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IN THE COMPETITION
APPEAL
TRIBUNAL

Case No:1673/7/7/24, 1408/7/7/22, 1378/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 25th September 2025

Before:
Hodge Malek
(Sitting as a Tribunal in England and Wales)

BETWEEN:
Professor Barry Rodger

Class Representative

- And -
Elizabeth Coll

Class Representative

- And -
Epic Games, Inc. & Others

Claimant

- V -
Alphabet Inc. & Others
Google LLC & Others

Defendants

A P P E A R A N C E S

Antonia Fitzpatrick on behalf of Elizabeth Coll (Instructed by Hausfeld)
Annelise Blackwood and Sarah O'Keeffe on behalf of Professor Barry Rodger (Instructed by Geradin Partners)
Kassie Smith KC and Jack Williams behalf of Google (Instructed by RPC)

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email:

Thursday, 25 September 2025

(10.34 am)

Housekeeping

THE CHAIR: Some of you are joining us on the live stream on our website so I must start there for 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 a contempt of court.

After this hearing a ruling reflecting what the -- rulings in the various requests being sought today will be issued.

If I can just set out how I intend to proceed today. The first is to hear anyone who wants to make any general submissions as to the approach I should take over and above what's in their skeleton argument, everyone's going to have the opportunity to do that. We will then go through in the normal way, the Redfern schedule process. That means we will go through each request one by one, I'll rule on them as we go along. There's one bite at the cherry for everyone, because this is not a case where anything's going to be a surprise to anyone. I've got the Redfern schedule. I can go through that and then I'll give a ruling on each one. There may be circumstances where I will still need assistance from the applicant, in which case they can make further submissions. So, if we can start, do you want to do the introductions?

MS BLACKWOOD: Yes, Sir, good morning. I appear on behalf of Professor Rodger and alongside Ms O'Keeffe. Ms Smith and Mr Williams appear on behalf of Google and Ms Fitzpatrick appears on behalf of Ms Coll.

Sir, one small issue has arisen between the parties as to the running order for today.

THE CHAIR: Well, don't worry about that. I'll tell the people when I want them to

1 speak. That's not a problem. Okay? The running order is that every -- I'll go through
2 each one of you. You can say what you want, no more than ten minutes, about the
3 general approach. I will then rule on what the general approach is going to be. We
4 will then go through your request one by one. You'll present your request. To the
5 extent the request is opposed, obviously Mr Williams will do it. When it comes to
6 Mr Williams's request, it's the other way round. That's how we're going to do it.

7 MS BLACKWOOD: Sir, it was simply that Ms Fitzpatrick, on behalf of Ms Coll, had
8 wanted the Google requests to be dealt with before Professor Rodger's requests and
9 we have reasons why we don't want it to proceed in that basis. But if you are content
10 for us to deal with Professor Rodger's request first, then I'm happy to sit down.

11 THE CHAIR: I'm going to do that first. This is not going to be a particularly long
12 hearing, because I've been given what I've been given. And so it's not as if I don't
13 know what the parties' submissions are, but there's -- I think let's just start off with do
14 you want to say anything further about the general approach that I should adopt in
15 relation to these requests?

16 MS BLACKWOOD: No, Sir.

17 THE CHAIR: Thanks very much.

18 Mr Williams?

19 MS SMITH: I'm afraid it's Ms Smith.

20 THE CHAIR: Ms Smith, you're next, are you?

21 MS SMITH: Well, I'm appearing for Google.

22 THE CHAIR: Okay. That's fine.

23 MS SMITH: And Mr Williams is my junior today for Google.

24 THE CHAIR: Okay.

25 MS SMITH: As regards the general approach, I have very little to say over and above
26 what's in my skeleton.

1 THE CHAIR: Yes.

2 MS SMITH: Sir, you're fully aware of the approach the Tribunal should take to
3 disclosure in Tribunal proceedings. The touchstones, Sir, around which I'll structure
4 my submissions on each request are, of course, those of relevance, necessity and
5 proportionality. And those are the only additional points I wish to make, Sir.

6 THE CHAIR: That's very helpful.

7 MS SMITH: On the running order, just to explain, I think the reason why Ms Coll's
8 representative would prefer the Google request, at least request G1 and 2, to be dealt
9 with first, is because those are the only requests the Tribunal is hearing today that she
10 is interested in, on which she will be making submissions. So if G1 and G2 are dealt
11 with first, she and her team can leave. But, Sir, we're in your hands on that.

12 THE CHAIR: She won't have to hang around for very long, so it's fine.

13 MS SMITH: Well, we hear what you say in that regard.

14 THE CHAIR: That's absolutely fine.

15 MS BLACKWOOD: Sir, thank you.

16 THE CHAIR: I will first rule on the general approach I am taking. Obviously, I will
17 follow 2020 CAT 3 and any other relevant decisions. I will bear in mind, obviously,
18 reasonableness, proportionality. The points that have just been stressed. But more
19 fundamentally, in relation to the present application, having taken into account the
20 written submissions of the parties, the position is as follows.

21 (10.40 am)

22
23 Ruling on outstanding disclosure requests (submitted to the Tribunal for approval)

24 (10.44 am)

25 Requests R8C and R20D

26 THE CHAIR: If we could turn now to the first category which is -- yes, it's category -- do

1 | you want to just take me through the first category and then we'll go through that.

2 | Submissions by MS BLACKWOOD

3 | MS BLACKWOOD: Sir. So the request in category 8C is for data and activation
4 | payments made by Google to OEMs.

5 | THE CHAIR: I've got my notes here. Can we do it in this order? So the CMA
6 | investigation in mobile browsers -- that's requests 9A and 9B -- that's the one I've got
7 | my notes on first. There is some logic in the way I want to deal with this. Let's try and
8 | do it that way.

9 | MS BLACKWOOD: Sir, yes, I understand. I think one of the concerns I have is that
10 | in order to explain our requests under 8C, 20D and 14, I'll need to take you to some of
11 | the pleadings so you can understand why those requests are relevant to issues that
12 | are alive in the proceedings.

13 | THE CHAIR: That's absolutely, fine, yes.

14 | MS BLACKWOOD: And that will, in a sense, provide a context and hopefully make
15 | my submissions much quicker in relation to the request for the CMA material, because
16 | then I won't have to go through again ...

17 | THE CHAIR: You don't want to repeat yourself.

18 | MS BLACKWOOD: I don't want to repeat myself. And, in relation to the CMA material,
19 | I think some background understanding of the EMADAs, the placement agreements,
20 | the anti-steering requirements is helpful so you can see why the passages that we've
21 | picked up are relevant for our expert.

22 | THE CHAIR: Yes.

23 | MS BLACKWOOD: I don't want to necessarily take you out of turn, but I think it would
24 | be more efficient to be dealt with in that way.

25 | THE CHAIR: Yes, okay. I'll let you do it that way.

26 | MS BLACKWOOD: Thank you, Sir.

1 THE CHAIR: Okay. But then you give your general presentation on those aspects
2 and then we'll look at them individually and then Google can respond firstly globally in
3 the way that you've done and then we'll look at the individual requests. Because
4 normally when I have a Redfern schedule, it's a process that I go through the
5 schedule, item by item, you say what you want to say, Google say what they want to
6 say, and then I give a ruling. That's the quickest way of doing it and I don't intend to
7 spend hours and hours going through something that I've already read and
8 understood. There may be things I haven't understood, and obviously you'll correct
9 me, but I have read what people have said. I've also read the pleadings, which are
10 quite long, and you have identified in relation to every request, and so has Google,
11 where they fit in with the pleadings.

12 Now, you know, as a general practice, I will not give disclosure of any documents
13 which do not relate to a pleaded issue. That doesn't mean that the particular item or
14 topic is expressly referred to in the pleadings. As long as it relates to a pleaded issue,
15 it's on the table, but that only gets you partway through the door because we've got
16 the litmus test of necessity and proportionality and the stage at which we've reached
17 these proceedings. And so I will be applying that.

18 So, yes, you can take me to the pleadings and I understand, hopefully, where each of
19 the categories that you seek are relevant to the issues in the pleadings. And I can see
20 that, for example, when we look at R9A and B, although it's not exactly the same as
21 we know, I can see that it can have some relevance, but I will have to be persuaded
22 how critical and proportionate it is, because when you look at the pleadings and what
23 we've got here, the case is complicated enough as it is, and that what one needs to
24 do is to focus on things like the broad axe principle and what the general picture is,
25 rather than going down potentially blind alleys.

26 It's not just your case; it's the same with Google. On Google, having looked at what

1 they're looking for in G1 and G2, they're trying to get effectively disclosure from class
2 members to help them on pass-on and mitigation. We all know that there's other ways
3 of estimating pass-on and mitigation, and it's actually quite difficult and complicated
4 and takes a long time to do a proper sampling exercise.

5 I mean, you say, at the end of the day, what's going to come? Are they able and are
6 you able to estimate overcharge and mitigation, given that this is a collective
7 proceedings without going down that route at this late stage? And is this something
8 that they've done on, for example, Coll? And if they haven't, why haven't they done
9 that, given that those proceedings have been going on for longer?

10 We do have a situation where we've got to have exchange of witness statements pretty
11 soon, and the first round of expert evidence for trial I think in December. So, you know,
12 people have got to realise that when you're asking for disclosure at this late stage, it's
13 a pretty crunch point. We've got to be practical, and in relation to your requests, I will
14 need to be convinced -- and I'm not saying I'm not convinced because I have got
15 preliminary views -- in relation to each category, how far it's really necessary.

16 I may have provisional views -- and you can shift me or both sides can shift me,
17 because I haven't said what my views are exactly on anything yet -- but we've got to
18 be realistic here. You know, this is pretty late down the route. It applies to both of
19 you: you've both got the same issue and we just have to try and see where we are and
20 cut through things. But you're welcome to show me the pleadings again, and I'll pull
21 them up. I've got them in hard copy.

22 MS BLACKWOOD: Just to reassure you, Sir, we are acutely aware of the tight
23 deadlines and that's why you'll see that the table of requests has shrunk down a lot
24 through communications.

25 THE CHAIR: Yes, but you both rely on the tight deadlines for resisting disclosure from
26 each other. Now, it may be that I think you're both right, in which case it has impacts

1 on what both of you are seeking.

2 I do feel that this is late and I'm not going to criticise anyone, because I really do think,
3 having looked at how these things have developed and how Google has responded
4 and how you have responded to Google, everyone has been constructive.

5 I don't feel that anyone is playing any games on disclosure. If I did, you'd know about
6 it and there'd be repercussions, but I can see that everyone's trying to work this
7 through, trying to figure out what's the best way of proving their case, not to try and
8 ruin the trial timetable, and that the points you're both making I think are valid about
9 where we are, what's practical, and where we are in the equation, so that it works for
10 and against both of you.

11 But let's look at the pleadings that you want me to have a look at.

12 MS BLACKWOOD: Well, Sir, not to irritate you further in terms of -- I understand --

13 THE CHAIR: You're not irritating me. Look, honestly I'm very happy --

14 MS BLACKWOOD: On the sequencing of the requests point. It would be helpful to
15 consider request 8C and request 20D together, because they are effectively two sides
16 of the coin.

17 THE CHAIR: You can do that. But all I'm saying is that normally what I do -- and it's
18 not a problem -- is that I go through them one by one.

19 Most people have been before me before and they know how I deal with these things.
20 Sometimes it's helpful what you want to do, and I'm not saying it won't be on this case;
21 other times it's not. What tends to happen is when you've got a large volume of
22 requests, what you do is when you start going through them, a pattern comes and then
23 people understand where they're standing, and then they make concessions or not
24 concessions or push points that they want to push.

25 That's why the whole idea of Redfern schedules is you're dealing with multiple
26 requests and to me, the easiest way for me to do it is one by one. But I do accept if

1 | you've got two which are related to each other, it makes sense that you make
2 | submissions on both of them, I will then deal with the first one in my order, and then
3 | we can come back to the second one, in any event, as part of the ruling. Because I do
4 | want to rule on each request in the normal way I do it, which is request, ruling, request,
5 | ruling. But I'm happy for you to do it whichever way you want.

6 | MS BLACKWOOD: I'm grateful. So request 8C is a request for data on activation and
7 | other payments made by Google to OEMs under placement agreements during the
8 | relevant period.

9 | Then the request under 20D is a request for data on revenues generated from any
10 | OEMs, payments under the EMADA licensing agreements during the relevant period.

11 | Just a point of clarification on our request 8C, you'll see in the table --

12 | THE CHAIR: Yes, let me just look at the schedule.

13 | MS BLACKWOOD: In the schedule, yes, Sir. It's bundle E, tab 4, page 73.

14 | THE CHAIR: Yes.

15 | MS BLACKWOOD: That's a point of clarification, that we are not seeking data in
16 | relation to payment agreements made to mobile network operators, MNOs. Because
17 | we've --

18 | THE CHAIR: So what do you want me to -- I can cross out (overspeaking) --

19 | MS BLACKWOOD: You can strike out, "and to mobile network operators (MNOs)",
20 | because we understand now that whilst there are payments made to MNOs, they're
21 | not under placement agreements.

22 | So Sir, if I can take you to our pleadings.

23 | THE CHAIR: Yes.

24 | MS BLACKWOOD: Apologies if you're familiar with this and I'm taking things too
25 | slowly, but if you could turn to --

26 | THE CHAIR: No, don't assume I'm familiar with anything, because this is -- all I can

1 say is I've read the pleadings and that --

2 MS BLACKWOOD: They are quite complicated. The subject matter is quite
3 complicated, so I think it's worth taking it step by step, certainly on this point.

4 THE CHAIR: The way I was going to do it is that it does make sense that I look at the
5 further financial data, which I've noted down as category 3, together. So that's 8C,
6 20D and 21A to 21B. That's what I've got -- I've been trying to split them into various
7 categories that fit together.

8 MS BLACKWOOD: Sir, I think from our perspective, that grouping doesn't quite work
9 because the data under 8C and 20D are relating to -- I'll come on to explain this in
10 more detail - effectively, measures that are taken to cross-subsidise or offset the
11 payments that are made by OEMs under the licensing agreements for the Play Store.
12 You need those two pieces of data: the payments under the placement agreements;
13 and the licence fees paid under the EMADAs to be able to evaluate that. That relates
14 to our claim in relation to exclusionary conduct.

15 Then separately, there are the requests for financial data in 20A and 20D, which
16 concern the excessive pricing argument that we're running. That data that's requested
17 relates to our accountant's ability, Mr Harman; his ability to properly assess the
18 profitability of the Play Store. Because our position is that the pricing is excessive and
19 this is evidence by itself.

20 So I'll come back to that later, but that's why there's not a sort of natural split between
21 grouping the financial data requests together, because they relate to quite different
22 subject matter. Other than the sort of generic point that Google makes that, "Well,
23 we've disclosed a lot of financial data", there's nothing that really ties those points
24 together. Whilst they may have provided a reasonable amount of financial data, they
25 haven't provided these key bits of data that we require for our experts to do the
26 requisite analysis.

1 So, Sir, to take you back then to the claim form and paragraph 84.

2 THE CHAIR: You want to go to the claim form, yes?

3 MS BLACKWOOD: Yes, Sir. This is in bundle B, tab 1, and paragraph 84 is on
4 page 37. (Pause)

5 So this just explains that Google produces a bundle called the "Google Mobile
6 Services", or "GMS". This bundle contains a number of different apps and APIs,
7 including, critically, for our purposes, the Play Store, along with other apps such as
8 Google Maps, YouTube, and so on. That's the GMS bundle.

9 If you turn, then, to paragraph 102 on page 45. (Pause)

10 This is where the relevance of the MADAs or EMADAs are explained. In
11 paragraph 102:

12 "Google requires OEMs wishing to obtain licences of products in the GMS bundle [that
13 includes the Play Store] to enter into the Mobile Application Distribution
14 Agreements ..." [as read]

15 Which is referred to as "MADA" in the UK, "EMADAs" in Europe.

16 If we turn over to paragraph 103, under the MADAs, EMADAs:

17 "OEMs are required to pre-install all elements of the GMS bundle." [as read]

18 So they have to pre-install the Play Store.

19 Then if you come down to paragraph 105, you will see that we've reviewed certain
20 sample MADAs that we've been able to obtain. We note at subparagraph 105.4 that:

21 "Google requires OEMs to give the Play Store prominent placement on their devices
22 under the terms of the EMADAs." [as read]

23 To take you back again to paragraph 84, which is on page 37. (Pause)

24 You'll see at the very bottom of that paragraph, it starts, "Until 2019", and explains
25 that:

26 "Until 2019, the GMS bundle also includes Google Search and Chrome" [and if you

1 turn over the page] But "following the decision of the [EC] in Google Android,
2 Google Search and Chrome were formally removed from the GMS bundle in the [UK]
3 and the [EEA]." But critically, in order to license "Google Search and Chrome, that
4 remains conditional on the OEM entering into the EMADA which includes the
5 Play Store and requires the OEM to pre-install and prominently place the Play Store
6 on their devices." [as read]

7 So, Sir, if I could then ask you to turn to paragraph 114, which is on page 50.

8 THE CHAIR: That's a fairly critical paragraph for your application.

9 MS BLACKWOOD: Yes, Sir. You'll see the point that's already been made, that in
10 order to license -- that Google Search and Google Chrome are licensed separately
11 from the GMS bundle now. That remains a precondition of entering into licences for
12 Google Chrome and Google Search, that the OEM has entered into an EMADA
13 regarding the Play Store.

14 And in paragraph 115, that Google then offers to enter into placement agreements
15 with OEMs who have entered into licences for Google Search and the Chrome apps,
16 and that under the placement agreements, Google pays activation payments for each
17 device on which the OEM pre-installs, and satisfies certain placement obligations.

18 We can see from the following paragraph that this is not a minor matter; that the CMA
19 has estimated that under the placement agreements in the UK alone in 2021, Google
20 paid activation payments of between 100 million and 200 million and, interestingly,
21 mainly to Samsung, who is also the developer of the most widely available alternative
22 app store in the UK, which is called the Galaxy Store.

23 Sir, if I could then ask you to turn to paragraph 161, page 70. Just to put it in context,
24 you'll see that we've pleaded exclusionary -- I'm sorry, Sir.

25 THE CHAIR: Sorry, it's 161, yes?

26 MS BLACKWOOD: 161, page 70. (Pause)

1 So you see that we are pleading exclusionary abuse, and we say that Google's
2 adopted a series of mutually reinforcing exclusionary practices, which are collectively
3 and individually aimed at and have the effect of making entry into the Android app
4 distribution market practically difficult, if not impossible, for anyone other than Google.

5 Sir, if you could turn over the page, you'll see, just above paragraph 169, the heading
6 that explains the first category of abuses that we've gathered together, collected
7 together, that are:

8 "... practices ensuring that the Play Store is the only app store pre-installed and
9 prominently positioned on virtually all Android devices." [as read]

10 Then the paragraph, which I'm sure you are very familiar with, because it would have
11 been in all of our skeleton arguments. Paragraph 171.

12 THE CHAIR: Yes, that's the (inaudible).

13 MS BLACKWOOD: This is what draws the threads together, and our position is that
14 the conditions by the placement agreement, Google offers financial incentives to
15 OEMs to take licences of the GMS bundle, thereby making the pre-installation and
16 prominent positioning of the Play Store a precondition of getting those financial
17 incentives.

18 So, in order to have access to the payments under the placement agreements for
19 Google Chrome, you have to first prominently place and install the Play Store.

20 THE CHAIR: Exactly, yes.

21 MS BLACKWOOD: And therefore, it is relevant, the extent to which those payments
22 are offsetting the cost of -- that OEMs are paying for that GMS bundle, and the
23 EMADAs.

24 THE CHAIR: Yes. Look, if it helps, you know, through the pleading, we can look at
25 anything else you want me to look at. I'm satisfied that these categories you're seeking
26 are relevant to the issues on the pleadings. I've got that far -- because you've given

1 me the references before -- and at the moment, subject to what the other side may
2 say, I can see how these categories fit in with the pleadings. You've explained pretty
3 well that, in the skeleton, and as you know with me, you've got main channels -- one
4 of the main channels of advocacy -- is what you put in writing, and then at the hearing
5 you have another opportunity to explain and make sure I've understood it, and that
6 you can answer any questions I put. But I think that's all very clear; that's very helpful.

7 MS BLACKWOOD: Just to talk, very quickly -- your attention to one sentence in
8 paragraph 171, which is just to highlight that we specifically plead that the amounts
9 paid, particularly to Samsung, make it harder for actual or potential competitors to
10 match Google's offer. And that's relevant, because it's key that we know not only the
11 offset between what's paid under the placement agreements as compared with what
12 is paid by OEMs under the EMADAs, we also need to know the actual size of the
13 placement agreements, because they are relevant to whether or not a competitor can
14 match them.

15 THE CHAIR: Yes. So then in the defence, we've got some stuff in there as well,
16 haven't we? That show that the issues are live.

17 MS BLACKWOOD: Yes, I can take you to the defence, but I anticipate, perhaps, that
18 these points are an issue between the parties. I'm happy to --

19 THE CHAIR: The one that I looked at was 121(e) in the defence, and I thought that
20 was pretty pertinent, because sometimes it's important to see how the issue
21 crystallises and where the divide is.

22 MS BLACKWOOD: I can take you -- perhaps it's worth mentioning -- paragraph 121(f)
23 of the defence --

24 THE CHAIR: Let me look at one as well.

25 MS BLACKWOOD: -- which is bundle, tab 2, page 145.

26 THE CHAIR: Yes.

1 MS BLACKWOOD: And you'll see in the file --

2 THE CHAIR: Sorry, say that again?

3 MS BLACKWOOD: I'm so sorry. Page 145 of tab 2.

4 THE CHAIR: Yes, let's have a look. (Pause)

5 Okay, so that's 121. You want me to look at F as well then? I've marked F as well.

6 MS BLACKWOOD: Yes. Just flagging that Google have said that competitors could

7 have matched any payments made by Google under the agreements.

8 THE CHAIR: Yes.

9 MS BLACKWOOD: So that is an issue.

10 THE CHAIR: Yes, clearly it's an issue on pleadings.

11 MS BLACKWOOD: So --

12 THE CHAIR: I think, in a way, you're home on relevance. What we've got to do is

13 why -- how necessary is it, and to what extent have they already given disclosure this

14 material? Because it's been said that they've already given you some disclosure on

15 this.

16 But one of the problems in these cases is that there's so many documents, have been

17 produced by someone who's really familiar with the material, and when you're on the

18 other side and you've got a mass of documents, it's sometimes a needle in a haystack.

19 And one of the things I think would be helpful is that if it is determined that you're

20 entitled to disclosure, but insofar as Google say you've already got it, they just point to

21 you where it is. They understand their own material the most, and given how close

22 we are to the relevant stage, the more help both of you can give each other, the better.

23 MS BLACKWOOD: Yes, Sir.

24 THE CHAIR: I can direct -- and I have directed in other cases -- the party does identify

25 where particular information is within the disclosure, particularly when you've got

26 a large exercise like the present.

1 MS BLACKWOOD: Yes, and in fairness, Google has in some instances highlighted
2 documents, and those requests have fallen away. In other instances, it's highlighted
3 documents, and we said, well, those actually don't go to the point; they don't provide
4 the requisite information.

5 So, from our perspective, to the extent that Google have not by this point highlighted
6 that there is relevant information that would satisfy this request, already in the
7 pre-existing disclosure, that is a pretty good indication that it is not in the pre-existing
8 disclosure. Of course, if they can identify documents to us, we just want the data; we
9 want the information.

10 THE CHAIR: Everyone's going to be pragmatic, and so we'll come to it when we hear
11 from them. But if there's anything in these categories that they say they've already
12 disclosed, then unless there's more that they should supply, then it'd be very helpful if
13 they can tell you where it is. I know in some litigation it's counterintuitive to try and
14 help the other side find stuff, but I don't think that that really operates at the sort of
15 level that we're at on litigation like this, and it's in everyone's interest that you don't
16 spend time potentially wasting your time looking for a needle in the haystack, and then
17 you don't find it, and if it's in there already, let us know where it is. Yes.

18 MS BLACKWOOD: Yes, Sir. If I could ask you to then turn to bundle D. Sir, do you
19 have --

20 THE CHAIR: Just tell me what you're looking for.

21 MS BLACKWOOD: Amelia Fletcher's letter. Professor Amelia Fletcher's letter.

22 THE CHAIR: I've got her letter; I've pulled it out separately, actually. It's quite an
23 important letter.

24 MS BLACKWOOD: Thank you. (Pause)

25 I was going to ask you, Sir, to read paragraphs 5 to 9, but I appreciate you've probably
26 already done that.

1 THE CHAIR: I have, but there's no harm in looking it again.

2 MS BLACKWOOD: I thought I'd let you have an opportunity to read that, and then
3 I can make some comments.

4 THE CHAIR: Yes. (Pause)

5 I don't know what the parties have estimated for the pre-reading for this, but it's taken
6 me -- maybe because I'm slow -- about 20 hours to prepare.

7 MS BLACKWOOD: I'm afraid it's very dense material. I apologise for that.

8 THE CHAIR: Yes. If this was on my ticket, it probably would have taken three hours
9 or four hours to prepare, but it's not, and so it has taken a bit of time to get up to speed
10 on this case. But there's nothing we can do about it, we are where we are, but it does
11 take a long time to prepare a case like this, but hopefully it leads to at least some
12 shortening of the hearing, because you're not starting from square one. But there's
13 always the risk, as I know from being an advocate, the judge hasn't picked up a point
14 or hasn't understood it, so you want to make sure that he's got it.

15 But let me just read these paragraphs again.

16 MS BLACKWOOD: Yes. (Pause)

17 THE CHAIR: Yes.

18 MS BLACKWOOD: Sir, you'll have seen from these paragraphs that
19 Professor Fletcher needs the data on the EMADA licensing payments from each OEM
20 to Google, in respect of each device and model, and the corresponding payments
21 made under the placement agreements from Google to those OEMs, in respect of
22 each device model, in order for her first to calculate the net payment, positive or
23 negative, in respect of each device model, to determine whether a competitor with
24 similar costs could sustain payments of an equivalent size to the OEMs, in respect of
25 those devices without incurring losses, but also from a cash flow perspective; these
26 are very large payments.

1 And thirdly, to see which OEMs and which devices may have been targeted for higher
2 payments for strategic reasons. So if Google sees that perhaps Samsung is
3 a competitor and it really wants the Play Store installed on their devices because
4 they've got the Galaxy Store, that payments may be higher, to try and ward off
5 competition. (Pause)

6 I think you're seeing that it does appear, from at least the CMA's report, that the
7 payments made under the placement agreements do, in fact, fully offset the EMADA
8 licensing fee, and that's why Professor Fletcher needs that underlying data -- the
9 payments under the placement agreements, the EMADA licensing fee payments -- to
10 do that offsetting exercise, and as I've already said, to see which OEMs are being
11 targeted, to see which devices are being targeted, and to see whether the size of the
12 payment can be matched by competitors.

13 Now, our position is that the requested data is not in the pre-existing disclosure, and
14 you'll see that at paragraph 10 through to 12 that Professor Fletcher has looked at the
15 financial data that's been provided; she's looked at the P&L data and noted that it's
16 not granular enough; has looked at the contracts and said, well, yes, the payments are
17 not evident, evident on the face of the placement agreements, because either those
18 placement agreements don't specify the size of the payment at all, or they are a per
19 device payment, which is not useful without the data regarding the volume of devices
20 that qualify for that payment; and she's also considered whether she can limit her
21 request to just the material that was provided to the CMA, in relation to its mobile
22 browsers and cloud gaming investigation report, but noted that that's too narrow, as it
23 only relates to UK devices, whereas Professor Rodger's claim relates to sales by UK
24 app developers to users anywhere in the world, and therefore we need that worldwide
25 data.

26 The absence of this data from the pre-existing disclosure, we would say, is supported

1 by an offer that came in last night from Google to provide the net calculations. So
2 having already done that offsetting task, between the EMADA licensing fees and
3 placement agreements, per OEM, per country. (Pause)

4 So they seem to implicitly acknowledge that there is a gap there, and whilst we very
5 much welcome that progress and appreciate the offer, the data that they have offered
6 to provide isn't sufficient because it doesn't allow Professor Rodger to see the size of
7 the payments under the placement agreement, which is relevant to our analysis of,
8 can competitors match payments from equivalent size? Who are they targeting?

9 THE CHAIR: But when I looked at Fletcher, I learned some things; that there's
10 a distinction between data, which is nice to have, and must have, and I think that what
11 she's doing is explaining why she needs this material in fairly -- I don't mean to be
12 pejorative, but in -- simple terms. You can see exactly why she says she needs it for
13 the analysis, and that fits in with what you put in your pleading.

14 MS BLACKWOOD: Yes. And just to also make the further point, which is we are
15 conscious that there are likely to be judgment calls when you're trying to match up the
16 payments made under the placement agreements and the fees paid under the EMADA
17 licences that could potentially skew that offsetting analysis. And that's why we're not
18 content to simply receive a completed job of, "Well, these are the offsets. You can
19 have this material and why we need the data relating to the payments under the
20 placement agreements and the fees under the EMADAs."

21 We say that this is proportionate. They've offered to do the net calculations for us,
22 which indicates that they have the relevant underlying data and we know from the
23 CMA report on browsers and cloud gaming that they provided at least a subset of this
24 raw data to the CMA. I can take you to that report if that's helpful.

25 THE CHAIR: Not yet.

26 MS BLACKWOOD: Not yet. So we know that they have this data. We know that

1 they've provided at least some of it recently to the CMA. The disclosure of this material
2 is proportionate. We're not seeking documentary evidence. All we want is the data.
3 They've already provided some of it recently to the CMA and they've offered to provide
4 sort of the output. But by definition of providing us with the output they'll have needed
5 to gather the underlying data.

6 Sir, those are my submissions on our requests under 8C and 20D, unless you have
7 any further questions.

8 THE CHAIR: That's fine. Let me just hear from Google and then if there's anything
9 else I need from you, then I'll come back to you, yes.

10 Submissions by MS SMITH

11 MS SMITH: Sir, thank you. I hope I can be brief on this and cut through. As
12 Professor Rodger's counsel has explained, they seek this data because of an exercise
13 that Professor Fletcher wants to carry out. You've seen her letter. She explains she
14 requires the data sought in requests 8C and 20D in order to identify the magnitude of
15 payments made to OEMs once the activation payments made by Google to the OEMs
16 under the PAs are netted off, offset against the payments made by the OEMs to
17 Google under the EMADA agreements because she wants to assess the competitive
18 effects of those agreements effectively, to put it crudely, to see whether any competitor
19 of Google could match those sort of payments to the OEMs.

20 What counsel for Professor Rodger did not take you too, Sir, which is extremely
21 important, is the offer that we made to Professor Rodger, having had the explanation
22 in Fletcher's letter, which we only received last Friday. And so yesterday we sent
23 a letter to Professor Rodger's solicitors -- that's in hearing bundle D, the second
24 D bundle -- where we basically offered her the figures she wants. If I can take you to
25 that.

26 THE CHAIR: Is someone able to put that on the screen, because I haven't read that

1 because I thought you had made an offer.

2 MS SMITH: Yes, exactly, Sir. I hope it's made its way into your bundle.

3 THE CHAIR: I click on correspondence, yes?

4 MS SMITH: It's in bundle D, tab 84.5.

5 THE CHAIR: Okay.

6 MS SMITH: It should have been put in your bundle by Rodger's solicitors this morning.

7 It's page 559.9.

8 THE CHAIR: Let me see if I can --

9 MS SMITH: If you don't have it, I can hand up copies.

10 THE CHAIR: Can you just hand up a copy. It might be easier.

11 MS SMITH: Oh, okay. Sorry. It was provided to us this morning by Geradin. I hope

12 they brought copies of the inserts.

13 THE CHAIR: Yes.

14 MS BLACKWOOD: Sir, I have a clean copy if it's of assistance.

15 THE CHAIR: Clean copy. That's good.

16 MS SMITH: That's perfect. Thank you.

17 THE CHAIR: Look, at the end of the day --

18 MS SMITH: Sir, if I can show you what the offer was --

19 THE CHAIR: If I say --

20 MS SMITH: -- because we say it fully meets --

21 THE CHAIR: -- where I am at the moment. I can see what they want to do. I can see

22 how it fits in with the pleadings and I can see it's a worthwhile exercise that want to

23 carry out and I think it's a necessary exercise. But let's see what you've offered.

24 MS SMITH: Sir, what we've offered, before I take you to the letter, in summary, we

25 are prepared to provide a breakdown of the net payment data to Professor Rodger by

26 OEM and by country for each year of the relevant period. So that shows the net

1 amount paid under the PAs to each OEM in each country in each year of the relevant
2 period. And we say that more than meets the needs of Professor Fletcher. She can
3 see what net payment was made to each OEM by Google, and that enables her,
4 effectively, to carry out the assessment she says she wants to carry out, which is to
5 assess whether the competitive effect of those payments or, in other words, whether
6 those payments can be matched by the competitors to Google.

7 The only reason she says she wants it at a device level is so that she can add it back
8 up to see what the net payment is made to each OEM. We are providing her with the
9 net payment each OEM in each country for each year, and that's set out on the second
10 page of the letter in paragraph 5, where we make the point without prejudice to
11 Google's position. It's already provided the sufficient data. We make this offer; we're
12 prepared to provide a breakdown of the net payment data. So the figures were
13 provided across the board before, but we will break it down by OEM, by country and
14 by year. So, the net amount paid.

15 THE CHAIR: So what the CR says is that still leaves a gap.

16 MS SMITH: Well, it's unclear what that gap is.

17 THE CHAIR: But you just ask them what the gap is because we're trying to be practical
18 and I can see that this is a constructive letter. Yes.

19 Reply submissions by MS BLACKWOOD

20 MS BLACKWOOD: So, the gap is that we need the payments under the placement
21 agreements because they show us which OEMs and which devices at Google may
22 have targeted for specifically higher payments.

23 THE CHAIR: And you're saying that you're not going to get that through this, are you?

24 MS BLACKWOOD: No, Sir, because the offsetting may conceal the amounts being
25 paid. We also say that --

26 THE CHAIR: They're going to provide you with something.

1 MS BLACKWOOD: Simply being provided with the netting off, though, doesn't allow
2 us to ensure that that netting off analysis has been done properly. And where there
3 are judgment calls as to how you're going to match up data, if you do it one way, that
4 might be beneficial to Google, if you do it another way, we would say the correct way,
5 that might produce a different result. And so, I don't think we have confidence --

6 THE CHAIR: The problem with that is that I can see that they've already done the
7 exercise in general terms and that what you're saying is, effectively, you want to audit
8 that it's been done properly. But do you have any reason to believe that they haven't
9 done it properly?

10 MS BLACKWOOD: I think -- I don't know if they have already done that offsetting
11 process, but what we do know is that they have the raw EMADA data and they have
12 the raw payments under the placement agreements data, because that is what was
13 provided to the CMA.

14 THE CHAIR: Yes, but we'll come to that in a minute. That's one of the problems with
15 doing it in a different order. I wanted to do the CMA stuff first, because if I make the
16 order in respect of that, that may have an implication in relation to this. That's all.

17 MS BLACKWOOD: Yes, and what Professor Fletcher has said is that data is helpful,
18 but it's a subset of the data I need --

19 THE CHAIR: Yes.

20 MS BLACKWOOD: -- that's been provided to the CMA because it only relates to
21 devices in the UK, whereas our claim is for UK app developers, but devices worldwide.

22 THE CHAIR: Elsewhere, yes.

23 MS BLACKWOOD: And what I didn't discern Ms Smith addressing you on is why it is
24 more proportionate for them to do all this offsetting for us and then provide us with the
25 output than it would be to simply provide us with the underlying data that we've asked
26 for. And at least some of it we know has already been collated.

1 Further submissions by MS SMITH

2 MS SMITH: Sir, a very short point. The figures that were provided to the CMA were
3 the high level net figures. We have offered to break those down to provide them to
4 Rodger so they can identify the net payment per OEM. If we were required to break
5 them down even further by reference to thousands of different devices, we say that's
6 not proportionate.

7 As regards the payments themselves or the level of payments that can be discerned
8 from the payment placement agreements themselves. Rodger had been disclosed all
9 the payment agreements that are in force. If they wish to audit the figures, then their
10 own experts -- accounting and economic experts -- have the Android profit and loss
11 data -- the P&Ls -- and they can, I'm instructed, audit our figures from that data.

12 THE CHAIR: Anything else you want to say?

13 MS BLACKWOOD: Sir, simply that I did already address you on the point that the
14 placement agreements don't show, or are not good evidence of, the size of the
15 payments made. So I'm not going to repeat that.

16 (11.31 am)

17
18 Ruling on requests 8C and 20D (submitted to the Tribunal for approval)

19 (11.36 am)

20 Request 21A

21 THE CHAIR: Shall we look next then at -- what should we look at next? I suppose it's
22 logical to look at 21A and B now, isn't it?

23 MS BLACKWOOD: Sir, I can take you to that next.

24 THE CHAIR: Let me get my notes on that.

25 MS BLACKWOOD: Request 21A.

26 THE CHAIR: Well, can I just look at my notes first --

1 MS BLACKWOOD: Yes, sir.

2 THE CHAIR: -- and I'll remind myself where we are. (Pause)

3 This all ties in with what I've read in Harman's letter, isn't it?

4 MS BLACKWOOD: Yes, Sir. (Pause)

5 THE CHAIR: Can we start off with the pleadings then, on that.

6 Submissions by MS BLACKWOOD

7 MS BLACKWOOD: Yes, Sir. If you could go to the claim form in tab 1 of bundle B.

8 THE CHAIR: Yes.

9 MS BLACKWOOD: Page 4.

10 THE CHAIR: If I could just get the bundle again.

11 MS BLACKWOOD: Yes, Sir. I'm sorry.

12 THE CHAIR: Yes. So what page?

13 MS BLACKWOOD: Page 4.

14 THE CHAIR: Yes. Yes.

15 MS BLACKWOOD: In paragraph 3.2, you'll see that one of the heads of abuse that

16 we are claiming is that Google was charging prices that are excessive or unfair in their

17 own right, the rate of commission typically being 30 per cent.

18 If you could then turn to paragraph 189 on page 80, you'll see that this section is

19 dealing with the exploitative abuse. At the top of paragraph 189, we say:

20 "As to the excessive limb, the PCR will say that Google enjoys an extraordinary and

21 excessive profit margin in respect of its distribution operations." [as read]

22 THE CHAIR: Yes.

23 MS BLACKWOOD: And then again across the page, at paragraph 190,

24 subparagraph 1:

25 "As noted in paragraph 189 above, Google enjoys an extraordinary and excessive

26 profit margin in respect of the Play Store. Google's extraordinary level of excess

1 | margin is itself a strong prima facie indicator of unfairness." [as read]

2 | THE CHAIR: Yes.

3 | MS BLACKWOOD: So, Sir, if I could then take you to the defence, tab 2, page 169.

4 | THE CHAIR: As I said, I've already indicated, but we'll go through it.

5 | MS BLACKWOOD: Yes.

6 | THE CHAIR: I've looked at all your requests and I've checked them against the

7 | pleading. I do consider that they all fall within what's on the statements of case. So

8 | you get past the sort of first hurdle: does it relate to an issue on the pleadings?

9 | MS BLACKWOOD: Yes.

10 | THE CHAIR: You got home on that. Similarly, Google got home on that in relation to

11 | pass-on and mitigation. I know you deny it, but I mean, it's clear to me, looking at the

12 | pleadings, that they're right on that. Obviously, when we get to that, we can argue.

13 | But I'm not looking at a request as I see it that doesn't relate to the issues on pleadings.

14 | I'm certainly satisfied of that, for all the reasons that both of you have said. I know you

15 | both deny the other one is right, but at the end of the day, I've looked at the pleadings,

16 | I've looked at what you've all got to say, and I am satisfied that there is no request

17 | outstanding between the parties, in relation to when you're actually seeking

18 | documents, as in G1 and G2 for them, and the ones that you're seeking that fall outside

19 | the terms in the pleadings. There may have been some requests in the past which

20 | didn't fulfil that, but they seem to have disappeared. So not they're not being pursued

21 | anymore. But let's have a look at the paragraphs that the defence want me to look at.

22 | MS BLACKWOOD: Well, I was only going to take you very quickly to one

23 | subparagraph. It's paragraph 135A(ii)(5), which is on page 169.

24 | THE CHAIR: The numbering gets a bit confusing.

25 | MS BLACKWOOD: I know. Yes, it's a little bit annoying. But indented, you'll see

26 | a (5).

1 THE CHAIR: Well, let me try and figure out where it starts. Is it paragraph 128? Well,
2 no. It's a bit later than that.

3 MS BLACKWOOD: So it starts at paragraph 135.

4 THE CHAIR: That's right. Defence para 135. Yes.

5 MS BLACKWOOD: If you turn over the page, you'll see the number (5).

6 THE CHAIR: 135. Yes.

7 MS BLACKWOOD: Just to point out that it is pleaded there by Google that:
8 "The returns earned by Google from the Play Store are not unduly high." [as read]

9 THE CHAIR: 135(a), okay. Is it (ii)?

10 MS BLACKWOOD: (a)(ii).

11 THE CHAIR: (ii), and then it's (5).

12 MS BLACKWOOD: Yes, Sir.

13 THE CHAIR: In my day, when I started off at the bar, there was a convention as to
14 how you did the numbers. Everyone seems to have their own way of doing it. But
15 anyway, it's not a problem. I've got the point.

16 MS BLACKWOOD: I know, I'm sorry we had to go through that for what was a very,
17 very short point, which is simply that Google deny that (overspeaking).

18 THE CHAIR: Yes, it's an issue --

19 MS BLACKWOOD: It's an issue in the proceedings.

20 THE CHAIR: I'm satisfied that, you know, what you're asking for does fall within your
21 claim in relation to excessive pricing; it clearly falls within that. The real issues are in
22 the ones that we were dealing with last time: necessity and proportionality of what's
23 been offered.

24 MS BLACKWOOD: So it is necessary for Professor Rodgers's accounting expert,
25 Mr Harman, to be able to calculate the profitability of the Play Store. Some of this
26 work has already been done in the Coll proceedings, and Ms Coll's expert, Mr Dudney,

1 | relied upon the Play Store general ledger --

2 | THE CHAIR: Wait, wait.

3 | MS BLACKWOOD: I'm sorry, Sir.

4 | THE CHAIR: You say that Harman needs us to assess the profitability of Play Store.

5 | MS BLACKWOOD: Yes, Sir.

6 | THE CHAIR: And then we've got his letter.

7 | MS BLACKWOOD: Yes, so that is --

8 | THE CHAIR: This is Greg Harman, isn't it?

9 | MS BLACKWOOD: -- bundle D. Yes, Sir. I see you have it separately.

10 | THE CHAIR: Yes, and these are mercifully brief letters. It's really helpful when they

11 | crystallise everything in such short terms. I know that it doesn't necessarily get the full

12 | flavour of everything, but it's better that I have something that I can absorb than

13 | something I really can't follow. But the letters I've had from both Harman and Fletcher

14 | have been really helpful in just pulling all the threads together.

15 | MS BLACKWOOD: Sir, I'm grateful. I'm sure they will be happy to hear that.

16 | THE CHAIR: I do have other concerns, but --

17 | MS BLACKWOOD: Sir, and I seek to address those. Even if they're well-written,

18 | I understand.

19 | THE CHAIR: I have other concerns, but as this is not my case, I'm not going to say

20 | them. But I think that the experts really do need: (A), to focus on the issues; and (B),

21 | not take extreme positions. That the best experts, in my view and in this Tribunal, are

22 | the ones when you hear their evidence, you say, "If that chap or lady was giving

23 | evidence for the other side, his answers would be exactly the same".

24 | The other thing that I like to stress to everyone in these cases is I don't expect in cases

25 | like this to be able to assess the overcharge, the pass-on, to the exact farthing. If you

26 | see a report and it comes back with a really, really precise figure and you think, "Well,

1 it can't be; there's too many imponderables".

2 So it's always much better to have ranges and stuff like that, given that we're having
3 a broad axe. Because if you try and do what's impossible, or rather the incredible,
4 which is to say, "We've got a precise figure", you sort of end up with what we've got in
5 Trucks with a decision where it says it's 5 per cent. But hopefully everyone has
6 learned whatever lessons need to be learned from Trucks in relation to expert
7 evidence. I can't comment on this because I'm not the trial judge, but if I was a trial
8 judge, I'd be saying those things to the experts.

9 MS BLACKWOOD: Yes, Sir.

10 THE CHAIR: Okay. That's just a general point. Show me where in Harman you want
11 me to look at now.

12 MS BLACKWOOD: Sir, we have Mr Harman's letter, but what I wanted to take you to
13 first was actually the extract from Professor Easton's report.

14 THE CHAIR: Oh, yes. Of course. Yes.

15 MS BLACKWOOD: That's in bundle C, tab 7.

16 THE CHAIR: Well, let me see if I can get it.

17 MS BLACKWOOD: This is massively short because we've only (overspeaking)
18 extracts.

19 THE CHAIR: Well, can you just give me the page number, then? It's much easier for
20 me to find.

21 MS BLACKWOOD: Yes, Sir. I'm sorry. It is page 123 of bundle C.

22 THE CHAIR: Let's see if it works, shall we? Okay, so whose report is this?

23 MS BLACKWOOD: This is Professor Easton, who is Google's economist.

24 THE CHAIR: Okay, and what is this?

25 MS BLACKWOOD: This is a document or a report that's been served in the Coll
26 proceedings.

1 THE CHAIR: So it's his report in Coll, dated when?

2 MS BLACKWOOD: Dated 7 March 2025.

3 THE CHAIR: Yes.

4 MS BLACKWOOD: In this report, Professor Easton for Google criticises certain
5 analyses that Mr Dudney has done to assess the profitability of the Play Store. This,
6 I think, is helpful because it highlights why this missing data is so important.

7 THE CHAIR: So this is the expert report for Google, is it?

8 MS BLACKWOOD: Yes, Sir. (Pause)

9 THE CHAIR: Yes.

10 MS BLACKWOOD: You'll see at paragraph 14, which is on page 123,
11 Professor Easton notes that:
12 "As an initial point, Mr Dudney estimates the profitability of the Play Store as part of
13 Alphabet ..." [as read]
14 If you continue down seven lines, you'll see the criticism summarised here:
15 "The general ledger data on which Mr Dudney relies does not include all joint and
16 common costs necessary to operate Google Play, nor does his estimated balance
17 sheet for Google Play capture the assets and capital necessary to operate
18 Google Play. Because Mr Dudney's estimates do not capture these shared costs and
19 assets, his profitability ratios are overstated." [as read]

20 THE CHAIR: So you say, obviously, that they're trying to have it both ways.

21 MS BLACKWOOD: We say if you are going to criticise the report on this basis, you
22 need to give us sufficient data to allocate all the relevant costs --

23 THE CHAIR: Yes, I can see that.

24 MS BLACKWOOD: -- and assets and so on. The same point is made on page 124,
25 and it's been extracted. You'll see that at paragraph 65, he notes that:
26 "There are several categories of ..." [as read]

1 THE CHAIR: Let me just get that page number.

2 MS BLACKWOOD: I'm sorry, Sir. Page 124.

3 THE CHAIR: Yes. What paragraph number?

4 MS BLACKWOOD: 65.

5 THE CHAIR: It can't be 124 if it's 65. Oh, it can be because you've only -- yes, you've

6 been --

7 MS BLACKWOOD: It's only a very small (overspeaking).

8 THE CHAIR: Yes, okay. That's what you've done. Okay, let me read it. Because

9 I haven't read this, so let me look at it.

10 MS BLACKWOOD: Sir, it's paragraph 65 to 67 I think that would be helpful. (Pause)

11 THE CHAIR: Yes.

12 MS BLACKWOOD: You'll see again this criticism that Mr Dudley's estimate of the

13 profitability is not accurate because it does not take into account all the relevant costs.

14 Sir, then if I could take you to --

15 THE CHAIR: Well, (several inaudible words). (Pause)

16 So you say you need to know what the relevant costs are for a profitability analysis,

17 obviously.

18 MS BLACKWOOD: Yes, Sir. Mr Harman addresses it in his letter, you can see at

19 paragraph 12.

20 THE CHAIR: Yes.

21 MS BLACKWOOD: He notes there that:

22 "Google's allocation methods and principles policy reveal that [CONFIDENTIAL]." [as

23 read]

24 But he recognises that:

25 "Ideally, proportions of these common and joint costs which are attributable to the

26 Play Store should be taken into account for the purposes of assessing the profitability

1 of the Play Store." [as read]

2 So whilst they might have a specific accounting approach for a profitability analysis,
3 we need to understand what these unallocated costs are.

4 THE CHAIR: Yes, exactly. So you're saying that, actually, if they're doing it this way,
5 simply looking at the accounts isn't going to help you.

6 MS BLACKWOOD: Yes, Sir.

7 THE CHAIR: Yes.

8 MS BLACKWOOD: Mr Harman does explain in paragraph 17 why he needs the
9 requested data. What he's asking for is all the costs that are relevant to the Play Store;
10 the data and the sums. Then he will take a view on how to allocate, but he needs to
11 know what his unallocated costs are in the first place.

12 THE CHAIR: But how burdensome is it going to be to provide this data? That's the
13 concern I had, as to what -- if it's not a burdensome exercise, I'd be quite happy to
14 order it, to be honest. But how burdensome is this exercise going to be?

15 MS BLACKWOOD: Well, we're simply asking for data on costs for each quarter of the
16 relevant period.

17 THE CHAIR: Yes.

18 MS BLACKWOOD: They just need to, on their own, say, "Well, we think human
19 resources, some of those costs probably go to the Play Store". So I don't think
20 that -- the raw data --

21 THE CHAIR: Because I think the problem is, is that you have got a dispute as to which
22 costs can sensibly be or should be -- for the purposes of the profitability
23 exercise -- allocated. If you're asking them to give us the data in respect of the relevant
24 costs, there maybe a dispute as to what the relevant costs are.

25 MS BLACKWOOD: Well, what Mr Harman has said is, provided he has the data on
26 what Google say are the unallocated costs, he can take steps to sensibly then allocate

1 a proportion of that to the Play Store. So we're not asking for Google to do the exercise
2 of saying, "Well, for accounting purposes, we don't break down these unallocated
3 costs, and therefore you're asking us for something that doesn't exist". We're asking
4 for, well, what are the unallocated costs that you say potentially go to the Play Store,
5 and then our experts will attribute a proportion of that to the Play Store.

6 THE CHAIR: You know the broad categories of the unallocated costs. You can split
7 those out, can you? From what you've got so far.

8 MS BLACKWOOD: We are aware that there are a number of categories of costs that
9 are unallocated.

10 THE CHAIR: I understand that, but I'm asking you: is it clear what those categories
11 are?

12 MS BLACKWOOD: Well, I think we have some indication of them from the accounting
13 policy --

14 THE CHAIR: Yes, I've seen that.

15 MS BLACKWOOD: -- but there are issues whereby, I think legal costs for example,
16 we've seen -- in some of the accounts -- some legal costs attributed to the Play Store,
17 but also at the same time, they say that [CONFIDENTIAL].

18 So I think there is some guidance that Google needs to provide us, as to which costs
19 need to be allocated to the Play Store, that have been unallocated to date.

20 THE CHAIR: I hope we're not in a chicken and egg situation, because I think that's
21 what the hard thing about this is. So we'll have to see what is said about this.

22 MS BLACKWOOD: And it's in paragraph 17 of our --

23 THE CHAIR: Look, I can see the sense and why you want the unallocated costs; I can
24 see that. But is there going to be a difficulty for Google to be able to tell you what they
25 are?

26 MS BLACKWOOD: Well, I think that first of all, they should have a) the data that we're

1 asking for. The only question is then simply identifying certain tranches of data that
2 are relevant, and that is they should have a sense of the types of costs that would be
3 going to the Play Store, or at least what they say go to the Play Store, for the
4 profitability analysis. We can't have a situation where they say, on the one hand, "Aha,
5 you've not covered all the costs that are relevant to the Play Store", and at the same
6 time not tell us what they are. So I think --

7 THE CHAIR: Obviously for the profitability analysis you want to look at the actual
8 costs.

9 MS BLACKWOOD: Yes.

10 THE CHAIR: There'll be some costs which are allocated and some costs which won't
11 be allocated. (Pause)

12 But the higher the figure for unallocated costs, which can be then allocated, will reduce
13 the profitability.

14 MS BLACKWOOD: Yes, Sir. But what they're saying at the moment is that the
15 analysis that has been undertaken is unreliable, because it's not covering all the
16 relevant costs, and they must have a sense of what costs they need to operate the
17 Play Store.

18 THE CHAIR: Yes.

19 MS BLACKWOOD: So, unless we're in a situation where Google are saying, "Well,
20 you know, you've taken into account all the relevant costs because you've identified
21 them", we need to know what they are.

22 THE CHAIR: Yes. (Pause)

23 The problem you're going to have, as I understand it, is they're going to be saying that
24 whatever profitability analysis you conduct is not going to help, or not going to be
25 conclusive or accurate, because you're not covering these unallocated costs.

26 MS BLACKWOOD: We're saying there's a line of attack that Google is mounting, that

1 the analysis is overstated and not accurate.

2 THE CHAIR: Yes, I've looked at this witness statement, or expert report --

3 MS BLACKWOOD: Yes.

4 THE CHAIR: -- and clearly that's the line that they're taking. And you want to be able
5 to respond to that by saying, "Well, look, insofar as you're saying that there are
6 unallocated costs, tell us what they are".

7 MS BLACKWOOD: Yes, Sir.

8 THE CHAIR: And then give us the data.

9 MS BLACKWOOD: Yes, Sir, you can't really have it both ways, and we say that this
10 material is not in the pre-existing financial documents that have been provided to date,
11 the requisite material, and --

12 THE CHAIR: Whatever they use then, they can just point you to it.

13 MS BLACKWOOD: Well --

14 THE CHAIR: They haven't, but --

15 MS BLACKWOOD: -- they have pointed us to a number of documents, and there was
16 a second letter that Mr Harman sent in; I think it came in yesterday, and apologies
17 coming a little later, but we thought it was prudent just for him to specifically address
18 each of the documents that have been identified by Google, and to say, "Well, no, they
19 don't go to the point; this isn't the material that's relevant to the analysis I need to
20 undertake".

21 And so we say that we don't have the requisite material in the pre-existing disclosure,
22 and they haven't pointed us to such material that's necessary.

23 We say that our request is proportionate; we're only asking for data, we're not asking
24 for documents, and Google ought to be able to provide this and compile this data in
25 a proportionate manner.

26 Sir, those are my submissions, unless I can assist you further.

1 THE CHAIR: Well, yes, you can assist me a bit further.

2 Insofar as what you're asking for there, can you do it another way, which is that insofar
3 as Google contends that there are unallocated costs which bear upon the profitability
4 analysis, that they identify what those costs are and they give the data.

5 MS BLACKWOOD: Yes, Sir, and that's what we're seeking, Sir.

6 THE CHAIR: We might have to look at the precise wording of your request, but I think
7 that I can see the good sense of that, particularly in the light of the letter from
8 Mr Harman and the expert report from Mr Easton.

9 MS BLACKWOOD: It might be that some confusion is being caused by the way we
10 phrased request 21(a). We're not asking for them to do a reconciliation, we're just
11 asking -- it's starting for each quarter, that the first bit of the sentence is explaining why
12 we want it -- but what we're asking for is for each quarter in the relevant period, all the
13 costs that are relevant to the operating of the Play Store, but are not yet allocated to
14 the disclosed general ledger, because for accounting purposes, they didn't do that.

15 THE CHAIR: What I'm saying is slightly different from that. Let's say there's
16 unallocated costs, and there's seven potential categories, but in fact it's Google's case
17 that a profitability analysis, which doesn't take into account unallocated costs, is in
18 relation to five of those seven categories: do you need the disclosure, in respect of the
19 other two categories?

20 MS BLACKWOOD: No, Sir.

21 THE CHAIR: What you're really looking for is disclosure in relation to unallocated
22 costs which they say impacts upon the profitability analysis.

23 MS BLACKWOOD: Yes, Sir. I fear that might have been the way we phrased it in the
24 request, but that is what we had intended: we were wanting the cost, which --

25 THE CHAIR: Yes, but my point is slightly different, because there may be unallocated
26 costs that they don't rely on as saying, well, that feeds into the profitability analysis.

1 So it's probably better that what you get is information as to what they say are the
2 unallocated costs, and then you get disclosure in respect of that.

3 MS BLACKWOOD: Yes, Sir. That is (inaudible) specification of what the unallocated
4 costs are that are relevant, and only then the data being disclosed in relation to those
5 categories.

6 Submissions by MS SMITH

7 MS SMITH: Sir, can I start by asking you to have open the schedule for these
8 requests, 21A and 21B, that's bundle --

9 THE CHAIR: Let's have a look at that.

10 MS SMITH: So that you can see what's actually requested, and then I can make my
11 submission, if I may.

12 THE CHAIR: Let's have a look at that and see --

13 MS SMITH: It's bundle E, tab 4 --

14 THE CHAIR: Yes --

15 MS SMITH: -- page 83 and page 84. (Pause)

16 So you'll see --

17 THE CHAIR: I'm just getting it.

18 MS SMITH: Sorry.

19 THE CHAIR: I've got mine in A3 size, so I can actually read it.

20 MS SMITH: Unfortunately I've got mine in A5.

21 THE CHAIR: Oh, that's terrible. I don't know how you can.

22 MS SMITH: I have no ability to read it at all, except by (inaudible).

23 Anyway, Sir, on page 83 and 84, there are in fact three types of material that is sought
24 by -- or analysis in effect -- that is sought by Rodger.

25 First of all, 21A: Rodger wants Google to identify all of the unallocated costs that are
26 relevant to operating the Play Store, so as to enable, then, Mr Harman to carry out

1 a reconciliation of the Play Store general ledger costs, with the unallocated costs in
2 Alphabet's published financial statements. We have the unallocated costs at the
3 Alphabet level; they have not been broken down to the Play Store level, do not appear
4 in the general ledger data, they want us, by request 21A, to provide that breakdown.
5 I'll come back to why we say that's not possible.

6 The second request, 21B.

7 MS BLACKWOOD: I'm so sorry to interrupt, Sir, but just to be clear, I've not addressed
8 you yet on request 21B, because I was taking them sequentially.

9 MS SMITH: Okay. It might be sensible, seeing as they all come together, they're all
10 dealt with by the same experts, and they are all -- as I understand -- are sought to
11 enable Mr Harman to carry out a profitability analysis. Because you'll see, 84 is asking
12 for the best available evidence of the assets required to operate the Play Store. So
13 21A is the unallocated costs required to operate the Play Store, 21B is the assets
14 required to operate the Play Store, and 21B.2 is the R&D expenditure relevant to the
15 operation of the Play Store. All of these are, in effect, to be weighed by Mr Harman
16 and the various other experts in the balance to work out the profitability of the
17 Play Store. So, I understood they're all sought for the same purpose, by Mr Harman,
18 for his profitability analysis, and in order, they say, and they'll come back to this --

19 THE CHAIR: In an ideal world --

20 MS SMITH: -- to me --

21 THE CHAIR: -- Easton should be allowed to carry out the exercise he wants to do,
22 but I think what's practical, what is available: that's the real (inaudible).

23 MS SMITH: What is practicable, and Sir, I'll just address 21A and come back to B if
24 necessary. I want to make some general points and then deal with 21A.

25 The general point is the requests, 21A and 21B, are not necessary or proportionate,
26 because they're requests for material that has already -- and I'll show you this -- been

1 the subject of disclosure applications in the Coll proceedings. As regards matters that
2 have already been addressed in the Coll expert reports and the Easton Google expert
3 report -- and I'll come back to that -- and as regards which Google has already
4 provided, after a long, drawn out disclosure exercise and going back to the Tribunal
5 twice over the course of five months, all the material in its possession that goes to
6 these points.

7 THE CHAIR: That's one of the critical points.

8 MS SMITH: Well, exactly, Sir, and I want to show you that, if I may.

9 THE CHAIR: I thought your plan was, well, you've already got it, but --

10 MS SMITH: Well, yes, Sir, that is -- I need to make that point good, if I may, Sir.

11 THE CHAIR: But the thing is, have you identified exactly where in your disclosure --

12 MS SMITH: Yes.

13 THE CHAIR: -- all this is there? They say you haven't, and you say that you have.

14 MS SMITH: Well, I'll show you if I may, Sir, why we say --

15 THE CHAIR: You're going to have to.

16 MS SMITH: -- you have already got everything that you -- and insofar as you ask for
17 this further material by Mr Harman, their requests by Mr Harman for Google to provide
18 material that he would like to exist -- Mr Harman would love this material to exist -- but
19 it does not exist. And that has been explained by Google in two witness statements
20 from Ms Kourakina, financial controller at Google, and is reflected in the Coll expert
21 Mr Dudney's report and Mr Easton's report. I also need to correct some
22 misapprehensions or misunderstandings that may have arisen through the
23 presentation of the Easton evidence. And I'd like to do that if I can, step by step.

24 THE CHAIR: As you know, if an order for disclosure is made and you only have to
25 disclose what information that you have or documents in relation to what you have.

26 Sometimes you have a situation where you've got a broad category and you don't

1 have all of it but what you have to disclose is what you have. And so it may be that if
2 you're saying that you provided all of this stuff and your reply is going to be, "I've
3 already provided it: X, Y and Z".

4 MS SMITH: Well. That's --

5 THE CHAIR: Insofar as there's anything that falls outside what you say, "I've already
6 provided", probably that should be the focus because if I make an order along the lines
7 requested, maybe subject to amendments, and you've already provided stuff, then you
8 just simply say "I provided it" and everyone can see where it is. If there's stuff that you
9 haven't provided and you say that you shouldn't provide it, then obviously that's what
10 we need to concentrate on because that is in issue.

11 MS SMITH: Well, Sir, it's made clear in the schedule but I would like to have the
12 opportunity to make the points to you, but just by way of introduction, it's made clear
13 in the schedule, on page 83, our response, our position in column D. In response to
14 21A, second paragraph, refers to the Kourakina evidence that I've previously I think
15 I've mentioned and then there's the last sentence which makes it absolutely clear.
16 There is therefore no disclosure responsive to this request. And then it goes on to
17 explain, in reality, you're asking us to conduct fresh analysis, which is inappropriate
18 and is a matter for the expert evidence. Similarly --

19 THE CHAIR: The thing is if the Tribunal does have power, you know, to get people to
20 do things as part of disclosure, because we've done that already in previous cases but
21 what I'm trying to figure out is that it may be that the reconciliation is not available, but
22 are you able to identify that the categories of non-allocated costs in broad terms, let's
23 just start off with that to begin with.

24 MS SMITH: Well, the categories are, as I understand it, categories of non-allocated
25 costs are identified at the Alphabet level.

26 THE CHAIR: Okay.

1 MS SMITH: The question is [CONFIDENTIAL]. And that is effectively an exercise, as
2 I will show you, that has been carried out already by both Mr Dudney and
3 Professor Easton, using certain assumptions and estimates. That is an exercise, we
4 say, should be carried out by the experts and has already been carried out by the
5 experts. Both of them say "You haven't done a good enough job", if I can show you
6 that, but it is not something that is to be carried out by way of disclosure or even
7 analysis, because it is a matter that requires the exercise of judgment.

8 THE CHAIR: Look, I understand that, but what I'm trying to prevent is a situation
9 whereby you say that the other side's profitability analysis is fundamentally flawed and
10 is overstated because of unallocated costs. If your case was not that, then -- look, if
11 your case was, "I'm not going to be taking that point as against Rodger", then that cuts
12 everything and then we don't need to talk about it anymore. But if your case is, "I am
13 relying on unallocated costs to reduce your profitability figure", they need to be given
14 the data. You say they have, they say they haven't but --

15 MS SMITH: Can I just, if I may, be allowed to develop my submission, Sir. There are
16 three submissions I want to make. I want to explain to you, Sir, because it is relevant,
17 the basis upon which Rodger was given permission to adduce expert evidence on
18 accounting. It is only meant to be supplemental, I will show you that, to that already
19 given by Mr Dudney.

20 I would like then to show you, if I may, what disclosure has already been given and
21 what material has already been given, and what explanations have already been given
22 by Google as to the accounting data. And then I want to show you, if I may, what
23 further material is sought by Rodger and why and the expert evidence and particularly
24 the expert evidence of Professor Easton, because Professor Easton criticises -- again,
25 just by way of summary and I'll make it good on the papers -- Professor Easton says
26 to Mr Dudney, "Your primary analysis is just using the general ledger data at the

1 Play Store level". That does not contain certain unallocated costs, so that is no good.
2 What Ms Blackwood failed to show you and I'll show you is what follows in
3 paragraph 15, or what follows in paragraph 15 of Professor Easton's introduction,
4 where he says, "I have carried out certain estimates of allocating the costs, and these
5 are the profitability ratios I've arrived at". That is in response to the fact that
6 Mr Dudney's primary analysis was simply to carry out a general ledger data analysis
7 with certain elements of the unallocated costs estimated by him to feed into that
8 profitability analysis and then he carried out further sensitivity analysis where he made
9 different assumptions about the proportion of unallocated costs. The parties have
10 criticised each other's allocations and the basis upon which those allocations were
11 made and the basis upon which those estimates were made. That work has already
12 been done. That work has already been done.

13 But let me take you through, if I may, those three points. If I can start by reminding
14 the Tribunal of the basis upon which -- the very limited basis upon which -- Rodger
15 was given permission to adduce the expert accounting evidence.

16 THE CHAIR: Yes.

17 MS SMITH: If I can take you to the Tribunal's order in bundle E, tab 24. It's
18 page -- I think you're working from page numbers. Yes. It starts on page 314. 314 is
19 the order. It's the recent order of 27 August and this was the basis -- this was the
20 order, effectively, consolidating is the wrong word, but ordering that the not
21 consolidated proceedings, but the basis upon which the expert's evidence from
22 Rodger was to be adduced. And if you turn to page 318.

23 THE CHAIR: What's the date of the order?

24 MS SMITH: 27 August.

25 THE CHAIR: Of this year, yes?

26 MS SMITH: Of this year. The most recent order, page 318.

1 THE CHAIR: So you're saying that in the Coll proceedings, all this evidence or this
2 subject matter has been covered without this disclosure.

3 MS SMITH: That's my third point. But I want to just show you the basis upon which
4 Mr Harman has been giving evidence -- has been allowed to give evidence and the
5 point I will make is that it has not been anticipated by the Tribunal or anyone that he
6 effectively carries out the same exercise all over again, which has already been done
7 by Mr Dudney, that he effectively carries out his own profitability analysis.

8 If I can take you through the --

9 THE CHAIR: Let's have a look at the order.

10 MS SMITH: -- order. Exactly, Sir. Can I start with paragraph 8B, which is on the
11 bottom of page 317.

12 THE CHAIR: Yes.

13 MS SMITH: Professor Rodger is permitted to adduce, and rely at trial, on evidence
14 from the following expert witness, B, Mr Greg Harman. But that is subject to stringent
15 limitations. If I can start perhaps on paragraph 13 on the bottom of page 318:

16 "Mr Harman's report is to be limited to 50 pages."

17 THE CHAIR: Yes.

18 MS SMITH: Paragraph 9B, top of page --

19 THE CHAIR: 9B, yes.

20 MS SMITH: 9B at the top of page 318:

21 "Mr Harman shall not duplicate any of the evidence contained in the reports of
22 Mr Dudney. His report must be supplemental to the evidence already provided by
23 Mr Dudney." [as read]

24 And then even further, to make sure that his evidence is so restricted, in paragraph 11
25 of the order:

26 "By 7 October, Mr Harman shall meet with Mr Dudney, and insofar as relevant,

1 Professor Fletcher, to discuss the supplemental areas which Mr Harman wishes to
2 address, with a view to reaching agreement on those issues and/or considering
3 whether those issues can be addressed by Mr Dudney and/or narrowing the scope of
4 matters to be addressed in an additional report from Mr Harman." [as read]

5 So Mr Harman is not given permission to adduce expert evidence which either
6 reproduces or reworks or redoes the analysis already produced by Mr Harman. He
7 has given very limited permission to provide only limited supplemental evidence that
8 cannot be addressed by Mr Harman.

9 THE CHAIR: He's going to say, "Well, this evidence is not covered by Dudney. He
10 didn't have it --"

11 MS SMITH: I'm going to show you, if I may --

12 THE CHAIR: -- I need it to do my own analysis, but --"

13 MS SMITH: Well, I will show you, if I may, that Mr Harman actually, on the contrary,
14 appears to be proposing to address issues that have already been addressed by
15 Mr Dudney. And as regards which there's already been a detailed, extensive and time
16 consuming disclosure exercise carried out by Google.

17 THE CHAIR: Are you -- as I said, I'm not keen unless it's absolutely necessary that
18 people go into the nth degree in these expert analysis to come up with a precise figure.
19 But are you saying that it's going to be possible for the Tribunal on the evidence it's
20 got or will have from the experts to come to a broad figure as to what the unallocated
21 costs are?

22 MS SMITH: Well, the experts have already done that and I want to show you --

23 THE CHAIR: They may be so far apart that the Tribunal's sort of lost without anyone
24 actually looking at the underlying evidence. But --

25 MS SMITH: There will have to be -- arbitrary is perhaps too high a way of putting
26 it -- but there will -- Google does allocate certain costs at the Google Play level, at the

1 VAT level. [CONFIDENTIAL]. It only looks at them, for whatever business purposes,
2 it has taken that decision to [CONFIDENTIAL] And so that is not done by Google as
3 a business. Any allocation of those costs for the purposes of these proceedings will
4 have to be, in our submission, a matter of estimate and judgment based on certain
5 assumptions. Yes.

6 The unallocated cost that Alphabet -- and this is the point I was coming on to show
7 you next -- is what evidence is material and evidence is already being produced and
8 been disclosed.

9 THE CHAIR: So you're saying your costs are [CONFIDENTIAL].

10 MS SMITH: Yes. This brings me to my second point which --

11 THE CHAIR: And at the Play Store level, obviously [CONFIDENTIAL] --

12 MS SMITH: Yes, but [CONFIDENTIAL].

13 THE CHAIR: -- there's unallocated costs and we're fighting about that.

14 MS SMITH: Yes. So the material that has already been disclosed as - you will have
15 heard, Google has disclosed financial data for Google Play at the general ledger level.
16 That includes allocated costs. [CONFIDENTIAL]. Publicly available material is
17 Alphabet's financial -statements - its- form 10-Ks - and its quarterly
18 financial -reports - its- 10-Qs - and the experts have both looked at those, and those
19 contain- the unallocated costs that are considered by Google at that level, the Alphabet
20 level.

21 The general ledger -- and Google does not, as a business, [CONFIDENTIAL]. Well,
22 there are Google Play general ledger data. There's also Google Play P&Ls, I think,
23 which I can show you. In neither of those are [CONFIDENTIAL]. This has already all
24 been explained in these proceedings. If I can ask to take you to the first witness
25 statement of Ms Kourakina.

26 THE CHAIR: Yes. Where is that?

1 MS SMITH: That is in hearing bundle C, tab 1. Hearing bundle C, tab 1 is the witness
2 statement of Ms Kourakina. You'll see, on the first page, she's director of finance,
3 et cetera, at Google.

4 THE CHAIR: What page is it?

5 MS SMITH: Sorry. Starts on page 4. This is a witness statement that was produced
6 on 24 November 2023. Maria Kourakina is the director of finance, et cetera, at
7 Google. And if I could ask you - just to put it in context, if I may, before I take you to
8 the content of the witness statement -- this witness statement was produced in
9 response to disclosure requests that were made on behalf of Ms Coll's accounting
10 expert, Mr Dudney, back in October 2023.

11 There were disclosure requests made by Coll in October 2023 to enable their
12 accounting expert to carry out his profitability analysis. The Tribunal ruled on those
13 requests on 16 November 2023, and the Kourakina first witness statement was filed
14 on 24 November 2023, together with an exhibit MK1, which you'll be relieved to hear,
15 is not in the bundle because it comprised 1,100 pages of financial documents and
16 policies.

17 Paragraph 5 on page 5 explains what the witness statement addresses: the
18 accounting policies and practices that apply to Google Play.

19 As I explained, many of these accounting policies are [CONFIDENTIAL]. She goes
20 on to explain Alphabet and Google and the relationship between the two.

21 As regards Google Play, she sets out in paragraph 10 -- and I can't read this out
22 because this is confidential, so I've got to ask you, sir, to read this to yourself. She
23 sets out Google's -- I think I can read this bit.

24 THE CHAIR: What paragraph are we on now?

25 MS SMITH: 10. Paragraph 10 explains Google's cost allocation policies for
26 Google Play. (Pause)

1 THE CHAIR: Yes.

2 MS SMITH: As regards the further material already disclosed, I've explained to you
3 there's general ledger data at the Google Play level. There's the 10-Ks and the 10-Qs
4 at the Alphabet level, and also at paragraph 11, you'll see what further financial
5 material has been disclosed for at the Google Play level at paragraph 11 of her
6 statement, and the years for which that has been provided.

7 THE CHAIR: Yes.

8 MS SMITH: As regards allocated and non-allocated costs, if I could ask you to
9 read -- and again I can't read it out, but I would ask you to read to yourself,
10 sir -- paragraph 14, towards the bottom of page 8 which addresses allocated costs.

11 THE CHAIR: Yes.

12 MS SMITH: She explains those there.

13 Then in paragraph 15. If I could ask you to carefully read that because that is
14 important. (Pause)

15 THE CHAIR: Yes.

16 MS SMITH: Then she addresses on page 13 --

17 THE CHAIR: Can you give me the paragraph number?

18 MS SMITH: Page 13, paragraph 33. Above paragraph 33, if, sir, you have that.
19 Above paragraph 33 is the request, request 6, which was made by Google. That
20 request 6 -- sorry, not made by Google, I apologise -- made by Coll on behalf of their
21 expert Mr Dudney. Mr Dudney was seeking a reconciliation between the profit and
22 loss statements of the Play Store, Android and Google:

23 "These reconciliations and consolidations should show how the data contained with
24 the profit and loss statements for Play Store and Android are aggregated into Google
25 subdivisions and ultimately into Google [so the Alphabet level profit and loss
26 statement]." [as read]

1 What Mr Dudney was seeking in request 6 is effectively what is now being sought
2 again for Mr Harman in his request 21A. That is a reconciliation between the data at
3 the Play Store level, [CONFIDENTIAL], and the data at the Google/Alphabet level,
4 [CONFIDENTIAL]. You will see what Ms Kourakina's clear response to that is in
5 paragraph 33 of her first witness statement.

6 Now, that's not the end of the story. As I said, it was an extensive and detailed and
7 long drawn out disclosure process. Following this witness statement on
8 24 November 2023, on 15 February 2024, Coll's solicitors, Hausfeld, wrote to the
9 Tribunal seeking additional financial information to enable their expert, Mr Dudney, to
10 carry out his profitability analysis. As a result, Ms Kourakina produced a second
11 witness statement, which starts on page 16 of bundle C.

12 THE CHAIR: So what page is it?

13 MS SMITH: Page 16, 1-6, of bundle C. It's the next tab, it follows directly on --

14 THE CHAIR: Oh, okay. I don't have tabs but, yes.

15 MS SMITH: Sorry, it follows directly on from her first statement. It's page 16, and
16 you'll see this is the second witness statement of Ms Kourakina, dated
17 22 February 2024.

18 It starts on page 16, and I'd like to take you, if I may, to page 18, under the heading,
19 sort of halfway down that page, "Common Costs and Allocated Costs". There's
20 a request from Coll, saying which corporate overheads are unallocated in the general
21 ledger and on what amounts, and then a further request: which natural Play Store
22 accounts contain allocated costs, including details of which costs were allocated in
23 what amounts and the method of allocation.

24 She explains in her paragraph 12 that:

25 "Google's current policies and practices for costs allocation were summarised at
26 paragraph 10." [as read]

1 You'll recall that was the paragraph setting out various different cost allocations.
2 Further information was provided at paragraphs 13 and 14, and you've seen that. If
3 I could ask you, sir, to read to yourself the rest of paragraphs 12 to 14, which contain
4 confidential information. (Pause)

5 THE CHAIR: Yes.

6 MS SMITH: Then you'll see a reference to a worked example, and I can tell you, Sir,
7 that that worked example was provided -- it's not in the bundle, I'm afraid. Oh, it is.

8 THE CHAIR: Your position is that you don't hold data in this way --

9 MS SMITH: Yes.

10 THE CHAIR: -- it's not practicable, and estimates need to be given.

11 MS SMITH: Yes, and then that takes us to my third and final point -- well, and
12 Mr Harman is aware of this.

13 THE CHAIR: It's fine. Let me just deal with it now. So as regards request 21A --

14 Reply submissions by MS BLACKWOOD

15 MS BLACKWOOD: Sir, I would like to make a couple of comments in response, Sir,
16 because --

17 THE CHAIR: Yes, but I think --

18 MS BLACKWOOD: Critically, a lot of what Ms Smith has been is being targeted at
19 saying that [CONFIDENTIAL] and -we're- asking for that --

20 THE CHAIR: [CONFIDENTIAL].

21 MS BLACKWOOD: We're not asking -- in our disclosure, we are not asking for Google
22 to provide us with an allocated subset of these common costs, such that they need to
23 go through an exercise of allocating to us.

24 All we're asking for is for them to say, "Well, human resources, legal fees", or whatever
25 it might be, "some of those common costs are relevant to the Play Store, and we have
26 a record of what all those common costs are, and we'll provide those to you". We're

1 not asking for more; we're not asking them to carry out an allocation exercise.

2 (12.33 pm)

3
4 Ruling on request 21A (submitted to the Tribunal for approval)

5 (12.40 pm)

6 Request 21B

7 THE CHAIR: Can we now look at 21B?

8 Submissions by MS BLACKWOOD

9 MS BLACKWOOD: Thank you, sir. If I could ask you to turn to bundle D.

10 THE CHAIR: Can I just look at my notes on 21B for a second.

11 MS BLACKWOOD: Yes, Sir. (Pause)

12 THE CHAIR: Yes.

13 MS BLACKWOOD: Sir, if I could --

14 THE CHAIR: What do you want to look at now?

15 MS BLACKWOOD: Bundle D, page --

16 THE CHAIR: Let me just check. Have you --

17 MS BLACKWOOD: This isn't in our skeleton, it was just relevant to show you the
18 supplemental analysis that Mr Harman said he wanted to conduct.

19 THE CHAIR: Okay.

20 MS BLACKWOOD: And it was this --

21 THE CHAIR: You want to show me the Harman letter?

22 MS BLACKWOOD: It's an earlier letter from Mr Harman, that was sent on 7 July --

23 THE CHAIR: Oh, that one?

24 MS BLACKWOOD: -- and it was what was taken into account by the Tribunal, in giving
25 permission for him to adduce supplementary evidence.

26 THE CHAIR: Yes, I remember that. Where is it in the bundle?

1 MS BLACKWOOD: Sir, it's in bundle D, tab 89, page 589.

2 THE CHAIR: Yes.

3 MS BLACKWOOD: Just because it was suggested that maybe Mr Harman wasn't
4 given permission to do the analysis that we were seeking the information for, you can
5 see in paragraph 4B.2 that he explains that to supplement the existing evidence on
6 cost identification allocation, the proposed review of those costs, in particular those
7 allocated to the Play Store. That's just the point to make that, with in relation to both
8 of these requests, 21A and 21B, he is only seeking material relevant to this discrete
9 supplemental analysis, which as you would have seen, he cannot exceed 50 pages
10 on. And it continues -- so it's wrong for it to be portrayed as a situation where he's not
11 given permission to seek to gather this data and then rely on it for further analysis.

12 In terms of request 21B --

13 THE CHAIR: Yes.

14 MS BLACKWOOD: -- you will have seen already Professor Easton's report. I'm
15 conscious of the time, and I do want to take a quick look. I know we've been there
16 before --

17 THE CHAIR: Yes, that's fine.

18 MS BLACKWOOD: -- but you'll see that Professor Easton's report, that's page 123 of
19 the C bundle. (Pause)

20 THE CHAIR: Yes.

21 MS BLACKWOOD: Just to reiterate the point that Professor Easton criticises
22 Mr Dudney's analysis because it doesn't capture the assets and capital necessary to
23 operate Google Play. That's in paragraph 14.

24 And you'll see in paragraph 66 -- I'm sorry, Sir. (Pause)

25 THE CHAIR: So where am I looking at? Could you show me where I'm looking on
26 that page?

1 MS BLACKWOOD: So on page 124, paragraph 66.

2 THE CHAIR: Yes, I just want to look at this. (Pause)

3 Am I looking at the right document? Witness statements and experts' reports?

4 MS BLACKWOOD: Bundle C --

5 THE CHAIR: Yes.

6 MS BLACKWOOD: -- page 124. There's an extract from Professor Easton's report.

7 THE CHAIR: Wrong bundle. Brian, show me. (Pause)

8 Okay, thanks very much. Sorry about that. It's just that mine wasn't opening, but

9 Brian's been able to open it for me. Okay.

10 MS BLACKWOOD: Page 124, you'll see in paragraph 66 the criticisms made that

11 assets are not properly taken into account for the relevance to the Google Play Store.

12 THE CHAIR: Yes.

13 MS BLACKWOOD: And in the preceding paragraph, paragraph 65, you'll see

14 a criticism which is highlighted in yellow, so it's confidential. (Pause)

15 THE CHAIR: Yes, so we've got a similar problem.

16 MS BLACKWOOD: Yes.

17 THE CHAIR: They're saying that there's these other costs that you haven't taken into

18 account, for the purposes of your analysis, and they're saying you're not taking the full

19 account of the costs, but at the same time --

20 MS BLACKWOOD: It's the same problem, and we know that this material that we

21 need is not in the pre-existing data that's set out in, Mr Harman's letter.

22 THE CHAIR: In the Coll proceedings, how is this now being dealt with? Because are

23 the experts coming up with estimates of what these figures are, because I would have

24 thought that's what they're going to have to do. And the question is: is it going to take

25 us a huge amount further forward? If you do, let's say a more accurate analysis based

26 on the data, because the way I look at it, is that they've got a choice really. If they're

1 going to say, "No, we're not going to give you that data", and that data may well come
2 a significantly lower figure than they're estimating, at trial you can say, well, look, they
3 have the option of giving you this material, they're not giving it to you, and so the
4 Tribunal's open for you at least to argue that the Tribunal can draw an inference.

5 And so, insofar as they're saying, well, the actual costs are higher than you say they
6 are, and you dispute that for good reason, the reason why there's an absence of
7 precision is their position. So I'm not sure if I'm going to come to a different position
8 than I did with the other requests.

9 So I'm probably inclined to dismiss this one, or not dismiss it; I'll make the same order
10 on this one as the previous one, obviously subject to whatever Google's got to say.
11 But I can see we've got practical problems, which are exactly the same ones as before.
12 You know, timing, where we are, the cost of the exercise and the data is not kept in
13 that way, and it's going to be -- you are, I don't mean it unkindly, but you're tail end
14 Charlie to a certain extent, and it's going to be problematic, if this exercise is going to
15 be carried out, because I think whichever way you go, even with this, they're going to
16 say you've allocated the costs wrongly or whatever.

17 So look, unless you want to say something, I'll say the same as last time.

18 Submissions by MS SMITH

19 MS SMITH: It may assist if I summarise very briefly what has actually been done --

20 THE CHAIR: Yes, sure.

21 MS SMITH: -- by the experts already in this regard --

22 THE CHAIR: That's good.

23 MS SMITH: -- addressing particularly the two requests, 21B and 21C, that is for further
24 information or best evidence on assets and R&D.

25 What the experts have already done is that for Coll, Mr Dudney's primary approach in
26 his profitability analysis was to work out a profitability for Google Play, by reference to

1 the Google Play general ledger data, and only by making a slight adjustment for R&D
2 spend and by allocating a small proportion of [CONFIDENTIAL] for Google Play. That
3 was his primary approach.

4 THE CHAIR: Yes.

5 MS SMITH: He then produced what he called a supplemental report, at the same time
6 as his main report, in which he had been instructed to carry out certain sensitivity
7 analyses to his primary profitability analysis, and those included making further
8 allocations of Alphabet level R&D spend and further allocations of certain Alphabet
9 common costs to Google Play.

10 Now, what Professor Easton criticises in paragraph 14 of his statement that you've
11 been taken to was Mr Dudney's primary approach, of using the general ledger data to
12 calculate profitability, because, as we now all know, [CONFIDENTIAL].

13 But Professor Easton also makes it clear that he doesn't think Dudney's sensitivity
14 analyses were adequate either. So he carries out his own further analyses, to provide
15 a number of what he calls "illustrative examples" of what Google Play's profitability
16 would be, assuming the allocation of different proportions of common costs, shared
17 R&D, finance, human resources, and of Google losses. And that is --

18 THE CHAIR: Answer this question.

19 MS SMITH: Yes.

20 THE CHAIR: On that analysis, presumably he's only doing that analysis on the basis
21 of the information that's disclosed in the proceedings. So, ie, he's not having a free
22 kick; everyone's going to be working from the same data.

23 MS SMITH: Of course, yes.

24 THE CHAIR: That's fine.

25 MS SMITH: Yes, absolutely the case. And that is actually made clear by his report,
26 paragraph 15 -- which I don't think you were taken to, but just to show you what he's

1 done -- is in bundle C. Sir, it's only extract, so I have to fill in the gaps.

2 THE CHAIR: I've got it in front of me.

3 MS SMITH: Yes.

4 "I use illustrative examples to show that accounting for the costs necessary to operate
5 Google Play -- this is page 123 -- would result in lower measures of profitability. I don't
6 express an opinion on the precise amount of costs necessary to operate
7 Google Play -- and he doesn't have that material -- but the examples capture some of
8 the additional costs necessary." [as read]

9 And that's set out in detail in section 11B.

10 THE CHAIR: Yes.

11 MS SMITH: Specifically, he also addresses the points including further costs to reflect
12 shared R&D and assets.

13 Now, at paragraph 65 on page 124, he talks about another type of cost -- this is about
14 halfway down that paragraph -- that doesn't appear in the general ledger data.

15 THE CHAIR: Paragraph 65, isn't it?

16 MS SMITH: Yes.

17 So again, he's done the same exercise: he's allocated additional costs to reflect the
18 shared R&D costs. Both experts are doing the same; they're making certain
19 assumptions, they're making certain estimates.

20 Then 66 is important, as regards the balance sheet data and the asset data. Just to
21 explain what you have and what has been disclosed and what is available,
22 my Lord -- and this has been made clear to Professor Rodgers, including in the most
23 recent schedule or response to the most recent schedule -- [CONFIDENTIAL]. There
24 is no balance sheet produced at the Google Play level.

25 THE CHAIR: This is the same point as before.

26 MS SMITH: A detailed balance sheet, which sets out asset and current liability line

1 items, is produced at the Alphabet level.

2 THE CHAIR: Yes.

3 MS SMITH: And Mr Dudney used that Alphabet balance sheet, applied various
4 assumptions to those detailed asset and current liability line items, to produce his own
5 Play Store estimated balance sheet. And I'm afraid it's not in this bundle, but that is
6 the substance of appendix four of his main report.

7 THE CHAIR: Is that the same for R&D? So they do not track R&D at Play Store level.

8 MS SMITH: That is right. Well, they track certain R&D at the Play Store level, which
9 is included in the allocated costs in the general ledger data, but there is also, as
10 Professor Easton explains in paragraph 65, shared R&D. He also explains what that
11 might be, again, in the shared costs. In paragraph 67, you see the highlighted
12 sentence there.

13 And also over the page on paragraph 112, just for completeness, there the point is
14 made about the lack of balance sheet data for Google Play, and a reference to
15 Mr Dudney's attempted balance sheet arbitration for Google Play, which
16 Professor Easton criticises as arbitrary and unreliable.

17 So they're both having to carry out estimates and allocations of their own, using their
18 own judgment, and as one would expect, they take different approaches. There is no
19 independent, pre-existing or even independent data making those allocations; that's
20 exercises that have to be carried out by the experts and have been carried out by the
21 experts.

22 THE CHAIR: So [CONFIDENTIAL] --

23 MS SMITH: [CONFIDENTIAL].

24 THE CHAIR: -- [CONFIDENTIAL], and certain assumptions are being made.

25 MS SMITH: Yes.

26 THE CHAIR: Okay.

1 MS SMITH: And so --

2 THE CHAIR: Look, there's a limit to how long I can spend on this (inaudible). We're
3 only on the first --

4 MS SMITH: Yes. And in fact those are my points.

5 THE CHAIR: Okay.

6 Reply submissions by MS BLACKWOOD

7 MS BLACKWOOD: I did just want to make one very quick riposte, which was that my
8 understanding is not that Professor Easton is saying, "You can do a profitability
9 analysis on the basis of the evidence that's been disclosed", what he's been doing is
10 saying, "This isn't good enough" and then providing examples of costs that haven't
11 been allocated and saying, "See, look how this impacts. Your analysis isn't good
12 enough". I just wanted to --

13 THE CHAIR: That's the point you can make at trial. You can say that, "We don't
14 accept that these are a fair illustration and there's a gap". You know, when people
15 oppose disclosure and they don't provide disclosure on evidence that's potentially
16 relevant for trial, and the trial judge decides that's a sort of evidence would significantly
17 help then inferences can be drawn, as you know. There's plenty of cases that say
18 that.

19 MS BLACKWOOD: Thank you, Sir.

20 (12.57 pm)

21 Ruling on request 21B (submitted to the Tribunal for approval)

22 (1.01 pm)

23 THE CHAIR: The next item we'll deal with after the break. We'll just see what the next
24 item is going to be. I think it probably should be the full extracts of the report and some
25 of the underlying material that was submitted to the CMA and then we'll deal with the
26 Indian app, and then we'll try and deal with the Google requests. But we will have to

1 speed up. But it has been helpful, you know, to go through some of the issues that
2 we have done so far today and hear the parties expand their positions orally. So I'll
3 rise. We'll come back, if possible, at 1.45 pm, because I really don't want to find that
4 we just don't have enough time to finish.

5 (1.02 pm)

6 (The short adjournment)

7 (1.47 pm)

8
9 CMA investigation

10 THE CHAIR: The next one is CMA investigation and you want some underlying
11 submissions and evidence that was submitted to the CMA. I do accept that this
12 category does relate to the issues in the claim form, not necessarily directly, but it does
13 relate to the issues in the claim form. The relevant paragraphs I've looked at 161, 163,
14 169, 170, 171, 172. I've also looked at the defence at paragraphs 111, 113, 119 to
15 122. So you don't need to persuade me that it relates to an issue in the proceedings.
16 The other thing I bear in mind is that given that what you're seeking is something (a)
17 is in the report, so it's a question of unredacting to go into the CRO and its submission
18 is already provided and (inaudible) provided by Google so they've got it all together
19 that it shouldn't be a huge burdensome point. So the real issue is, is how necessary
20 is the exercise that you want to carry out in relation to these proceedings and how
21 necessary this information is for you to carry out that exercise? It's just those two
22 points.

23 Submissions by MS BLACKWOOD

24 MS BLACKWOOD: Yes, Sir. I think it might be helpful as well, just in case it's not
25 been made clear that in relation to request 9A, we are not requesting the entirety of
26 the report.

1 THE CHAIR: Of course not.

2 MS BLACKWOOD: Sorry, Sir, just in the table it's not marked.

3 THE CHAIR: No, but you can be sure that I've got that point that you're only asking
4 for a certain part of the report. When it comes to the order, it's going to be reflected
5 exactly which parts of the report are being ordered. But I think it was clear to me what
6 you were asking for. Let me see. Let me look at the wording of the order you're
7 seeking.

8 MS BLACKWOOD: The version that I understand you have is out of date in relation
9 to request 9A because it requests --

10 THE CHAIR: What I've got here is 9A, it's a copy of paragraphs 7187 to 7230. Those
11 ones, that list.

12 MS BLACKWOOD: Sorry, Sir. Then this has been updated since my version and
13 I apologise. So that is in the table.

14 If I could then ask you to turn to Professor Fletcher's letter, which is in bundle D.

15 THE CHAIR: I've got it separately, so don't worry about the reference to it.

16 MS BLACKWOOD: It's paragraph 16.

17 THE CHAIR: Just give me one second. (Pause)

18 MS BLACKWOOD: Sir, it would also be helpful if you could open up the report itself
19 which is in bundle --

20 THE CHAIR: Let's look at Fletcher. So what paragraph of Fletcher do you want me
21 to look at?

22 MS BLACKWOOD: Paragraph 16. This is the paragraph in which she explains why
23 she needs sections of the report that she's seeking. Sir, would it be best for you to
24 read that paragraph to yourself first?

25 THE CHAIR: Yes. (Pause)

26 MS BLACKWOOD: The need for the information in Appendix B is explained in

1 subparagraphs E and F of paragraph 16 and it might be helpful for me to briefly show
2 you Appendix B.

3 THE CHAIR: Yes, that'd be helpful.

4 MS BLACKWOOD: That is --

5 THE CHAIR: But as I said, I am presently minded to accept that the requests are
6 relevant and they're pertinent, and I don't think they're going to be particularly
7 burdensome to fulfil but it'd be useful just to look at the report. So where's that hiding?
8 Because I haven't looked at the report, to be honest.

9 MS BLACKWOOD: So that's in bundle F.

10 THE CHAIR: Yes.

11 MS BLACKWOOD: The report starts on page 169.

12 THE CHAIR: Okay, let me find it. I hope I don't give the impression I'm trying to rush
13 both of you, but there's a lot of material to get through in a day and I'm conscious that
14 we've already spent a half a day on your requests, and we're partly through those. So
15 hopefully the Indian app one isn't going to be too much difficulty in the light of the letter
16 I've just seen. It may be still, but it may not be. But this one, I really don't want to
17 spend too much time on it. But, yes. So what do you want me to look in the report?

18 MS BLACKWOOD: Will be most efficient -- I was just going to ask you to turn to
19 Appendix B.

20 THE CHAIR: Yes, what page is that?

21 MS BLACKWOOD: It starts on 781.

22 THE CHAIR: Wow. No wonder I never found that. Yes. 781. Yes.

23 MS BLACKWOOD: And if you could turn to page 788.

24 THE CHAIR: Yes, I'll just scroll down. It's quicker.

25 MS BLACKWOOD: This was just to give a flavour of the sorts of material that's in
26 appendix B that are relevant. And given the submissions we made earlier about the

1 EMADA and the placement data, hopefully this will make sense.

2 THE CHAIR: Okay, so we're going to 788. Appendix B, isn't it?

3 MS BLACKWOOD: Appendix B.

4 THE CHAIR: And it's at page 788.

5 MS BLACKWOOD: This is just --

6 THE CHAIR: Redactions, yes.

7 MS BLACKWOOD: This section deals with Google's motivations for developing

8 placement agreements and revenue sharing agreements. You'll just see some

9 examples of paragraph 23 where it says:

10 "Google also acknowledged the role that default apps have in driving search traffic."

11 So that explains that they understand the significance of pre-installation and prominent

12 placing. You've got table one that deals with payments made under the EMADA and

13 placement agreements in the UK. The commentary in paragraph 29 about the

14 payments under the placement agreements being that OEMs recoup the payments

15 made under the EMADAs and so on.

16 THE CHAIR: Yes, I can see that, yes.

17 MS BLACKWOOD: It's just to give you a flavour of the type of material that's in this

18 appendix and we consider that to be directly relevant to the issues and likely for these

19 points to be resolved and certainly provides information as to Google's motivations for

20 setting up some of these agreements.

21 THE CHAIR: Hopefully it's not going to take a huge amount of time for your expert to

22 get her head around it once it's been made available.

23 MS BLACKWOOD: No. Exactly, Sir. It's a very discrete 17 pages of an appendix that

24 we're requesting. It shouldn't be onerous for Google to remove the redactions in

25 relation to that. (Pause)

26 THE CHAIR: When I look at the request, as I've got it, is you're asking for certain

1 paragraphs of the report. Are you still asking for that?

2 MS BLACKWOOD: Yes, we're asking for certain paragraphs of the report --

3 THE CHAIR: Then you want it unredacted for the confidential information. Then you

4 want the written submissions. But where is, in that --

5 MS BLACKWOOD: So the written submissions, but only those cited in appendix B,

6 so we don't want the written submissions writ large.

7 THE CHAIR: I understand that.

8 MS BLACKWOOD: I'm sorry, Sir.

9 THE CHAIR: I'm asking whether or not you're also seeking an unredacted version of

10 Appendix B.

11 MS BLACKWOOD: Yes, Sir.

12 THE CHAIR: Where is that in the request?

13 MS BLACKWOOD: That is -- did it get missed? Ah, I understand there was a typo,

14 but in our skeleton argument, we have asked for that. I can show you that, Sir.

15 THE CHAIR: So where will it appear? It's after 9A, yes?

16 MS BLACKWOOD: Yes.

17 THE CHAIR: Now, show me in your skeleton the wording you put. No, let's look at

18 the Redfern schedule because I was a bit unsure about this. Let me have a look.

19 (Pause)

20 Because it's broader -- it's says, "and its appendices unredacted(?)".

21 MS BLACKWOOD: So in paragraph 19 of our skeleton --

22 THE CHAIR: Yes, so you --

23 MS BLACKWOOD: -- we've asked for --

24 THE CHAIR: Let's have a look, yes. (Pause)

25 MS BLACKWOOD: We explained that we are prepared to. Because when the table

26 was originally drafted we were asking for the entire report.

1 THE CHAIR: Well, I know, and it's a really confusing --

2 MS BLACKWOOD: And then --

3 THE CHAIR: But when I looked at the ...

4 MS BLACKWOOD: Well, I apologise for that typographical error, but we have always

5 been seeking Appendix B. I understand --

6 THE CHAIR: Okay, so you want those paragraphs of the report "and unredacted" plus

7 "Appendix B unredacted".

8 MS BLACKWOOD: Yes, Sir.

9 THE CHAIR: Okay. I'd always just assumed that that's what you wanted, but it wasn't

10 actually on the wording.

11 MS BLACKWOOD: I'm sorry, Sir, that there was a typo that crept in there.

12 THE CHAIR: No, no, that's absolutely fine.

13 MS BLACKWOOD: I understand it hopefully has been corrected now in the certain

14 updated documents that have been put in the bundles, albeit it may not have made it

15 through to your bundle, Sir, and I apologise for that.

16 THE CHAIR: Okay, well, I know what you're asking for and that (audio distortion) --

17 MS BLACKWOOD: I'm conscious of the time -- then we're also requesting

18 paragraphs 7.187 to 7.230. That's ten pages of the report.

19 THE CHAIR: Yes.

20 MS BLACKWOOD: The reasons for requesting that are set out in paragraph 16(b) of

21 Professor Fletcher's letter.

22 THE CHAIR: Yes, don't worry, I've got that. Because I was working from his letter

23 rather than the report itself. But if it helps you, I can see what Fletcher is saying, and

24 it's coherent. At the moment, I agree with it, subject to what anyone else wants to say.

25 MS BLACKWOOD: Well, I won't trouble you further with that. Then in relation to

26 paragraphs 8.199 to 8.324, so that's 30 pages of the report.

1 THE CHAIR: Yes.

2 MS BLACKWOOD: Our reasons for requesting that are set out in paragraph 16(g)(i).

3 THE CHAIR: Yes, no, I've read all of 16. I've read it twice now, but as I've said, at the

4 moment I accept --

5 MS BLACKWOOD: Well, Sir, perhaps --

6 THE CHAIR: -- the explanation given and I've looked at what's being said in the

7 skeleton that (inaudible) -- the Redfern schedule on paragraph 16. I've looked at it at

8 the pleadings and I'm satisfied that for this analysis, you need this material, and it's

9 relevant and it's proportionate.

10 So let's just hear from the other side. If I move away from that, then I'll give you another

11 chance, because it may be I'll be persuaded to move away from it. But I don't see this

12 as a request for either -- or certainly for Google to die on, because at the end of the

13 day, it's not a huge burden and that it is certainly not going to change the direction of

14 travel in these proceedings. You know, sometimes you have requests and you say,

15 "Well, I really have to fight this, because it's going to be a complete disaster". I don't

16 see it in that way unless I'm persuaded on that. Can we just quickly go through this,

17 yes?

18 Submissions by MS SMITH

19 MS SMITH: Sir, I'll try to dissuade you, but I'll try and do it as briefly as I can.

20 THE CHAIR: Yes, sure.

21 MS SMITH: My submissions are threefold -- well, my submission is that these

22 requests don't meet the thresholds for either relevance, necessity, or proportionality,

23 and I'll address that briefly.

24 THE CHAIR: So you say they're not relevant?

25 MS SMITH: Right, and if I can say what my --

26 THE CHAIR: Yes, sure.

1 MS SMITH: At best, I say they are of minimal relevance, and that feeds into, I would
2 say, your assessment of necessity and proportionality.

3 THE CHAIR: Yes, okay.

4 MS SMITH: So as to relevance, you will appreciate that this CMA investigation is into
5 mobile browsers and cloud gaming.

6 THE CHAIR: I know, yes.

7 MS SMITH: It does not consider any of the products, any of the markets or any of the
8 alleged abuses which are an issue in the Rodger proceedings. It didn't even focus to
9 a particularly great extent on Google; it was primarily concerned with conduct by apple.

10 Even now that Professor Rodger has limited his request to unredacted copies of
11 particular paragraphs from the CMA report in Appendix B, and for Google's written
12 submissions and documents cited in Appendix B, we say even as narrowed, the
13 requests are, at best, of minimal relevance to the pleaded issues in these proceedings.

14 Then, Rodger says these requests are relevant and necessary and rely upon
15 Professor Fletcher's letter in that regard. But my initial point as regards
16 Professor Fletcher's letter is, of course, what she's asking for here -- or what Rodger
17 is asking for here under R9(a) and (b), these are not a request for data that she
18 requires in order to carry out any sort of economic analysis. Given your ruling on
19 requests 8C and 20D, she is already going to get the data on placement agreements
20 and EMADA payments, and in fact, she's going to get that data at a much more
21 granular level and in more detail than it is set out in Appendix B, table 1 of this report.
22 So she's getting the relevant data and she's getting it, in fact, at a greater level of detail
23 than is set out in the CMA report.

24 As regards the other requests for taking off the redactions and for Google's written
25 submissions and other documents referred to in the footnotes in Appendix B, we say
26 that, at best, these simply provide context for her arguments and as regards the

1 motivation -- or Google's motivation -- for placement agreements and revenue-sharing
2 agreements.

3 If I can take you to a couple of examples just to make good the point that we say this
4 is of marginal relevance at best. If I could ask you to turn up paragraph 16(b) of
5 Professor Fletcher's letter --

6 THE CHAIR: Yes, I've got that.

7 MS SMITH: -- which you have in front of you, where she talks about paragraphs 7.187
8 and onwards of the CMA report. She accepts that these paragraphs deal with, as she
9 quotes, "the impact of Google's policies on in-app browsing on Android". Without
10 getting too technical, this is in-app browsing, which is not to be confused with what's
11 at issue in the Rodger proceedings and in the other Coll and Epic proceedings, which
12 is about in-app purchases.

13 Fletcher says that these paragraphs about in-app browsing are directly relevant
14 because of steering. She says here, it's paragraph 16(b):

15 "Steering through browsers to alternative sources for content [alternative sources, I've
16 underlined that] and payment channels, plus access to web apps and direct
17 downloads. Those form part of Google's conduct I consider to be exclusionary." [as
18 read]

19 But this is -- it sort of slides around the issues. The issues in the current proceedings,
20 the Rodger, Coll and Epic proceedings, are about the alleged restrictions placed by
21 Google on app developers as regards alternative sources for their own content, that
22 is access to alternative app stores to Google Play or access that consumers can get
23 to app developers' own apps by way of sideloading. Those are the sources and the
24 alternative sources by which an app developer can provide its own content to
25 consumers. It's also about access to alternative payment sources to Google Play
26 billing, again for an app developers' own content.

1 By contrast, what the CMA's MBCG investigation is about is the question of in-app
2 browsing, and that is about alternative sources for different content and payment
3 channels. If I can just make that point good by taking you to one short sentence in the
4 report itself. This is in bundle F.

5 THE CHAIR: I've got that already.

6 MS SMITH: On page 230.

7 THE CHAIR: Okay, let me --

8 MS SMITH: Paragraph 2.56. So we're going right back to the beginning where the
9 CMA is explaining what its investigation is about.

10 THE CHAIR: What it's about. Yes, okay.

11 MS SMITH: Page 230, paragraph 2.56. This is where -- you'll see the beginning of
12 that paragraph, if you've got it, 2.56 -- the CMA is explaining what in-app browsing is
13 about. Then I want to ask you to focus on the last sentence of paragraph 2.56:

14 "Our analysis focuses primarily on the display of web content developed by a party
15 other than the native app supplier." [as read]

16 THE CHAIR: Okay, exactly. That's a big difference. I understand that.

17 MS SMITH: Yes. So this is, at best, of marginal relevance.

18 As regards Professor Rodger's request -- Sir, that's just one example; I'm not going to
19 go through every one of them. But as regards Professor Rodger's request for
20 disclosure of the Google written submissions and documents that are in the footnotes
21 in Appendix B of the CMA's MBCG investigation, it is the case that Appendix B -- and
22 if you've got it open, it starts on page 781.

23 THE CHAIR: 781, yes.

24 MS SMITH: That appendix is about Google's PAs and RSAs. We accept that. But
25 you can see from the heading of Appendix B it is about those agreements' impact on
26 a particular issue which was of relevance to that investigation and which is not of

1 relevance to these proceedings. That is the impact of those agreements on Android
2 choice architecture.

3 Choice architecture in mobile browsers is not at issue in these pleadings; it's not
4 a pleaded issue. As you will understand, Sir, the focus of Professor Rodger's claim,
5 along with those of Coll and Epic, is about the pre-installation and prominent
6 positioning of the Google Play Store on mobile devices and the agreements via which
7 Google allegedly seeks to ensure this. It is not about mobile browsers or choice
8 architecture in mobile browsers.

9 So again, yes, this appendix refers to the PAs and the RSAs, but it is being looked at
10 by the CMA in a totally different context and for a totally different purpose.

11 That leads me then to the point as to whether this disclosure is necessary, given what
12 has already been disclosed in this case. You already have my point that insofar as
13 Professor Fletcher might require hard data that might be disclosed as a result of
14 getting what's in Appendix B, table 1, she is already getting that and in fact, she's
15 getting more at a more granular level.

16 As regards the commentary, descriptions, submissions about the PAs and the RSAs,
17 what has already been disclosed by Google in these proceedings is as follows.

18 We have already disclosed all the PAs and the RSAs themselves. Professor Rodger
19 has also received, or will receive, extensive disclosure, as a result of receiving the Coll
20 and Epic disclosure, of internal and external documents to Google concerning the
21 RSAs and the PAs, and those also to be addressed in the disclosure statements that
22 are being provided to Rodger. We have also agreed to provide further extensive
23 disclosure as a result of our agreement to requests R8A and B and R10 on the present
24 application that go to these agreements.

25 Moreover, apart from the disclosure of the agreements themselves, the disclosure of
26 all the associated documentation, internal and external, that go to these agreements,

1 as part of our disclosure in the Epic proceedings, Google has provided two Epic -- and
2 also I think already, if not already, will shortly provide to Rodger -- copies of all the
3 submissions and documents that it provided to the CMA, as a result -- in the CMA's
4 mobile ecosystems market investigation. That is an investigation that concerned the
5 operation of the market, including Google Play and the issues that are directly relevant
6 to these proceedings, and all of Google's documents, written submissions to the CMA
7 for the purposes of that investigation, and documents submitted by Google to the CMA
8 for the purposes of that investigation are being disclosed. And that is an investigation
9 that concerned matters of much closer relevance to the issues in these proceedings
10 than the CMA's mobile browser and cloud gaming investigation.

11 So finally, we say, in that context of the marginal relevance and the lack of necessity,
12 these requests are not proportionate, and I say that because Google will be required,
13 if these requests are ordered, to conduct an extensive review for confidentiality and
14 irrelevance before they are able to do that, before they are able to make the disclosure.

15 And I make that point on the following basis: Google, you are aware, Sir, and I've made
16 the point, that most of what is in this investigation report, and importantly, most of what
17 will have been in Google's submissions and the documents submitted by Google to
18 the CMA for the purposes of this investigation, including those submitted and referred
19 to in the footnotes to Appendix B, will predominantly consider matters that are not
20 relevant to these proceedings. And in order to ensure that these requests do not turn
21 into a fishing expedition on the part of Rodger, Google will need to carry out redactions
22 of material which are not relevant to the current proceedings from those documents.

23 Such a review, we say, will be disproportionate in all the circumstances, particularly
24 given the compressed time scale for these proceedings and the late stage at which
25 this request is made, and the marginal relevance of the requests. But just to give you
26 some example, to put in context why I say this is disproportionate, there are

1 98 footnotes in Appendix B. 74 of those refer to documents and material, which has
2 been redacted from the face of Appendix B, and in many cases, multiple documents
3 appear to be referenced in those footnotes. It's not possible at this stage for those
4 instructing me to say how many different sets of written submissions and other
5 documents are referred to in these footnotes, but it is an investigation that spanned
6 nearly three years, and in my submission is very likely to have resulted in a voluminous
7 amount of material being submitted into the CMA. So in those circumstances, we say
8 these requests certainly are not proportionate, they are not necessary, this disclosure
9 is not necessary, given the marginal relevance of the disclosure and the disclosure
10 that's already been given on these issues.

11 THE CHAIR: Thank you very much.

12 MS SMITH: Thank you.

13 THE CHAIR: As regards to CMA --

14 MS BLACKWOOD: Oh, sorry, Sir --

15 THE CHAIR: Sit down.

16 (2.16 pm)

17 Ruling on CMA investigation (submitted to the Tribunal for approval)

18 (2.21 pm)

19
20 Request 14

21 THE CHAIR: So that's my ruling on that.

22 We now turn to the Indian one, and I have seen the letter from RPC, and I think, in my
23 view at the moment, is I'm inclined to accept what they say. It's not going to be a huge
24 step to get much more. They're giving you the answer in a convenient form. Not only
25 are they giving you the answer, they say it's already in the material ready provided.
26 But if I've missed something, then tell me, but at the moment you cut things short, I am

1 inclined to accept the position of Google on this, in the light of the letter that I've read
2 on 24 September.

3 Submissions by MS BLACKWOOD

4 MS BLACKWOOD: Sir, perhaps to take first the availability of data point, and which
5 builds upon the letter of last night providing the slide deck, we don't think the provision
6 of that document is sufficient, because that appears to set out Google's official position
7 on line, on why the ten Indian developers' apps were suspended from the Play Store,
8 and our position is that the ten developers were removed from the app store because
9 they were taking steps to circumvent certain anti-steering provisions that have been
10 put in place.

11 So, there's an official Google line, which it has always maintained: no, the ten Indian
12 developers were not meeting certain standards, or paying certain sums, and our
13 understanding is that they were in fact being punished for circumventing the
14 anti-steering provisions.

15 THE CHAIR: Google is not a fly-by-night operator. If they have lied in this letter and
16 given misleading information, they will be in trouble, but I don't believe they have. If
17 you have a credible reason -- if you have, for example, one of the Indian app people
18 saying, "Look, I had this problem because of reasons other than the ones we say
19 here", then there's a plausible case to rebut what's here. But unless you have
20 something like that to rebut what's here --

21 MS BLACKWOOD: May I correct what may be a misunderstanding: this is not a public
22 facing document that Google published; it's an internal document.

23 THE CHAIR: I agree. Look, to me, it's unlikely that Google would lie to itself. That's
24 one thing. And it's also less likely, given how often they appear before the Tribunal,
25 that they want to lie and try and mislead the Tribunal.

26 So, my point is, that unless the CR can come up with a plausible case as to why this

1 evidence is false or misleading, I'd rather the Tribunal not take up time on a blind
2 alley. There's enough issues in this case without something like this. So --

3 MS BLACKWOOD: Well, Sir, perhaps --

4 THE CHAIR: If you can show me any evidence at all that suggests what we're being
5 told may be false -- and you don't need to prove it's false now -- then, of course,
6 obviously I will take that into account. But at the moment, I don't see that, and if you
7 don't have that, I'm not going to order it. We're already 25 past, we've had a lot of time
8 on your side, and it's unfair for Google, when they've got their applications, which may
9 take some time, that we cut them off.

10 MS BLACKWOOD: Sir, perhaps I can take you to bundle F, tab 22 first.

11 THE CHAIR: Yes, okay. Let's have a look.

12 MS BLACKWOOD: Page 1068. This is an extract of the US subcommittee on
13 antitrust, commercial and administrative.

14 THE CHAIR: We're looking at F --

15 MS BLACKWOOD: F1068. That's the part of the report I'd like to take you to, and it's
16 a US committee report that's been looking into various digital market competition and
17 digital market issues. And I just want to draw your attention to the third paragraph
18 down. This is just to provide some context:

19 "The subcommittee encountered a prevalence of fear among market participants that
20 depend on the dominant platforms, many of whom expressed unease that the success
21 of their business and their economic livelihood depended on what they viewed as the
22 platforms unaccountable and arbitrary power." [as read]

23 And if you turn then to the next page --

24 THE CHAIR: I'm looking at that.

25 MS BLACKWOOD: -- the bottom paragraph. It says:

26 "The subcommittee also spoke with several market participants that said that Google

1 has abused its control of the Play Store by using rule violations as a pretext for
2 retaliatory conduct. For example, one third party described how soon after it ceased
3 using AdMob, an in-app ads monetisation tool, Google began sending third-party
4 notifications of policy violations related to content the third party had included on its
5 app for years." [as read]

6 And then similarly, we have a document, which starts at 1070. It's the: "Submissions
7 to the CMA by the coalition for app fairness". And if you turn to page 1088, the second
8 paragraph from the top, you'll see it says:

9 "The app store review process affords Apple and Google with unique power over app
10 developers and can be used as a weapon to retaliate and even deprive developers
11 from the benefit of new regulations, for instance, by finding frivolous reasons to block
12 new app updates of developers wishing to make use of the new rules." [as read]

13 So you see, there is a context in which there are concerns that Google says, "Well,
14 we're removing you or we're removing your apps for reason X", but there is a sense
15 that it's very much driven by Google's desire to enforce certain -- be it anti-steering
16 requirements or similar regulations. That is the background context that should be
17 borne in mind. And if you look at the slides, slide 11, it starts, "[CONFIDENTIAL]".

18 THE CHAIR: Yes.

19 MS BLACKWOOD: You know, it says, "[CONFIDENTIAL]" and --

20 MS SMITH: It's confidential.

21 MS BLACKWOOD: Oh, I'm sorry.

22 THE CHAIR: We can see it's all yellow.

23 MS BLACKWOOD: My apologies.

24 THE CHAIR: I looked at this through my lunch break, but -- yes. Can you just show
25 me which bit you want.

26 MS BLACKWOOD: Fourth bullet down.

1 THE CHAIR: Fourth big bullet point?

2 MS BLACKWOOD: Little bullet. So fourth bullet from the top.

3 THE CHAIR: What starts "Without of"?

4 MS BLACKWOOD: Yes. (Pause)

5 THE CHAIR: Yes.

6 MS BLACKWOOD: There's little --

7 THE CHAIR: But the fact is, is that you now will have the details of who these ten

8 people are, these ten Indian app developers. If you haven't, I'll order it. Then you'll

9 be able to contact them. And if what comes out of that is evidence that the reasons

10 for, let's say, the termination is anything other than what's in represented, then

11 obviously things will flow from that.

12 MS BLACKWOOD: I understand that there are articles in the press setting out the

13 Indian app developers' position, saying that they perceived it as being persecution.

14 THE CHAIR: Yes.

15 MS BLACKWOOD: What we don't have is Google's side of the picture. We don't have

16 their internal documents as to why they picked up on these ten developers and took

17 action against them. We have the confidential slide deck, which you can see, whilst

18 an internal document, does appear to be drafted with a view of it being outward facing.

19 That's difficult for me to make submissions on this.

20 (2.31 pm)

21 Ruling on request 14 (submitted to the Tribunal for approval)

22 (2.33 pm)

23 THE CHAIR: So that is request number 14.

24 Are there any other requests I need to deal with on your side?

25 MS BLACKWOOD: No, Sir.

26

Requests G1 and G2

THE CHAIR: Okay, so we now turn to the requests in relation to G1 and G2 and we'll deal with that as the next topic. Thereafter, we've got the witness statements point and there's various other information that's being sought. So we'll run through those as quickly as we can. Please don't assume that I haven't read anything or I'm not aware of what's in the pleadings because if you assume I haven't read it, then we're going to be here for a couple of days. Okay? So I've read the submissions.

I'm certainly aware of what the law is in relation to control and when you have CR proceedings as to whether or not documents in the hands of the class members are in the hands of the class representative. And the argument that what you normally have to do is to go through non-party disclosure. But what I've seen is that despite that, a letter or an email has been sent to something like 2,600 class members and what I'm inclined to do, in respect of G1 and G2, is to say, insofar as they get a response from those 2,600 that provides relevant documents on pass-on and mitigation, then those should be provided to Google. And I would have thought that's a fair outcome for everyone involved.

MS SMITH: Sir, if I could just take one moment to (inaudible)?

THE CHAIR: Of course you can. Yes, of course you can. (Pause)

Submissions by MS SMITH

MS SMITH: Sir, we're very grateful for that proposal and happy with it, but can I just make one or two further points, which is that Professor Rodger's consultation with the developer, so far as we understand it, has not been limited to sending out that letter. This goes to the further questions that we want to ask, that we have set at the end of our skeleton, but which I think properly fall within the same area, the same ambit, as G1 and G2. If I could take --

THE CHAIR: But look, what I could do -- I know what the point you're making. Look,

1 in relation to that, insofar as they get documents back, whether it's from this email or
2 any other email, it's in their control.

3 MS SMITH: Yes.

4 THE CHAIR: Once it's in their control, irrespective of what the request is, I'm saying
5 they've got to disclose it to you. So I don't necessarily want to order disclosure of any
6 other correspondence. I think I'm happy that what you will get is whatever they get.
7 So I don't think we need to go down that alley, if that's -- unless you feel we have to.

8 MS SMITH: No. The only point I would raise, which hasn't been covered by your
9 answer, Sir, with respect, is the indication in the correspondence which you may have
10 picked up on -- if not, I can take it to you -- is that it appears that Professor Rodger set
11 up what he has called a group of representative developers -- four of them, he told the
12 Tribunal at previous hearings -- and that he was holding quarterly meetings with those
13 four app developers.

14 THE CHAIR: That's a separate point.

15 MS SMITH: Right, Sir. Well, this in effect is a very similar point.

16 THE CHAIR: But can we deal with that separately? I'd rather clean this one --

17 MS SMITH: Sir, absolutely.

18 (2.37 pm)

19 Ruling on requests G1 and G2 (submitted to the Tribunal for approval)

20 (2.41 pm)

21 THE CHAIR: Shall we move on to the next one, which on my list is the CR witness
22 statements? Is that okay if we deal with that one and then we deal with the next one
23 after that?

24

25 Request G3

26 Submissions by MS SMITH

1 MS SMITH: Sir, yes. I will try to deal with that as well, relatively briefly. Sir, you'll be
2 aware that by G3, we seek disclosure from Professor Rodger's factual witnesses of
3 material relevant to the matters that will be the subject of their factual evidence, so
4 that we can test that factual evidence by reference to the contemporaneous
5 documents, in the normal course, as one would do in the normal course of litigation.
6 You'll recall that the Tribunal's order on 4 August required -- I can take you to it if
7 necessary -- but that required Professor Rodger to identify the scope of any disclosure
8 he intends to provide by reference, where applicable, to inter alia factual witnesses.
9 That's hearing bundle E, page 308.

10 But on 30 June, Professor Rodger confirmed he doesn't intend to provide any
11 disclosure at this stage.

12 THE CHAIR: Can you just remind me what's the date for the exchange of witness
13 statements?

14 MS BLACKWOOD: 31 October.

15 THE CHAIR: 31 October. Yes.

16 MS SMITH: Rodger's witnesses will be providing their evidence on 31 October. Our
17 witnesses will be providing their reply factual evidence on 28 November.

18 THE CHAIR: Because what's wrong with just not -- following the normal route, which
19 is you get the witness statements. If there are documents referred to in the witness
20 statements, you're entitled to them. Are the parties following the practice that insofar
21 as documents have been shown to the witness, they have to be itemised because --

22 MS SMITH: Yes.

23 THE CHAIR: -- one way -- Look, I'm sympathetic with what you're trying to do. Don't
24 say I'm not sympathetic, but I feel at the moment that the best thing is that you get
25 those witness statements; that they do disclose with the witness statements, the
26 documents referred to in those witness statements. I'll direct -- that's going to be done

1 in any event, okay. And that if there's any other problem with those witness statements
2 and you need further disclosure from that, just write into me and I will give a ruling on
3 it, because I can see that this is a category that you should have, but now probably is
4 not the time to get it.

5 You don't need to worry about waiting for weeks for a ruling, because I now
6 understand what this case is about, what disclosure is about. And as you know from
7 other cases, I'm always very happy to deal with these things on an informal basis
8 where you write into me, say this is what you want, this is what the issues are, "Please
9 give us an indication". I'll give you an indication and if either party is unhappy with the
10 indication, we can have a short hearing. But I'm not unsympathetic to your application,
11 so I'm not saying you're wrong to ask. It's just the timing. There are practical ways of
12 getting around this difficulty.

13 MS SMITH: Sir, that's a very constructive proposal, which I will just double check in
14 a moment, if I may, with those instructing me. But just to clarify, I think it has been
15 agreed by Rodger's lawyers that we do in the Tribunal follow the practice direction and
16 not only should you get disclosure of the documents that are referred to in a witness's
17 statement, but the witness should also provide a list of all documents which he or she
18 has been referred to in order to prepare.

19 THE CHAIR: Exactly, that's quite important.

20 MS SMITH: Yes, exactly. In order to prepare the statement. Just to get that on the
21 record, that that will also be expected and we would ask that perhaps as well as the
22 list, those documents be provided to us at the same time as the witness statement,
23 because of course, they've been put to the witness, they are readily at hand.

24 As regards --

25 THE CHAIR: Unless there's an issue about LPP, but I doubt -- as long as there's no
26 issue about LPP on the last bit --

1 MS SMITH: As regards your proposal, otherwise -- if I could just have one moment.

2 THE CHAIR: Of course. (Pause)

3 MS SMITH: The only slight concern raised by those behind me is the short period
4 between 31 August and 28 November when we need to put in our reply witness
5 statements.

6 THE CHAIR: (Inaudible) because it's got to be -- the documents which are referred to
7 both in the body of the witness statement and that the witness says they've read --

8 MS SMITH: Yes.

9 THE CHAIR: -- needs to be disclosed. Clearly, a decision will need to be made quickly
10 after that, given the timetable. I'm not saying you're not going to get it, it's just let's do
11 it in the proper, normal way -- and I'm not saying this is improper -- but the normal way,
12 and we can move forward on this.

13 MS SMITH: We understand that would also cover documents that are in the control
14 of Rodger's solicitors that'd go to the issues in the witness statements, even if they
15 haven't explicitly referred to either witness.

16 THE CHAIR: That may be a bit of a stretch. I'm not inclined to say that at the moment.
17 Obviously, you can argue that next time around, but I'm not inclined to do that because
18 that's a pretty open-ended suggestion. Let's try and be realistic; is that all right?

19 MS SMITH: Yes, Sir.

20 (2.47 pm)

21 Ruling on request G3 (submitted to the Tribunal for approval)

22 (2.50 pm)

23 THE CHAIR: So that deals with that one.

24 Now, the next one is you want to have -- are you still looking for this? Communications
25 with the class in respect of G1 and G2? Because I think I've dealt with that already;
26 that I'm not inclined to order that. But you'll get the same results because you'll get

1 the documents that have been produced. Can we just see if there's an issue on that?

2 MS SMITH: Sir, by way of update, one of the points we mentioned in the skeleton was

3 a list of those who had opted out. That's been provided now. So we'll take that

4 (overspeaking).

5 THE CHAIR: I was going to order that, in any event. I thought that that was a very

6 sensible --

7 MS SMITH: That has now been (overspeaking).

8 THE CHAIR: But in whatever way you look at it, you want to see what the size of the

9 claim is, and if lots of people have opted out --

10 MS SMITH: Yes, absolutely, Sir.

11 THE CHAIR: Yes.

12

13 Request on identity disclosure

14 Submissions by MS SMITH

15 MS SMITH: That then just leaves the identity of the four app developers.

16 THE CHAIR: So the consultative group have four app developers.

17 MS SMITH: Yes.

18 THE CHAIR: Okay.

19 MS SMITH: As we understand matters. If I can just show you what --

20 THE CHAIR: Well, could I just get my notes first and then see where we are? You

21 may know that this became an issue in a ruling that I gave on Tuesday of this week.

22 I'm not sure if I'm going to have time tonight to finalise that ruling, but I have looked at

23 something similar in relation to this. What I'd like to find out from the CR is that when

24 the consultative group was formed, was the consultative group told that their names

25 would remain confidential? Because in the other case, that was an issue which was,

26 let's say, not irrelevant. Or you don't know?

1 MS BLACKWOOD: Well, I know certainly at the CPO hearing, the issue of
2 confidentiality was raised when the Tribunal said that they wanted to see some
3 evidence of class engagement, and those types of documents I took you to earlier
4 about the fear of reprisals from Google were drawn to the Tribunal's attention.

5 If I could take you to the letter that was sent to the Tribunal following that hearing,
6 you'll see that that point is made again; that we won't be identifying these app
7 developers.

8 THE CHAIR: Yes, it's a similar issue to what I looked at then. If you could sit down,
9 we'll just hear from Google.

10 Can you tell me exactly why you need to know their names? Then I can just note that
11 down.

12 MS SMITH: I think the reason is they are meant to be a representative group. We'd
13 like to know who they are so that we can determine whether they are a representative
14 group. Also, it goes to the question of whether we want to seek further disclosure,
15 further information.

16 I hope this has got through, Sir. I think it was on the face of the skeleton. We have
17 made it clear that although we don't accept that there's merit in the concerns about
18 commercial consequences from Google, we are willing to receive the information as
19 to the names of those four app developers on a non-party, highly confidential basis.

20 THE CHAIR: Sorry, under what?

21 MS SMITH: It's one of the many -- I think it's the highest level of confidentiality in the
22 ring.

23 THE CHAIR: Why(?) in the ring information (overspeaking).

24 MS SMITH: So the effect that has, is it will only be seen by lawyers and experts; it will
25 not be seen by anyone at Google. (Pause)

26 It's a non-party, highly confidential level of the (overspeaking).

1 THE CHAIR: Does the Tribunal know who the members of the group are?

2 MS BLACKWOOD: I don't think the Tribunal has been --

3 THE CHAIR: So it's not been disclosed. (Pause)

4 Yes. Do you want to make any further submissions on this? (Pause)

5 MS SMITH: Yes, that is the point that I think you've got in mind already, Sir; that the

6 Tribunal did indicate and expected an update on this consultative group or whatever.

7 I don't think -- consultative group is perhaps putting it a little formally, but the group of

8 representative developers, the Tribunal made it clear in the CRO.

9 THE CHAIR: When's the update meant to be given to the Tribunal?

10 MS SMITH: I'm not sure a date was set on for -- sorry, perhaps I can find the

11 reference. I don't have the reference to hand to the actual indication from the Tribunal,

12 but I understand it was at the next available hearing.

13 Perhaps I can take you just to double check that I'm getting this clear, because I think

14 it's actually clear on the face of the correspondence from Geradin to the Tribunal. Let

15 me just check that, rather than make various submissions as to the evidence on

16 instructions, which is never a safe thing to do.

17 Yes, Sir. If I could ask you to turn to, bundle D, page 560. 5-6-0.

18 MS BLACKWOOD: Sir, we understand that this is the updated letter that the Tribunal

19 requested and has been provided.

20 THE CHAIR: Okay. Let me just have a quick look.

21 MS SMITH: It's page 560, 5-6-0. The letter of 25 March 2025.

22 THE CHAIR: I know. Let me get that again. I typed in the wrong page. Let me get

23 that. (Pause)

24 So it's only the first bit, is it? It's 2(a).

25 MS SMITH: Sir, yes. Paragraph 1 and paragraph 2(a).

26 THE CHAIR: All right. (Pause)

1 MS SMITH: Oh, sorry. I'm very sorry. This is extremely relevant. Paragraph 3, over
2 the page:

3 "We would welcome the Tribunal's comments on these arrangements. In any event,
4 we will write to the Tribunal with an update on them in due course, and most likely
5 after the quarterly discussion has been established and the CMA has provided any
6 additional suggestions it has." [as read]

7 Then, I think the next relevant letter, Sir, that you should see -- we haven't seen any
8 further correspondence or any further update subsequent to that by the class rep to
9 the Tribunal. There is, however, a relevant letter from when we pressed them on
10 a number of times on this point about what is the update, we did get a letter of
11 10 September, which is on page 532 of the bundle. It starts at page 532. This is
12 a letter of 10 September from Geradin to my instructing solicitors.

13 THE CHAIR: Yes, I've got it.

14 MS SMITH: And on page 536, paragraph 10. (Pause)

15 THE CHAIR: Can I just have that page number again?

16 MS SMITH: 5-3-6. (Pause)

17 Do you have it? Paragraph 10.

18 THE CHAIR: I'm just trying to get it up at the moment.

19 MS SMITH: I work with paper.

20 THE CHAIR: Yes, exactly. Don't worry. This one looks quite small in writing as well.

21 Let me put my glasses on. (Pause)

22 Yes, paragraph -- well, what's the date of this?

23 MS SMITH: This letter starts on page 532. It's 10 September of this year. We have
24 said, "Where is your update?", or words to that effect, and this is Geradin's answer.

25 THE CHAIR: So the first letter you showed me was, what? The 25th of ...?

26 MS SMITH: March.

1 THE CHAIR: I've got that.

2 MS SMITH: And that was to the Tribunal.

3 THE CHAIR: Yes, and then you've got your chaser, saying you want the update.

4 (Pause)

5 MS SMITH: Yes. We've chased a number of times saying, "What's going on?"

6 paragraph 10.

7 THE CHAIR: I've got that now.

8 MS SMITH: "As set out in a letter to the Tribunal and response to [your] request for

9 an update, [Professor Rodger confirms] that [he] will and continue to invite the four

10 app developers to consult with [him] on a quarterly basis. The identity of those is

11 confidential. [Professor Rodger has] inquired as to whether these four app developers

12 would be willing to give disclosure of the documents Google has requested." [as read]

13 So that's another reason why we would like to know who they are and what response

14 he has received from those app developers, and then, be as he will, continue to invite

15 other members of the class to speak to him on a quarterly basis. There are meetings

16 in June and September with those other members of the class:

17 "(c) a meeting with the CMA on 25 April 2025." [as read]

18 Then at paragraph 11, a slightly surprising response, given that Rodger himself said

19 he would provide the Tribunal with a further update in his letter of 25 March.

20 Professor Rodger says, in paragraph 11:

21 "[Professor Rodger does] not consider it is within Google's powers to compel [him] to

22 provide an update to the Tribunal in relation to [his] class engagement arrangements

23 as proposed in paragraph 13 of [your letter]. Should the Tribunal wish to receive an

24 update from [Professor Rodger], then we would of course be happy to provide such

25 an update, either at the CMC listed on 25 September or on written correspondence."

26 [as read]

1 Slightly bizarre, given that they'd written on 25 March to the Tribunal, saying in terms
2 they will provide the Tribunal with a further update. But in any event, that's what they
3 now say.

4 So, Sir, that's the position as far as we know it, as regards the four app developers,
5 and that's the basis on which we ask for them to be identified into this, on a non party,
6 highly confidential basis.

7 THE CHAIR: Thank you very much.

8 (3.01 pm)

9 Ruling on identity disclosure request (submitted to the Tribunal for approval)

10 (3.06 pm)

11 THE CHAIR: I think we've got one more application, which has been resolved, which
12 is the information as to the persons who've opted out from the class. In my view, that
13 was a perfectly reasonable request, and as I understand it, this information has been
14 or will be supplied. Of course, Google need to know what the scope of this claim is,
15 and the potential level of damages, and if there are significant number of opt outs, that
16 may reduce the value of the claim.

17 So I would have granted it, were it not the fact it had been.

18

19 Discussion re rulings

20 MS SMITH: Thank you, Sir.

21 Can I just make one point, in light of the judgment you've handed down about the
22 identification of membership of the consultative group, a point of factual clarification,
23 which is the statement in your judgment that the four app developers were told when
24 they joined the group that their names would be kept confidential. I don't think that
25 point was addressed by my learned friend for Rodger, and there's nothing on the face
26 of the correspondence which says that was the case. And as far as I'm aware, it was

1 not said, in terms at the CRO hearing, that they had been told when they joined the
2 group, these four particular app developers, that their names would be kept
3 confidential. That's just on the basis of what I have seen, and I did not --

4 THE CHAIR: I think can you just clarify?

5 MS BLACKWOOD: Sorry, I didn't catch all of that, but I think the point was made that
6 the Tribunal at the CPO hearing raised the issue about needing engagement with the
7 class. On the transcript, it was made very clear that there were concerns about --

8 THE CHAIR: I know about the concerns; I think this is a different point. I must have
9 misunderstood what you said. I asked you whether at the time they were appointed
10 to the consultative group, it was on the basis that their names would be kept
11 confidential. I thought you confirmed that. If I misunderstood that, then I've made
12 a mistake. (Pause)

13 MS BLACKWOOD: I think a degree of confusion has arisen because there isn't
14 a consultative committee as such. But when those who instructed me reached out to
15 these individuals, to seek to have them engaged, they were told that the
16 communications would be kept confidential and identity confidential. That is what is
17 in the letter to the Tribunal and the update at 2A, where it said he intends to keep the
18 identity of those developers confidential, and that may entail withholding certain details
19 about them, so as to prevent (inaudible) identification.

20 So that was always the understanding that was explained to the Tribunal, as to how it
21 was going to be liaising with these four individuals.

22 THE CHAIR: Let me break it down. The ruling I gave in bulk mail on Tuesday dealt
23 with the scenario where when the members joined the consultative group, it was on
24 the understanding, at least, that their names would be kept confidential. And I'm trying
25 to figure out now whether that is the same situation here or something different, and
26 we just have to see what the answer is.

1 MS BLACKWOOD: I think perhaps some of the difficulties arisen, because this has
2 been elevated to the status of it being a consultative committee to which people are
3 appointed. That is not what the position is. There are four app developers with whom
4 Professor Rodger has been engaging, and so they were not told, "You are being
5 appointed", they've been approached if they would engage, and they were told that
6 this material is going to be kept confidential, and that their engagement was
7 confidential.

8 THE CHAIR: I'm satisfied, I haven't got a commitment, that when they agreed to
9 provide such assistance, it was on the basis that their participation would be kept
10 confidential. If in fact the position is any different, please write to the Tribunal to clarify
11 that, and then we can make sure it's done. Because sometimes when things are done
12 on the hoof, when you dig down, it may not be quite as what was said to the Tribunal.
13 So if you can dig down, find out if, at the end of the day, when they provided this -- let's
14 say "co-operation", whichever way you want to call it -- it was on the understanding
15 that their identities would be kept confidential. If you're able to say that, then it's
16 probably easier to put it in a letter, then it's on the record, rather than on the hoof.

17 I'm not going to change my ruling, because I can see that this is something that may
18 need to be revisited later, for the reasons I've given earlier, but I think it's easier if you
19 write a letter to the Tribunal, let's say by Monday close of business, 4.00 on Monday,
20 just clarifying that point. And really, all I need to know is: was it on the basis that their
21 identities would be kept confidential?

22 That's all. So if someone can remember that, 4.00 on Monday.

23 Is there anything else I need to deal with?

24 MS FITZPATRICK: Sir, so just in light of your rulings, I'd like to make two short points.

25 I don't mean to disrupt those rulings at all. And I'm aware that this is --

26 THE CHAIR: This is their fight.

1 MS FITZPATRICK: Exactly.

2 THE CHAIR: There may be implications for you, but the fact is that, when it comes to
3 G1 and G2, which is the ones that you're concerned with, I'm not ordering that the
4 class representative has those documents in its control.

5 So that's the first point I've made, and I'm not ordering them to write any further letters.

6 So at the moment, there's no order against you to go out and do this. I've already
7 expressed some scepticism, just from past experience; what comes out of these
8 sampling exercises, as opposed to the exercise that's already been done on a more
9 global basis, and given the broad axe principles, I don't expect a precise figure for both
10 pass-on and mitigation, and these are collective proceedings after all. You're looking
11 for what the collective overcharge is, and that once you start going into the detail of
12 individual members, it makes the job of the Tribunal, and for the parties' experts, a lot
13 harder, because of the issue about how accurate is the sampling -- you haven't agreed
14 the sample.

15 All of that takes, from my experience, a long time to work out between the parties. I've
16 had other disputes, we've done at the bar, where it's so hard to even agree what the
17 sample is and how representative they are.

18 So I'm not encouraging anyone to go down this route, when there are other ways of
19 estimating, on a broad axe basis, what they are, and you will notice that other rulings
20 I've made today are consistent with that as well.

21 MS FITZPATRICK: That's well understood, Sir, and I'm grateful for the further
22 explanation. None of what I'm about to say will disturb any of that, just two short points.

23 The first one is that, in Geradin Partners' letter to RPC and Hausfeld, which annexed
24 the mailouts to developers in relation to pass-on, in paragraph 3 of that letter,
25 Professor Rodger said he would:

26 "Update Google and the Tribunal should there be positive responses received." [as

1 read]

2 Now, I think this is implicit, but obviously Ms Coll would also want to be expressly
3 notified, in the event that any positive responses were received, and I trust that's
4 uncontroversial.

5 THE CHAIR: If we put that in the order, then there's no dispute over that, and that's
6 fine.

7 MS FITZPATRICK: Yes, exactly. Thank you.

8 The other point is just a short one to make clear on the transcript. You will already
9 have picked this up from my skeleton, Sir.

10 THE CHAIR: I might not have done; let's see what it is.

11 MS FITZPATRICK: This is the question of representativeness, and all I want to say
12 and make clear, because transcripts from these hearings can be deployed down the
13 line, is that Ms Coll does not accept that a representative sample, whatever that may
14 mean in Professor Rodger's proceedings, is going to be representative of the
15 developers that are relevant in her proceedings. So there is less than a one per cent
16 overlap between those two categories of developers.

17 So, we just don't want it to be said, or in any way held against us, that we didn't stand
18 up at this hearing and make that point, that representativeness means something quite
19 different in the two different claims, and in any event, if developers have come forward
20 to Professor Rodger, that is likely to be because they feel aggrieved because they
21 have perhaps been unable to pass on Google's overcharge. And, of course, the
22 almost half a million developers worldwide, relevant to Ms Coll's claim, may well have
23 been able, more able, much more able, than those developers who've come forward
24 to Professor Rodger on a self-selecting basis to have been able to pass on the
25 overcharge.

26 So I just wanted to put that point on the transcript. Thank you.

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Costs

THE CHAIR: You've done your duty by making that point. Is there anything about costs? Because I'm inclined to say costs in the case. If anyone wants something better than that, then let's hear them.

Submissions by MS BLACKWOOD

MS BLACKWOOD: Yes, Sir. We would say we were predominantly successful party today and obviously with funded claimants in collective proceedings, it matters when costs are run up for hearings. Given that I think we were successful on almost every application that was made today, we would request our costs.

Just for the avoidance of doubt -- I just have to make this point because it's relevant to costs -- Sir, you indicated that you would have ordered the opt-out data. We were asked for that on 18 September, the day before the skeletons went in, and we provided it close of play two days later. We've never objected to that. So that is not something that they won on or was contested; they raised it just before the skeleton went in and we promptly provided it. So that is not something that they have won on either, Sir.

(3.18 pm)

Ruling on costs (submitted to the Tribunal for approval)

(3.20 pm)

THE CHAIR: I would finally like to say that the way that this case has been prepared and the way things have developed is exactly what I would expect from a proper Redfern schedule exercise. The whole purpose of having a Redfern schedule is you identify where you agree and you do not agree and the reasons for that. You then, in an ideal world, have the lawyers to meet to try and thrash out those areas which are agreed and not agreed, and that tends to happen relatively shortly before the hearing. Then at the hearing, the Tribunal just concentrates on those items which are in dispute,

1 and that is exactly what we have done today. So I would like to thank the solicitors
2 and the experts as well as counsel for the way that this hearing has been conducted.
3 It is an example of the higher standards I expect in this Tribunal.
4

5 Disclosure position statements

6 MS FITZPATRICK: Sir, I appreciate that you're trying to conclude. May I beg just two
7 more minutes of the Tribunal's time? This is --

8 THE CHAIR: You have two minutes. Okay, that's fine.

9 Submissions by MS FITZPATRICK

10 MS FITZPATRICK: Thank you. I just want to raise one further point, which rises out
11 of the disclosure position statements which you ordered, which --

12 THE CHAIR: That's very helpful. Look, I should have said something about those
13 position statements. They make my job so much easier, because coming into this
14 relatively new, I thought the best thing is to ask for position statements so I know
15 what's happened. Because when you decide what disclosure should be ordered, you
16 need to know what's happened in the past, and that, to a large extent, has directed
17 some of the rulings I've given today, what's happened in the past. Yes.

18 So what would you like to say about your statement? Obviously, I've read it.
19 I specifically asked you to provide one after I saw the one of the two parties in this
20 case.

21 MS FITZPATRICK: Yes. Google's statement was the first notification that Ms Coll
22 has had of the astonishing scale of Google's disclosure costs, which you, Sir, will have
23 noted, run to over £8 million. I mentioned this in my skeleton, because it's a staggering
24 figure.

25 Ms Coll, of course, as a class representative under the rules, has to ensure that her
26 insurance covers her ability to pay any adverse costs that are ordered, and so she's

1 | keen to understand how much of that £8 million figure is attributable to the Coll
2 | proceedings.

3 | We tried to pursue this in correspondence in the hope that it could be resolved. We
4 | understand that the figure, the broken out figure of the Coll proceedings should be
5 | readily available because it would have been accounted for separately, prior to the
6 | consolidation.

7 | We received a letter yesterday evening, which didn't say that Google couldn't provide
8 | the breakdown, but just that it didn't consider that it was necessary or appropriate to
9 | provide it now. So our first reaction, Sir, was to seek to make an application on the
10 | papers not to be decided today, but just to elicit this figure from Google, which it
11 | obviously has at its disposal.

12 | But I was wondering, since we do have a couple of minutes now, whether you'd be
13 | willing to make a direction that Google provide that figure, ie the proportion of the
14 | costs, or the amount of costs that are attributable to the Coll proceedings, within
15 | a reasonable period of, say, two weeks, so that Ms Coll can understand her costs
16 | position for conversations with her insurer.

17 | THE CHAIR: Sometimes these things sound easier than they do. So the first point I'd
18 | like to make is that you may be astonished by the level of costs. I've been around on
19 | this earth long enough not to be astonished by anything. I've felt things in my life that
20 | I would never hope ever happens to you. So when you ask me -- I'm not astonished
21 | by anything. So that's the first point.

22 | The second, is the level of costs that I've seen, frankly, doesn't surprise me at all
23 | compared to other exercises that I've been involved, both as counsel and as a judge
24 | and my experience in disclosure. So I'm not astonished by the figures that have been
25 | given.

26 | But the third point you want to make is that, look, you need to know what your exposure

1 is for an adverse costs order. But I don't think what you're asking for is particularly
2 easy if you want something that's precise. I think that what they can probably do is
3 give you a figure, possibly to the nearest million as to where you are, so you can
4 understand a ballpark. I'm quite happy to direct that, so you know where you are. But
5 what I don't want to happen is that Google would have to do what could be quite
6 a difficult exercise, allocating the costs against the different cases.

7 Now, let's see what counsel for Google say to that, because I understand the point
8 you're making, but I'm not, frankly, surprised about the figures being given.

9 Submissions by MS SMITH

10 MS SMITH: Sir, perhaps I can hand up the letter that my learned friend referred to
11 that I don't think you've got. The letter where we responded to Coll's request.

12 THE CHAIR: Well, let's just have a quick look at it.

13 MS SMITH: Thanks. (Pause)

14 Leaving to one side my first point, which is it's not clear why this is required at this
15 stage nor what the basis of Coll's application is, but I make the point which is made in
16 paragraph 7 of this letter.

17 THE CHAIR: Let's have a look at it. One second. (Pause)

18 Yes, but given what I've said, that I would have -- I haven't seen this letter before.
19 You've probably given a bit more precision than I would have directed. You said 3.9,
20 I said --

21 MS SMITH: Oh, no, sorry, my Lord, 3.9 is the costs that Coll estimates that they have
22 incurred --

23 THE CHAIR: Oh, that's --

24 MS SMITH: -- as regards disclosure.

25 THE CHAIR: Where's your costs?

26 MS SMITH: Our costs are -- well, what we have said is that the £8 million is across

1 all three sets of proceedings --

2 THE CHAIR: I understand that, yes.

3 MS SMITH: -- that have been ongoing since about 2020. It will be a substantial
4 exercise as, Sir, you'll appreciate, to break down the costs in any detail.

5 THE CHAIR: I'm not required (overspeaking).

6 MS SMITH: We estimate a substantial proportion are being incurred in relation to the
7 Coll proceedings. We are happy to provide the sort of estimate as regards the
8 closest million that your Lordship indicated. But in that regard, we would draw
9 your Lordship's attention to the points at paragraphs 10 through to 12 of our letter,
10 which is Coll has outstanding formal obligations to keep the Tribunal properly informed
11 as to its litigation budget, and the certification being an ongoing issue and having
12 a litigation budget which is appropriately revised as the proceedings develop is
13 irrelevant.

14 We've requested on a number of occasions that Coll provide a revised litigation budget
15 since the ruling on the proceedings being heard together on 30 April. We still await
16 that revised litigation budget, and we would ask that if the Tribunal would also order
17 Coll to provide a revised litigation budget to it within a short period of time.

18 As regards litigation funding, we also make the point in paragraph 12 that unlike in
19 other proceedings, the Coll class representative has not provided publicly on their
20 claim website or otherwise the litigation funding agreement or the arrangements that
21 they've made for litigation funding as other class representatives have.

22 So again, we would ask the class representative to provide that information, which
23 should be open to public scrutiny as envisaged by this Tribunal's regime, so --

24 THE CHAIR: We're moving into other things. I'm keen to sort of not allow the
25 two minutes I gave to be half an hour. But, look, what I can say about litigation budgets
26 is -- well, certainly the ones I'm dealing with -- I tend to like to have the litigation budget,

1 | even if it's just sort of very general, so I know where the direction of travel is.

2 | So I'm not going to order that they provide a revised litigation budget, but I would
3 | encourage them at the next hearing to provide an updated litigation budget. Because
4 | the Tribunal is a supervisory jurisdiction, we like to know where they're going. But my
5 | practice is I don't cut it down and say, you know, "You're not allowed to spend this
6 | money". But I do need to know, because when it comes to settlement, if there is
7 | a settlement, the amount of money that's been taken up in circumstances where the
8 | funder is paid or claims to be payable by reference to the outlay, it's important to know
9 | what the outlay is when it comes to approving a settlement.

10 | So it's useful information. I'm not ordering it, but I do think it would be helpful for the
11 | Tribunal if, at the next CMC, we have a revised litigation budget and that budget is
12 | done on like terms as the previous budget, and it shows any differences between the
13 | previous one and the current one. So I'm not going to order it, but you've heard what
14 | I say about that as.

15 | As regards the figures, Ms Smith has said that they're quite happy to provide it on
16 | a broad basis for basis to the Malek suggestion of one million. I think that's probably
17 | all I'm going to do, because I really appreciate that although it sounds simple, it's not
18 | simple when you've got multiple defendants and multiple proceedings, and multiple
19 | claimants and multiple proceedings. Sometimes it just doesn't work like that and that.
20 | But I do appreciate you want to know what your exposure is, because you need to
21 | know your exposure to make sure that you've got adequate ATE cover, and I'm sure
22 | that Google want you to have adequate ATE cover. So it's not in its interest not to
23 | provide you with at least the broad figures, so you can make sure you've got adequate
24 | ATE cover.

25 | MS SMITH: Yes, and on that point, and then I promise I will sit down.

26 | THE CHAIR: Thank you.

1 MS SMITH: We would ask, given the astonishment expressed by Coll's counsel and
2 the indications that you made, Sir, about supervisory jurisdiction and ATE insurance,
3 we would welcome confirmation from Coll once they have received this round figure
4 from us, that they do, in fact, have enough ATE insurance in place in light of the costs
5 incurred.

6 THE CHAIR: I'm sure that what will happen is the next CMC, an agenda item will be
7 covering this type of thing. I don't know what your practice is, but my practice is
8 normally to have these things on the -- I look at funding and I look at the costs being
9 incurred, the litigation plan and the budgets. That's my routine practice on CMCs. As
10 long as everyone knows what's expected, then it's going to be fine.

11 MS FITZPATRICK: I'm very grateful, Sir, and what you've said on the budget is heard
12 and understood. There is one item for the budget which can't be settled upon until we
13 know the length of the trial, which is something that Google has resisted agreeing at
14 previous CMCs. So I just wanted to make sure that I put on the record that that is an
15 outstanding item, though of course, we'll try our best to be open about the budget in
16 due course once that item is settled.

17 THE CHAIR: It's not for me to make a direction at a disclosure hearing about the
18 length of the trial; I'd need to perhaps know a bit more about the proceedings to take
19 a view as to what the length should be.

20 All I can say from my point of view as the Chairman, that if one should try and aim to
21 have a trial that is very efficient and not too long, and that parties can make it worse
22 by filing really long reports, being contentious and partisan, and overcomplicating
23 arguments and duplicative submissions.

24 It's not going to happen on any of my cases, but I hope that in this case, the parties
25 bear in mind that these cases have to be tried. They have to be triable and
26 comprehensible for the Tribunal. I'm not saying anything today was incomprehensible;

1 everything today has been very clear. But by the time you get to trial, you know,
2 everything is so contentious. If everyone wants to fight every point to the death, these
3 cases are going to be very long, and so I would hope when it comes to the parties
4 looking at things sensibly, you try and say, "Well, how can we efficiently get a fair
5 outcome without having a too long trial?"

6 So I can't really say any more than that. So, look, I'll rise now, and this may just be
7 a guest appearance and you'll have someone else at the next hearing, but it does
8 make sense if there's any issues of disclosure arising out of anything that is being
9 dealt with today, it comes back to me, and I'm quite happy to do anything to assist the
10 parties in resolving issues of disclosure.

11 Everyone knows I've got no skin in the game on this; I really don't mind who wins and
12 who loses. I've got no prejudice against Google and I've got no favouritism towards
13 the CR. I don't know what the ultimate answer is going to be in this case. It's one of
14 those ones that's probably going to have to be tried, and that's how it's going to be
15 resolved. If the parties are able to settle it, that's even better.

16 But it's not possible at this stage for me to take any view on the merits. I can see on
17 both sides there's a lot of merit in what everyone is saying and some of the questions,
18 I can see what the answer could well be. But there are others where I say I really don't
19 know where that is going to go. But that's just a general observation that people may
20 want to take into account, that this is not one of those cases where you say it's an
21 obvious winner, it's an obvious loser. It's not one of those; it's one where -- on the
22 material I've seen so far -- everything's up for grabs. So I'll rise now.

23 (3.37 pm)

24 (The hearing concluded)