5 to the order that Epic has submitted ahead of today's
23 hearing in relation to the expert evidence.

24 **MR JUSTICE MORRIS:** "... *permitted to rely on* ..."

25 Paragraph 2.

26 **MR HOLMES:** Then at paragraph 3.

1 **MR JUSTICE MORRIS:** "... *henceforward permitted to give instructions to ...*"

2 **MR HOLMES:** This is Epic. Epic is permitted to call Mr Dudney and/or Mr --

3 **MR SCANNELL:** None of that refers to the Rodger Class Representative.

4 **MR HOLMES:** This is the Epic order.

5 **MS LUCAS:** I think Mr Scannell was pointing out that whilst his position is one thing --

6 **MR HOLMES:** Maybe Professor Rodger has not arrived at the same position as Mr
7 Scannell but we had understood at least in relation to the Epic position that there was
8 to be joint instruction hence forward in relation to Mr Dudney and Mr Burelli.

9 **MR SCANNELL:** If I may just in relation to Dr Krein, that's inaccurate. We have never
10 said that we want to rely on Dr Krein or jointly instruct him. The position in relation to
11 Dr Krein is our factual evidence covers his evidence and we don't need --

12 **MR HOLMES:** I hope I didn't misspeak. I had thought that Rodger like Epic was
13 seeking to jointly instruct these experts to avoid the problem of settlement and risk that
14 particular experts would be removed from the fray.

15 **MR BEAL:** I can confirm we are hoping to, but we are not in a position where because
16 of the issue with the Class Representative we have discussed, we are not in a position
17 to have taken that forward. Our position is joint --

18 **MR HOLMES:** The position then is there is a hold-up because of the difficulty in
19 obtaining instructions for Ms Coll's party.

20 **MR JUSTICE MORRIS:** In relation to Dudney and Burelli the position is hoped to be
21 that both of the other parties that it will be along the lines of paragraphs 2 to 5 of the
22 Epic draft order.

23 **MR BEAL:** I think not. We are not proposing to instruct Mr Dudney. Mr Harman is
24 giving evidence.

25 **MR JUSTICE MORRIS:** Sorry. Sorry. Anyway let's go back --

26 **MR HOLMES:** The short point for present purposes is there is to be a joint instruction,

1 | which presumably has been agreed already by Epic. At the moment for other experts
2 | there is an attempt to achieve a joint instruction by --

3 | **MR JUSTICE MORRIS:** Joint instruction/reliance on what has been done in the past.

4 | **MR HOLMES:** Both of those things, and for reasons that have independent basis the
5 | joint instructions necessary to address the concern of Ms Lucas raised that a party
6 | might otherwise settle out and there wouldn't be scope to call, but if there is joint
7 | instruction there is scope to instruct the expert to address matters in supplemental
8 | evidence.

9 | **MR JUSTICE MORRIS:** So you say that -- anyway carry on.

10 | **MR HOLMES:** So we say that in reliance on Stellantis and the passage that I showed
11 | to you that that joint instruction offers an opportunity for supplemental evidence by
12 | an existing expert. Indeed that is contemplated in terms in the Epic order where it
13 | refers to further updating reports. We say that that principle should be available in
14 | other circumstances, other cases as well, and when considering the applications that
15 | are before you it is relevant to ask why it would not be possible for an existing expert
16 | to address the matters on which further evidence is proposed to be called.

17 | **MR JUSTICE MORRIS:** Okay. Let me digest that. So that is the suggestion that in
18 | respect of those areas where one of the Claimants says, "*We want to call different*
19 | *experts on X because the existing experts don't deal with this point, there is no reason*
20 | *why the existing experts could not deal with that point*".

21 | **MR HOLMES:** Subject to any point of conflict. We see that if there was some lack of
22 | identity of interests the position is different. Indeed we accept that with
23 | Professor Fletcher, because we recognise that there is an important disjuncture in
24 | terms of pass on between the position of Rodger and Coll, but subject to that
25 | consideration we say that in proceedings of this kind adopting forceful case
26 | management to keep them on track and to deal with the scale of the proceedings to

1 stop them collapsing under their own weight, the Tribunal should consider the option
2 of a joint instruction to address interstitial points, points which have not --

3 **MR JUSTICE MORRIS:** That would not necessarily reduce the volume of expert
4 evidence. It would reduce the number of experts and therefore, leaving to one side
5 the assumption that the new experts are not going to re-invent the wheel, which we
6 are going to work very hard to stop in any event, but it would effectively increase -- it
7 would avoid the problem of six more experts and therefore reduce the problem of the
8 issues arising from joint expert reports and schedules and the like.

9 **MR HOLMES:** And live evidence at trial. A choir on the front bench in this courtroom
10 all singing a cappella in slightly different notes -- if you will pardon that mangled
11 metaphor, which the Tribunal will then have to pick through.

12 **MS LUCAS:** So your point is that we all know technical restrictions are an issue. We
13 all know security issues are going to have to be debated. There is some evidence
14 about that. The Defendants all ought to be rowing in the same direction on it, because
15 it supports all of their cases.

16 **MR HOLMES:** Yes.

17 **MS LUCAS:** And it shouldn't be for them to point to the odd point that's not covered
18 by the existing experts and say, "*Aha. We need a new one*".

19 **MR HOLMES:** Little points here and there.

20 **MS LUCAS:** I am not suggesting that I am putting --

21 **MR HOLMES:** No, no, that's my submission though. When one comes to these
22 alleged points of difference -- if I may I will address you on the individual experts,
23 because you do need to consider them one by one in turn, but we say that there is
24 very significant identity, and it is not at all obvious where the differences really lie.

25 Insofar as there are discrete points that a particular party wants an expert to consider,
26 that can be canvassed with an existing expert. There's no difference of interest on

1 security, and there is no reason if there are a handful of points, a laundry list of the
2 kind we have seen from Dr Paul, for example, or Professor Ryan, there is no reason
3 why Dr Lee shouldn't be invited to express his views about that, but the alternative of
4 having four experts in the front row for a hot tub or being cross-examined minutely in
5 relation to argumentative testimony judging by the letters, that's not a prospect that
6 the Tribunal should entertain lightly.

7 **MR JUSTICE MORRIS:** That deals with the issue of additional points. What about
8 where you have the parties saying, "*Well, our expert takes a different view on that*
9 *point*".

10 **MR HOLMES:** If one can point to a really clear and significant difference --

11 **MR JUSTICE MORRIS:** A different view from the existing --

12 **MR HOLMES:** -- a material difference, then we accept that that creates a difficulty
13 with joint instruct to that extent. Of course, there is the option of a hybrid approach.
14 We see that from the approach that Rodger is taking in relation to Krein and Lee where
15 they are proposing a joint approach and supplemental material. That would certainly
16 be an efficiency.

17 **MR JUSTICE MORRIS:** That's Dr Paul or Mr Paul. Okay. Carry on.

18 **MR HOLMES:** Against that backdrop can I turn now to consider the specific experts
19 that are before you? In relation to the economic experts you have heard what I say
20 about Fletcher. Our focus is on McCall and Hunt.

21 Ms McCall's proposed report would have market definition, dominance and
22 exclusionary conduct. On those she is not asking different questions from the
23 questions that Dr Singer is asking and that can be seen quite shortly without delving
24 deeply into the materials.

25 Starting with the market definition and dominance, the questions Dr Singer is asking
26 can be seen at Bundle C. I have a page reference. I'm afraid I don't have a tab

reference.

MR JUSTICE MORRIS: Go on.

MR HOLMES: Page 349. It is tab 13 I understand.

MR JUSTICE MORRIS: Yes, it is tab 13. One minute.

MR HOLMES: So you see at the foot of the page:

"Market definition:

1. What are the relevant product markets?

2. What is the geographic scope of any relevant product markets, to the extent relevant what is the temporal scope of any relevant product markets.

...

4. Is Google dominant in one or more of the relevant markets."

Ms McCall is asking exactly the same questions. What about the answers? You can see Dr Singer's conclusion summarised at C, 351 in paragraph 10. He is proposing to find or he finds that Google is dominant in three relevant product markets: the Licensable Operating System market, the Android App Distribution market and the Android In-App Aftermarket.

Ms McCall's markets are set out in her letter at paragraph 10.

MR JUSTICE MORRIS: This is Bundle E, is it?

MR HOLMES: Yes, E.

MR JUSTICE MORRIS: Can I just have a moment to tidy my bundles?

MR HOLMES: Of course.

MR JUSTICE MORRIS: I have got a lot out.

MR HOLMES: They are in a constant state of disorder.

MR JUSTICE MORRIS: So E.

MR HOLMES: Tab 6, page 40. You see at paragraph 10 what she proposes to do.

First bullet:

1 *"Define the relevant market for licensable ..."*

2 **MR JUSTICE MORRIS:** I am not quite there yet. Yes.

3 **MR HOLMES:** *"Define the relevant market for the Licensable Smart Mobile OS and*
4 *assess whether Google is dominant.*

5 *Define the relevant market for Android App Distribution services for developers and*
6 *assess whether Google is dominant.*

7 *Define the relevant market for Play Store in-app payment services."*

8 So the markets appear to be indistinguishable from the markets defined by Dr Singer.

9 So the questions and answers on market definition and dominance appear to be
10 identical. This is the view taken by Google's expert, Mr Noble. I can give you the
11 reference I think. His letter is at E, 168, paragraph 13. As he pithily observes, *"This*
12 *appears to be duplicative of Dr Singer's evidence."*

13 **MR JUSTICE MORRIS:** Did you say 168, paragraph 13?

14 **MR HOLMES:** Yes.

15 **MR JUSTICE MORRIS:** Yes.

16 **MR HOLMES:** Mr Noble. Epic is undeterred. It identifies differences which it says
17 would nonetheless warrant a separate report. The same points were developed orally
18 as appear in Epic's skeleton argument but as a sort of aide-memoire. If we could go
19 to that. That's in Bundle A --

20 **MR JUSTICE MORRIS:** Give me the paragraph number of the skeleton?

21 **MR HOLMES:** Paragraph 28. If you are looking in the bundle, it is page 192.

22 **MR JUSTICE MORRIS:** Yes.

23 **MR HOLMES:** You see first of all there is a generic legal definition about market
24 definition, not a one size fits all construct. Now, as we will see in a moment, the same
25 conduct is alleged in each case. So we say that there is no reason why the market
26 definition should differ between the claims.

1 There is then an admission in the second sentence that the market definitions are
2 broadly similar. Now we've seen that's not quite --

3 **MR JUSTICE MORRIS:** On their face.

4 **MR HOLMES:** Yes. It is not quite accurate. They are identical markets on their face.
5 They then say that the rationale and evidence relied upon for that conclusion will differ,
6 but it is very hard to gauge why or how they will differ. The second sentence is opaque.
7 If I could ask you, please, to read that, beginning:

8 "Although Dr Singer's analysis ..."

9 **MR JUSTICE MORRIS:** I have read the one that considers the differences in the
10 frame.

11 **MR HOLMES:** Mean rationale and evidence relied on. We say that's extremely unclear
12 and takes us no further forward. The footnote 16 is practically the entirety of the
13 McCall letter. No specific paragraph is identified.

14 If one goes to the McCall letter itself, that's equally opaque.

15 **MR JUSTICE MORRIS:** One minute.

16 **MR HOLMES:** That's E 42. So tab 7.

17 **MR JUSTICE MORRIS:** Yes.

18 **MR HOLMES:** Tab 6. E 42. It is in paragraph 22. One sees there's a suggestion
19 that a pleading difference will affect Ms McCall's approach to market definition.
20 A difference in the way the exclusionary abuse is pleaded, but it won't affect the
21 conclusion on market definition because we already know the conclusion, which is
22 identical to Dr Singer's. It remains mysterious exactly how Ms McCall's approach will
23 differ and why her approach is additive of Dr Singer. Indeed, there is no guarantee
24 that Ms McCall will actually apply a different approach.

25 In paragraph 29 of Ms McCall's letter at E 44 she says there:

26 "*Some of the areas identified above may prove not to be material to my analysis.*"

1 So there is no guarantee that there will be any differences of the routes to get to the
2 market definition at all. If on further enquiry and given difference in approach proves
3 not to be material it will be abandoned.

4 **MR JUSTICE MORRIS:** Sorry. I didn't see that. Where is that bit?

5 **MR HOLMES:** Sorry. That is in paragraph 29.

6 **MR JUSTICE MORRIS:** I have "...some areas may prove not to be material."

7 **MR HOLMES:** Yes.

8 **MR JUSTICE MORRIS:** Was the reference to abandonment?

9 **MR HOLMES:** We derived from that that if on further enquiry a difference proves not
10 to be material, it won't then be pursued.

11 **MR JUSTICE MORRIS:** Okay.

12 **MR HOLMES:** So in the case of market definition we have good reason to think it will
13 be immaterial, because as things stand both approaches lead to the same conclusion.
14 Returning to Epic's skeleton argument --

15 **MR JUSTICE MORRIS:** Okay. Just pause for a moment.

16 **MS LUCAS:** Isn't that the answer to the problem, though? So if she looks at this and
17 finds that the differences aren't material, there won't be any evidence that you actually
18 have to grapple with.

19 **MR HOLMES:** Well, I see your point, but I think what I was suggesting was we know
20 the end point. We know the market that she expects to derive from this process. What
21 there is, is apparently a difference of methodology or means of arriving at that for
22 reasons which we say are unclear, but that's a very slender basis on which to admit
23 a whole additional report going to the questions of market definition and dominance
24 where the conclusions appear to be identical as between the parties.

25 **MS LUCAS:** But say for the sake of argument your devastating cross-examination
26 destroys Dr Singer's analysis but Ms McCall's analysis would stand up better to

1 scrutiny, why should we be deprived of seeing the other route of getting there?

2 **MR HOLMES:** My response to that, Madam, would be to say that in any case where
3 you are managing experts' evidence that objection could be raised. It is a recipe for
4 more in all cases. Wherever there is some difference of approach, difference of
5 methodology, one could say that insofar as another methodology proved to be subject
6 to weakness at trial one should, therefore, admit further evidence, but we have seen
7 that that was not the approach taken in Stellantis. The same -- exactly the same point
8 could be made to justify having parallel econometric models in a series of Claimant
9 cases. It is a balance. It is a balance of the conflicting considerations of allowing
10 a party to offer expansive expert evidence on any point it wishes as against the case
11 management constraints that are needed to keep a case within manageable bounds.
12 Moreover, there is at the moment no evidential basis for even expecting a different
13 methodology at all in this case, because we simply do not know in what respect it is
14 said Ms McCall's analysis will differ.

15 **MS LUCAS:** Thank you.

16 **MR HOLMES:** So, returning to Epic's skeleton at A, 193, there is a further point made
17 in paragraph 29, but it seems to us similarly vague. The alleged point of difference is
18 in the penultimate sentence of the paragraph over the page, internal page 11. They
19 say there:

20 *"Ms McCall proposes to use focal products which are the subject of each element of*
21 *the restricted conduct alleged by Epic."*

22 Now in relation to that again this appears at most to be a difference in the means of
23 approaching the same question. There's no attempt to explain or justify what value it
24 will add for the purposes of the Tribunal's assessment of the relevant markets, and our
25 submission is simple. This sort of opaque difference in approach does not immunise
26 Ms McCall's evidence from the charge that it is duplicative and shouldn't be admitted.

1 Some more tangible explanation is needed of the adjudicatory benefit of having yet
2 another approach to market definition ventilated before the Tribunal, which means yet
3 another issue for the Tribunal to resolve. That's precisely the sort of evidence which
4 shouldn't be admitted.

5 Moreover, if there were some additional point to be made, there's no reason why it
6 should not be canvassed with Dr Singer and Dr Singer --

7 **MR JUSTICE MORRIS:** But that's if -- I mean, if they both get to the same result, but
8 the second expert fundamentally disagrees with how the first expert got to the result,
9 you couldn't get the first expert to deal with it.

10 **MR HOLMES:** There is, of course, a --

11 **MR JUSTICE MORRIS:** It is linked to the point that Ms Lucas has just made.

12 **MR HOLMES:** Yes. I think you have my response to that. In the end case
13 management considerations weigh against allowing unlimited expert evidence on
14 every point where parties might wish to adopt differences of methodology leading to
15 the same end conclusion.

16 **MR JUSTICE MORRIS:** Yes.

17 **MR HOLMES:** The pleadings on exclusionary abuse are, we say again, practically
18 the same in Coll and Epic. You see that from Ms Coll's Claim Form at B, 183.

19 **MR JUSTICE MORRIS:** I need to get that bundle.

20 **MR HOLMES:** It is tab 5.

21 **MR JUSTICE MORRIS:** B, 183 I have. Yes.

22 **MR HOLMES:** Paragraph 9(b):

23 *"(i) An allegation of bundling and a pre-installment and prominent display.*

24 *(ii) Contractual and technical restrictions."*

25 *Then in paragraph (iii):*

26 *"Requiring payments from Google Play Store's payment system."*

Turning back to B4, tab 1, you see the points in Epic's case. At 1, pre-installation --

MR JUSTICE MORRIS: Page?

MR HOLMES: Page 4, paragraph 3(a), (i), the allegation of pre-installation and prominent placement.

2. Bundling.

3. Contractual restrictions.

4. Technical restrictions.

5. Tying to Google Play Store payment system.

So these are --

MR JUSTICE MORRIS: I haven't got a 5. Tie is in B.

MR HOLMES: Yes. Tie is in B. On the exclusionary really the same heads.

Now Epic's skeleton argument focuses on one difference of approach between Dr Singer and Ms McCall. That is in paragraph 26 if you have the skeleton loose.

MR JUSTICE MORRIS: Yes.

MR HOLMES: So again, Epic accepts that the wrongdoing alleged by Epic and the other two Claimants is "broadly similar". Again we say that is an understatement.

Then the point of difference that is identified is in the final sentence of the paragraph:
"By contrast, Epic seeks injunctive relief in relation to discrete aspects of Google's conduct as well as its conduct as a whole."

Turning on to paragraph 31 on internal page 11, the point is developed. It is said that:
"The Tribunal will require evidence on the lawfulness of the elements of the conduct alleged by Epic both collectively and discretely and this will entail consideration of counterfactuals relating to particular discrete elements of the conduct whereas Dr Singer considers only one overarching counterfactual."

You heard Mr Scannell making the same point this morning.

The key difficulty with this submission is that it is not borne out either by Coll's pleaded

1 case or its evidence. So if one goes back to the Pleadings Bundle to tab 5, page 216.

2 **MR JUSTICE MORRIS:** Just a minute.

3 **MR HOLMES:** You see first of all just by way of illustration at paragraph 108.

4 **MR JUSTICE MORRIS:** Sorry. Tab 5.

5 **MR HOLMES:** Tab 5, page 216.

6 **MR JUSTICE MORRIS:** 216.

7 **MR HOLMES:** 216.

8 **MR JUSTICE MORRIS:** Thank you.

9 **MR HOLMES:** This is the Coll pleading. You see:

10 *"Google has engaged and continues to engage in the following exclusionary conduct*
11 *that constitutes abuses" – plural - "of its dominant positions on the various markets*
12 *stated."*

13 Then a list of the different alleged abuses. Those are then considered and addressed
14 in turn.

15 **MR JUSTICE MORRIS:** One minute.

16 **MR HOLMES:** Then at paragraph -- turning on to page 230, at paragraph 149, as one
17 would expect, the allegation is not only a single overall infringement:

18 *"The above exclusionary practices are each abusive in their own right."*

19 Although they are also said to be mutually reinforcing. Mr Scannell was, with respect,
20 wrong to suggest that it is only dealt with globally, if that was the submission.

21 Then turning to Dr Singer's evidence, at C, 495 -- I'm afraid I don't have the
22 tab number.

23 **MR JUSTICE MORRIS:** Just give me a moment.

24 **MR HOLMES:** C13. 495.

25 **MR JUSTICE MORRIS:** Yes.

26 **MR HOLMES:** So you see at paragraph 275 that there is a consideration in turn of

1 the position absent particular alleged abuses starting with the alleged bundling abuse,
2 then the contractual restriction, then the technical --

3 **MR JUSTICE MORRIS:** So counterfactuals for each abuse is what you are saying.
4 Yes.

5 **MR HOLMES:** Certainly a consideration of the position absent those. Then at 279
6 similarly in relation to the In-App Aftermarket. Same point. Each separately
7 considered.

8 **MR JUSTICE MORRIS:** Yes. Okay.

9 **MR HOLMES:** So we say that the suggestion that Dr Singer cannot address multiple
10 counterfactuals is not correct, and if a more segmented counterfactual analysis were
11 desired, it is not clear why he couldn't be invited to develop that through by way of joint
12 instruction. We say this is a slender basis indeed for admitting a further report by a
13 different expert in relation to allegations of exclusionary conduct which are accepted
14 to be broadly similar across the parties.

15 So there are, we accept, some differences of temporal scope between the cases as
16 currently pleaded, but we say Dr Singer could be invited to produce a supplemental
17 report to update that. If I understood his submission, Mr Scannell accepted that by
18 doing so one could overcome the problem of temporal scope which would in any event
19 be something that one would expect Ms Coll to do given her indication that she intends
20 to update the class definition to bring it up to date by the time of the trial.

21 Of course, that's precisely what Epic proposes to do as we saw from the order in
22 connection with Dr Dudney and Mr Burelli. They make that point in their skeleton at
23 footnote 46.

24 Turning next to Mr Hunt --

25 **MR JUSTICE MORRIS:** Just let me -- so you say that, number one, there are no real
26 differences in terms of market definition and abuse?

1 **MR HOLMES:** Yes.

2 **MR JUSTICE MORRIS:** Number two, that this distinction between individual abuses
3 and overall abuse is more illusory than real?

4 **MR HOLMES:** Yes.

5 **MR JUSTICE MORRIS:** And number three, temporally this could be dealt with by
6 Dr Singer?

7 **MR HOLMES:** Yes.

8 **MR JUSTICE MORRIS:** And might be anyway. Anyway. Okay. All right.

9 **MR HOLMES:** More crisply articulated than I managed, but yes.

10 **MR JUSTICE MORRIS:** I am only playing it back so my understanding is correct.

11 **MR HOLMES:** To make sure.

12 So Mr Hunt, his report will cover excessive pricing. He is tasked with considering the
13 same question that Mr Holt has already considered. Are the commission rates
14 charged by Google excessive and unfair? There are a couple of nuances. Epic wants
15 to assess the commission rates charged by Google under the UCB pilot and this hasn't
16 been assessed by Mr Holt so far. There is also some debate about the extent to which
17 the lower commission to Spotify has been assessed or will be assessed.

18 Now I will come back to those two points of nuance in a moment, but those differences
19 apart, what we have is extremely nebulous in terms of a justification for Mr Hunt's
20 further evidence.

21 It is worth turning up Epic's application to see that. It is in Bundle E at tab 4, page 26.

22 First of all, there's a reference to the standard analytical framework, the two limbed
23 structure derived from United Brands which, of course --

24 **MR JUSTICE MORRIS:** E, 26?

25 **MR HOLMES:** E, 26, paragraph 24. Do you have that? This is Epic's application.

26 **MR JUSTICE MORRIS:** Yes, yes.

1 **MR HOLMES:** The first point is you have the generic test as applied by Mr Holt. There
2 is then a listing of points which Mr Hunt may cover as part of his analysis. Turning
3 over to page E, 27.

4 **MR JUSTICE MORRIS:** Yes.

5 **MR HOLMES:** You see that each of the proposed items are qualified by the word
6 "may".

7 **MR JUSTICE MORRIS:** "Introduce", yes.

8 **MR HOLMES:** So Mr Hunt is remarkably tentative about whether his approach will
9 truly differ from that of Mr Holt or Mr Dudney in any respect. The items that, with
10 respect, generic again, profitability analysis, return on capital employed. These are
11 matters -- allocation of Android costs, review of internal documents. These are all
12 matters that are considered in the existing evidence. Spotify I will come back to. Then
13 a potential to introduce additional factors going to the quality differences between the
14 Play Store and putative comparators but very little that one could really attach weight
15 to.

16 Now in my submission these vague references to potential additional analysis of topics
17 that have already been considered by Mr Holt are not sufficient to justify further and
18 distinct expert reports on this topic. This is duplicative analysis, which should not be
19 permitted.

20 Coming back to the two discrete matters which are arguably not part of the enquiry
21 and the existing evidence, on Spotify if Dr Fletcher is addressing that point for Rodger,
22 then that should suffice. We think that she will address it. It is pleaded by Rodger and
23 it is mentioned in her preliminary report. The reference for your note is Fletcher 1,
24 paragraph 345 at C, 2520 and paragraph 658 at C, 2597.

25 **MR JUSTICE MORRIS:** You are going to have to give me that again slowly. Fletcher
26 1, paragraph.

1 **MR HOLMES:** 345, C, 2520 and paragraph 658 at C, 2597. On UCB if Dr Fletcher is
2 addressing that point as well, well and good. If not, the more sensible course is to
3 have the existing expert, Dr Holt, briefly address it by way of supplemental comment.
4 Epic's application, therefore, does not present genuine, novel, valuable,
5 non-duplicative evidence in relation to either of the economic experts.

6 **MR JUSTICE MORRIS:** Okay.

7 **MR HOLMES:** Turning to accountancy --

8 **MR JUSTICE MORRIS:** Right. Just let me remind myself. We are talking now?

9 **MR HOLMES:** This is Mr Rodger's application for Mr Harman.

10 **MR JUSTICE MORRIS:** Okay.

11 **MR HOLMES:** The Tribunal already has the accountancy evidence from Mr Dudney
12 and Professor Easton. Epic, which now has an excessive pricing claim has considered
13 its position and has chosen to adopt the evidence of Professor Dudney in full. This is
14 Epic's skeleton paragraph 24, subject to liberty to apply to update that evidence.

15 **MR JUSTICE MORRIS:** Yes, and Epic are going to be jointly instructing going
16 forward?

17 **MR HOLMES:** Yes, as we saw. Rodger does not take this path. Rodger is seeking
18 to adduce additional expert evidence from Mr Harman.

19 The fundamental problem we say is that Rodger has not justified why this evidence
20 could not be provided by Mr Dudney pursuant to a joint instruction and to the extent
21 necessary a supplemental report. It is not good enough we say for Epic -- sorry. If it
22 is good enough for Epic, it should be good enough for other developers. The answers
23 given in the skeleton do not work we say. Indeed, they give rise to another substantial
24 concern, which I will show you.

25 **MR JUSTICE MORRIS:** You are taking me now to?

26 **MR HOLMES:** Rodger's skeleton. I have it in Bundle A, tab 12.

1 **MR JUSTICE MORRIS:** I have it separately. Paragraph?

2 **MR HOLMES:** 16.1.

3 **MR JUSTICE MORRIS:** I just want to remind myself actually of the justification.

4 **MR HOLMES:** Yes. So it is the whole of paragraph 16.

5 **MR JUSTICE MORRIS:** Can I just read that again?

6 **MR HOLMES:** Yes, of course. Have you read that?

7 **MR JUSTICE MORRIS:** I have read it.

8 **MR HOLMES:** 16.1 to 16.4 I was going to address you on. Just to rattle through
9 them, 16.1 says it is not for Google to dictate how Professor Rodger should advance
10 his case. That's of course correct. It is, however, the Tribunal's job to do so pursuant
11 to its duty to limit expert evidence and you have heard what I said on Stellantis.

12 16.2, Rodger prays in aid of Mr Harman's multi-disciplinary abilities, but we say that's
13 not a good enough reason. Mr Dudney is a properly qualified expert. If anything, the
14 economic lens applied to accounting analysis at skeleton paragraph 16.3 only risks
15 procedural complication without adjudicatory benefit.

16 At 16.3 there is a contention that Mr Harman's broad expertise means he should be
17 allowed to put in an additional report, but the obvious solution here is for Rodger to
18 use Professor Fletcher as a vehicle to address any additional economic points that are
19 needed to complement Dr Dudney's accounting analysis. We say cross-cutting
20 evidence of this kind is actually not needed. He is asking for a further economist in
21 relation to the permission they are already seeking, which we don't oppose, for
22 Professor Fletcher.

23 **MR JUSTICE MORRIS:** Yes.

24 **MR HOLMES:** In paragraph 16.4 Rodger raises a concern about instructing Mr Holt
25 because of differences of position on pass on. That concern does not arise if Rodger's
26 expert, Professor Fletcher, is used to address economic points, as one would expect.

1 **MR JUSTICE MORRIS:** Okay.

2 **MR HOLMES:** Our position is that all of this suffices to justify an order that Rodger
3 should adopt the posture of Epic and instruct Mr Dudney. To the extent that there are
4 any additional points that need to be made, there is no good reason why they shouldn't
5 be considered either by Mr Dudney in a short supplementary report or indeed on the
6 economic side by Rodger's own economist, Professor Fletcher, who has yet to give
7 evidence.

8 **MR JUSTICE MORRIS:** Yes.

9 **MR HOLMES:** For security -- I think I can be brief -- the Tribunal already has before
10 it --

11 **MR JUSTICE MORRIS:** I need to -- you are going at a rate not surprisingly --

12 **MR HOLMES:** I am only conscious of the time.

13 **MR JUSTICE MORRIS:** So you should be.

14 **MR HOLMES:** If the Tribunal would permit me --

15 **MR JUSTICE MORRIS:** You are going now to security, which is Paul and Ryan.

16 **MR HOLMES:** Exactly. There is already evidence from two experts, Lee and
17 McDaniel. There are now applications to double the number of security experts. You
18 have Dr Paul and Professor Ryan joining the scrum. The justification for that is said
19 to be that both of them have non-duplicative evidence to provide, but we say that there
20 are two concerns about this. First, there is no compelling justification for why the
21 additional evidence really adds materially to the evidence which has been provided to
22 date in assisting the Tribunal in resolving the issues it defined as relevant, and we do
23 have a concern that some of the materials being brought forward now looks quite
24 argumentative in terms which is also a point that needs to be factored in.

25 Second and more fundamentally, we have no account of why any such incremental
26 matters cannot be handled by means of a supplemental report from Dr Lee. Rodger

1 has already instructed Dr Lee. If Rodger is able to instruct him, so should Epic. Insofar
2 as Epic and Rodger have genuine points which need to be assessed, they can be
3 channelled through Dr Lee by means of a supplemental report. Dr Lee can certainly
4 be invited to consider the points that Professor Ryan and Dr Paul have said they think
5 should be considered. That's the simplest and most efficient solution and we are given
6 no detail as to why it is not feasible in present circumstances.

7 Now the only other point to make, Sir, is on the constraints if you are not with me on
8 any particular expert.

9 **MR JUSTICE MORRIS:** Yes.

10 **MR HOLMES:** We agree with the need for stringent page limits. This has been done
11 recently in the Qualcomm case by the Tribunal President, as she now is. 90 pages for
12 main economic expert reports. 35 pages.

13 **MR JUSTICE MORRIS:** 30 pages.

14 **MR HOLMES:** 35 pages for all non-economic reports. In this case we say tighter
15 constraints would be appropriate because these are supplemental reports and both
16 parties agreed to pull their horns in where there's overlap.

17 **MR JUSTICE MORRIS:** These are supplementary. All right. Yes, yes, yes.

18 **MR HOLMES:** So we would suggest 50 pages for the supplemental economic
19 reports, including annexes, and 20 pages for the others. We think the flimsy letters
20 from Professor Ryan and Dr Paul do not remotely justify a page -- a proposed
21 page limit of 50 pages. So 20 pages we say should suffice for all others with liberty to
22 apply. So if it really can't be done, they can come forward with reasons. That's the
23 only way you will avoid having a --

24 **MR JUSTICE MORRIS:** I am very concerned about volume of material, and two, I am
25 mostly concerned about managing the process after, but -- yes. That's why we've
26 raised the issue.

1 **MR HOLMES:** Sir, if I may, can I suggest a couple of further directions that we think
2 would be helpful in that regard if you are not with me with any of the experts?

3 **MR JUSTICE MORRIS:** Yes.

4 **MR HOLMES:** We say that there should be a direction not to duplicate. This is notably
5 lacking from Epic's draft order. The Tribunal I would invite to give a clear steer as to
6 the consequences of non-compliance. If the parties fail to engage sensibly with the
7 constraint, we say there should be scope to strike duplicative material at a subsequent
8 hearing. If that is not made clear and put on the record, we fear that there will be
9 duplication.

10 Finally, the question of whether all these experts are to give oral evidence or to
11 participate in any hot tub should be saved for a later date.

12 **MR JUSTICE MORRIS:** Absolutely.

13 **MR HOLMES:** Insofar as material is not additive, there should be no permission at
14 this stage to call oral evidence. So these are the three directions that we would seek
15 to the extent that any of the expert evidence is admitted.

16 **MR JUSTICE MORRIS:** It might be one gets to the stage down the line and you have
17 the joint expert reports and you then -- I mean, you may or may not be aware but the
18 Tribunal is in the process of preparing some new approaches to expert evidence, but
19 further down the line there may be further iterations to streamline one way or the other
20 by reference to reports and/or numbers of people giving evidence and the way it is
21 going to be given, but we have that very much in mind.

22 **MR HOLMES:** That's helpful. Thank you, Sir. Subject to questions, those are my
23 submissions.

24 **MS LUCAS:** Thank you.

25 **MR JUSTICE MORRIS:** We will rise for a few moments. We have the factual
26 evidence to deal with, which I hope will not take very long. Then we do have the

1 disclosure issue to deal with. I can tell you that the date of the hearing that's suggested
2 I don't think can be done. We may not be able to take it much further today in terms
3 of dates, but I think you are suggesting 15th/16th September. At the moment I don't
4 think that can be done. We are looking into it, but it is not looking straightforward at
5 the moment. Right. Okay. Thank you.

6 **(Short break)**

7 **MR JUSTICE MORRIS:** Thank you. Just looking at the clock, I am still very much
8 aiming to conclude by 4.30, which really means that the argument ought to be
9 concluded, if possible, by 4.15 so that we have time to have a debate, and that
10 includes dealing with -- the disclosure issue I don't think will take more than a couple
11 of minutes in light of the indication we have given you. I am not sure we can take it
12 much further. We have to deal with the factual witness evidence point as well.

13 So, Mr Scannell and Mr Beal, with that in mind, you will no doubt tailor your replies.

14 **MR SCANNELL:** I am very grateful for that. On the reply points, I will be as short and
15 punchy as I can. Unfortunately, as is always the way with replies I will have to jump
16 from one point to the other.

17 **MR JUSTICE MORRIS:** That's fine.

18 **MR SCANNELL:** The first point I want to make is that my learned friend is quite wrong
19 to say, and I don't want there to be any uncertainty about this, in respect of Ms McCall's
20 evidence and Dr Singer's evidence it was no part of my submission that we would be
21 prepared to allow Dr Singer's evidence to stand if the temporal scope of the evidence
22 changed. That was a debate you may recall we had in the context of Mr Hunt and
23 Mr Holt.

24 **MR JUSTICE MORRIS:** Oh, yes. Yes.

25 **MR SCANNELL:** It was no part of my submission in respect of market definition,
26 dominance and abuse. My submission in respect of those matters and Ms McCall's

1 evidence is that we want Ms McCall to give her expert opinion, because the analysis
2 conducted by Dr Singer is not sufficient. I hope that's clear.

3 My learned friend took you to the Stellantis case. That is a case I didn't take you to
4 but it is a case I addressed in my submissions. It is the point that there is a very
5 important difference between a case like Stellantis, which was a cartel claim, where
6 multiple Defendants are asked to share an expert, on the one hand, and a case such
7 as this where you have different Claimants in different cases who are asked to adopt
8 evidence from experts for parties who are not parties to their own case.

9 **MR JUSTICE MORRIS:** Why is there a difference? There is a difference plainly
10 between the fact that in principle or in theory there are three separate actions here,
11 whereas in the cartel case there's one action with three different Defendants parties
12 to the same action, but leaving that to one side, what is the difference in principle
13 between three Defendants instructing one expert and three Claimants instructing one
14 expert on the assumption that the issues are parallel or similar or the same?

15 **MR SCANNELL:** Well, quite apart from anything else there is the fact that in principle
16 when a Claimant takes a case, that Claimant should be able to have a debate with the
17 Tribunal as to whether or not expert evidence should be allowed in that party's case.
18 The Tribunal's duty to limit expert evidence is a duty within each case to consider
19 whether or not parameters can be put on the expert evidence. It is not a duty that has
20 ever been considered by the Tribunal or the Court of Appeal as a duty that could
21 extend from one case to another case which has not been consolidated with it. So
22 there is that question of principle.

23 **MS LUCAS:** How does that fit with the fact we are now jointly case managing this
24 case to a joint trial and that was on the -- I mean, that was something that your client
25 supported and Professor Rodger wanted. Ms Coll actually objected to it, but that was
26 precisely on the basis that everyone would be working damn hard to make sure that

1 duplication could be reduced. So is it not slightly --

2 **MR SCANNELL:** None of that has changed. This is a point that I wanted to address
3 also. None of that has changed. All of the experts that I have addressed the Tribunal
4 on today have conscientiously engaged with all of the expert evidence that has already
5 been filed. It is no part of any of my submissions to try to say "can we have a second
6 bite of the cherry in relation to this?" Ultimately, we have no interest in over-burdening
7 the Tribunal either. All we are after is the fair determination of the pleaded issues in
8 our own case.

9 Could I also say in respect of Stellantis itself and the circumstances of Stellantis itself
10 within the context specifically of a cartel claim what was being considered by the Court
11 of Appeal in that case was whether the multiple Defendants should be free from
12 a standing start, as it were, to instruct an expert to grapple with the expert issues in
13 the case. So both of the Defendants had an input in what the expert would ultimately
14 be addressing. It was no part of Stellantis to ask itself the question: "*Well, should one
15 of your expert reports stand and the other just has to tailor their case to make sure
16 that it fits with that evidence?*", which is, of course, the situation that we are grappling
17 with, where expert evidence is already there in a different case, which is not our case,
18 and we are asked, "*Well, can you mould things to suit adopting that evidence?*"

19 I can say on the basis of my own experience, because I ultimately acted for Autoliv in
20 the case that followed, that both of the Defendant parties had their own expert to begin
21 with, and as a result of the Court of Appeal they essentially had to sack their experts
22 and a new expert had to start from the beginning. It was never any part of the analysis
23 to suggest, "*Well, Autoliv, you can have your expert and, TRW, you can just adopt it
24 and see what you can do with it*" or vice versa. So even within Stellantis some care
25 has to be taken.

26 Now I fully accept that the Tribunal wants to limit the expert evidence and I don't want

1 to take this point too far and I don't want my submissions to you to be unhelpful, but
2 I just do want to contextualise that case.

3 **MR JUSTICE MORRIS:** Okay.

4 **MR SCANNELL:** The submission was made that my submissions in respect of
5 Ms McCall's evidence -- so if I could just focus for a moment on Ms McCall's
6 evidence -- were based on there being little points here and there -- they were my
7 learned friend's points -- that she might want to deal with.

8 I am perplexed by that submission. That was not my submission in respect of market
9 definition, dominance and abuse. The point that I made was that there are
10 fundamental structural differences that call for a different approach to market
11 definition.

12 Now I am going to come on to the suggestion that was made that, in fact, all of the
13 relevant markets were defined by Dr Singer and also that he considered all of the
14 different counterfactuals that I said were necessary. Neither of those is even close to
15 true. He did not do either of those things.

16 So turning first to market definition and what exactly Dr Singer does, it is true, as I said
17 in my submissions to the Tribunal, that Dr Singer refers to the Licensable Operating
18 Systems market, but the difficulty with his evidence -- and this really goes to the heart
19 of the matter -- is that he doesn't go about defining that market in the way that you
20 would expect.

21 Now my learned friend says --

22 **MR JUSTICE MORRIS:** Defining it in the way you expect, meaning "defining" as in?

23 **MR SCANNELL:** As in putting his flag up and saying, "*I have defined the market and*
24 *it is the licensable operating systems market*".

25 **MR JUSTICE MORRIS:** He doesn't reach that conclusion?

26 **MR SCANNELL:** No, and the problem we are going to face at trial is that my client

1 will have to define that market and will have to use that market definition to
2 contextualise the abuses that it alleges on that market.

3 My learned friend will come along and he will cross-examine in relation to the issue of
4 the Licensable Operating Systems market and he will make the submission, "*Well, we*
5 *don't accept that there is such a market or that we are dominant on that market.*
6 *Dr Singer, you have not defined that market. You have referred to it certainly. You*
7 *have said there is such a market. Epic, you have not gone about thoroughly defining*
8 *that market either and considering your abuses in the context of that market definition*".

9 It is imperative for that reason, and this is Ms McCall of AlixPartners' point, that she
10 will have to go through that market definition process in the context of the abuse
11 allegations that are made by Epic.

12 It was suggested also --

13 **MR JUSTICE MORRIS:** So although Dr Singer refers to such a market --

14 **MR SCANNELL:** He doesn't need to define it.

15 **MR JUSTICE MORRIS:** I am not on top of the detail, to be perfectly honest with you.
16 You say that he doesn't go through the process of analysis leading to such -- either
17 the process of analysis nor leading to a conclusion of a finding of such a market.

18 **MR SCANNELL:** Well, he says that there is a market which is the Licensable
19 Operating Systems market, but what he doesn't do is the sort of conventional market
20 definition analysis of --

21 **MR JUSTICE MORRIS:** SSNIP test.

22 **MR SCANNELL:** -- SSNIP test and substitutability and competitive restraints and so
23 on. That is the analysis that Ms McCall will have to do.

24 **MS LUCAS:** Can we just look at this so we can all get on the same page with it? For
25 me it is C1, but it is tab 13. It is Dr Singer's --

26 **MR JUSTICE MORRIS:** It is C2 for me. Page?

1 **MS LUCAS:** C, 385.

2 **MR JUSTICE MORRIS:** Yes.

3 **MS LUCAS:** I have very quickly turned this up. He does specifically define the
4 Licensable OS market. On the next page, paragraph 63, he says how he is going to
5 go -- he is looking at the relative product market and he says five lines down:

6 *" I explain why a formal (quantitative) HMT using the SSNIP test cannot apply to this*
7 *market."*

8 So he has done a market definition exercise. Is your point that your expert will do it
9 differently?

10 **MR SCANNELL:** It is a different methodology, a far more thorough methodology. The
11 suggestion was made that Ms McCall has not suggested that she will apply a different
12 methodology, but, with respect, that's entirely wrong. Ms McCall in her letter to the
13 Tribunal has said expressly at paragraph 22 of her letter -- the reference is E, 6,
14 42 -- that she will apply a different methodology and that this methodology, which is
15 highly superficial, it will not work for (inaudible). That's really the important point.

16 **MR JUSTICE MORRIS:** Which paragraph? I have E, 42.

17 **MR SCANNELL:** It is E, 6, page 42.

18 **MR JUSTICE MORRIS:** Is it? Isn't that the abuses?

19 **MR SCANNELL:** It is paragraph 22 where she says that her assessment will be
20 different.

21 **MR JUSTICE MORRIS:** Can I just ...

22 (Reading sotto voce.)

23 That goes to the abuse, doesn't it, rather than to the market definition? It doesn't
24 actually say, *"Well, I've read paragraph 63 and the following of Dr Singer and that*
25 *methodology is suspect"*, or, *"I don't think that's the right methodology"*.

26 I mean, this is the point that Ms Lucas raised about you have expert one, who reaches

1 the same conclusion as your expert, but actually your expert tells you that expert one's
2 methodology is fundamentally weak and you have a much better -- your expert says
3 you have a more sound approach. I can see that, but is Ms McCall saying that?

4 **MR SCANNELL:** She is not saying that. She is not saying that Dr Singer's market
5 definition is deficient. She is accepting that Dr Singer's market definition may well be
6 okay for the Coll case. Her point is that it is not suited to the allegations that are made
7 in the Epic case. Dr Singer's market analysis is, of course, informed by the scope of
8 Ms Coll's claims.

9 **MR JUSTICE MORRIS:** Yes.

10 **MR SCANNELL:** This is what Dr Singer deals with at around paragraphs 51 to 57 of
11 his report. He is contextualising his market definition analysis in the context of the
12 claims that are made by the Coll Class Representative.

13 **MR JUSTICE MORRIS:** Right.

14 **MR SCANNELL:** On counterfactuals also the suggestion was made, "*Well, Dr Singer*
15 *has done enough. He has considered all of the counterfactuals that are necessary for*
16 *Epic's claim*", and I suggest that that word "*considered*" was very carefully selected.
17 What he has not done is provide any analysis in relation to that.

18 Could I ask you, given that Dr Singer's report is open, to turn to page 494 of his report?
19 If one looks at paragraph 272 on this page, Dr Singer says -- he is dealing with the
20 counterfactual:

21 "*I next consider what the world may have looked like in a counterfactual but for world*
22 *absent all or some of Google's alleged contact. The counterfactual is a but for world*
23 *in which the GMS bundling and distribution restrictions and payment system*
24 *restrictions never existed.*"

25 So it is, with respect, in line with the submission that I made to the Tribunal that there
26 is an agglomeration of all of the different abuses and the question is: what would the

1 | prices have been but for all of that?

2 | One sees it also at paragraph 274 in the first sentence:

3 | *"I have been instructed to analyse a counterfactual in which all three categories of*
4 | *conduct described in F2, the GMS bundling, app distribution restrictions never*
5 | *existed."*

6 | That is fundamentally the problem. None of this is an analysis which suits Epic's case.

7 | **MR JUSTICE MORRIS:** Okay.

8 | **MR SCANNELL:** I can deal very briefly with Messrs Hunt and -- Mr Hunt and
9 | Professor Ryan. In respect of the temporal elements changing we have accepted that
10 | it may be possible, if the temporal change -- the temporal scope of the collective
11 | proceedings were to change, to square this off, but with the best will in the world, and
12 | I do hope that the Tribunal understands this, we have to deal with the case as it stands
13 | at the moment, and as it stands at the moment the temporal scope is the temporal
14 | scope. We don't have any extension of the period in the Coll Class Representatives'
15 | case.

16 | As to Spotify, which is the other point, which I initially brought to your attention to show
17 | that there are important differences between our case and the Coll case in the context
18 | of excessive pricing, the only submission made by my learned friend is, *"Well,*
19 | *Professor Fletcher can look after that"*, but with the best will in the world that does
20 | leave Epic in a rather invidious position where it is left to hope that Professor Fletcher
21 | deals with that issue in the way that suits its case without actually having input, which
22 | is exactly the problem that we face in respect of all of the experts.

23 | **MR JUSTICE MORRIS:** Isn't the answer to that joint instruction?

24 | **MR SCANNELL:** It may alleviate it. It's not something that I am instructed -- is
25 | something that Epic wishes to do. It is not part of the application that I made.

26 | **MR JUSTICE MORRIS:** Even though you are happy to do it in respect of Mr Burelli?

1 **MR SCANNELL:** I can see Mr Burelli's evidence and the candidate as an expert to
2 provide that evidence has seen it also and a conscientious process has been gone
3 through where different experts have looked and said, "*Does this suit our case?*". The
4 answer in Mr Burelli's case is, "*Yes, it does*", but the answer in Mr Holt's case is "No,
5 it doesn't".

6 In relation to security and the suggestion that was made that there was no compelling
7 justification for additional evidence, with the best will in the world we say that there is.
8 I have shown the Tribunal that the timeline that's considered by Dr Lee is a very
9 specific timeline. In his evidence he has said, "I will not deal with anything more
10 modern than the relevant period in my case", and things have moved on in the security
11 environment. I showed the Tribunal that also. The question then becomes, "*why*
12 *should Dr Lee have to address all of the questions that are specific to Epic's case,*
13 *such as how Google could achieve its security concerns in a less market foreclosing*
14 *and restrictive way?*" That's no part of the Coll Class Representatives' case.
15 So they are the reply points that I wish to address. I am sure that the Tribunal wouldn't
16 thank me if I didn't address also the page limit proposal that was made.

17 **MR JUSTICE MORRIS:** Yes.

18 **MR SCANNELL:** If I could just very briefly make one or two points in relation to this.
19 Firstly, while, of course, it is understood that page limits are attractive, there is at least
20 to be aware of an uncomfortable aspect to all of this, which is that my learned friend
21 suggests, for example, that an expert report dealing with market definition, dominance
22 and abuse could be 50 pages long -- I believe he even suggested including
23 annexes -- when Mr Noble's report on behalf of Google is ten times that length in and
24 of itself and a real question of equality arises in those circumstances.

25 The second point is in relation to annexes and whether annexes should be included in
26 a page limit. I would respectfully suggest that again guided by the question "*what will*

1 *be useful for the Tribunal and for that matter what will be useful for other experts in the*
2 *case who have to grapple with the analysis?". It is very important that experts are able*
3 *to set out their calculations and so on in annexes so that other experts, when they are*
4 *reading the report, can actually get under the hood of it and work out how conclusions*
5 *were reached.*

6 So it is one thing to shorten the report and that can be done in a pithy, short, punchy
7 way, but you need the maths. You need the annexes.

8 **MR JUSTICE MORRIS:** It depends what you put in annexes.

9 **MR SCANNELL:** It depends what you put in annexes, of course --

10 **MR JUSTICE MORRIS:** I mean, if I'm drafting something and I think, "*Oh, my*
11 *goodness. I've overstepped the mark. I will take this chunk out and put it in an annex*".
12 That's really what we are guarding against.

13 **MR SCANNELL:** That can be policed. That can be policed. There's a world of
14 difference between including substantive matters in annexes and having an annex at
15 all.

16 **MR JUSTICE MORRIS:** Calculations possibly, but yes.

17 **MR SCANNELL:** The suggestion that was made was 50 pages including annexes,
18 which in my submission is borderline preposterous.

19 The third short point is that if there are to be page limits, that is one thing and it is
20 understandable that the Tribunal wants to do that. Some care is going to have to be
21 taken in any consequential order capturing that, that Google is subject to the same
22 requirements. We have heard quite a lot from Google professing to be terribly
23 concerned about how much paperwork there is. It serves them, of course, to restrict
24 Epic's expert evidence very considerably and it must be subject to commensurate
25 constraints when it comes to any replies to this evidence.

26 Now as to the instructions that we have been able to obtain in the brief period since

1 the submission -- the suggestion was made, Professor Ryan, number one, it has to be
2 seen in the context of what is there already. We have, for example,
3 Professor McDaniel's report is 387 pages. Professor Ryan ideally would like
4 100 pages he has indicated.

5 **MR JUSTICE MORRIS:** 100 pages before annexes? These are supplemental points,
6 aren't they?

7 **MR SCANNELL:** I have just turned around and heard from those instructing me that
8 at a push Professor Ryan could reduce to 80.

9 **MR JUSTICE MORRIS:** I am looking at the clock, Mr Scannell. I am sorry about this,
10 but ...

11 **MR SCANNELL:** I am just conscious of the need to contextualise what I am saying.
12 Mr Hunt then, if we could move on to him, Mr Hunt has indicated that he would be
13 content with 100 pages, which I would suggest is actually very generous, given
14 everything that he has to accomplish in his report. That's on the assumption that there
15 be allowance for annexes.

16 Ms McCall, who has a great deal to deal with in support of the Epic case, she has
17 suggested that ideally the limit should be 250. At a push she has indicated 210.

18 **MR JUSTICE MORRIS:** Okay.

19 **MR SCANNELL:** So those are the reply points.

20 **MR JUSTICE MORRIS:** Thank you very much, Mr Scannell.

21 Yes, Mr Beal. You are conscious I am sure of time.

22 **MR BEAL:** I have a point per minute.

23 Page limits. What is an annex? Please could you turn to Supplemental Bundle 1,
24 page 1082?

25 **MR JUSTICE MORRIS:** I can if I can find it. Supplemental Bundle 1, page 1082?

26 **MR BEAL:** Yes. It is in the second supplemental.

1 **MR JUSTICE MORRIS:** It would help me with tabs actually.

2 **MR BEAL:** It is part of Mr Noble's report, which is Tab 25.

3 **MR JUSTICE MORRIS:** Just tell me what this document is.

4 **MR BEAL:** It is the end of the opinion evidence purportedly given by Mr Noble in this
5 case.

6 **MR JUSTICE MORRIS:** Okay.

7 **MR BEAL:** It is his expert declaration, statement of truth, which marks the end of his
8 report. It is page 477 the top right-hand corner. What then follows are a series of
9 annexes. My point is some annexes are different than others. So the CV, if that's to
10 be included in the page limit, then our experts are going to have to think of another
11 way of summarising their careers.

12 Then at page 1100 one finds a different type of annex, which is actually reversion 2.
13 1100. There's "*Annex A4: EBIT Benchmarking*".

14 **MR JUSTICE MORRIS:** Yes.

15 **MR BEAL:** The expert reverts to what I would describe as opinion evidence. So if
16 I can put it this way, if the page limits are opinion evidence, then that makes sense,
17 regardless of whether it is an annex or not. I think that deals with the mischief that
18 you, Sir, have identified, which is what is the scope of the expert evidence that is, in
19 fact, being given that you have to read?

20 **MR JUSTICE MORRIS:** You are saying -- sorry. Your submission is that the
21 page limit should be referenced -- should be confined to opinion evidence, whether
22 that is contained in the body or in an annex?

23 **MR BEAL:** Yes.

24 **MR JUSTICE MORRIS:** Obviously cross-references, bibliographies, CVs not
25 included?

26 **MR BEAL:** Yes.

1 **MR JUSTICE MORRIS:** What about statistical analysis, etc, etc?

2 **MR BEAL:** That's opinion evidence.

3 **MR JUSTICE MORRIS:** Okay. All right.

4 **MR BEAL:** Mr Noble's was 478. Mr McDaniel is 281 on that basis. The page limits
5 we are proposing are 50 for Dr Paul.

6 **MR JUSTICE MORRIS:** 50 for Paul.

7 **MR BEAL:** 120 for Mr Harman --

8 **MR JUSTICE MORRIS:** Right.

9 **MR BEAL:** -- and 300 for Professor Fletcher. Now one sees that Professor Fletcher
10 is recognised to be giving evidence that is on a par with Mr Noble.

11 **MR JUSTICE MORRIS:** Yes, yes.

12 **MR BEAL:** In terms of Qualcomm -- this is my second point -- my learned friend
13 Mr Holmes is no doubt better informed than I am. I simply cannot find any reference
14 to an order that restricts the page limits for expert evidence in the Qualcomm case.

15 What I can find is an order that was given on 9th August 2024 on the CAT website
16 where Mr Noble, appearing there for the Consumers Association, and Dr Padilla,
17 appearing for Qualcomm, were told that they had to agree page limits to apply to each
18 of their expert reports. I can't understand at the moment from that direction whether
19 that was applied retrospectively to existing reports or it was only applied to further
20 reports. Paragraph 21 imposes restriction on all future experts' reports in terms of font
21 size and everything else, the sort of CJEU limits to what you can put into a document.

22 **MR JUSTICE MORRIS:** Your short point is you don't think there are page limits?

23 **MR BEAL:** Or at least they are not discernible from the public record.

24 Next point. My learned friend said, "*Oh, this means there will be 16 experts*". Can
25 I just -- for your note, page 542 of the Authorities Bundle has paragraph 43 in Kent. In
26 Kent there were 14 experts. The CAT said, "*It is a lot but we need discipline*". We are

1 happy to have discipline here.

2 **MR JUSTICE MORRIS:** Hold on. I don't think they heard from 14 in the end, though.

3 **MR BEAL:** There may well have been --

4 **MR JUSTICE MORRIS:** I am looking at my friends in front of me. I think there were
5 about six or seven in the end.

6 **MR BEAL:** Through a process of managing the nature of the oral evidence.

7 **MR JUSTICE MORRIS:** We discussed this, didn't we, yesterday? There were a total
8 of 14 you say?

9 **MR BEAL:** That's on the face of the record.

10 **MR JUSTICE MORRIS:** Yes. My point is it doesn't matter what they were, but my
11 understanding was that, when it came to them giving evidence, there were fewer.
12 I may be wrong. You might want to check that.

13 **MR BEAL:** That is consistent with my next point, which is managing who is the lead
14 expert and who gives evidence on what point. So, for example, one would
15 imagine -- my learned friend said there will be a choir before you. There won't. There
16 will be a symphony in four parts, because you will have expert economic evidence,
17 expert evidence about payment systems, expert evidence about financial accounting
18 and expert evidence about cyber security ecosystem -- mobile ecosystem, four
19 tranches of expert evidence which can be managed.

20 **MR JUSTICE MORRIS:** Well, managed potentially, managed in advance, for
21 example, through the joint expert process --

22 **MR BEAL:** Partly.

23 **MR JUSTICE MORRIS:** -- and the agree/disagree and narrowing it down and saying,
24 *"Well, three of those experts all agree on that point. We will hear from one of them".*
25 I don't know. I'm thinking aloud.

26 **MR BEAL:** That would be one way of dealing with it.

1 The fifth point is Google actively supported consolidation here. They were facing, as
2 they said, three complex and substantial cases. They are now only facing the one,
3 and that brings with it an advantage. They can't take advantage of that advantage by
4 imposing an inequality of arms on us. So it is all very well having Mr Noble doing
5 570 pages and then saying, "*You get 50*", which just strikes me frankly as unfair,
6 an unfair submission for Google to make.

7 **MR JUSTICE MORRIS:** I am sure there are equal submissions on the Claimants' side
8 saying, "*this will all lead to simplification and non-duplication*". I hear the point you are
9 making, but we can go back over who said what in the past. I am not sure it is
10 ultimately --

11 **MR BEAL:** My next point is expert sharing. This is what we have done. We did not
12 instruct these experts. They were not dealing with our case. We have chosen, through
13 fear partly of settlement now, but also in the light of the concerns expressed by the
14 Tribunal, to seek joint instructions for those where we can do so consistently with
15 advancing Professor Rodger's claim.

16 You were taken to Stellantis, where there were essentially two groups of Defendants
17 who were told to instruct the same joint expert and were able to provide instructions
18 to that joint expert. That is not this case, as Mr Scannell has made clear. Conversely
19 in Interchange Mastercard and Visa were given permission to have a suite of experts
20 for each of them. So different Tribunals have managed different cases differently.
21 Here we respectfully suggest that there are three separate sets of proceedings, which
22 are substantial proceedings.

23 **MR JUSTICE MORRIS:** In Mastercard and Visa Interchange has there been any sort
24 of consolidation in terms of experts?

25 **MR BEAL:** No. The Merricks proceedings were joined --

26 **MR JUSTICE MORRIS:** As between Mastercard and Visa, for example?

1 **MR BEAL:** No, there wasn't.

2 **MR JUSTICE MORRIS:** And obviously similar and parallel issues presumably?

3 **MR BEAL:** Yes. Mastercard chose to instruct two separate experts, one of which
4 was Mr Harman to deal with certain issues, one of which was Ms Webster to deal with
5 some economics.

6 **MR JUSTICE MORRIS:** All right.

7 **MR BEAL:** So different proceedings call for different solutions.

8 **MR JUSTICE MORRIS:** Okay.

9 **MR BEAL:** Our solution here is respectfully to invite the Tribunal to allow us to adduce
10 evidence from Mr Harman, which I was at lengths to point out was non-duplicative,
11 additional evidence that went to a very specific issue on profitability, where
12 Professor Fletcher said she didn't think she had the requisite expertise to do a detailed
13 effective accountancy job of working out the profitability analysis.

14 Mr Dudney says his evidence is complete per Ms Fitzpatrick's submission to you
15 earlier. Given that Mr Harman has advised Professor Rodger that there are some
16 additional points that need to be made for Professor Rodger, simply adopting
17 Mr Dudney's evidence is no answer. It doesn't deal with the lacuna in the evidence as
18 it stands for Professor Rodger's claim. So it is only additional supplemental points that
19 will be made by Mr Harman and that's the basis upon which we seek permission.

20 It was also put to me that we didn't have to use Mr Holt. The only reason I was
21 addressing Mr Holt was because they said, "*You should use Mr Holt*". If they are not
22 saying that anymore, fine.

23 In terms of economics and the crossover with forensic accountancy, Mr Harman is not
24 going to be giving evidence of what I would call the economic liability issues. He is
25 dealing with the very specific issue of replacement costs for intangible assets where
26 the criticism that is made by the other side is, "*You haven't looked at economic issues.*"

1 *You have just looked at -- look at financial statements. That tells you what the costs*
2 *are". They say that's too narrow. So Mr Harman is saying, "If they are saying it is too*
3 *narrow, I can give the economic cost analysis as well". So it is all part and parcel of*
4 *a very confined area of evidence.*

5 In relation to Mr Paul, as I understand it, the real concern here is not his 50-page
6 proposed witness statement. It is that he is another witness on the front row dealing
7 at the hot tub with three other witnesses who are dealing with security witnesses, but,
8 of course, if his evidence is confined and then adopted by the others, then he need
9 not have an active part in cross-examination if we choose the lead expert to deal with
10 those points. The point is if his evidence doesn't go in, then my client is automatically
11 deprived of the ability to persuade this Tribunal that he is making good points. We
12 ultimately don't care who makes those points, but we have no guarantee that Dr Lee
13 will agree with them and that's the real problem we have.

14 Duplication. I don't mind a direction saying, "*You must not duplicate*". If we do
15 duplicate, of course, the irony is that Google have already got an answer to it, because
16 they have already dealt with the points they say are duplicative. No doubt there will
17 be issues about costs if we don't abide by the obligation not to duplicate.

18 Unless I can help any further, those are our submissions.

19 **MR JUSTICE MORRIS:** Thank you very much. Did you have anything else? Okay.
20 Can we deal --

21 **MR HOLMES:** I have the references for the page limits for Qualcomm, which need
22 slight correction. I can give you those separately.

23 **MR JUSTICE MORRIS:** There were actual page limits?

24 **MR HOLMES:** They are recorded in transcripts. The judge arrived at a provision in
25 relation to the page limits.

26 **MR BEAL:** If that's right and the transcript that's being referred to is 19th December

1 2024 --

2 **MR HOLMES:** And 29th July 2024.

3 **MR BEAL:** The one I saw from December was 100 pages.

4 **MR JUSTICE MORRIS:** We will take it that there were page limits.

5 **MS LUCAS:** Perhaps you could send the references through by e-mail.

6 **MR HOLMES:** We will provide the references through.

7 **MR JUSTICE MORRIS:** I'm sure that's fine. Thank you.

8 Yes. Mr Scannell, very quickly on the Epic factual material.

9 **MR SCANNELL:** Yes. I am going to try to deal with it in a couple of minutes. I will
10 take it --

11 **MR JUSTICE MORRIS:** I am wondering whether we ought to hear Mr ...

12 **MR HOLMES:** It might assist, because I think I can cut through quite a lot of it. I
13 mean, the context is obviously that there has already been extensive factual witness
14 evidence exchanged in the Epic proceedings. So you had first round March 2023,
15 seven witnesses from Epic, five from Google. Reply evidence March 2024. That was
16 the closure of the factual evidence. Epic was directed to serve a further update
17 witness statement in October 2024, following a pleading amendment. There have
18 already been 25 factual witness statements that have been served by Epic and by
19 Google. So our underlying concern is that anything further should be subject to
20 sensible constraint. The only constraint --

21 **MR JUSTICE MORRIS:** Sensible constraint by reference to subject matter?

22 **MR HOLMES:** Subject matter, indeed. So all that we seek today -- the order at the
23 last CMC proposed a process whereby Epic would apply for permission to update its
24 witness evidence by reference to the issues they intend to address. They have
25 identified some issues, but it is a non-exhaustive list. We say for now the permission
26 should be in the terms set out in that non-exhaustive list. If there are others, they can

1 approach us. We can discuss them, and only if there's a dispute, that can be brought
2 before the Tribunal. Otherwise, there's a risk of having carte blanche unbounded
3 factual evidence --

4 **MR JUSTICE MORRIS:** Can either of you point me to that --

5 **MR HOLMES:** Bundle F, tab 16, page 525.

6 **MR JUSTICE MORRIS:** F?

7 **MR HOLMES:** Tab 16.

8 **MR JUSTICE MORRIS:** One minute. Yes. 525?

9 **MR HOLMES:** Yes. That's all we seek today.

10 **MR JUSTICE MORRIS:** Okay. Just so that I can refresh -- I am aware of the fact that
11 updating evidence is wanted and that three of the current witnesses are no longer
12 employed and it is proposed to call evidence from two fresh witnesses and potentially
13 from others who will cover their areas.

14 **MR HOLMES:** Yes. The only area of uncertainty we have is whether any of the
15 existing witnesses will also be called.

16 **MR JUSTICE MORRIS:** That was a question I had. Where's the list? Sorry. The
17 topics?

18 **MR HOLMES:** At paragraph 14.2 at the top of the page:

19 *"Epic shall, if so advised, apply for permission to update its witness evidence of fact in*
20 *earlier proceedings by reference to all issues in the Epic proceedings they intend to*
21 *address in signed witness statements of fact."*

22 **MR JUSTICE MORRIS:** Sorry. One minute.

23 **MR HOLMES:** Do you have that? So it was by reference to identified issues and so
24 we say --

25 **MR JUSTICE MORRIS:** Sorry. I am a bit confused. This was the order ...?

26 **MR HOLMES:** The order following the last --

1 **MR JUSTICE MORRIS:** This is the draft order or whatever.

2 **MR HOLMES:** Yes. I think it was agreed. It was settled.

3 **MR JUSTICE MORRIS:** By reference to all issues. (Reading sotto voce).

4 **MS LUCAS:** I think it might be slightly, dare I say, inelegantly drafted. It's difficult to

5 get a handle on. I think what was intended was when the permission application was

6 made, Google would be well aware of the subject headings of the areas that were

7 going to be covered. I think that's what it means.

8 **MR HOLMES:** That is very clear from the agree/disagree list that was made before

9 the last hearing. I can find the reference for that if that helps.

10 **MR JUSTICE MORRIS:** I am trying to understand it. The requirement was that when

11 they sought to update, they should identify the issues?

12 **MR HOLMES:** Yes, understandably, given the evidence that (inaudible).

13 **MR JUSTICE MORRIS:** They have not yet done so?

14 **MR HOLMES:** They have given a list, which is in E --

15 **MR JUSTICE MORRIS:** That is what I wanted to see.

16 **MR HOLMES:** E, tab 4, 12.

17 **MR JUSTICE MORRIS:** Mr Scannell, I know that we are doing this in a slightly

18 reverse order, but I'm trying --

19 **MR HOLMES:** I hope it cuts through, though, because there were a range of

20 objections taken.

21 **MR JUSTICE MORRIS:** Let's just go a bit slower. E4, 12?

22 **MR HOLMES:** Yes.

23 **MR JUSTICE MORRIS:** No. E4. Sorry. The page isn't --

24 **MR SCANNELL:** It is not E4. It is E3.

25 **MR HOLMES:** E3, page 12. I am grateful.

26 **MR JUSTICE MORRIS:** Can you just show me the list of ... "Non-exhaustive list".

1 **MR HOLMES:** Paragraph 13. You see there are a number of items identified.

2 **MR JUSTICE MORRIS:** Yes.

3 **MR HOLMES:** Fine for those, but they should be recorded in the order, and if there
4 are any further updates required, then they can be subject of application subsequently.

5 **MR JUSTICE MORRIS:** I have the point you are making. Yes. Thank you.

6 Mr Scannell.

7 **MR SCANNELL:** I am grateful. The expectation was that the factual witnesses can
8 update their factual evidence within the scope of the evidence that they have already
9 given up to 31st October this year. This issue has arisen because quite rightly Norton
10 Rose Fulbright, the solicitors for Epic, have indicated that if the purpose of this is to
11 update the factual position up to 31st October, we can't be categorical about what all
12 the developments are likely to be, but we can anticipate on the basis of today's date
13 what the likely -- what the likely points that they will want to update are and here they
14 are.

15 **MR JUSTICE MORRIS:** This is what you think by October they will want to update
16 on?

17 **MR SCANNELL:** Yes.

18 **MR JUSTICE MORRIS:** This is what you think now in August?

19 **MR SCANNELL:** This is what we think now in August, but if my learned friend's
20 suggestion were accepted, that would make essentially a mockery of the updating
21 process, because the updating process would be, as it were, frozen in time today, but
22 if something happens between today and 31st October, none of these witnesses are
23 going to be able to update their evidence. That's all this really amounts to.

24 **MR JUSTICE MORRIS:** Can't that be resolved by a simple letter? When you are
25 drafting -- sorry. When have these got to be served by?

26 **MR SCANNELL:** 31st October.

1 **MR JUSTICE MORRIS:** So presumably -- they have got to be served by then. You
2 are going to be looking at it -- you are going to be drafting -- it's not going to be 31st
3 October. It is going to be the middle of October at the latest.

4 **MR SCANNELL:** Yes.

5 **MR JUSTICE MORRIS:** If you are drafting them in October or September and you
6 think, "*Well, there's been -- this list here is -- actually there is another three*
7 *developments we need to do*", can't you just notify Google and/or -- notify Google
8 saying, "*We actually want to identify the following further issues*"? If Google -- in the
9 unlikely event that they objected, it would have to be adjudicated on.

10 **MR SCANNELL:** I would question the adjective "*unlikely*".

11 **MR JUSTICE MORRIS:** All right. I will take that --

12 **MR SCANNELL:** It is almost certain that they would. We are here now.

13 **MS LUCAS:** We have had disclosure debates, as you and I know very well, over the
14 last few weeks. The truth of the matter is Google need to know what the developments
15 are. So, I'm not sure -- I think -- as I understand it from last time Google's concern
16 was this isn't a carte blanche to have another crack at the evidence. This is to update
17 things because it's a developing world. I don't think, unless anyone tells me otherwise
18 on Google's side, they would be objecting to something that was a proper update of
19 a development, because they actually positively want to know about that and they
20 have sought disclosure in relation to that.

21 **MR SCANNELL:** Yes. In a sense we are singing from the same hymn sheet in
22 relation to that. We are not saying anything different. For the avoidance of doubt no
23 update is going to be provided at all if there is nothing to update within the evidence
24 that a particular witness has given. Equally the witnesses will only address
25 developments of relevance to the evidence they have already given. So, there is no
26 question of any witness coming along and saying, "*Well, I would quite like another*

1 *crack at the evidence".*

2 **MS LUCAS:** *"I forgot to put that bit in last time."*

3 **MR SCANNELL:** *"I forgot to put that bit in",* or whatever it might be. That was the
4 whole basis on which the application was made and then, as I said, Norton Rose quite
5 rightly I think said, *"Well, look, we can't be too prescriptive about this and we can't put*
6 *words into the mouths of our witnesses either consistent with our professional*
7 *obligations. Here is the best that we can say about what they'll be addressing",* but if
8 something else comes up within the scope of their evidence, and all of the other riders
9 that I've just explained, then they'll have to be free to update there too, and that is what
10 will be of use to the Tribunal and, as you rightly say, Madam, of use to Google as well.
11 Then that just leaves the question of -- unless you would like me to address --

12 **MR JUSTICE MORRIS:** No. That is fine. We will take a decision on exactly how we
13 frame that. I mean, the difference between you might not be great.

14 **MR HOLMES:** We do seek notification or notice in advance as and when additional
15 issues arise.

16 **MR JUSTICE MORRIS:** Your position is limit to that and some sort of notification of
17 new issues or new developments. That is your position. Your position is no such
18 limitations.

19 **MR SCANNELL:** No such limitation, but clearly the parameters that --

20 **MR JUSTICE MORRIS:** Well, how would you frame the order then? What would be
21 the terms? Update -- you would have to think of some wording.

22 **MR SCANNELL:** We have wording in the order as it stands. It is by reference to the
23 evidence that they have already given.

24 **MR JUSTICE MORRIS:** That's much more -- that is wider.

25 **MR SCANNELL:** Of course we can debate about adding further riders.

26 **MR JUSTICE MORRIS:** We will think about it. I am just moving you along quickly

1 because of time.

2 **MR SCANNELL:** You are and quite understandably so.

3 So the other issue --

4 **MR JUSTICE MORRIS:** I think -- go on.

5 **MR SCANNELL:** The witnesses who will actually give evidence

6 **MR JUSTICE MORRIS:** It crossed our mind that those -- you have the three who have
7 left.

8 **MR SCANNELL:** One is in personal difficulties for confidential reasons. Just to be
9 clear, that witness, Mr Stolfus, has not left and Google is aware of this. The other two
10 are witnesses who have left. So logically they are not going to be able to provide the
11 updating evidence that we are talking about.

12 **MR JUSTICE MORRIS:** They can't do the update. I don't think there is a problem
13 about who does the update. I think the problem is who is actually going to be called
14 to give evidence.

15 **MR SCANNELL:** I can give you those three names.

16 **MS LUCAS:** Will the original people --

17 **MR JUSTICE MORRIS:** Will the original people who are no longer there --

18 **MR SCANNELL:** Oh, I'm sorry. It is going to have to be both of them logically. It is
19 going to have to be the original witness and the updating witness. I don't think that
20 there is any way around that.

21 **MR JUSTICE MORRIS:** Okay.

22 **MS LUCAS:** I think we were just seeking clarification as to whether the second
23 deponent would be speaking to the previous deponent's statement, but it sounds like
24 you are just going to call both.

25 **MR SCANNELL:** That is correct.

26 **MR HOLMES:** So they will all be there and tendered for cross-examination. I think

1 that's the position.

2 **MR SCANNELL:** That is correct.

3 **MR JUSTICE MORRIS:** As matters stand, yes. I mean, whether that can be -- it is
4 not the case that the new replacements are going to say, "*I adopt the evidence of my*
5 *predecessor*".

6 **MR SCANNELL:** Yes. That would be problematic.

7 **MR JUSTICE MORRIS:** That was the issue. Okay.

8 **MR SCANNELL:** Of course, it is not envisaged that any of these updates are going
9 to be lengthy witness statements.

10 Just for your note very finally the three names you might want.

11 **MR JUSTICE MORRIS:** I think they were in your --

12 **MR SCANNELL:** There has been an update because not all of the names were
13 present.

14 So for Mr Stolfus the person providing the update would be Mr Eric Gass. I believe
15 you do have his name. He is Epic's Senior Mobile Partnership's Lead. In Mr Seaver's
16 case it is Epic's E-commerce Product Director, Mr Lucas Schmitt. That's
17 S-C-H-M-I-T-T.

18 **MR JUSTICE MORRIS:** The German spelling of "*Schmitt*".

19 **MR SCANNELL:** For the avoidance of doubt these are all people with the same role
20 as the absent ones. Then the final witness, Mr Weissinger, in his case it is Epic's Vice
21 President of Marketing, Mr Michael Stout, spelt as one would expect, S-T-O-U-T.

22 **MR JUSTICE MORRIS:** So they will replace those, but the originals will do updating
23 insofar as -- sorry. We are getting to the point now where it is getting a bit
24 counter-productive, because I am rushing, and you are rushing, and I am rushing you.
25 I would have to go back to that list.

26 Is it intended that the existing witnesses were also updating insofar as they're around?

1 It is not. This is just coming from the three?

2 **MR SCANNELL:** I am terribly sorry?

3 **MR JUSTICE MORRIS:** The updated witness statements, will it be just from those

4 three people?

5 **MR SCANNELL:** Just from those three people.

6 **MR JUSTICE MORRIS:** Right. Okay. So, they will be updating generally.

7 **MR SCANNELL:** Yes.

8 **MS LUCAS:** Is that right?

9 **MR SCANNELL:** Sorry. No. I am terribly sorry. That is not right.

10 **MS LUCAS:** No. Mr Sweeney --

11 **MR SCANNELL:** I am terribly sorry. There's nodding all round. I'm terribly sorry.

12 They will be the updaters for the three --

13 **MR JUSTICE MORRIS:** All the other witnesses who are still employed will be updating

14 insofar as they need to?

15 **MR SCANNELL:** Yes. I am terribly sorry, Mr Chairman. Yes.

16 **MR HOLMES:** That matches our understanding. Our main concern is just to ensure

17 there is no general refresh. It is within the enumerated topics with liberty to apply and

18 to notify us.

19 **MR JUSTICE MORRIS:** Yes. We will make a decision.

20 **MR SCANNELL:** (Inaudible).

21 **MR JUSTICE MORRIS:** We will make a decision as to whether we are going to limit

22 it to those categories or not.

23 **MR SCANNELL:** Yes, exactly. That is what you have to determine.

24 **MR JUSTICE MORRIS:** Fine. We are going to rise in a moment.

25 **MR SCANNELL:** I am terribly sorry. Just one very short point. In relation to this I am

26 sure you weren't minded to do this anyway, but it is actually quite important that the

1 ruling on this factual point be a ruling that is not, for example, delayed to the end of
2 the summer or whatever it might be. It is quite important that the ruling --

3 **MR JUSTICE MORRIS:** On the facts?

4 **MR SCANNELL:** On the factual update so that work can begin, because the deadline,
5 of course, is the end of October.

6 **MR JUSTICE MORRIS:** Yes. Fine. The disclosure issue we have dealt with in the
7 sense that you have sent us a timetable. You wanted a hearing in September. I think
8 that is going to be unlikely. You will have to liaise with the Tribunal to see how we go.
9 We would say, however, that my recollection is that at earlier stages there were
10 observations that it was thought that the disclosure -- supplemental disclosure might
11 not be too extensive. I am aware of a rather long schedule. You might want to bear
12 in mind what was said earlier about that.

13 **MR BEAL:** I will take that away. You will have appreciated that there is going to be
14 a modification/refinement process and those sitting behind me will bear well in mind
15 the observation you just made, Sir.

16 Can I just -- I don't want to set any hares running, but I would like to remind Google
17 that the Class Representative is the party, not the Class Members, and Ms Lucas has
18 dealt with disclosure orders against Class Members directly I think in the context of
19 separate litigation. So when our response comes in next Friday that addresses these
20 points, I don't want any squeals of surprise that Professor Rodger himself, for
21 example, does not have supply and procurement policies for developers as
22 a disclosure.

23 **MR JUSTICE MORRIS:** Yes. Sorry.

24 **MS FITZPATRICK:** A very short point, Sir. Ms Coll has an interest in the disclosure
25 requests in the Rodger Proceedings, because Google has indicated that it will seek
26 disclosure in relation to the issue of pass on, which is of central concern to Ms Coll,

1 from at least Professor Rodger's witnesses. So we wrote to the other parties
2 yesterday on this to indicate our interest. We are in the process of taking detailed
3 instructions from Sir Gerald Barling. We propose to update the other parties early next
4 week and would simply ask, given the Tribunal's indication that it is not in a position to
5 make the consent order today that it would hold off from doing so until Ms Coll has
6 had an opportunity to input into the process.

7 **MR JUSTICE MORRIS:** You can let us know the extent to which you are interested
8 and what your participation is going to be. The sooner, the better.

9 **MS FITZPATRICK:** We propose to do that by Tuesday, which really is in short order.
10 The only other point, Sir, is in our skeleton we did seek a direction from the Tribunal
11 that it determine trial length at the next CMC, which at the time of filing the skeleton
12 was on 26th February 2026.

13 Now there will be this intervening CMC to deal with disclosure issues. So, if I may,
14 I would just like to ask the Tribunal if it would be amenable to determining trial length
15 at this disclosure CMC as opposed to much later on in February.

16 **MR JUSTICE MORRIS:** Okay. We'll think about that.

17 **MS FITZPATRICK:** I am grateful.

18 **MR JUSTICE MORRIS:** I am not going to give you an answer to that now.
19 Is there anything else?

20 **MS LUCAS:** I don't think so.

21 **MR JUSTICE MORRIS:** We are going to rise for a few minutes. We will certainly be
22 back before 4.45. We will decide where we are going from here. Thank you very
23 much.

24 **(Short break)**

25 **MR JUSTICE MORRIS:** Thank you, everybody. It probably will come as no surprise
26 to you that we are not going to give you a decision now. We are thinking about it. One

1 possible way in which we will deal with it, depending on our other commitments, is that
2 we will let you know our decision sooner than our reasons, if that makes sense. So
3 we are not giving any deadline, but what we have in mind is we might have a decision
4 for you next week -- I am looking at Ms Lucas -- as I said, I am not going to be held to
5 any of this -- with reasons to follow. We would just like to digest everything we have
6 heard today just to work out the various permutations.

7 We are grateful for everybody's submissions. Other than that I don't think we have
8 anything else to add. We will certainly bear well in mind the need for a decision on
9 the factual witnesses as a priority. Unless anybody has anything else, I think that
10 concludes things from our point of view. Thank you very much.

11 **(4.43 pm)**

12 **(Hearing concluded)**