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IN THE COMPETITION

Case No:1673/7/7/24, 1408/7/7/22

1378/5/7/20

APPEAL

TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 30th January

Before:
The Honourable Mr Justice Morris
Tim Frazer
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Professor Barry Rodger

Class Representative

- And -

Elizabeth Coll

Class Representative

- And -

Epic Games, Inc. & Others

Claimants

- V -

Alphabet Inc. & Others
Google LLC & Others

Defendants

A P P E A R A N C E S

David Scannell KC and Daisy Mackersie on behalf of Epic (Instructed by Norton Rose
Fulbright LLP)

Matthew Kennedy on behalf of Elizabeth Coll (Instructed by Hausfeld)

Annelise Blackwood on behalf of Professor Barry Rodger (Instructed by Geradin Partners)

Kassie Smith KC and Jack Williams on behalf of Google (Instructed by RPC)

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Friday, 30 January 2026

1 (10.30 am)

2 Opening remarks

3 THE CHAIR: People are joining us via the live stream on our website so I must start
4 therefore with the customary warning. An official recording is being made and an
5 authorised transcript will be produced but it is strictly prohibited for anyone else to
6 make an unauthorised recording, whether audio or visual, of the proceedings, and
7 breach of that provision is punishable as contempt of court. Thank you very much.

8 Yes, good morning, Mr Scannell.

9 MR SCANNELL: My Lord, good morning. I appear for Epic with Ms Mackersie. Given
10 the number of legal representatives before the Tribunal this morning, I will let others
11 introduce themselves.

12 This is the fifth joint case management conference following the Tribunal's order in
13 March last year that the Epic, Coll and Rodger cases be jointly case managed. There
14 is an agenda for today's hearing. It is in core bundle, tab 2, page 8.

15 THE CHAIR: Yes. Mr Scannell, before you start, having raised the agenda, can I just
16 tell you how we are thinking of proceeding.

17 MR SCANNELL: That would be very helpful.

18 THE CHAIR: You can obviously, all of you, respond. If there are any housekeeping
19 matters -- certainly some additional papers have come in -- they can be dealt with as
20 well.

21 Looking at the agenda, we would propose proceeding with item 1, which is the claim
22 form amendments issue. In relation to that, we are going to suggest each of the
23 claimants make their submissions in respect of their amendments, and then Ms Smith
24 responds compendiously to all of them, partly to do with some overlap in issues.

25 Then we would proceed going to issues 2a(1) and (2), the first of which is disclosure
26 in relation to the Rodger factual witness statements, which I understand there may not

1 be much dispute about.

2 Then there is the Sensor Tower data issue, which although there appears to be
3 agreement in relation to it, we, ourselves, I think, have some questions about that and
4 we think that might need to be gone into.

5 Then the second two aspects of disclosure, which is essentially the Redfern Schedule,
6 we are going to put to the end of proceedings, and we will only deal with them if there
7 is time to deal with them all compendiously together. We will see how we go with that,
8 but at the moment we can see the possibility that we won't be able to deal with those
9 today.

10 So that's items 2a(1) and (2). Then we would deal with item 3, the three issues there.
11 Or effectively the two issues there in relation to the trial estimate and the updated
12 litigation budgets.

13 In relation to those issues, 2 and 3, we will hear the parties in turn. Again, I suspect
14 when we get to 3a and b we might hear the claimants together and then hear Google
15 compendiously.

16 So that's how we propose proceeding. Obviously if you have any observations to
17 make on that, we will hear them.

18 MR SCANNELL: I am very grateful for that, my Lord Chairman.

19 It will come as no surprise, I think, to the Tribunal to say that that accords with the
20 approach that we had rather assumed that the Tribunal would ultimately be driven to
21 take, given the number of agenda items, in particular dealing with the disclosure at the
22 very end if there is time.

23 THE CHAIR: Yes.

24 MR KENNEDY: Matthew Kennedy for Ms Coll, sir. Just one piece of housekeeping,
25 which is that we provided a further draft re-re-amended claim form in the Coll
26 proceedings late last night. I am hoping that a hard copy has made its way to you.

1 I will use that as the basis for my application.

2 THE CHAIR: Yes, we do have it and there was a covering letter, which I have seen -
3 - the letter and the re-re-amended or the further version -- I've seen it briefly this
4 morning. I have not really looked at it in any detail, but yes, I am aware of it.

5 There is also a slightly different version of the Rodger amended claim form which I am
6 gathering has confidential markings on it. That may be no different in substance from
7 what is in the bundle otherwise.

8 MS BLACKWOOD: I am Anneliese Blackwood for Professor Rodger. Yes,
9 I understand it is confidentiality markings that have been updated and not the
10 substance of the amendments.

11 MR KENNEDY: Sir, on my application to amend the claim form, I am obviously happy
12 to take you through what we have done to meet Google's concerns as expressed in
13 correspondence, but we don't know whether things have fallen away. So it may be
14 that you would wish to hear Ms Smith before hearing me to find out what remains in
15 issue, whether certain matters have fallen away, and then I can respond to any extant
16 objections. But I am in your hands, sir.

17 THE CHAIR: That may add a complication. I am not really on top of - I mean, I have
18 picked up something which I am a little bit confused about. You have -withdrawn - you
19 have taken bits out that raised the Evans point but reserved your rights in relation to it
20 later. But the Evans point arises in any event on the other two claimants. I would
21 imagine we will end up taking a uniform approach about whether these amendments
22 which raise the Evans point should be allowed in or not allowed in.

23 Again, my impression from the letter is that you have sort of rowed back a bit and
24 taken them out for the time being. Maybe let's see how we go. I think it is probably
25 better still to hear each of the claimants first. Perhaps we will hear Epic and Rodger
26 and then you and we can see where we go.

1 MR KENNEDY: Thank you, sir.

2 THE CHAIR: Yes, okay.

3 Yes.

4 Submissions by MR SCANNELL

5 MR SCANNELL: Before I turn to the Epic amendments, there are four preliminary
6 points to make.

7 The first is that the Tribunal may have seen from Mr Tricker's fourth witness statement
8 in support of the amendment application that the proposed amendments fall into five
9 categories. The first relates to the CMA's decision, published in October, that Google
10 has strategic market status within the meaning of the Digital Markets, Competition and
11 Consumers Act. The second relates to Google's decision to launch a so-called User
12 Choice Billing pilot in the UK for non-gaming apps. The third relates to Google's anti-
13 steering provisions. The fourth category comprises sundry updating and clarificatory
14 amendments; and the fifth comprises amendments which align the pleading to the
15 expert evidence Epic filed in December.

16 Now, as we understand it, this last category of amendments is not objected to by
17 Google, subject to its delay point which it makes in respect of the amendments
18 generally.

19 The second point is that contrary to what is said against us by Google, in particular in
20 the witness statement of Mr Cran, we don't accept that any of the amendments that
21 we are proposing to make are substantial or, to the extent that that elucidates the
22 description, substantial and significant.

23 You will want to reserve judgment on that until I have shown you the amendments,
24 I understand that and I will do that in a moment, but by way of a preliminary contextual
25 remark the proposed amendments simply seek to update the existing pleading to
26 account for market developments, including regulatory developments and

1 developments in Google's own business practices and policies and the evidence now
2 before the Tribunal. They don't materially add to the scope of the claims.

3 Those developments moreover are developments which are very well known to
4 Google. The regulatory developments comprise administrative processes in which
5 Google has fully and actively participated. The business developments are
6 developments within Google's own business and the factual additions arise from
7 Google's evidence and not just ours.

8 The third preliminary point relates to prejudice. Mr Cran of RPC claims that the
9 amendments would cause significant prejudice to Google. He doesn't substantiate
10 that assertion, and I would suggest that it follows from the fact that the amendments
11 do not materially alter the scope of our claims that it cannot be substantiated. Google
12 can, of course, plead back to these amendments. There is ample time for that. It may
13 decide not to, given that the amendments are not expansive. But if it does, the costs
14 of, and occasioned by, that will be borne by Epic in the usual way.

15 As to evidence, each one of the amendments categories has already been canvassed,
16 either in the factual or expert evidence already before the Tribunal in the Epic case --
17 as one would expect, given that they lie within the scope of the existing pleaded
18 issues -- or in the factual and expert evidence filed by the witnesses in Ms Coll's case,
19 and in Professor Rodger's case. That evidence, of course, stands as evidence in the
20 Epic case too under the extant case management orders.

21 The only point that Google makes that touches in the loosest possible sense on the
22 question of prejudice is whether or not Google might have to give further disclosure in
23 light of the amendments and whether Google would have to apply to adduce further
24 factual evidence or have an automatic right to do so. Neither of those points amount
25 to a reason why the amendments should not be allowed, of course.

26 As to the answers to the questions, Epic has explained to Google in correspondence

1 that it does not consider that any of these amendments will necessitate further
2 disclosure, but without having seen Google's defence to the amendments, if any, Epic
3 can't safely dismiss that possibility entirely.

4 The same goes for factual evidence. So far as Epic is concerned, no further factual
5 evidence is required, but Google may wish to adduce more. If it does, its request will
6 be considered in the usual way.

7 The final preliminary point, if I may, my Lord Chairman, relates to delay and Google's
8 allegation that Epic's proposed amendments are too late and therefore shouldn't be
9 allowed.

10 It is very important for the Tribunal to understand that Google attaches that description
11 "late" to the amendments only by reference to the time passing between Epic
12 becoming aware of a relevant new fact or matter and today's date.

13 It doesn't characterise the amendments as late by reference to the remaining time
14 between now and trial in 10 months' time. Ultimately, I would suggest that it is, of
15 course, the latter end of the timeline that really counts and there isn't a point for Google
16 at that end.

17 THE CHAIR: You say that such case law there is on late amendments tends to be
18 cases where people are amending on the door of the trial or just before trial. That's
19 what you say late means?

20 MR SCANNELL: Exactly.

21 THE CHAIR: Yes. Delay and late might be slightly different concepts but there we
22 are.

23 MR SCANNELL: Yes. There are two ends to the delay telescope.

24 THE CHAIR: Yes.

25 MR SCANNELL: Now as to the passage of time between Epic becoming aware of
26 facts and 10 November last year, which is when Epic sought Google's consent to the

1 | amendments, the sequence of events is important.

2 | When the CMA launched the SMS investigation against Google on 23 January last
3 | year, it announced on the same day, as it was required to do under the Digital Markets,
4 | Competition and Consumers Act, that the final decision would be taken on 22 October
5 | last year.

6 | Epic took the view that it was premature at that time to amend to refer to the SMS
7 | investigation, because that would have necessitated a yet further amendment on or
8 | after 22 October 2025 to reflect its outcome. The approach it therefore took -- and
9 | I would suggest that this was a sensible approach -- was to wait until the decision
10 | appeared and then to plead to the outcome, along with any further developments that
11 | had happened in the meantime.

12 | When the decision was duly published on 22 October, Epic immediately drafted the
13 | amendments and sought Google's consent on 10 November. There was no delay.
14 | Given that none of the other amendments altered the scope of the proceedings, or the
15 | factual and expert evidence likely to be required for trial, that approach was, in my
16 | submission, unimpeachable.

17 | The UCB amendment, which I will come to, which seems to cause Google particular
18 | offence, was in any event pleaded to in the gap between the announcement of the
19 | SMS investigation and its publication, and that's because it was pleaded to by way of
20 | reply to the defence.

21 | THE CHAIR: Pled by you in your reply.

22 | MR SCANNELL: Pled by us in our reply, because it was pleaded by Google four
23 | days after the launch in its defence.

24 | THE CHAIR: Okay.

25 | MR SCANNELL: Those preliminary remarks in mind, could I ask you to turn up the
26 | draft amended pleading.

1 THE CHAIR: Yes, of course.

2 MR SCANNELL: That is in the core bundle, tab 5, at page 16.

3 THE CHAIR: Yes.

4 MR SCANNELL: Or, if preferred, it is also in bundle B, at tab 4, page 160. I propose

5 to use the B references in the first instance, but each time I refer to a paragraph I am

6 going to give you the internal page number and the core bundle --

7 THE CHAIR: I've got the core bundle.

8 MR SCANNELL: I think we are covered, yes.

9 THE CHAIR: You do it in whichever way, as long as I can follow it.

10 MR SCANNELL: Yes. The proposed amendments I will be drawing to your attention

11 appear in pink.

12 We begin on page 202 of the B bundle, page 58 of the core.

13 THE CHAIR: Yes.

14 MR SCANNELL: Paragraphs 114G and 114H comprise the category 1 amendments

15 relating to the SMS decision.

16 If I can just paraphrase what is said there, those paragraphs explain that the CMA

17 published the decision on 22 October 2025, following an administrative process in

18 which Google participated.

19 The CMA concluded that Google has substantial and entrenched market power in

20 respect of its own mobile platform as defined in the decision and found also that

21 between 2020 and 2024, 90 to 100 per cent of first-time native app downloads were

22 downloads from the Google Play Store.

23 If I could ask you, please, to keep your finger on this page and turn over to internal

24 page 48 of the draft pleading, core bundle-page 63.

25 THE CHAIR: Yes.

26 MR SCANNELL: At paragraph 129(b), you will see that the same point as to the

1 proportion of native app downloads is repeated in the context of the Android app
2 distribution market.

3 The CMA's SMS decision is obviously an important development in the
4 United Kingdom. It strengthens the basis of Epic's belief that the facts and allegations
5 it makes against Google are true and it is a conventional factual inclusion in a pleading
6 of this nature. It is also consistent with the extant references in the pleading to other
7 administrative proceedings that have considered issues which are similar to issues
8 arising in the present proceedings.

9 THE CHAIR: Okay. So, there are already in the pleadings references to other relevant
10 decisions?

11 MR SCANNELL: There are.

12 THE CHAIR: They have not been struck out or there has been no application to strike
13 them out?

14 MR SCANNELL: No.

15 THE CHAIR: Fine, okay.

16 MR SCANNELL: They are pleaded to, lest there be any doubt in this regard, because
17 they are part of the factual context before which this Tribunal will have to make its
18 multiple assessments. They are not pleaded to because it is alleged that they must
19 be taken into account by the Tribunal in determining the likelihood that the allegations
20 made by Epic are established.

21 THE CHAIR: Can you give me that submission again? They are not?

22 MR SCANNELL: They are not pleaded to because it's alleged that they must be taken
23 into account by the Tribunal in determining the likelihood that the allegations we make
24 are established. They are pleaded to --

25 THE CHAIR: One moment. They are pleaded because?

26 MR SCANNELL: Because they are part of the factual context of the case.

1 THE CHAIR: Whatever that means.

2 MR SCANNELL: I will return to that point in a moment.

3 THE CHAIR: One minute.

4 Carry on.

5 MR SCANNELL: Before I do, no question of prejudice arises from these amendments
6 and Google doesn't say otherwise. In particular, the decision by the CMA has already
7 been canvassed extensively by the experts.

8 Ms McCall, on behalf of Epic, refers to the decision in the report she has filed pursuant
9 to the Tribunal's orders of 4 August and 27 August last year. And Professor Fletcher,
10 on behalf of the Rodger class representative likewise considers the SMS decision at
11 length in her second expert report.

12 Google will no doubt respond to that expert evidence when it serves its responsive
13 expert evidence on 1 April.

14 As to disclosure, under the directions to trial order the Tribunal made following the 1
15 May CMC last year, Google has already disclosed to Epic all of the documents
16 pertaining to the SMS investigation that it had already disclosed to Ms Coll, so no
17 further disclosure burden arises.

18 Finally, as to factual evidence --

19 THE CHAIR: Just on that issue, just give me a flavour of what Google has disclosed
20 in that context.

21 MR SCANNELL: These were the documents that were generated by the investigation
22 and Google's participation in that investigation.

23 THE CHAIR: Okay. So that includes things that they submitted to the CMA, does it?

24 MR SCANNELL: I can't immediately provide an answer, a safe answer, to that
25 question, Mr Chairman.

26 THE CHAIR: All right. Okay.

1 MR SCANNELL: I was going to mention --

2 THE CHAIR: Yes, carry on.

3 MR SCANNELL: -- briefly, the factual evidence.

4 Epic has confirmed that it does not anticipate objecting to any application by Google
5 to adduce factual evidence limited to the SMS decision, should it wish to do so.

6 Before I leave that first category of amendments then, one of the objections that
7 Google makes to it is that the amendment is inadmissible by reason of FX, the
8 Supreme Court's recent judgment in *Evans v Barclays Bank*.

9 THE CHAIR: Yes.

10 MR SCANNELL: We don't accept that. The Supreme Court in *Evans* was considering
11 the same question that was considered by the Court of Appeal during the
12 Second World War in *Hollington v Hewthorn*.

13 THE CHAIR: Yes.

14 MR SCANNELL: And more recently by this Tribunal in *Qualcomm*. That question was
15 whether a tribunal responsible for finding facts should base its finding on its own
16 evaluation of the evidence and not on the evaluation of someone else who is not the
17 relevant decision maker.

18 That's actually a narrow question. It doesn't, in particular, overlap with the question
19 whether in reaching conclusions on matters of expertise the Tribunal may have regard
20 to expert evaluations undertaken elsewhere. It doesn't detract from the principle that
21 earlier proceedings may generate an issue estoppel such that a party to the current
22 proceedings is bound not to question them; and it does not detract from the principles
23 governing abuse of process.

24 THE CHAIR: Yes.

25 MR SCANNELL: Nor, in particular, we say, does the Supreme Court's judgment alter
26 the elementary rules of pleading a statement of case. There is a fundamental

1 difference between a question whether a litigant whose statement of case must be
2 supported by a statement of truth and who perforce is pleading before disclosure and
3 witness evidence is given, may plead to findings of fact even if they are non-expert
4 findings by a person before whom none of the other litigants in the case had the
5 opportunity to appear, in order simply to particularise a claim and establish a belief
6 that the claim is well founded.

7 On the other hand, the question whether at trial those findings of fact can be weighed
8 in the balance by the court or tribunal in deciding whether it should make the same
9 findings.

10 THE CHAIR: Just a minute. Okay.

11 MR SCANNELL: As a general principle, pleas -- that is pleas without an "e" at the
12 end -- are neither admissible nor inadmissible in evidence. They are either arguable,
13 in which case they may proceed, or they are unarguable, in which case they are apt
14 to be struck out. The gist of this point I am making is that it is a fallacy to mix the two.
15 It follows from all of that that the question whether any findings made by the CMA in
16 its SMS decision can ultimately be weighed in the balance by this Tribunal, at trial,
17 when it comes to consider whether the same findings should be made by it, is
18 a question to be determined at trial. There is a great deal to be said about what Evans
19 v Barclays Bank actually says at that time, but this is not that time.

20 THE CHAIR: I just want to be clear that -- I mean, there is the fact of the decision by
21 the CMA. That's a fact. There are, it seems to me, as you have pleaded it, 114G
22 pleads the fact of the decision; 114H pleads a finding that the CMA made of substantial
23 entrenched market power, number one, which is an evaluative judgment. It's not
24 a finding of fact. I mean it's either a secondary finding of fact or it is an evaluative
25 judgment.

26 Then you plead the finding, which was a finding of fact about the 90 to 100 per cent.

1 Then it is clear that at page 63, 129(b), you plead that fact, the 90 and 100 per cent,
2 and you rely on that fact as found. So, there are three different stages, aren't there?

3 One is the fact of the actual decision, two is a finding of substantial entrenched market
4 power and three is the pure finding of primary fact about 90 to 100 per cent.

5 MR SCANNELL: Yes.

6 THE CHAIR: Now, I absolutely hear what you say about it is not for now for us to
7 make any decision on how that fits in with Evans.

8 MR SCANNELL: Yes.

9 THE CHAIR: But I would just be interested to know, you are not going to tell us at trial
10 that we are bound by those findings?

11 MR SCANNELL: No.

12 THE CHAIR: But you say they are weighed in the balance. I would just like to
13 understand a bit more what that means.

14 So, we look at the evidence, do we, and we say: well, you adduce your evidence about
15 dominance, which presumably is different anyway -- and you are going to say what, in
16 relation to -- I mean, I am not going to pin you down but I am just interested.

17 You are going to say what in relation to the CMA's finding? You say weighed in the
18 balance and another factor, by the way they found -- I mean let's say the 90 to
19 100 per cent.

20 MR SCANNELL: Yes.

21 THE CHAIR: Here is our evidence before you, it shows 90 to 100 per cent and, by the
22 way, the CMA found the same.

23 MR SCANNELL: Everything that you have just said, my Lord Chairman, is correct,
24 except for that very last bit "and by the way."

25 THE CHAIR: All right.

26 MR SCANNELL: We are not permitted to say, "and by the way."

1 THE CHAIR: You might say you are. I don't know.

2 MR SCANNELL: Yes. Subject to all of those --

3 THE CHAIR: If it's the same party you might have an abuse of process argument.

4 I don't know.

5 MR SCANNELL: Yes, yes.

6 THE CHAIR: Okay. So, carry on.

7 MR SCANNELL: I am not going to unpack now, because tempting though it is, all of

8 the nuances of Evans v Barclays Bank, whether there is a distinction between

9 a process that parties before the Tribunal actually participated in --

10 THE CHAIR: Yes.

11 MR SCANNELL: -- and processes where they didn't participate and so on. That's all

12 for trial.

13 THE CHAIR: Your main point is that to the extent that this material is admissible / we

14 can rely on it, that's not for now. Because this is --

15 MR SCANNELL: Absolutely.

16 THE CHAIR: Your main point is this is a pleading issue and not an admissibility issue.

17 MR SCANNELL: Yes. And we are allowed in pleading our case, just to respond

18 specifically to your question about paragraph 129(b) --

19 THE CHAIR: Yes.

20 MR SCANNELL: -- a party must surely be permitted to plead an allegation.

21 THE CHAIR: Yes, the factual allegation of the 90 --

22 MR SCANNELL: Such as that the relevant percentage is 90 to 100 per cent.

23 THE CHAIR: Absolutely.

24 MR SCANNELL: And what is informing that allegation is knowledge that it's already

25 been found by somebody else. But when it comes to trial the position might be entirely

26 different. Then that allegation has to be built up on its own and critically the Tribunal

1 has to evaluate all of the evidence, not taking into account inadmissible evidence, and
2 reach a conclusion of its own as to whether that is fair.

3 THE CHAIR: I mean it is paragraph 114H, if anything, that Google would object to in
4 principle.

5 MR SCANNELL: Yes.

6 THE CHAIR: And you say that we will get to that later, as to whether or not we are
7 allowed to see or whether or not we should see paragraph 114H.

8 MR SCANNELL: Just taking a step back and thinking about it. It simply could not be
9 right that a party is somehow prevented from making an allegation, just inviting a court
10 or tribunal to agree with him that that allegation is well founded, just because
11 a regulator has considered that question and reached a finding on it in another forum.
12 Of course one can make the same allegation, but what Evans is dealing with is how is
13 the court or tribunal before which that pleading party ultimately appears to evaluate
14 the allegation.

15 THE CHAIR: Okay.

16 MR SCANNELL: Is that decision-making forum allowed to take account of the fact
17 that the same point was made before? That's a different question.

18 THE CHAIR: All right. I think I have your submissions on what I call the Evans point.

19 MR SCANNELL: Can I move in that case to the category 2 amendments.

20 THE CHAIR: That's UCB, is it?

21 MR SCANNELL: That's UCB.

22 THE CHAIR: Yes.

23 MR SCANNELL: That happened on 29 March last year. Under that scheme
24 developers of apps distributed via the Google Play Store can offer users of the apps
25 an alternative billing system alongside Google's billing system to process purchases
26 of digital content that they make in the app.

1 If developers do make an alternative payment system available, they still have to pay
2 a commission to Google every time a user makes a purchase of digital content within
3 the app. The general rate of that commission will be 26 per cent if the user opts for
4 the alternative system and 30 per cent if the user opts for Google's system and that is
5 subject to thresholds which are already set out in the existing pleadings.

6 I've explained to the Tribunal before, particularly in the context of the June hearing,
7 how the User Choice Billing intercepts with the issues in the case, in particular the
8 tying claim that we make that Google ties the Play Store to use of its billing system,
9 and our argument that Google's commissions are excessive and unfair and therefore
10 abusive.

11 I don't propose to go over that now.

12 THE CHAIR: No.

13 MR SCANNELL: Epic has consistently pleaded to such facts as have become known
14 to it about UCB, User Choice Billing, once those facts have become known. So the
15 existing claim form already addresses UCB in various respects. It addresses the offer
16 that Google made to the CMA in 2023 to launch UCB in the UK as a means of fending
17 off the CMA's investigation launched in 2022 into Google's market conduct. That is
18 paragraphs 114A and B.

19 THE CHAIR: 114?

20 MR SCANNELL: 114A to B. Which is in core page 55.

21 THE CHAIR: I am just turning it up, okay, yes.

22 MR SCANNELL: The existing pleading also addresses similar offers Google made to
23 the European Commission in 2022 which were implemented in 2024, in India and
24 South Korea. That is over the page at 114C, core page 56.

25 THE CHAIR: Yes.

26 MR SCANNELL: At core page 66, at paragraph 135(b) of the existing pleading, Epic

1 sets out its understanding that take up of UCB by developers has been very low in the
2 jurisdictions where Google has permitted it.

3 As to the launch of the UCB pilot --

4 THE CHAIR: So that was 135(b). I am just looking at the colour coding.

5 MR SCANNELL: Yes. So that's purple.

6 THE CHAIR: That's already there.

7 MR SCANNELL: That's already there.

8 THE CHAIR: Yes.

9 MR SCANNELL: So the point I am making here is that as soon as facts about UCB
10 have become known to Epic, Epic has pleaded to them. It is no different when it comes
11 to the UCB pilot launched on 29 March last year.

12 As I have mentioned before, that was pleaded to by way of reply to the defence that
13 Google filed. If I could just make that good. Could we turn up Google's defence,
14 please. It is in bundle B at tab 2.

15 THE CHAIR: Yes. This is where I am going to go into soft, so I might take a moment.

16 MR SCANNELL: Yes, I do apologise.

17 THE CHAIR: No, no, it is my choice. B?

18 MR SCANNELL: B, tab 2.

19 THE CHAIR: When you go into main bundle, could you just give me the page number?

20 MR SCANNELL: Yes, of course. B2/65.

21 THE CHAIR: Okay, let's see. Right. I have the defence in front of me.

22 MR SCANNELL: Wonderful.

23 Google served that pleading on 2 April last year. So that is four days after it launched
24 the UCB pilot in the UK.

25 THE CHAIR: Yes.

26 MR SCANNELL: We can take it up at page 124 of the bundle, at paragraph 126.

1 THE CHAIR: Yes.

2 MR SCANNELL: Page 124, paragraph 126.

3 THE CHAIR: Okay, I think I have that. Paragraph 126, yes.

4 MR SCANNELL: Yes. That should read:

5 "Paragraph 146 is denied."

6 Do you have that?

7 THE CHAIR: Yes.

8 MR SCANNELL: So there Google is responding to Epic's plea that Google ties the

9 distribution of apps via the game store to the use of its in-app billing system. That's

10 what 146 says.

11 THE CHAIR: I have it now, yes. Okay.

12 MR SCANNELL: I am grateful. So I will just repeat what I said a moment ago.

13 Paragraph 146 of the claim says that Google ties the distribution of apps via the Play

14 Store to the use of Google's billing app system.

15 THE CHAIR: Yes.

16 MR SCANNELL: What we are looking at here in paragraph 126 --

17 THE CHAIR: Is their response to that.

18 MR SCANNELL: -- is Google denying that.

19 THE CHAIR: Yes.

20 MR SCANNELL: And Google has two answers to that. The first we can see from

21 paragraph 126(a) at the bottom of the page. That is that Google's in-app billing system

22 is actually inseparable from the Play Store and from its own services. The very last

23 line it says "They are not separate products."

24 THE CHAIR: I have lost you, I am afraid.

25 MR SCANNELL: I am terribly sorry.

26 THE CHAIR: 126(a)?

1 MR SCANNELL: Yes, just below "146 is denied," there is an (a).

2 THE CHAIR: Yes. "Aspect of and not a separate product"?

3 MR SCANNELL: Yes. That's what I was referring to.

4 THE CHAIR: Yes, okay.

5 MR SCANNELL: So that's their first answer. We don't tie it, they are just not separate

6 products.

7 The second, which we can see from subparagraph B over the page --

8 THE CHAIR: Yes, I have it.

9 MR SCANNELL: -- is that even when developers distribute their apps via the Play

10 Store, they don't have to use Google's billing system.

11 THE CHAIR: Yes.

12 MR SCANNELL: And Google cross refers in (b) to three subparagraphs of the

13 pleading.

14 THE CHAIR: Yes.

15 MR SCANNELL: 13(b), 15(b)(2) and 21(d)(4).

16 As we are going to see in a moment, in those subparagraphs Google relies on the

17 launch of User Choice Billing in the United Kingdom on 29 March -- four days earlier -

18 - to substantiate its plea that developers don't have to use Google's billing system.

19 THE CHAIR: Yes.

20 MR SCANNELL: Now all of the subparagraphs say the same thing, each of the three.

21 So we can take it up from paragraph 21(d)(4). That's on internal page 11, page 75 of

22 the B bundle.

23 THE CHAIR: Page 75, paragraph 21(d)(4), got it. Yes, thank you.

24 MR SCANNELL: "It is denied that the Google Play Store system must be used by

25 developers who wish to offer digital content for purchasers by users of apps distributed

26 through the Google Play Store."

1 So that's what they were saying before they amended their pleading. Then the next
2 sentence we can see the argument that Google relied on before the launch of the pilot:
3 "Developers may offer and Consumers may purchase digital content for consumption
4 within an app distributed through the Play Store via other channels."

5 In other words, they don't have to make in-app purchases, they can make out of app
6 purchases and that avoids our in-app billing system.

7 But in the purple text which follows that -- we are looking now at the amendments that
8 were just made --

9 THE CHAIR: Yes, they include UCB.

10 MR SCANNELL: There they are relying on UCB. So that's the point. So, the reason
11 the UCB pilot is part and parcel of these proceedings -- and indeed the Coll
12 proceedings and the Rodger proceedings -- is that Google relies on it by way of
13 a defence.

14 There has been no delay in responding to that. So, two weeks after Google filed this
15 third amended defence, and less than a month after the launch of UCB in the UK, Epic
16 responded to this in its third amended reply. It did that on 16 April last year.

17 THE CHAIR: Yes.

18 MR SCANNELL: That's behind tab 3 of the B bundle but we needn't turn that up.

19 There is a comprehensive response in that to all of the points that are made in the
20 defence.

21 THE CHAIR: Okay.

22 MR SCANNELL: First the point is made that it is impossible for Google to maintain
23 that the products are inseparable as we saw in circumstances where they are clearly
24 willing to allow developers to use alternative billing systems.

25 The second point that is made is that this UCB pilot doesn't apply to gaming apps, and
26 of course Epic is in the business of gaming apps.

1 THE CHAIR: Yes.

2 MR SCANNELL: And it is no mystery why it doesn't. It is because Google makes
3 most of its revenue from gaming apps.

4 The third point, there is not that incentive even for non-gaming developers to actually
5 provide alternative billing services in circumstances where they have to pay these very
6 high commissions.

7 THE CHAIR: Just give me the paragraph of the references in the reply.

8 MR SCANNELL: Paragraphs 9 at B page 147; paragraph 11 at B/149;
9 paragraph 12(b) at B/150.

10 THE CHAIR: Okay, yes, all right.

11 MR SCANNELL: So no delay.

12 Then if we could just very quickly have a look at the category 2 amendments
13 themselves.

14 THE CHAIR: Yes.

15 MR SCANNELL: Now we are back into the core bundle, you will be pleased to hear.
16 Again, it is core bundle, tab 5.

17 THE CHAIR: Yes.

18 We are going to look at internal page 8, which is core bundle-page 23. Again, we are
19 only interested in pink text.

20 At paragraph 16A the UCB pilot is introduced and the point is made that any developer
21 that participates in it will become liable not only for the cost of providing the alternative
22 payment system but also Google's commission.

23 Turning forward to internal page 42, page 57 of the core bundle. Paragraphs 114E
24 and F, under heading "The UCB pilot in the UK". Further elucidation of the facts
25 underlying the UCB launch in the UK for non-gaming apps.

26 Paragraph 114F also reflects an extant controversy between the parties as to whether

1 developers who enrol for UCB can or cannot offer app users different prices for the
2 same product depending on which payment service they use.

3 THE CHAIR: Yes, okay.

4 MR SCANNELL: Core page 47 --

5 THE CHAIR: 114E and F. 47?

6 MR SCANNELL: 47. Paragraph 97(b) is amended to make it clear that the default
7 rule for all apps remains that Google's billing system must be used, but that is subject
8 to enrolment in UCB.

9 THE CHAIR: Yes.

10 MR SCANNELL: There are further incidental amendments. I am not going to go
11 through them all.

12 THE CHAIR: You don't need to.

13 MR SCANNELL: But they are just inserted to avoid factual inaccuracy in the light of
14 the introduction of UCB.

15 So, none of those changes, I would suggest, could possibly come as a surprise.

16 Google has positively relied on UCB in its pleadings to date and in its evidence.

17 Finally then, before I leave category 2, there is no possibility of prejudice in relation to
18 the amendments. They don't expand the pre-existing case in the slightest. As to
19 disclosure, UCB in the UK and elsewhere comprised the subject matter of Epic's
20 disclosure requests E13 to E16, which Ms Lucas considered in the June and July
21 hearings, and Ms Lucas has ruled on those and said that all of the disclosure has to
22 be given by Google. That's paragraph 135 of Ms Lucas' September ruling.

23 There has also been extensive UCB disclosure in the Coll and Rodger proceedings.

24 As to the factual evidence, UCB has already been extensively canvassed by the
25 witnesses, not only Epic's but also in the other cases. I won't go through the list of
26 witnesses.

1 As to the experts, the UCB pilot in the UK has been considered in detail by Epic's
2 experts in the reports they filed in December, in particular by Mr Hunt in the context of
3 excessive pricing, and Ms McCall in the context of exclusionary abuse claims, and
4 Mr Burelli. Indeed, the Tribunal may recall that Mr Burelli addressed UCB in his latest
5 report in accordance with an express direction from the Tribunal that his further
6 evidence be confined to addressing the incidence of take-up of UCB since March
7 2025.

8 And UCB has also been canvassed by the expert in the Rodger proceeding,
9 Professor Fletcher.

10 So that is 2. Then 3. So, 3 relates to anti-steering.

11 THE CHAIR: Yes.

12 MR SCANNELL: The Tribunal is already aware of the in-app billing requirement.

13 THE CHAIR: Yes.

14 MR SCANNELL: You, developer, must use our, Google's, billing system. And the tie
15 that that creates between distribution via the Play Store and use of Google's in-app
16 billing service.

17 That tie and the in-app billing requirement is the central plank of Epic's pleaded case.
18 The allegation is that the tie forecloses potential competitors in the payment services
19 market.

20 THE CHAIR: Yes.

21 MR SCANNELL: The scope and the extent of the in-app billing requirement is staked
22 out by two documents. The first is Google's Developer Distribution Agreement. That's
23 the agreement that developers must conclude with Google if they want to distribute
24 their apps via the Google Play Store.

25 THE CHAIR: Yes.

26 MR SCANNELL: The second is Google's developer programme policies, which are

1 binding under the terms of that agreement. As I will show you in a moment, each of
2 those documents is already pleaded in the case and it is central to Epic's case.

3 The anti-steering prohibition is simply one of the provisions of the policies under
4 Google's Developer Distribution Agreement.

5 THE CHAIR: Paragraph 4, is that right, of the DPP?

6 MR SCANNELL: Yes. So, it clarifies the scope of the in-app billing requirement by
7 preventing developers from attempting to evade it.

8 So if we could now turn to the draft amended pleading, core bundle-page 47.

9 THE CHAIR: 97(b) and (c)?

10 MR SCANNELL: Yes. So, I am going to begin with the black text in 97(b) just to show
11 you that it has always been a core element of our case that developers can't avoid
12 using Google's in-app billing system and that the existence and extent of that
13 prohibition is set out by the DPP and by the Developer Distribution Agreement.

14 So that is already pleaded to.

15 And from the ninth line of the paragraph, the pink text which is struck out -- so it is part
16 of our pleading as of right now but will disappear if the amendments go through -- the
17 Tribunal can see that as Epic's pleading currently stands, the Google developer
18 programme policy is as set out on the date of the original claim. One can see what
19 that policy said at that time over the page.

20 THE CHAIR: Just bear with me a moment.

21 Yes. I am just not sure I fully -- oh I see, it is what is deleted, okay. So, the pleading
22 as currently is:

23 "As at the date of this claim form the policy in force provided that ..."

24 And then you go to the bottom of the page:

25 "... apps that employ ..."

26 Et cetera, et cetera. And that, just remind me, that was the terms of a particular

1 paragraph of the policy at the time?

2 MR SCANNELL: Yes, the developer programme policies as they stood at the time of
3 the claim.

4 THE CHAIR: Yes.

5 MR SCANNELL: I am showing it to you here because it is in the core bundle. If
6 I showed it to you in our existing pleading as it is today, it would be in a different
7 bundle.

8 THE CHAIR: No, that's fine. I am following you.

9 MR SCANNELL: Okay.

10 So, if one looks then, over the page at the pink struck out text, so part of our claim as
11 of right now but will not be part of our claim if the amendments go through, one can
12 see what the developer programme policies said at the time of the original pleading in
13 the first bullet. Developers must use the Google Play Store in-app billing as the
14 method of payment.

15 THE CHAIR: I have lost you. One moment.

16 MR SCANNELL: Okay.

17 THE CHAIR: I am confused. I am reading what's deleted, okay.

18 MR SCANNELL: Yes. In pink.

19 THE CHAIR: Yes. "Apps that employ ... must comply with the following guidelines."
20 Now, what are the following guidelines?

21 MR SCANNELL: It is the text at the top of page 48 of the core bundle, which is also
22 struck out.

23 THE CHAIR: Sorry, that's my fault. I had put two pages together. I have you now.
24 So that's the old policy.

25 MR SCANNELL: That's the old policy.

26 THE CHAIR: Okay, I've got you.

1 MR SCANNELL: I will just draw your attention if I may to the first bullet.

2 THE CHAIR: Yes.

3 MR SCANNELL: "Developers ..." and then go to the end of that bullet, "must use the

4 Google Play Store in-app billing as the method of payment."

5 THE CHAIR: Yes.

6 MR SCANNELL: So, we have always pleaded of course to the in-app billing

7 requirement. It is a core element of our case. Anti-steering is simply the opposite side

8 of that coin. Developers can't try to evade the in-app billing requirement by steering

9 users away from Google's in-app billing service towards some other way.

10 THE CHAIR: Just so that I understand it, I think what you are saying is

11 paragraph 97(b) had the old version of the policy.

12 MR SCANNELL: Yes.

13 THE CHAIR: Which is now struck out.

14 MR SCANNELL: Yes.

15 THE CHAIR: But what is put in its place in (b) --

16 MR SCANNELL: Yes.

17 THE CHAIR: -- is the new policy.

18 MR SCANNELL: Yes.

19 THE CHAIR: Which is an updating of what was there before.

20 MR SCANNELL: Yes.

21 THE CHAIR: Without reading it and digesting it, it is essentially making the same point

22 in more words. Is that right?

23 MR SCANNELL: Yes.

24 THE CHAIR: But what is new is 97(c), which is paragraph 4 of the current DPP, which

25 is the anti-steering restriction, which I understand that Google say there was such

26 a provision before --

1 MR SCANNELL: Yes.

2 THE CHAIR: -- and was not pleaded by you before, and they say that the paragraph 4,
3 which you say is sort of belt and braces and supports what's above in 97(b), they say
4 that's new and you say effectively it's not. And that's the issue.

5 MR SCANNELL: Yes.

6 THE CHAIR: So, the changes to 97(b) are really an updating change.

7 MR SCANNELL: Correct.

8 THE CHAIR: And I am not sure that that is objected to. Maybe it is, I don't know. But
9 what's really objected to is 97(c).

10 MR SCANNELL: Yes, that's correct.

11 I want to be quite transparent with the Tribunal about this. The anti-steering provision
12 was in the policies as it stood before.

13 THE CHAIR: Yes.

14 MR SCANNELL: I don't hide from that fact at all. It simply wasn't expressly pleaded
15 to.

16 THE CHAIR: Yes, I understand.

17 MR SCANNELL: So, what we are saying is that it was always of course inherent in
18 any allegation that there is an in-app billing requirement, that anybody addressing that
19 question would also have to ask oneself can it be evaded? So anti-steering was
20 always part of in-app billing but now we are spelling it out.

21 THE CHAIR: Is it suggested that if the amendment had not been made and we went
22 to trial with the old, that you would have been debarred from relying on the anti-steering
23 provision in the policy in which you pleaded? I don't know. You would say obviously
24 not. I am just asking that rhetorically.

25 MR SCANNELL: I would say obviously not and I am going to be coming to this, but of
26 course all of the factual witnesses and expert witnesses --

1 THE CHAIR: Have already referred to it.

2 MR SCANNELL: Yes, of course. Because they can't really consider the in-app billing
3 requirement if they don't consider a provision which says "thou shalt not depart from
4 it."

5 THE CHAIR: Okay, thank you.

6 MR SCANNELL: I do need to draw your attention, also, because it is an amendment
7 which exercises Google in particular, to the prayer for relief and to the amendment
8 that has been made there.

9 So, if we could turn forward, please, to page 80 of the core bundle. The Tribunal will
10 see there the insertion of a subparagraph (ba).

11 THE CHAIR: Yes.

12 MR SCANNELL: Paraphrasing that, it provides for an order requiring Google to
13 remove its anti-steering restriction or any equivalent restriction on app developers
14 directing users to a payment service other than Google's in-app billing service.

15 Google does characterise that as a "new claim" but we don't accept that it is. We say
16 that the anti-steering prohibition is simply the other side of the in-app billing
17 requirement coin. It serves to define its scope. In just the same way, the injunction at
18 paragraph 164(ba), compelling Google to allow developers to use alternative payment
19 services -- sorry, (ba) -- is the other side of the same coin of --

20 THE CHAIR: I have lost you. Which is the one that you say is the other side? (ba) is
21 remove the restriction, is that the one you are talking about?

22 MR SCANNELL: Sorry, I am talking about (ba), which is the new insertion --

23 THE CHAIR: The new insertion.

24 MR SCANNELL: -- dealing with anti-steering.

25 THE CHAIR: Yes.

26 MR SCANNELL: I am saying that that is the other side of the coin of the relief that we

1 seek at paragraph 164(b) just above it.

2 THE CHAIR: Ah yes.

3 MR SCANNELL: So (b) says "Google, get rid of your in-app billing system", the tie,
4 and (ba) says "also get rid of restrictions which prevent developers from steering users
5 towards the alternative."

6 We say that one is the other side of --

7 THE CHAIR: If you had an order, if you were to succeed on (b) --

8 MR SCANNELL: Yes.

9 THE CHAIR: -- you didn't have (ba)--

10 MR SCANNELL: Yes.

11 THE CHAIR: -- and they maintained in place the anti-steering restriction --

12 MR SCANNELL: Yes.

13 THE CHAIR: -- would they be in breach of (b)?

14 MR SCANNELL: There would be a risk, I would say --

15 THE CHAIR: Okay.

16 MR SCANNELL: -- that they would be. So, there is a risk that (b) would be rendered
17 ineffective.

18 THE CHAIR: Yes, you might have arguments about facilitating or aiding and abetting
19 breach of the injunction. I don't know. Alright, I am just asking that to test your other
20 side of the coin submission. I am not saying it is wrong, I just raised it.

21 MR SCANNELL: The matter can be tested this way. If the Tribunal were to grant the
22 injunction at paragraph 164(b), compelling Google to allow developers to use
23 alternative payment services to sell digital content in the apps they distribute via the
24 Play Store, as we say the Tribunal should, there would be, in my submission, a risk
25 that that injunction would be undermined if Google could continue to prevent
26 developers from steering their users to those alternatives.

1 THE CHAIR: Yes.

2 MR SCANNELL: I fully accept that the relief we are seeking at paragraph 164(ba)
3 might be considered surplus to requirements. But Epic is wary of Google's conduct
4 and it does not want the relief it seeks to become an empty letter. I would suggest
5 that an abundance of clarity is in any event not a good reason for disallowing the
6 amendment.

7 THE CHAIR: All right.

8 MR SCANNELL: Now, I already addressed the factual evidence, but just to make one
9 final point. The experts also deal with anti-steering extensively. Ms McCall on behalf
10 of Epic, Dr Singer on behalf of Ms Coll, Professor Fletcher on behalf of Professor
11 Rodger and Dr Noble on behalf of Google. So, there are no case management
12 implications.

13 This takes me to the final category of amendments resisted by Google, the
14 miscellaneous clarifications listed in Mr Tricker's fourth witness statement.

15 Now apart from the delay point, which I have already addressed, Google has not
16 articulated any objection to these amendments except for two of them.

17 THE CHAIR: Yes.

18 MR SCANNELL: The first is an amendment designed to remove an ambivalence from
19 paragraph 51 of the current pleading and to explain that I need to ask the Tribunal to
20 indulge me and to turn that up, that paragraph.

21 THE CHAIR: Okay.

22 MR SCANNELL: This is going to be in B.

23 THE CHAIR: In B, okay. You look worried every time you take me to a soft document
24 because you think I am incompetent.

25 MR SCANNELL: No, not at all.

26 THE CHAIR: Or challenged. I am probably both.

1 MR SCANNELL: You could not possibly be more analogue than I am.

2 THE CHAIR: That wasn't fishing. I was just lightening the -- yes, I am ready to type
3 in the page number.

4 MR SCANNELL: Excellent. So B1, page 18, please.

5 THE CHAIR: I have paragraph 47 and following in front of me.

6 MR SCANNELL: That's excellent. I need you, please, to look at paragraph 51. We
7 are going to look now at some purple text.

8 THE CHAIR: Yes. I just need to -- yes.

9 MR SCANNELL: This is the claim as it stands. The purple text denotes that there
10 were amendments to get us even to that point.

11 THE CHAIR: Just bear with me a moment -- I have lost it now.

12 I have it now. Thank you.

13 MR SCANNELL: In paragraph 51, Epic pleads that:

14 "The AOSP licence [that's the licence to use the Android operating system] does not
15 give OEMs the right to licence Google Mobile Services which gives OEMs the right to
16 pre-install and distribute certain key Google apps known as Google Mobile Services
17 apps (including Google Play Store, Gmail and YouTube) and access other services
18 known as Google Play Services as further discussed in paragraph 89."

19 That wording is ambivalent.

20 THE CHAIR: Is ambiguous, did you say?

21 MR SCANNELL: Yes. It can either be read as meaning that the AOSP licence does
22 not allow OEMs to license Google mobile services, which comprises lots of apps, and
23 neither does it give them access to other services known as Google Play Services --

24 THE CHAIR: Yes.

25 MR SCANNELL: -- or it could be read as meaning that the AOSP licence does not
26 allow OEMs to license Google mobile services which comprise both the apps and

1 access to Google Play Services.

2 THE CHAIR: Yes, got you, I think.

3 MR SCANNELL: The first interpretation suggests that Google Mobile Services and

4 Google Play Services are two separate services.

5 The second, which is correct as it happens, suggests that Google Play Services are

6 a subset of Google mobile services.

7 In the interests of time, I am not going to --

8 THE CHAIR: No, okay.

9 MR SCANNELL: -- turn up paragraph 89, which is cross referred to here, but that

10 makes things even less clear and more confusing.

11 It suggests that Google Mobile Services comprise the apps alone while Google Play

12 Services is something different from that comprising proprietary software.

13 THE CHAIR: Okay.

14 MR SCANNELL: In fact, and for the avoidance of doubt, Google Mobile Services

15 comprises both the apps and the software. The proposed amendments to

16 paragraph 51 would remove that ambiguity.

17 THE CHAIR: I've now turned that up on page 32 of the core bundle.

18 MR SCANNELL: I am grateful. So perhaps I could just ask you, Mr Chairman, to read

19 it to yourself, with a view to asking: does this make it clear? Of course, none of the

20 struck-out text gets read.

21 THE CHAIR: Okay.

22 MR SCANNELL: It is now perfectly clear.

23 THE CHAIR: You made the A and B, Google Mobile Services comprises A and B.

24 MR SCANNELL: Yes.

25 THE CHAIR: No doubt I will hear what Ms Smith says about this particular

26 amendment.

1 | You say they have objected to that one.

2 | MR SCANNELL: Yes, they say it is unnecessary. We say it is.

3 | THE CHAIR: All right. I mean I am not sure how much -- so that was the first point on

4 | the miscellaneous.

5 | MR SCANNELL: The second and the final amendment Google objects to is the

6 | insertion of a quotation from the CMA when it closed the June 2022 investigation into

7 | Google's conduct in relation to app distribution on Android devices following

8 | commitments that were offered by Google.

9 | So that quotation is at paragraph 114D. At page 56 of the core.

10 | THE CHAIR: Yes.

11 | MR SCANNELL: The 2022 investigation is already part of Epic's pleaded case.

12 | THE CHAIR: Yes.

13 | MR SCANNELL: So, it is surprising that there is an objection to this at all. The basis

14 | of the objection is, again, Evans, this is inadmissible. I have already addressed the

15 | Tribunal on that.

16 | It is a fact that the CMA made the statement pleaded to, and it's otherwise a question

17 | for trial whether the statement is admissible to prove any of the allegations Epic makes

18 | against Google.

19 | THE CHAIR: And what is pleaded is the reasons -- the CMA's reasons -- for not

20 | accepting commitments?

21 | MR SCANNELL: Yes.

22 | THE CHAIR: Yes, all right, I have the point. Okay. That covers --

23 | MR SCANNELL: That covers the application to amend.

24 | THE CHAIR: Thank you very much.

25 | I don't know whether we are in the habit of rising and having a mid-morning break. We

26 | are. I think now would be a good time, wouldn't it?

1 We will say 10 to 12. Thank you very much.

2 (11.39 am)

3 (A short break)

4 (11.54 am)

5 THE CHAIR: Yes, Ms Blackwood.

6 Submissions by MS BLACKWOOD

7 MS BLACKWOOD: Sir, as per your direction on 20 January, Professor Rodger has
8 filed his amended collective proceedings claim form on Tuesday of this week. That is
9 in the core bundle at tab 33.

10 THE CHAIR: I have two volumes. Yes.

11 MS BLACKWOOD: At tab 32 of the core bundle, just in front, is Professor Rodger's
12 amendment application.

13 If you could turn to page 485 --

14 THE CHAIR: Yes.

15 MS BLACKWOOD: -- paragraph 4, you will see set out the proposed categories into
16 which the proposed amendments fall.

17 THE CHAIR: Yes.

18 MS BLACKWOOD: It is clerical amendments to reflect the progress of the case.
19 Amendments to reflect the expert evidence of Professor Rodger's experts.
20 Amendments to update the regulatory and legal proceedings brought against Google
21 in this jurisdiction and others, and to reflect the judgment in Kent v Apple.

22 Amendments to reflect that Google introduced User Choice Billing in the UK.
23 Amendments to correct some errors identified and to remove some allegations that
24 Professor Rodger no longer seeks to pursue.

25 THE CHAIR: Yes.

26 MS BLACKWOOD: And amendments to remove Professor Rodger's claim for

1 compound interest.

2 THE CHAIR: Now, in relation to those categories, obviously you can take it in
3 whatever way you wish, but do we know which are the controversial ones?

4 MS BLACKWOOD: Yes, sir. Google have responded by means of letter yesterday.

5 THE CHAIR: Yes.

6 MS BLACKWOOD: That's in bundle D, tab 32. Page 105.

7 THE CHAIR: I have it now, yes. I probably have this in hard copy somewhere.

8 MS BLACKWOOD: I have it in hard copy.

9 THE CHAIR: Obviously normally I would ask you to make your case and I would wait
10 for Google to respond, but it may shortcut things if we can identify -- I have it, I think.
11 No, I don't have it, no. If you have a hard copy, it might help, thank you. (Handed)

12 MS BLACKWOOD: I think it is helpful to refer to this letter because it identifies where
13 the battleground lies.

14 THE CHAIR: Yes.

15 MS BLACKWOOD: You can see from paragraph 2 of the letter that they object to
16 certain amendments being made late.

17 THE CHAIR: Yes.

18 MS BLACKWOOD: But the only amendments they identify are the ones in
19 paragraph 135 and paragraph 143A, and then some related wording at
20 paragraph 137.

21 THE CHAIR: Yes.

22 MS BLACKWOOD: At paragraph 4 --

23 THE CHAIR: Paragraph 2 is they give examples but there is a general objection on
24 lateness.

25 MS BLACKWOOD: I would say, though, that it is helpful to look at paragraph 10 of
26 the letter when you are considering paragraph 2, because Google says there:

1 "Save in respect of the paragraphs of the DACF referred to in paragraphs 2, 4 and 7
2 [...] Google confirms that it does not oppose the remainder of Prof. Rodger's proposed
3 amendments."

4 THE CHAIR: So, paragraph 2?

5 MS BLACKWOOD: Whilst paragraph 2 is more broadly drafted, the only paragraphs
6 identified as objected to are the ones in subparagraphs (a) and (b).

7 THE CHAIR: That is slightly odd, isn't it? Because they are late, disclosure completed,
8 two rounds of factual evidence, it is a general statement "for example." I mean -
9 anyway, no doubt Google will explain their position.

10 2, 4 and 7. 4 is the Evans point?

11 MS BLACKWOOD: 4 is the Evans point.

12 THE CHAIR: And 7?

13 MS BLACKWOOD: 7 is what Google refers to as pleading deficiencies in
14 paragraph 189.1 and 194.

15 THE CHAIR: Yes, okay.

16 They can make those points, all right. That is helpful. You address it the way in which
17 you wish to address it.

18 MS BLACKWOOD: Sir, I would like to take those objections in turn.

19 THE CHAIR: Yes.

20 MS BLACKWOOD: Otherwise, subject to certain caveats that have been identified by
21 Google, they accept our pleading amendments.

22 THE CHAIR: Okay.

23 MS BLACKWOOD: If I could address first the Evans point that's been raised.

24 THE CHAIR: Yes.

25 MS BLACKWOOD: I obviously am aware that Mr Scannell has covered this in some
26 detail already and I don't want to unnecessarily repeat what he's already said.

1 Sir, if I could ask you very quickly to turn up the authorities bundle --

2 THE CHAIR: Yes.

3 MS BLACKWOOD: -- tab 15, which is the Supreme Court judgment in Evans.

4 THE CHAIR: Page number?

5 MS BLACKWOOD: It is 780, the beginning of the judgment.

6 THE CHAIR: Just bear with me a moment.

7 Yes, Evans.

8 MS BLACKWOOD: Sir, I just wanted to very briefly draw your attention to

9 paragraph 145. I think it was touched on earlier but the fourth line, second sentence

10 down --

11 THE CHAIR: Yes, 823 of the authorities bundle.

12 MS BLACKWOOD: 823, sir.

13 THE CHAIR: Yes.

14 MS BLACKWOOD: The second sentence:

15 "This fundamental objection does not apply to someone who was a party to the earlier

16 proceedings. In some cases, such a party may be bound by findings, for example

17 where they give rise to an issue estoppel; or it may be an abuse of process for the

18 party to contest them."

19 That was the point made by Mr Scannell earlier.

20 THE CHAIR: Yes.

21 MS BLACKWOOD: Then, at paragraph 159 on page 827, it starts at the second

22 sentence:

23 "Likewise, it is not inconsistent with the principle underlying that case [that's the case

24 of Hollington v Hewthorn] to rely on prior judgments or reports in so far as they record

25 evidence of relevant facts [...]. It is only in so far as such material contains opinions

26 on matters of fact [...] that the material is inadmissible."

1 So, sir, I just wanted to briefly draw your attention to those passages simply to highlight
2 the fact that the Supreme Court's judgment in Evans doesn't establish some kind of
3 blanket ban on the Tribunal considering or being aware of previous regulatory
4 decisions, or legal decisions. What it states is that certain findings by those decision
5 makers are not admissible as evidence of facts found.

6 If you turn to our pleading --

7 THE CHAIR: One moment.

8 MS BLACKWOOD: I am sorry, sir.

9 THE CHAIR: Yes.

10 MS BLACKWOOD: Which is at tab 33 of the core bundle. I am afraid I am going to
11 do the very tedious task of taking you through our amendments and showing that they
12 are really just setting out background and context for our claim.

13 THE CHAIR: That's all right.

14 MS BLACKWOOD: So, sir, the first paragraph that Google objects to is
15 paragraph 47.3. That's on page 505.

16 THE CHAIR: Yes.

17 MS BLACKWOOD: If you could turn back to page 503, you will see that this section
18 is simply setting out details of proceedings relating to the same or similar conduct.

19 THE CHAIR: Yes.

20 MS BLACKWOOD: It is background material and context material for this claim and
21 the decision in Kent v Apple has simply been added at the end of paragraph 47 to
22 reflect that the decision was handed down after the pleadings were originally drafted.

23 THE CHAIR: Yes.

24 MS BLACKWOOD: The next paragraphs that Google object to are 59.3 and 59.4.
25 That's on page 510 and 511.

26 THE CHAIR: Yes.

1 MS BLACKWOOD: You will see that -- sorry to make you turn back again -- page 509,
2 you will see that this pleading comes within a section which is concerned with setting
3 out the relevant regulatory proceedings and legislation by jurisdiction. It is background
4 material in relation to Professor Rodger's claim. It is in this section that
5 Professor Rodger has added in the updates in relation to the decisions of the CMA
6 and added that relevant material.

7 THE CHAIR: 59.3 is the CMA's investigation --

8 MS BLACKWOOD: Into mobile browsers and the cloud gaming market.

9 THE CHAIR: Is that a market investigation?

10 MS BLACKWOOD: It's a market investigation, yes.

11 THE CHAIR: Then 59.4 is the Digital Markets Act.

12 MS BLACKWOOD: It is the SMS investigation that's been discussed already today.

13 THE CHAIR: 59.4 mirrors to some extent the amendment which Epic seek to make?

14 MS BLACKWOOD: Yes, sir.

15 THE CHAIR: Okay. Thank you.

16 MS BLACKWOOD: At paragraphs 60.1 on the following page, page 512, we have
17 added an update in relation to the Commission's Google Android
18 decision/investigation. Just to note that it's been appealed and that Advocate General
19 Kokott has issued her opinion.

20 THE CHAIR: Yes.

21 MS BLACKWOOD: The next amendment that Google takes issue with is 60.7. That
22 again is simply an update as to the progress of the Commission's DMA investigation.

23 THE CHAIR: Yes.

24 MS BLACKWOOD: Paragraph 64, which is on page 515, this is an update as to the
25 progress of the US litigation that has already been pleaded.

26 THE CHAIR: Yes.

1 MS BLACKWOOD: And 65 is an update on the Australian litigation.

2 THE CHAIR: Yes.

3 MS BLACKWOOD: If I could then ask you, sir, to turn to page 535.

4 THE CHAIR: Yes.

5 MS BLACKWOOD: Google object to the addition of "This finding was upheld on
6 appeal" at paragraph 108.

7 Again, this is background pleaded material. It falls within the section which starts on
8 page 519.

9 Sorry, sir, to make you bounce around the claim form so much.

10 THE CHAIR: That's all right. It's the factual background.

11 MS BLACKWOOD: This update is pleaded in the factual background.

12 THE CHAIR: 519? The section is the factual background, is that the point you are
13 making?

14 MS BLACKWOOD: Yes, sir.

15 THE CHAIR: Yes, okay.

16 MS BLACKWOOD: The same stands for paragraph 122, which is on page 541.

17 Again, this is just an update of the factual background.

18 THE CHAIR: Yes.

19 MS BLACKWOOD: Likewise, with paragraph 126 which is on page 545.

20 THE CHAIR: Okay.

21 MS BLACKWOOD: The next objection that Google raises is in relation to
22 paragraph 153A.

23 THE CHAIR: 153A?

24 MS BLACKWOOD: Yes, sir, which is on page 558 of the bundle.

25 THE CHAIR: Yes.

26 MS BLACKWOOD: So, you will see, if you start at paragraph 153 on the preceding

1 | page, you will see that the previous pleading, our original pleading, was that:

2 | "While dominance is to be assessed in light of the factual and expert evidence in due
3 | course, without prejudice to the evidence and submissions that the CR may advance
4 | at trial, at present he relies on ... "

5 | And it had originally included references to the CMA's decision, the European
6 | Commission decisions and US findings.

7 | THE CHAIR: Yes.

8 | MS BLACKWOOD: And Professor Rodger's proposed amendment is just simply to
9 | note those regulatory findings and decisions to remove the express plea of reliance.

10 | THE CHAIR: Okay.

11 | It notes his position -- sorry, his position being Professor Rodger's position, is that
12 | right?

13 | MS BLACKWOOD: Yes, sir.

14 | THE CHAIR: All right. I see, yes.

15 | MS BLACKWOOD: Then finally, Google objects to paragraph 189.2. That's on
16 | page 573.

17 | THE CHAIR: Yes.

18 | MS BLACKWOOD: You will see we already pleaded there that Professor Fletcher's
19 | evidence was consistent with the findings of various authorities.

20 | THE CHAIR: Yes.

21 | MS BLACKWOOD: We don't rely on it. That pleading is not objected to. All that is
22 | proposed is that we add the words "and Mr Harman's evidence is consistent with the
23 | findings of the various authorities."

24 | So, sir, our position is that these amendments, which are designed to update the claim
25 | form, are really setting out background information that's relevant for the Tribunal and
26 | provide context for the claim in the Rodger proceedings. And Professor Rodger in due

1 course will have to decide what aspects of the regulatory materials and decisions, if
2 any, he seeks to rely on at trial, but that is not a matter for now in terms of the
3 pleadings, that is a dispute to be dealt with at trial.

4 The pleadings themselves do not make any comment on the evidential weight, if any,
5 to be ascribed to these decisions.

6 THE CHAIR: One minute.

7 Yes.

8 MS BLACKWOOD: Therefore, there is nothing objectionable, we would submit, in our
9 amendments in light of the Supreme Court's decision in Evans.

10 THE CHAIR: Okay.

11 MS BLACKWOOD: Sir, the next set of objections raised by Google were in
12 paragraph 2 of the letter. That's the point of delay. The only paragraphs that they
13 have specifically identified, as I noted before, were paragraph 135 and
14 paragraph 143A and the associated pleading and paragraph 137.

15 THE CHAIR: Yes.

16 MS BLACKWOOD: Given those are the only paragraphs they have identified and they
17 seem to otherwise accept our amendments, I am going to limit my submissions to
18 those particular objections.

19 THE CHAIR: Yes.

20 MS BLACKWOOD: Sir, if I could ask you to turn to paragraph 135, which is on
21 page 547.

22 THE CHAIR: Yes.

23 MS BLACKWOOD: You will see that there are updates that have been made in
24 relation to the alternative billing services offered by Google.

25 First of all, I would like to flag the final sentence of that paragraph, that update has
26 been introduced to reflect the evidence of Professor Fletcher.

1 THE CHAIR: I have slightly lost you, I am afraid.

2 MS BLACKWOOD: I am sorry, sir. Paragraph 135 starts on page 547 and continues
3 over the page --

4 THE CHAIR: I have that. But you said something about the last sentence and I was
5 not sure --

6 MS BLACKWOOD: The final sentence of the paragraph starting "Third party app
7 developers do not have any ..."

8 That sentence has been added in to reflect Professor Fletcher's evidence, which was
9 filed on 23 December last year, as was the sentence:

10 "In practice, enrolment in User Choice Billing in the UK has been negligible."

11 THE CHAIR: Okay.

12 MS BLACKWOOD: Given that those amendments arise out of Professor Fletcher's
13 evidence, there can be no suggestion, we would submit, that those amendments have
14 been made late.

15 The other amendments in this paragraph are designed to provide updates on User
16 Choice Billing, which has already been pleaded, and to provide some clarification on
17 developer only billing.

18 THE CHAIR: Okay.

19 We would submit it is sensible and reasonable for Professor Fletcher to have made
20 those amendments at the same time as the amendments that were necessitated by
21 Professor Fletcher's evidence --

22 THE CHAIR: I think you said "Fletcher," you meant Professor Rodger --

23 MS BLACKWOOD: I am so sorry, sir.

24 THE CHAIR: Only sensible for Professor Rodger to make the amendments to reflect -
25 -

26 MS BLACKWOOD: To have made the amendments to paragraph 135, at the same

1 time that he was making the amendments to reflect the updated expert evidence of
2 Professor Fletcher filed on 23 December. Otherwise, you would end up with
3 a piecemeal or iterative set of continuing amendments.

4 THE CHAIR: Yes, okay.

5 MS BLACKWOOD: We submit that there is no prejudice to Google in making these
6 amendments. First of all, we had already pleaded alternative billing services and User
7 Choice Billing in that paragraph, and Google has already addressed these matters in
8 its defence.

9 Sir, I can take you to those paragraphs if it would assist.

10 THE CHAIR: No, that's not necessary, I don't think.

11 MS BLACKWOOD: So, these matters are already in issue before the Tribunal at trial.
12 Google has already adduced factual evidence in relation to its alternative billing
13 systems in Mr Feng's evidence, and I can give you references to that if it would assist -
14 -

15 THE CHAIR: No, I am sure that is not disputed, I would imagine. We will see what
16 they say, but yes.

17 MS BLACKWOOD: So, from our perspective it is difficult to see what further factual
18 evidence would be needed in light of its already existing comprehensive coverage and
19 the minor nature of the amendments which are proposed to be introduced by
20 Professor Rodger.

21 Google also has until 1 April this year to prepare its responsive evidence. It still has
22 the opportunity to adduce additional expert evidence as appropriate, and
23 Professor Rodger has confirmed in correspondence that he will not be seeking further
24 disclosure arising out of these amendments.

25 THE CHAIR: Okay.

26 MS BLACKWOOD: Given the minor nature of the amendments proposed and the fact

1 that most of the material is already in evidence and to the extent more expert evidence
2 is required it is already accounted for in the trial timetable, it is difficult to see what
3 impact, if any, it could have on the timetable to trial.

4 In those circumstances, we submit those amendments should be allowed.

5 In relation to Google's criticisms of paragraph 143, that paragraph is set out at
6 page 551 of the bundle.

7 THE CHAIR: That is interesting, you have deleted 143 after you have put in 143A. Is
8 that right? Yes.

9 It doesn't matter, but yes. You go from 142 to 143A. It is fine. It doesn't matter.

10 MS BLACKWOOD: I think you might be working -- I am sorry that this has happened.
11 There was a version of the claim form where I understand that the numbering went
12 awry and that an updated version of the claim form was provided which fixed that
13 numbering error. So, I am sorry if that is present in your --

14 THE CHAIR: I am not sure I have that.

15 MS BLACKWOOD: Hopefully for present purposes we can make it work.

16 THE CHAIR: Yes, it doesn't matter. I am working on the version that is in my bundle
17 at page 551.

18 MS BLACKWOOD: Suffice to say that numbering glitch should be fixed, that you have
19 in your version of the claim form.

20 THE CHAIR: Just give me a moment. It is a bit odd, but never mind. I have been
21 provided with another version this morning with confidentiality markings. That still
22 goes from 142 to 143A.

23 Maybe there is not an issue.

24 MS BLACKWOOD: Well, sir --

25 THE CHAIR: Yes, 143 is struck through afterwards. That was my only comment.
26 Maybe I have the right version.

1 My only comment is that logically you would expect --

2 MS BLACKWOOD: It should be 142A. You are right -- the amendment we are
3 concerned with.

4 THE CHAIR: It doesn't matter.

5 MS BLACKWOOD: But in any event it is currently referred to as 143A.

6 THE CHAIR: Yes, okay. It was my passing comment which maybe set a hare running
7 that if it was 143A you would expect to see 143 deleted before. Anyway, carry on,
8 I have 143A which says, "Further programmes include ..." and then there is a list of
9 programmes.

10 MS BLACKWOOD: Yes. So, sir, you will see we have pleaded in paragraph 142
11 above that Google offers certain third-party app developers additional benefits in
12 exchange for ensuring the presence of their apps on the Play Store.

13 THE CHAIR: Yes.

14 MS BLACKWOOD: What paragraph 143A does is provide further details of those
15 programmes. Google objects to them on the basis that they are late. But I should first
16 highlight that there are aspects of these amendments which we only know about in
17 light of the disclosure that we've received. Professor Rodger received approximately
18 3.5 million documents from Google between May and September last year. In fact,
19 he's still receiving some disclosure. So, it has taken time to process that material and
20 in that context the pleadings. For example, that some of these programmes required
21 the maintenance of content, feature and pricing parity, which you see at the end of
22 subparagraphs b, c, d and e --

23 THE CHAIR: Yes.

24 MS BLACKWOOD: -- were only known to us in light of that disclosure.

25 Again, as with my comments on the alternative billing amendments, it was reasonable
26 for Professor Rodger to make a single set of amendments following the filing of the

1 expert evidence and the processing of this disclosure material, rather than to make
2 a series of amendments to the claim form in a piecemeal manner.

3 Sir, the pleading at 137, which is on page 549 --

4 THE CHAIR: Yes.

5 MS BLACKWOOD: -- really reflects that later pleading as acknowledged.

6 THE CHAIR: Reflects 143A?

7 MS BLACKWOOD: 143A.

8 THE CHAIR: They say it is unrelated wording.

9 MS BLACKWOOD: You will see that in the fifth line from the bottom there is pleading
10 that:

11 "in some cases including provisions for content parity and/or pricing parity with other
12 app distribution platforms."

13 That's the point I mentioned before. We were not aware of that prior to processing
14 disclosure.

15 THE CHAIR: Okay. All right.

16 MS BLACKWOOD: Sir, our position is there is no prejudice to Google as a result of
17 these amendments. The existence of the further programmes are not new matters in
18 these proceedings. They are specifically addressed already in Google's defence.
19 I can take you to it or give you a reference if it would assist?

20 THE CHAIR: Just give me a moment, please.

21 MS BLACKWOOD: Yes, sir.

22 THE CHAIR: Are you saying, sorry -- I am going back to 143A and all the further
23 programmes. Are you saying that those are specifically mentioned in the defence?

24 MS BLACKWOOD: They are specifically mentioned.

25 THE CHAIR: But not specifically relied on by you until now?

26 MS BLACKWOOD: Yes, sir.

1 THE CHAIR: Okay.

2 MS BLACKWOOD: They are addressed in the expert evidence of Professor Fletcher.

3 THE CHAIR: Okay.

4 MS BLACKWOOD: We say they are already in issue in these proceedings because

5 Google has raised them in their defence. Google has already adduced factual

6 evidence on these programmes in Mr Feng's evidence. I can give you references to

7 his statements if that would assist.

8 Google --

9 THE CHAIR: Sorry, which witness?

10 MS BLACKWOOD: Mr Feng.

11 THE CHAIR: Okay.

12 MS BLACKWOOD: In his first, fourth and fifth statements.

13 THE CHAIR: Yes.

14 MS BLACKWOOD: Google has still the opportunity to submit responsive expert

15 evidence until 1 April this year. Therefore, it has the opportunity to adduce additional

16 expert evidence within the confines of that permission. And Professor Rodger has

17 confirmed to Google in correspondence again that he will not be seeking further

18 disclosure arising out of this amendment.

19 THE CHAIR: Okay.

20 MS BLACKWOOD: Finally, we again see no reason why this amendment should have

21 any impact on the timetable to trial.

22 THE CHAIR: Okay.

23 MS BLACKWOOD: So we submit that these amendments should be allowed.

24 THE CHAIR: Yes.

25 MS BLACKWOOD: Then, finally, Google objects to two paragraphs of the amended

26 pleadings on the basis that it says there are pleading deficiencies. That is

1 paragraph 189.1, which is on page 573.

2 THE CHAIR: Yes.

3 MS BLACKWOOD: So, you will see that in this paragraph there are pleading
4 amendments to update it by reference to Mr Harman's evidence that was filed in
5 December last year.

6 THE CHAIR: Yes.

7 MS BLACKWOOD: And Google's objection to these amendments is that
8 Professor Rodger has not positively pleaded the specific level at which he alleges the
9 service fee, or the commission as we would call it, became excessive.

10 THE CHAIR: I didn't hear that.

11 MS BLACKWOOD: I am sorry, sir. Google's objection, is that we have not positively
12 pleaded the specific level at which we alleged that the service fee, which we would
13 call the commission --

14 THE CHAIR: Yes.

15 MS BLACKWOOD: -- became excessive. We haven't pinpointed a specific, you
16 know, commission at X level it was fine, but you tipped over the edge.

17 THE CHAIR: Yes.

18 MS BLACKWOOD: Sir, we say there is no need for Professor Rodger to plead this.

19 THE CHAIR: This is a point also raised, I think, in relation to Coll. I am interested to
20 hear submissions on this point as plainly there is an issue, I think, in relation to Coll,
21 that Google say you have not pleaded which existing commissions are excessive. The
22 higher figure. I think Google are saying that you are required to plead a counterfactual
23 lawful level of fee. I think that's the point.

24 So I am interested -- on that issue at the moment I don't know the answer. You say
25 there is no need to plead a counterfactual level of lawful fee.

26 MS BLACKWOOD: Yes, sir. I could perhaps -- it means taking it out of order, but

1 I could perhaps take you to the authorities bundle and the decision of Apple v Kent, at
2 tab 12.

3 THE CHAIR: Yes.

4 MS BLACKWOOD: You will see on page 582, tab 12.

5 THE CHAIR: Yes.

6 MS BLACKWOOD: This is the portion of the judgment where the Tribunal was
7 considering excessive pricing.

8 THE CHAIR: Yes.

9 MS BLACKWOOD: And I wanted to draw your attention to paragraph 664, which
10 relates to their conclusions on limb 2. That's whether or not the price was unfair.

11 THE CHAIR: Yes.

12 MS BLACKWOOD: The Tribunal specifically states:

13 "In reaching our conclusion, we have not attempted to identify what a 'fair' (that is,
14 non-abusive) Commission would be. While the comparators indicate what price might
15 be charged for the services in conditions of workable competition, the various issues
16 relating to the comparators [...] mean that reaching any reliable view on the level of a
17 non-abusive commission is not possible, at least for the purposes of assessing
18 fairness."

19 Sir, that is recent authority that the Tribunal doesn't need, for the purposes of
20 establishing liability in relation to excessive pricing, to identify the specific lawful
21 counterfactual.

22 THE CHAIR: Yes, the counterfactual level.

23 MS BLACKWOOD: Obviously we posit certain commission rates for the purposes of
24 assessing quantum, but for the purposes of liability and abuse --

25 THE CHAIR: Yes, okay, I have the point.

26 MS BLACKWOOD: Sir. And related to that, then, is just also to flag paragraph 610.

1 That's on page 562.

2 THE CHAIR: One minute.

3 The objection to 189.1 is not the mere fact that you just refer to Mr Harman.

4 MS BLACKWOOD: No, sir.

5 THE CHAIR: The objection is you haven't specified a counterfactual lawful level.

6 MS BLACKWOOD: Yes, sir, that's what it is limited to.

7 THE CHAIR: Okay. Where are you taking me now?

8 MS BLACKWOOD: Paragraph 610 on page 562.

9 THE CHAIR: Give me the paragraph again.

10 MS BLACKWOOD: 610.

11 THE CHAIR: Of Kent, sorry. I thought we were going back to the pleading.

12 MS BLACKWOOD: Sir, I didn't --

13 THE CHAIR: It is fine.

14 MS BLACKWOOD: It would also be helpful to have the pleading open, sir, as well, in

15 relation to the point --

16 THE CHAIR: Page 610 or paragraph 610?

17 MS BLACKWOOD: Paragraph 610, page 562.

18 THE CHAIR: Yes.

19 MS BLACKWOOD: This is where the Tribunal sets out its conclusion in relation to the

20 application of limb 1 of the test for excessive pricing. You can see from that paragraph

21 that the exercise that the Tribunal performs is to compare to see whether there is a

22 significant and persistent difference between the price of the services and the cost of

23 those services.

24 THE CHAIR: Yes.

25 MS BLACKWOOD: It's not seeking to identify the specific level at which the

26 commission tips over into being unlawful. It is saying --

1 THE CHAIR: Yes, okay.

2 MS BLACKWOOD: -- we look at the profitability and that gives us an indication. The
3 level of profitability, the persistent nature of that. That then gives us an indication of
4 whether or not the pricing was excessive.

5 THE CHAIR: Yes. So, we are looking at, effectively, rates of return, profitability?

6 MS BLACKWOOD: Yes, sir. Yes, sir.

7 THE CHAIR: Okay, all right.

8 MS BLACKWOOD: That's what, for the purposes of that limb 1 test, that is what is set
9 out in paragraph 189.1.

10 THE CHAIR: Yes.

11 MS BLACKWOOD: We explain the analysis that's been undertaken by Mr Harman
12 and the rates of return.

13 THE CHAIR: Yes.

14 MS BLACKWOOD: Which is precisely in line with what the Tribunal said in
15 Kent v Apple. So, our position is that pleading is not defective.

16 THE CHAIR: Okay, one minute.

17 Okay.

18 MS BLACKWOOD: Then in relation to paragraph 149 --

19 THE CHAIR: Yes.

20 MS BLACKWOOD: -- Google makes two points in relation to this. The first is the one
21 that you've already alluded to --

22 THE CHAIR: I am not quite there yet.

23 MS BLACKWOOD: I am sorry, sir.

24 THE CHAIR: Which paragraph number?

25 MS BLACKWOOD: 149, page 577.

26 THE CHAIR: I thought you said 149.

1 MS BLACKWOOD: I have inverted my number, sir, I apologise. 194. I am
2 responsible for that confusion, I am sorry.

3 THE CHAIR: Yes.

4 MS BLACKWOOD: So, Google makes two complaints in relation to this pleading. The
5 first is that they say that Professor Rodger cannot just refer to Professor Fletcher's
6 evidence and his pleading needs to set out what his case is and the particulars relied
7 on.

8 But, sir, we would say that's already done in the subsequent paragraphs. This is an
9 introductory paragraph, 194; then the pleading goes on particularly at 196 and 199, to
10 set out our pleaded view on the counterfactual.

11 THE CHAIR: Okay.

12 MS BLACKWOOD: So, we say that is --

13 THE CHAIR: One minute. At 196 and 197, did you say?

14 MS BLACKWOOD: 196 and 199.

15 THE CHAIR: Okay.

16 MS BLACKWOOD: The second objection that Google raises is the one we have
17 already addressed. I took you to paragraph 664 of Kent v Apple, which is they say the
18 pleadings are defective because Professor Rodger has not positively pleaded the
19 service level fee that he alleges would be lawful in the counterfactual. For the reasons
20 I have already given, we say that's not necessary and the pleadings are not defective.

21 THE CHAIR: You are slightly confusing me. This is all the second point?
22 What you have just been taking me to now is paragraph 7(b) of the letter.

23 MS BLACKWOOD: Yes. So, in 7(b) of the letter --

24 THE CHAIR: I am not sure, do 7(a) and (b) really -- it is all the same point, isn't it? It's
25 not the same point, all right. I will hear from Google.

26 All right.

1 MS BLACKWOOD: Thank you, sir.

2 THE CHAIR: So that I understand, you say your response is the same throughout,
3 is it? That you don't need to plead the lawful level?

4 MS BLACKWOOD: We don't need to plead the specific level.

5 THE CHAIR: The lawful level.

6 MS BLACKWOOD: The lawful level, yes.

7 THE CHAIR: There is the point about you just would cross refer to your expert, but --

8 MS BLACKWOOD: I don't think that that is right, in light of what --

9 THE CHAIR: I will hear what Google have to say on that, okay.

10 MS BLACKWOOD: It may be that you wish to move matters along.

11 THE CHAIR: Yes.

12 MS BLACKWOOD: There are a couple of qualifications on Google's consent to our
13 amendments that we don't necessarily agree with.

14 THE CHAIR: Right.

15 MS BLACKWOOD: So, they consent to the remainder of our amendments provided
16 that we will not seek further disclosure.

17 THE CHAIR: Yes.

18 MS BLACKWOOD: And that we consent to Google adducing factual and expert
19 evidence relating to the proposed amendments.

20 As I have already indicated, Professor Rodger has confirmed that he does not intend
21 to seek disclosure arising out of his amendments.

22 THE CHAIR: Of what?

23 MS BLACKWOOD: Of the amended claim form. At all. None of them.

24 THE CHAIR: Yes.

25 MS BLACKWOOD: But what he's not prepared to confirm at this stage is that he will
26 not seek disclosure arising out of any consequential amendments in Google's defence.

1 For the simple reason that we can't sensibly make that commitment when we have no
2 visibility as to what Google may raise in its defence.

3 THE CHAIR: Okay.

4 MS BLACKWOOD: The second issue is the further evidence. Our position is that in
5 light of the nature of the pleading amendments we have made, we don't understand
6 why further factual evidence would be required. We have referred to various
7 paragraphs of their existing evidence that cover UCB, terms of billing systems, the app
8 developer programmes quite extensively. We struggle to see what more factual
9 evidence would be required, and Google has not told us what they think they might
10 need.

11 I appreciate, particularly in relation to us they only have our claim form relatively
12 recently, but where they have not identified that they should need further information,
13 further factual evidence, and they still have the opportunity to put in their expert
14 evidence, Professor Rodger isn't prepared to agree to a general wide-ranging
15 permission for Google to adduce further evidence beyond what it's already committed
16 to submit.

17 THE CHAIR: Okay. All right, thank you.

18 MS BLACKWOOD: There is one tiny point about the timing of reply evidence. We
19 say it should be 21 days, Google say 14.

20 THE CHAIR: We will come back to things like that, I think. Reply evidence, you mean
21 further amended defence.

22 MS BLACKWOOD: Amended defence and then our reply to their amended defence.

23 THE CHAIR: Okay. We will deal with it in due course, I think. I am just watching the
24 clock.

25 MS BLACKWOOD: Yes, sir.

26 THE CHAIR: Yes.

1 Submissions by MR KENNEDY

2 MR KENNEDY: Sir, our application to amend our re-amended claim form is at core
3 bundle-tab 13, page 162.

4 THE CHAIR: Right.

5 MR KENNEDY: We don't need to turn it up, sir. The amendments are in four
6 categories there, but what I propose to do is not go through category by category but
7 rather to deal with Google's objections which they raised first in correspondence and
8 then in their skeleton argument.

9 THE CHAIR: I am a bit confused about your position, to be honest. I have read your
10 skeleton, I have, as of yesterday, the re-re-amended claim form in the bundle, and
11 I have now been provided with something new this morning.

12 MR KENNEDY: Yes, sir.

13 THE CHAIR: Just walk me through the position generally.

14 MR KENNEDY: So the loosely amended claim form is the current proposed draft that
15 we seek permission for. So the one you received this morning. Which I think is not in
16 the bundle but should have been handed in, in hard copy. That's the one I am going
17 to be referring to.

18 THE CHAIR: Let me find that, please. I think I have that in larger format. I have.

19 MR KENNEDY: It should have "Google confidential information" at the top, sir, if that
20 is helpful in identifying it.

21 THE CHAIR: Okay.

22 MR KENNEDY: This is the form for which we seek permission. I think, sir, perhaps
23 the confusion has arisen in respect of our position on Evans -- that is Google's first set
24 of objections.

25 THE CHAIR: What I would like you to do is first of all summarise briefly what you were
26 seeking until this morning. And then tell me what's changed. Is that all right? Because

1 that will help me understand what's happened.

2 MR KENNEDY: Until this morning, sir, we were seeking permission to make additional
3 amendments which pleaded out various regulatory and private litigation
4 developments.

5 THE CHAIR: So that is category 1. Is that the only change?

6 MR KENNEDY: That's the only thing that has changed, sir.

7 THE CHAIR: I would just like you, if you can, to summarise the categories of types of
8 amendment, just as Mr Scannell did, that you were originally seeking. And then tell
9 me what you have deleted from that.

10 MR KENNEDY: Of course, sir. The categories haven't changed, sir. There are four
11 categories, amendments to bring the claim form into line with Ms Coll's expert
12 evidence, is category 1.

13 THE CHAIR: Okay.

14 MR KENNEDY: Amendments to reflect certain factual developments, category 2. An
15 amendment to the relevant period within the class definition --

16 THE CHAIR: Yes.

17 MR KENNEDY: -- and other minor typographical clarificatory amendments, category
18 4.

19 THE CHAIR: All right. Can I understand what factual developments included --

20 MR KENNEDY: Regulatory --

21 THE CHAIR: Included but not limited to.

22 MR KENNEDY: Included but not limited to.

23 THE CHAIR: Okay.

24 MR KENNEDY: Likewise, category 1 expert evidence included but not limited to
25 reliance on certain regulatory decisions.

26 THE CHAIR: Yes.

1 MR KENNEDY: There is one category 1 item, paragraph 95 -- I will take you to it in
2 a moment -- which had an Evans issue, if you look at it that way, and we have changed
3 our approach on that. So that's a subset of category 1.

4 THE CHAIR: Now you are going to tell me that you are no longer seeking the Evans
5 aspects of categories 1 and 2.

6 MR KENNEDY: Correct, sir.

7 THE CHAIR: Right. That's helpful. Take it now in the way you wish to take it.

8 MR KENNEDY: Sir, I was going to start with the Evans category amendments.

9 THE CHAIR: Yes.

10 MR KENNEDY: Those concern paragraphs 95, page 40.

11 Sir, for Ms Smith's benefit, the categories which I am now using to address you don't
12 correspond to the four categories I have just given you. They correspond to the
13 categories of objection that Google raised. So I am proceeding --

14 MS SMITH: That's my skeleton.

15 THE CHAIR: That's.

16 MR KENNEDY: That's your skeleton, yes.

17 THE CHAIR: But to the version you are now looking at, page 40 --

18 MR KENNEDY: Yes, sir.

19 THE CHAIR: Am I right in thinking that version before this had additional things in it
20 which are no longer being put in.

21 MR KENNEDY: Correct, sir.

22 THE CHAIR: But you are also deleting parts of the existing? Is that right? I don't
23 know.

24 MR KENNEDY: For example, sir, in the first sentence of paragraph 95 that is now
25 entirely struck through.

26 THE CHAIR: So that was there all along.

1 MR KENNEDY: That was there in the original and then --

2 THE CHAIR: I am going to turn up what you applied for originally, so that I can

3 understand what is going on. Can you tell me where in the first --

4 MR KENNEDY: It is core bundle, tab 15, sir. It starts on page 167.

5 THE CHAIR: Let me just look at this equivalent paragraph.

6 Let me just look. Without being able to digest this very quickly, your original

7 amendment effectively included in principle paragraph 95, but you modified it or

8 updated it.

9 MR KENNEDY: That's correct, sir.

10 THE CHAIR: Right. Now, not only are you not modifying and updating it, but you are

11 deleting the original paragraph itself?

12 MR KENNEDY: We are not deleting the whole paragraph, sir. If you look over to

13 page 41, you will see we have added the words "As to those exclusions" and the

14 exclusions to which those refer back are those identified at 94(a) and (b), and then the

15 subparagraphs that follow expand upon the nature of the exclusions from the relevant

16 market as defined.

17 THE CHAIR: Just then tell me, the net effect is that in your original pleading at this

18 stage you are relying -- I don't know what you are doing.

19 Your original pleading relied on, or referred to, regulatory decisions.

20 MR KENNEDY: Yes, sir.

21 THE CHAIR: You are now no longer relying on regulatory decisions. Full stop. Is that

22 your position?

23 MR KENNEDY: That's not our position, sir.

24 THE CHAIR: Right.

25 MR KENNEDY: Perhaps I can try to summarise at a high level what we have done.

26 In the version that is in the core bundle, which we were just looking at, we have

1 introduced certain pieces of new text that relied on certain regulatory decisions or that
2 refer to certain regulatory decisions for certain outcomes in private litigation, such as
3 the Epic US proceedings.

4 THE CHAIR: That's in the --

5 MR KENNEDY: The core bundle version, the application bundle.

6 THE CHAIR: That's amendment version 1.

7 MR KENNEDY: Amendment version 1.

8 THE CHAIR: Okay. Carry on.

9 MR KENNEDY: Then we received a letter from Google that said "we object to those
10 amendments that you have made, you have proposed, on the basis that they are
11 contrary to the Supreme Court's decision in Evans."

12 THE CHAIR: Right.

13 MR KENNEDY: We wrote back and we said "we don't agree that they are contrary to
14 Evans. We think that you are wrong about the scope of Evans."

15 However, we don't think it is necessary to have that fight now. We think we can have
16 that fight at trial. So, we are going to remove the proposed amendments that were in
17 amendment 1 that fall into the list that was provided by Google.

18 THE CHAIR: Can I ask you this question: in your existing pleading, pre amendment
19 1 and amendment 2, is there any reliance on regulatory decisions?

20 MR KENNEDY: Yes, sir.

21 THE CHAIR: But you are not deleting those?

22 MR KENNEDY: No and that's what I was coming on to, sir. We are not proposing to
23 go back through the pre-existing pleas as to regulatory decisions.

24 THE CHAIR: So, your existing pleaded regulatory decisions stay? Just not adding
25 new ones?

26 MR KENNEDY: That's correct, sir.

1 THE CHAIR: Okay. I now understand your position, thank you.

2 MR KENNEDY: That's our position on evidence. We don't accept that Google is
3 correct. We think it is an argument for trial. If we are right about the scope of Evans
4 we will refer to the regulatory decisions that we want to refer to at trial and if we are
5 wrong, we won't be able to, sir. That's where we are at on the pleas.

6 THE CHAIR: You say you didn't need to plead them?

7 MR KENNEDY: We didn't need to plead them.

8 THE CHAIR: You didn't need to plead them.

9 MR KENNEDY: We did not need to plead them. It was not necessary, for example,
10 for us to plead the existence of the strategic market status designation.

11 THE CHAIR: Okay.

12 MR KENNEDY: We have a complete claim form absent those new pleas that we
13 proposed in amendment 1.

14 THE CHAIR: Okay.

15 MR KENNEDY: Sir, I hope that deals with the Evans point.

16 Then I move to what I call Google category 2, which was concerns that Google raised
17 with respect to pleas in our excessive pricing case, where we introduced a term the
18 "Effective Commission." What Google says in its skeleton is that the term was unclear
19 and in particular it was unclear as to "(a) what level of Google's actual service fees are
20 challenged by Ms Coll as excessive and unfair; and (b) what level of service fee is
21 alleged by Ms Coll to be a lawful, counterfactual rate".

22 THE CHAIR: The (b) point is the point which has already been addressed. I am not
23 saying you shouldn't address it but the (b) point is the point we have been dealing with
24 with Ms Blackwood. The (a) point is the contention that you have not identified clearly
25 which commission rate or commission rates is excessive.

26 MR KENNEDY: That is correct, sir.

1 THE CHAIR: Okay.

2 MR KENNEDY: We say that there is no lack of clarity and that Mr Holt's reports are
3 clear as to what commission rates he has taken into account in reaching his
4 conclusions on excessiveness and unfairness and what level of commission rate
5 would be present in the counterfactual, or would be likely to be present in the
6 counterfactual. And there is no suggestion in Mr Noble's responsive evidence that he
7 was unclear as to what Mr Holt's position was.

8 Nonetheless, in a bid to be cooperative, sir, what we sought to do is clarify the pleading
9 and reflect in the pleading the approach that Mr Holt has taken in his evidence.

10 If I can show you the changes that we have made, this is in amendment 2, sir. If we
11 could start on page 5, sir, you will see there is a list of definitions.

12 THE CHAIR: Yes, just give me a moment.

13 MR KENNEDY: Of course.

14 THE CHAIR: I have the wrong document.

15 Yes, okay.

16 MR KENNEDY: Page 5. Halfway down you will see "i.a" and then a defined term
17 "Counterfactual Commission." Do you have that, sir?

18 THE CHAIR: Okay. Well, that seems a pretty clear pleading -- Mr Rodgers is nodding.
19 Yes.

20 MR KENNEDY: Yes. This is after the letter. Mr Williams is correct.

21 THE CHAIR: Yes.

22 MR KENNEDY: Then just below that you will see "Effective Commission" and then
23 you will see that there are different types of effective commission.

24 THE CHAIR: Yes.

25 MR KENNEDY: In each case we identify the precise rate that the defined term
26 correlates to. Then if we go over the page, by 2 to 7, you will see that we have

1 introduced a new defined term which is "Incidence Rate." That's the proportion of
2 overcharge borne by GMS --

3 THE CHAIR: This is pass-on?

4 MR KENNEDY: This is pass-on, sir.

5 THE CHAIR: Okay.

6 MR KENNEDY: Then if we could pick it up at page 62 of the amendment 2 document,
7 you will see "(v) Relevant Counterfactual".

8 THE CHAIR: One minute. Yes, thank you.

9 MR KENNEDY: It is paragraph 150. This is the relevant counterfactual for the
10 purpose of the exclusionary abuse, sir.

11 THE CHAIR: Yes.

12 MR KENNEDY: You will see over the page, (c), it is the final two words of (c), you will
13 see we have introduced the defined term "Counterfactual Commission" to identify what
14 we say the counterfactual commission would be absent the exclusionary abuse. So,
15 we hope that that clears up any confusion.

16 THE CHAIR: Yes. Excessive pricing --

17 MR KENNEDY: You see just below that excessive pricing, so we move into the
18 excessive pricing submission. If we can pick it up at paragraph 159, page 66 about
19 halfway down, you see we are dealing with the excessive limb and you will see that
20 the evidence shows that "the Aggregate Effective Commission [as defined] satisfies
21 the excessive limb by reference to the Play Store's costs" and that reflects the nature
22 of the exercise that Mr Holt has done, which is to analyse those matters in the
23 aggregate. He looks at all of the relevant purchase transactions, the effective
24 commission rate that was payable on those transactions and the revenues that were
25 attributable to them, and he looks at the Play Store's costs with the assistance of
26 Mr Dudney's evidence, and he reaches his conclusions on excessiveness.

1 THE CHAIR: So that I can just understand, this is still a case on the excessive limb
2 that the commission was excessive by reference to profitability?

3 MR KENNEDY: That's right, sir.

4 THE CHAIR: But you have also specified a counterfactual commission rate.

5 MR KENNEDY: We have, sir.

6 THE CHAIR: Going back to that definition at page 5 of "Counterfactual Commission",
7 where is that referred to then?

8 MR KENNEDY: That's --

9 THE CHAIR: That is referred to on exploitative -- no, the exclusionary abuse.

10 MR KENNEDY: It is referred to in two places, sir. 150(c) which I just showed you,
11 which is exclusionary, and then if you could go forward, page 73, paragraph 166, this
12 is the counterfactual to the exploitative abuse, the excessive pricing abuse.

13 THE CHAIR: Yes, sorry. Yes, okay.

14 MR KENNEDY: Then you will see "In a sufficiently competitive market the
15 Counterfactual Commission would be in the range of 10-20%" and again that reflects
16 Mr Holt's evidence. So that's where the counterfactual commission rate comes in.
17 That's in that pleading there, sir.

18 THE CHAIR: Okay. So, in fact, in relation to the exploitative abuse there are sort of
19 two strands to your case? It is excessive -- well, the counterfactual, I presume, is
20 relevant to the damages claim?

21 MR KENNEDY: Precisely, sir. What we sought to do --

22 THE CHAIR: Okay. You have pleaded the counterfactual for the damages claim.

23 MR KENNEDY: Precisely, sir.

24 THE CHAIR: But when it comes to the counterfactual for the abuse and exploitation,
25 you have done it by reference to profitability.

26 MR KENNEDY: That is correct, sir.

1 THE CHAIR: Okay, all right.

2 MR KENNEDY: For each of the limbs and sub-limbs what we have sought to do is
3 summarise by reference to our new defined terms what Mr Holt has done.

4 THE CHAIR: Okay.

5 MR KENNEDY: So that it is clear that we are saying -- rather than just rely --

6 THE CHAIR: I will hear what Google have said -- effectively what you have done or
7 sought to do is meet the objection in relation to that. We will hear what they have to
8 say.

9 MR KENNEDY: Precisely, sir. I can take it very quickly, but you will see at 160 we do
10 the same thing, "The CR will rely at trial on Mr Holt's expert evidence that [the]
11 Aggregate Effective Commission is unfair in itself". Then at page 71, paragraph 162,
12 we set out Mr Holt's approach to unfair comparison. In that case he uses two different
13 prices because the comparators are necessarily different for the different products in
14 question.

15 Sir, that deals with the excessive pricing objections. There are miscellaneous
16 objections to pass-on and quantum, whereby it was said that we had no longer pleaded
17 our case on pass-on and quantum. We found that somewhat baffling. Our case is set
18 out very clearly in our expert evidence. To meet that objection what we have done, at
19 paragraphs 174, 176 and 178, is to simply summarise the expert evidence as to what
20 the pass-on rate was.

21 THE CHAIR: Yes.

22 MR KENNEDY: And how the damages have been calculated. So, we pick it up at
23 paragraph 174. We have summarised there how the overcharge is analysed. 176(a)
24 starts with volume of commerce and (b) goes to more precisely identifying the
25 overcharge. (c) is the Incidence Rate and then you will see, paragraph 178A again,
26 "In the premises, the CR claims damages... in the amount of --" and then it is redacted

1 | because it is confidential.

2 | THE CHAIR: Yes.

3 | MR KENNEDY: So hopefully that meets that category of objection.

4 | I think, sir, that takes us on to the objections relating to the relevant period. I am

5 | conscious of the time, sir. This is a little bit involved. Perhaps you want to hear it --

6 | THE CHAIR: After this issue, are there other issues?

7 | MR KENNEDY: There is just a question of prejudice sir. I can summarise the position

8 | on prejudice very quickly.

9 | THE CHAIR: The relevant period will take a little bit longer.

10 | MR KENNEDY: Ten minutes, perhaps, sir. It is slightly more involved in terms of --

11 | THE CHAIR: My understanding is that the relevant period of objection is a sort of

12 | technical one in relation to what you have done in terms of notice and the class.

13 | MR KENNEDY: I think that's right, sir.

14 | THE CHAIR: And satisfying the procedures for certification.

15 | Relevant period, you extend the period but the key issue is it is going to bring in new

16 | class members.

17 | MR KENNEDY: That's right, sir. I am not entirely sure what the scope of the objection

18 | is. There is certainly an objection as to whether or not we have provided for a new

19 | opt-out period.

20 | THE CHAIR: Yes.

21 | MR KENNEDY: We have now provided for a new opt-out period. Certain objections

22 | were taken to the form of notice. We have now revised the form of notice. What is

23 | not clear to me is what Google's case is on whether or not you need to certify the

24 | incremental new class.

25 | THE CHAIR: Whether you need to apply to certify and whether we need to certify --

26 | MR KENNEDY: Precisely, sir. And whether or not we need a new claim form. I had

1 submissions on that. I don't know to what extent that is the objection --

2 THE CHAIR: What I suggest we do is we break now, and you can perhaps discuss
3 with Google the extent to which there are issues between you generally.

4 It may be that in the light of the new claim form that you have submitted this morning,
5 that the scope of argument in relation to your case might be reduced. Rather than
6 spend ten minutes of you going through it --

7 MR KENNEDY: Yes.

8 THE CHAIR: -- as long as I understood what the broad point was and you do, it may
9 be that we can narrow the issues.

10 MR KENNEDY: I hope we can, sir. We will try to do that.

11 THE CHAIR: Okay. We will break until 2 o'clock. The way things are going, I think it
12 is most unlikely we are going to get to disclosure issues.

13 Obviously, Google has heard what everybody has said. I will hear everything that you
14 want to say, but I am hoping that we may have narrowed a little bit.

15 MS SMITH: If I can hand up an authority for you and for my colleagues to look at over
16 lunch. This is in response to a point, a new point, that was made by Epic's counsel
17 orally, which is about the impact that the Evans judgment on what is inadmissible at
18 trial has on what one can plead.

19 I understood him to be arguing, which has not been argued before, that he can plead
20 these matters, and then whether or not they are inadmissible is a matter to be dealt
21 with at trial. I want to hand in a recent judgment -- well, it's not a recent judgment, it is
22 2022 -- which is about striking out pleadings on the basis of the evidence.

23 THE CHAIR: I have to say, if there is going to be an application to strike out --

24 MS SMITH: It's not in support of an application to strike out. I will address that point
25 as to why that has not yet been done.

26 THE CHAIR: Right.

1 MS SMITH: But this is about the impact of Evans, paragraphs 58 and 62, which I will
2 be --

3 THE CHAIR: It can't be about the impact of Evans, because this case you are handing
4 up is before Evans, presumably. But it is something to do with pleading and striking
5 out and admissibility. (Handed)

6 Thank you very much.

7 MS SMITH: Apologies, the paragraphs are 56 and 62. I may have got those wrong.
8 56 and 62.

9 THE CHAIR: Okay. I have marked those.

10 MS SMITH: Hollington v Hewthorn, not Evans, I got that wrong. The general
11 application of the law which is subsequently reaffirmed in Evans.

12 THE CHAIR: Right. 2 o'clock, thank you very much.

13 (1.03 pm)

14 (The luncheon adjournment)

15 (2.05 pm)

16 THE CHAIR: Thank you. Yes.

17 MR KENNEDY: We made good progress over the short adjournment with regard to
18 Ms Coll's pleading amendments --

19 THE CHAIR: Before you do can I just open my notebook.
20 Yes.

21 MR KENNEDY: There are perhaps just three or four points just to deal with, sir.
22 The first is a factual allegation at paragraph 65 of the amendment 2 document that we
23 have been talking about. That's the loose document.

24 THE CHAIR: Mr Kennedy, can you just go a little bit more slowly.

25 MR KENNEDY: Of course, sir. My apologies.

26 THE CHAIR: You don't need to apologise. You are very fluent but I am a little bit

1 slower than you are. Paragraph 65.

2 MR KENNEDY: Page 28. You will see the penultimate paragraph has a purple mark
3 up. In correspondence Google told us that we had made a mistake as to what had
4 happened in the Portuguese court proceeding, so we have excised the reference to
5 the Portuguese court order.

6 THE CHAIR: Sorry, I am not --

7 MR KENNEDY: Sorry, sir, the penultimate sentence you will see "Google also."

8 THE CHAIR: Yes.

9 MR KENNEDY: The point that was made in correspondence was that the reference
10 to the Portuguese court order in October 2018 was incorrect.

11 THE CHAIR: Yes.

12 MR KENNEDY: So, we have excised that reference. Then we have sought to update
13 the substantive factual allegation to make it more accurate.

14 THE CHAIR: Right.

15 MR KENNEDY: Or what we understand to be more accurate. We have given the
16 source for that in footnote 70. I understand that Google objects to that on the basis
17 that it is a new factual point. Beyond it being a new factual point, I don't know what
18 the nature of the objection is.

19 If the nature of the objection is Google is going to have to put in a new witness
20 statement or something of that nature, then we are content to remove the sentence as
21 a whole, but until we know precisely why the simple fact that it is a new factual
22 allegation is a problem we don't see a reason not to pursue it. But I am sure that
23 Ms Smith will --

24 THE CHAIR: If there is an objection you might withdraw it? But you don't know what
25 the objection is?

26 MR KENNEDY: Beyond being just told it is a new factual allegation, I don't know what

1 the nature of the objection is.

2 THE CHAIR: That's --

3 MR KENNEDY: It is not a criticism. Things happened very late.

4 THE CHAIR: Then that's still live.

5 MR KENNEDY: Then two tweaks, sir, at paragraphs 161 and 162. That is page 71,

6 sir. That's in the excessive pricing analysis.

7 THE CHAIR: Right.

8 MR KENNEDY: My learned friends have pointed out that there appear to be two

9 references to "the Commission." The first that "In the premises the Commission" --

10 this is paragraph 161 -- and that ought to be "the Aggregate Effective Commission."

11 THE CHAIR: The first line should be "Aggregate Effective"?

12 MR KENNEDY: Yes, "in the premises the Aggregate Effective Commission does not

13 reflect."

14 THE CHAIR: Okay.

15 MR KENNEDY: Then similarly at paragraph 162:

16 "There are a number of factors that indicate that the [Effective] Commission", so we

17 would put the word "Effective" in there, and that is just for the sake of accuracy.

18 THE CHAIR: That is agreed, is it? You are suggesting that you are going to add in

19 those words --

20 MR KENNEDY: We will add in those words --

21 THE CHAIR: -- to meet points that Google have made.

22 MR KENNEDY: Purely being helpful. They point they think we have it wrong. We

23 think they are right and we will confirm that.

24 THE CHAIR: Okay.

25 MR KENNEDY: For the relevant period application --

26 THE CHAIR: Yes.

1 MR KENNEDY: -- pleading amendments are agreed. Google again helpfully drew to
2 our attention an error in the notice.

3 Sir, I have the notice in a separate tab. I don't have a reference.

4 THE CHAIR: Is it in the core bundle or the main bundle?

5 MR KENNEDY: I think it is in bundle D, actually. In the correspondence bundle.

6 THE CHAIR: I have bundle D.

7 MR KENNEDY: D/38, sir.

8 THE CHAIR: Can you give me a page number rather than a tab number, please?
9 Thank you.

10 MR KENNEDY: 123, sir.

11 THE CHAIR: That's a draft order -- no, it's not, sorry.

12 MR KENNEDY: You have the draft notice.

13 THE CHAIR: No, it is all right. Right, I have -- yes, okay.

14 MR KENNEDY: The draft notice.

15 THE CHAIR: I have the draft notice.

16 MR KENNEDY: You will see three paragraphs from the bottom there is a sentence
17 that starts "If you made Relevant Purchases at any time ... "

18 THE CHAIR: Again, going too quickly.
19 How many paragraphs down? Yes, I have it.

20 MR KENNEDY: You will see that it refers to 18 July and 28 November 2022. That's
21 legacy language that ought not to be in there, sir. So, we are going to remove that
22 sentence from the notice and amend the paragraph that follows to make clear that
23 anyone who doesn't opt-out by the opt-out date will form part of the proceedings. So,
24 it is just a clarificatory amendment to the notice, sir. I understand that that is agreed.

25 THE CHAIR: Okay.

26 MR KENNEDY: There is a question on the notification plan. We have made provision

1 for notifying the class of the new opt-out period in the draft order, which should be one
2 page back in the D bundle. Or two pages back, sir. You should have the draft order,
3 I hope.

4 THE CHAIR: One minute. Page number 121?

5 MR KENNEDY: It should be page 121, sir.

6 THE CHAIR: Yes.

7 MR KENNEDY: You will see paragraph 6:

8 We propose to "publish the Notice" on the website and to "provide a copy to those
9 class members who have registered for updates."

10 That was what we did last time we amended the relevant period, sir, and we hope the
11 Tribunal is content with that approach to notification.

12 THE CHAIR: Okay.

13 MR KENNEDY: Sir, that just leaves the question of prejudice.

14 I think perhaps only one point on prejudice is pursued, which is the question of
15 disclosure. The Class Representative has confirmed that she won't seek any
16 additional disclosure arising out of these amendments apart from that update to what
17 is called the "UK transaction data." That's the data on the relevant purchases that are
18 made at various points in time.

19 It is common ground, I think, that at some point that data will need to be updated. At
20 the moment it runs, I think, until about February of 2024, but we will need another
21 tranche at some point. There is a debate ongoing between us about when that tranche
22 should be delivered, but I think that we don't need to ask for any ruling on that today,
23 sir, and we will pursue that in correspondence.

24 Otherwise, no disclosure sought by us. With respect to --

25 THE CHAIR: You are giving the confirmation that to the extent that there is an
26 amended defence, you won't seek disclosure following the amended defence?

1 MR KENNEDY: Sir, not if there is something that arises out of their amended defence
2 that we consider --

3 THE CHAIR: Your position is the same as the other claimants.

4 MR KENNEDY: Our position is same as the other claimants.

5 THE CHAIR: You don't envisage any, but you are not going to give a guarantee that
6 you won't ask for further disclosing arising out of anything which is raised.

7 MR KENNEDY: That's correct, sir. On the question of whether we consent to further
8 factual or expert evidence, our position is likewise the same as the other claimants.
9 We don't think that any further factual evidence is required arising out of our
10 comments. We can't give a blanket consent to adducing further factual expert
11 evidence, which we have not seen the application for, the nature of the evidence, but
12 our starting position is we just don't think anything is going to be required on Google's
13 part. We think the amendments relate to issues that are already canvassed.

14 THE CHAIR: Don't think further factual evidence shall be required from Google, but
15 you don't consent to such evidence. You want to see --

16 MR KENNEDY: We want to see what they are asking for. That's essentially it, sir.

17 THE CHAIR: Okay.

18 MR KENNEDY: I think that covers the points that were raised in the skeleton argument
19 on prejudice. I think, sir, that's all you need from me. But I think otherwise everything
20 is agreed between us.

21 THE CHAIR: Thank you. I will hear if it is not.

22 Thank you very much.

23 Yes. Ms Smith, thank you.

24 Submissions by MS SMITH

25 MS SMITH: Thank you, sir. Can I start by making two general points -- addressing
26 two general points -- which apply to all the applications to amend.

1 Those are first the principles that should be applied to pleading amendments these
2 days, especially delayed and late applications for amendment. Then, secondly, the
3 rule in Hollington v Hewthorn as recently applied to CAT proceedings by the
4 Supreme Court in Evans and how that applies to the applications before you.

5 So, first, the principles to be applied to pleading amendments. Can I ask you to take
6 out the authorities bundle and turn to the judgment of Mr Justice Coulson in
7 Galliford Try, which is at tab 5, page 28 for those working from the electronic bundle.

8 THE CHAIR: Just wait a moment while I have a tidy up.

9 Can you tell me what tab it is?

10 MS SMITH: Tab 5, sir. You will see that is a judgment of Mr Justice Coulson. If
11 I could ask you, sir, to turn to paragraph 15, which is on page 32. AB32.

12 He there summarises the law to be applied to pleading amendments. If I could ask
13 you to read the first half of paragraph 15, which makes the point that:

14 "The traditional approach is that as long as amendments can be compensated for in
15 costs, they should be allowed. That is no longer the right starting point and indeed it
16 is arguable it never was ..."

17 And he refers to two previous decisions of the Court of Appeal.

18 THE CHAIR: Right.

19 MS SMITH: Then if I could ask you to look at paragraph 16, and in particular at the
20 very bottom of page 32, what Lord Justice Lloyd said in the Swain-Mason case, over
21 the page. The quotation is:

22 "A heavy onus lies on parties seeking to make the very late amendment to justify it."

23 So, the burden is on the applicants.

24 Then if I could ask you to turn to paragraph 18B, at the bottom of AB33. I will
25 summarise what was said by Lord Justice Briggs in the Hague Plant case. He there
26 distinguishes between very late amendment cases, such as Swain-Mason which

1 I have just referred you to, where the amendment might risk the trial date, where
2 effectively the application to amend will of itself cause the balance to be heavily loaded
3 against the grant of permission; and late amendments. And here I am reading from
4 the judgment:

5 "In which the consequence of the large-scale reformation of the particulars will risk
6 undermining work already done and cause a duplication of cost and effort."

7 I there focus on --

8 THE CHAIR: One minute.

9 Okay, thank you, yes.

10 MS SMITH: Sir, what I take from the judgment of Lord Justice Briggs there is that we
11 are not just concerned with very late amendments, which might put a trial date at risk,
12 but also late amendments which necessitate further work to be done in response to
13 them, causing a duplication of cost and effort or previous steps in the proceedings
14 effectively to be revisited.

15 Then, in paragraph 19 --

16 THE CHAIR: Wait a minute. Paragraph 19?

17 MS SMITH: 19A. The judge says:

18 "I consider the right approach to amendments is as follows ..."

19 We cited 19A in our skeleton:

20 "The lateness by which an amendment is produced is a relative concept. An
21 amendment is late if it could have been advanced earlier or involves a duplication of
22 cost and effort or it requires the resisting party to revisit any of the significant steps in
23 the litigation such as disclosure or the provision of witness statements and expert
24 reports which have been completed by the time of the amendment."

25 Then (b) I don't rely on. That's talking about very late amendments. I am not
26 suggesting these amendments threaten the trial date. But I do rely on (c), which

1 applies in my submission both to late and very late amendments:

2 "The history of the amendment, together with an explanation for its lateness, is
3 a matter for the amending party and it is an important factor in the necessary balancing
4 exercise. In essence there must be [and I underline these words] good reason for the
5 delay."

6 I also rely upon paragraph (e). You will see from our skeleton --

7 THE CHAIR: Paragraph (d), did you say?

8 MS SMITH: (e), which deals with the prejudice to the resisting parties. And the
9 resisting party in this case is of course Google:

10 "If the amendments are allowed, the prejudice that the court will take into account and
11 weigh in the balance will incorporate at one end of the spectrum the simple fact of
12 being mucked around, to the disruption of and additional pressure on their lawyers in
13 the run-up to trial, the duplication of cost and effort at the other."

14 And then about the adjournment, which we don't rely on.

15 That's prejudice to the resisting parties on the one hand, (f):

16 "Prejudice to the amending party [these are the applicants in this case] are not allowed,
17 will obviously include its inability to advance its amended case. But that is just one
18 factor to be considered and weighed against obviously the prejudice to the resisting
19 party. Moreover [and I ask you, sir, to underline this sentence as well] if that prejudice
20 has come about by the amending party's own conduct then it is a much less important
21 element to the balancing exercise."

22 We say particularly in this case a number of these amendments could have been
23 brought a lot earlier and there is no good reason being given by the applicants as to
24 why they weren't.

25 So, in effect the prejudice, if there is any -- we don't accept that, but in any event if
26 there is any prejudice to the applicants -- that has been brought about by their own

1 conduct.

2 So, we say these applications to amend are late. They will cause prejudice to Google,
3 not just the simple fact of us being mucked around, as it was put in this judgment, but
4 also a duplication of cost and effort by having to revisit potentially disclosure --

5 THE CHAIR: Can you go a little bit slower?

6 MS SMITH: Sorry. By having to potentially revisit disclosure and witness evidence.
7 We may need -- I will come back to the detail of this -- to produce further factual
8 evidence in response to the amendments. And the claimants have indicated that they
9 may wish to seek further disclosure on the back of those amendments or as Epic puts
10 it in paragraph 10 of their skeleton argument, they cannot provide categoric
11 confirmation that they will not do so.

12 So, these amendments will potentially require previous revisiting.

13 THE CHAIR: Sorry, I didn't catch that.

14 MS SMITH: The duplication and revisiting of previous procedural steps that have
15 already been carried out in this case, disclosure and witness evidence and potentially
16 expert evidence.

17 THE CHAIR: Potential expert evidence from you. And you still have to put in your
18 expert reply, is that right?

19 MS SMITH: We have, yes.

20 THE CHAIR: Yes, 1 April.

21 MS SMITH: Yes.

22 THE CHAIR: Okay.

23 MS SMITH: So, we say these proposed amendments have not just been delayed but
24 they are late. They come well after -- in the case of Epic, in particular, they come five
25 years after the date of Epic's initial claim form, and after multiple extensive
26 amendments of that document we are now on to the sixth set of Epic's amendments.

1 The proposed amendments come well after the bulk of disclosure has been provided
2 by Google to Epic, Coll and Rodger. They come two months after the factual evidence
3 has closed by Google filing its fifth round of witness statements, which it did before
4 Christmas. This application has come after the claimants have filed their expert
5 evidence and during the period in which Google is preparing its responsive evidence
6 to Epic's and Rodger's expert reports.

7 On Rodger's and Coll's proposed timetable for --

8 THE CHAIR: One moment. I am just putting the authority down. I presume I can for
9 the moment.

10 MS SMITH: Yes, sir. I won't be coming back to that.

11 On Rodger's and Coll's proposed timetable for submission of their amended claim
12 forms, our submission of our amended defence and their submission of their amended
13 replies, the pleadings would not close until basically the deadline for us to serve our
14 expert reports. So, these are late amendments.

15 They are also delayed --

16 THE CHAIR: One minute.

17 Yes.

18 MS SMITH: They are also delayed amendments. A significant proportion of the
19 proposed amendments -- and I will go through them step-by-step but just by way of
20 introduction -- relate to issues which the claimants have known about for a long time.
21 I will come back to these, but just to give you some examples. Epic's category 3
22 amendments by which they seek to introduce a new allegation of abuse, their anti-
23 steering restriction, and a new in fact plea for injunctive relief on the back of that new
24 allegation of abuse.

25 THE CHAIR: One minute.

26 Yes.

1 MS SMITH: So those amendments relate to paragraph 4 of the payment section of
2 Google's Developer Payment Policy, DPP, which as Epic's counsel rightly accepted
3 this morning, that paragraph 4 and those restrictions, as they put it, have been put in
4 place and have been in place and have been available on line for more than five years.

5 THE CHAIR: Okay. Can you just give me a moment, please.

6 MS SMITH: I will come back to these to make this point good, but it is just an indication
7 of how long Epic have waited before making this application to amend.

8 Similarly, their category 2 proposed amendments relate to Google's extension of the
9 User Choice Billing pilot to the UK which took place on 29 March last year.

10 THE CHAIR: Yes.

11 MS SMITH: No good reason has been given by any of the claimants for the significant
12 delay in bringing these late amendments. The best that we have is what is said in
13 paragraph 7 and 8 of Epic's skeleton. I don't ask you to turn to it, but I can if you want.
14 I will quote from it. Paragraphs 7 and 8 of Epic's skeleton for today's hearing, they
15 say:

16 "The timing of Epic's application reflects the timing of the publication of the CMA's
17 SMS decision."

18 That was 22 October 2025. And Epic says:

19 "Given that it wished to amend its claim form in respect of the CMA decision in any
20 event, Epic considered whether there were any other amendments that it could
21 conveniently make."

22 And, therefore, back in October, we are told, or November, it decided to introduce its
23 category 2 amendments as regards UCB and its category 3 amendments as regards
24 the alleged anti-steering restriction.

25 With respect, in my submission convenience provides no good reason for respectively
26 the ten-month delay and five-year delay by Epic in seeking to introduce these

1 | amendments.

2 | I will come back to the detail of the amendments, but that's my general point about the
3 | lateness of these applications.

4 | THE CHAIR: Yes.

5 | MS SMITH: It brings me to my second introductory point, which is the inadmissibility
6 | of findings of other decision makers, such as the CMA in its SMS decision.

7 | THE CHAIR: Yes.

8 | MS SMITH: If I could ask you to reopen the authorities bundle but this time turn to the
9 | judgment of the Supreme Court in Evans, which is at tab 15, and starts on page 780.

10 | You will be familiar with this, sir, but there are some paragraphs I need to take you to
11 | that you were not taken to by Ms Blackwood, and in fact Mr Scannell didn't take you
12 | to this authority at all.

13 | But if I could ask you to start on page 822, AB/822.

14 | THE CHAIR: I am not as familiar with the case -- I mean, I am familiar but not fully
15 | familiar -- as you, I think, think I am.

16 | MS SMITH: In that case --

17 | THE CHAIR: Can I just be clear.

18 | MS SMITH: Yes.

19 | THE CHAIR: Just tell me what regulatory decision was or was not in issue there --
20 | you need not take me to the paragraphs -- and confirm to me that the parties to this
21 | litigation were not parties -- or was not party to those decisions.

22 | MS SMITH: Yes, sir. The regulatory decision that was at issue in the Evans case was
23 | what the Supreme Court summarised or called the "Sterling Lads decision".

24 | THE CHAIR: And that was a decision --

25 | MS SMITH: Which was a decision by the Commission finding a breach of Article 101,
26 | exchange of information as regards foreign exchange. The Sterling Lads decision --

1 | there were three Commission decisions.

2 | Two Commission decisions resulted in settlements, so didn't involve a great deal of

3 | reasoning.

4 | THE CHAIR: Yes.

5 | MS SMITH: The Sterling Lads decision was a reasoned decision by the Commission -

6 | -

7 | THE CHAIR: And --

8 | MS SMITH: -- but it did not apply to Barclays.

9 | THE CHAIR: Okay. Barclays were not an addressee.

10 | MS SMITH: They were not an addressee.

11 | THE CHAIR: Okay.

12 | MS SMITH: So, there were no follow-on actions. They were stand-alone actions but

13 | reference was sought to be made to the Sterling Lads decision, which was effectively

14 | the same. Yes, reference was sought to be made to the Sterling Lads decision.

15 | THE CHAIR: Okay.

16 | MS SMITH: And the question addressed by the Supreme Court in this under issue 4

17 | was "Did the Court of Appeal err in its use of the Sterling Lads decision?" Because

18 | the Court of Appeal used it, held that it was admissible, relevant and provided strong

19 | support for Mr Evans's claim.

20 | THE CHAIR: Right.

21 | MS SMITH: And that is found in paragraph 142 --

22 | THE CHAIR: Yes.

23 | MS SMITH: -- of the judgment.

24 | Then the findings of the Supreme Court are set out in paragraph 144 in this regard as

25 | to the admissibility of that decision. They are set out in paragraph 144 onwards of the

26 | judgment. I would emphasise the following parts of this judgment.

1 First of all, in paragraph 144, the Supreme Court restates the general rule of the
2 common law as set out in Hollington v Hewthorn, that findings made by another
3 decision maker are not admissible as evidence of the facts found.

4 They make it clear that the rule is based on the principle of fairness which requires a
5 Tribunal responsible for finding facts to base its findings on its own evaluation of the
6 evidence and not on the evaluation of someone else who is not the relevant decision
7 maker.

8 Then just to jump forward, before I come back as it were, paragraph 152 on page 825
9 is the finding of the Supreme Court. The first sentence of paragraph 152 on page 825:
10 "In our view the rule in Hollington v Hewthorn, as explained in Rogers v Hoyle, does
11 indeed apply to ..."

12 THE CHAIR: That was an argument that the common law rules don't apply in the CAT.

13 MS SMITH: This rejects the point that Rule 55.1(b) of the Tribunal rules doesn't
14 provide otherwise.

15 THE CHAIR: Yes.

16 MS SMITH: Could I take you back to paragraph 145. Having stated the general rule
17 set out in Hollington v Hewthorn that findings made by another decision maker are not
18 admissible as evidence of the facts found in different proceedings; in paragraph 145,
19 because we are here dealing with the Sterling Lads decision, which as I said was not
20 addressed to the parties in this case, in 145 the Supreme Court says:

21 "It would be particularly unfair ..."

22 And I emphasise the word "particularly":

23 "It would be particularly unfair to treat findings made by an earlier decision maker as
24 admissible against a person who was not a party to the earlier proceedings."

25 But I stress that it is clearly not the case -- and I will make this point good if I need to -
26 - that the rule in Hollington v Hewthorn is restricted to such cases. It is particularly

1 unfair to apply decisions made by an earlier decision maker as admissible against
2 a party who is not party to the earlier proceedings. But the rule in Hollington v
3 Hewthorn is not so limited.

4 THE CHAIR: So, you say it's not restricted to where – non-identity of parties.

5 MS SMITH: Exactly, my Lord.

6 THE CHAIR: That's your submission?

7 MS SMITH: It is. In support of that, if I can ask you to turn to paragraph 153 of the
8 Supreme Court's judgment. They make it clear in the first paragraph of 153:

9 "We also note that the rule in Hollington v Hewthorn applies here in what may be called
10 its strong form because the applicants were not parties to the procedure which led to
11 the Sterling Lads ordinary decision."

12 But the rule is not limited --

13 THE CHAIR: Alright.

14 MS SMITH: -- only to different parties --

15 THE CHAIR: I am just thinking aloud here, and you will all know better than I, but in
16 the Interchange litigation isn't a large part of that based on the Commission decision
17 in relation to MasterCard and the findings in the UK courts? I can't remember whether
18 they found they were binding but how did that apply?

19 MS SMITH: Merricks is the follow-on action --

20 THE CHAIR: I am not talking about Merricks -- okay, it is that follow-on action.

21 MS SMITH: Yes.

22 THE CHAIR: But what about the litigation with the retailers? Anyway, I am just
23 throwing it out. I mean, if you are right, you appear to be saying now that if I am a party
24 to a Commission decision, right --

25 MS SMITH: Yes.

26 THE CHAIR: -- and somebody sues me, that Commission decision, a follow-on action

1 is under the statutory provisions presumably, but leaving that to one side, it's not
2 binding. In fact, not only not binding, it's not admissible.

3 MS SMITH: My Lord, yes. If I can take you back in that -- sir, yes -- if I can take you
4 back to paragraph 145, where the Supreme Court says:

5 "It would be particularly unfair to treat findings made by an earlier decision maker as
6 admissible."

7 THE CHAIR: Yes, I have that sentence.

8 MS SMITH: This fundamental objection does not apply to someone who is party to
9 the earlier proceedings.

10 THE CHAIR: Yes.

11 MS SMITH: But because in some cases such a party may be bound by the finding.
12 For example, where they give rise to an issue estoppel or it may be an abuse of
13 process.

14 THE CHAIR: They then refer to follow-on.

15 MS SMITH: And in follow-on actions.

16 THE CHAIR: Yes.

17 MS SMITH: "In such circumstances, where the follow-on jurisdiction is not in issue
18 [this is paragraph 146] and there is no question of issue estoppel or abuse of process,
19 the defendants are entitled to challenge the correctness of findings."

20 So, the defendants, the defendants to the same proceedings. Unless they are bound,
21 they are entitled to challenge the correctness of the findings.

22 THE CHAIR: Entitled to challenge?

23 MS SMITH: "And the principle of fairness considered in *Rogers v Hoyle* remains
24 relevant."

25 THE CHAIR: Yes.

26 MS SMITH: That's the principle of fairness that underlies the *Hollington v Hewthorn*

1 rule.

2 It goes on to say:

3 "The court or tribunal which has to decide whether the findings of the earlier decision
4 maker were correct can only properly do so by making its own evaluation of the
5 evidence on which they were based and any additional evidence."

6 Then this point is made in *Calyon v Michailaidis*, where Lord Rodger said:

7 "The essential reasoning is compelling, unless the second court--"

8 This is the second court that is reconsidering a case against the same defendants or
9 is considering a case against the same defendants:

10 "Unless the second court goes into the facts for itself, it cannot actually tell what weight
11 it should properly attach to the previous decision, which means that the previous
12 decision itself cannot be relied upon."

13 So it is that on which I rely to say that the *Hollington v Hewthorn* rule, and the principle
14 of fairness considered in *Rogers v Hoyle* -- so the *Hollington v Hewthorn* rule founded
15 on the principle of fairness as explained by the Court of Appeal in *Rogers v Hoyle* --
16 here I am reading from paragraph 144:

17 "Does not just apply where the proceedings involve different parties, it applies where
18 the proceedings involve the same parties, unless the parties are bound by those
19 previous findings."

20 For example, where they give rise to an issue estoppel or an abuse of process or in
21 follow-on damages claims. That is also -- I will just check if I can make the point.

22 I just want to double-check that I am not going mad, but I don't think I am. At
23 paragraph 147 of the Supreme Court's judgment, they look at *Qualcomm*, the CAT's
24 approach in *Qualcomm*, and the question arose whether the rule in *Hollington v*
25 *Hewthorn* applies in a Competition Appeal Tribunal. The Tribunal decided it was not
26 bound by the rule but it wished nevertheless to adopt the same principle, that it would

1 not be appropriate to attach any weight to findings reached by other courts, tribunals
2 or regulators and the principal reason was that given in Rogers v Hoyle. Those
3 fairness principles. And as I understand it, in Qualcomm what they were talking about
4 were previous regulatory decisions relating to the same parties. In fact, you can see
5 that if you look at tab 9.

6 THE CHAIR: You don't need to turn it up. What date was Qualcomm?

7 MS SMITH: Qualcomm is in the bundle, sir, just to take the point.

8 THE CHAIR: Can you tell me what date Qualcomm was handed down?

9 MS SMITH: 17 February 2023. And the foreign decisions which sought to rely on in
10 that case were the European Commission decision in Qualcomm relating to
11 Qualcomm itself; the US district court decision in FTC v Qualcomm. So, all previous
12 decisions involving the same parties.

13 THE CHAIR: Okay.

14 CO-ARBITRATOR: Could I just ask. You took us helpfully through paragraph 146. Is
15 146 saying that where the same defendants were involved they have a right to
16 challenge, that the previous rulings can be pleaded, as it were, they can be brought
17 in, but the tribunal or court must weigh the importance of those on the basis of its own
18 finding of facts, not that they can't be pleaded at all but they must be balanced with
19 a finding of the current tribunal to determine whether those were fairly reached or
20 whether they were applicable?

21 MS SMITH: My submission is that the same reasoning and the same principle of
22 fairness considered in Rogers v Hoyle -- which is set out in paragraph 146 -- is what
23 underpins the rule in Hollington v Hewthorn about previous findings being
24 inadmissible.

25 So, my submission is in 146 this is also saying that the same principles apply as to
26 inadmissibility, the same Hollington v Hewthorn rule applies. The reasoning continues.

1 | There is no suggestion that the Supreme Court is taking a different approach in 146.
2 | It is considering in 145 and 146 and 147 -- these are -- 147 in Qualcomm is exactly
3 | the same point. Does Hollington v Hewthorn apply in the CAT? There was no
4 | suggestion that it didn't apply because --
5 | CO-ARBITRATOR: I am just looking at the sentence of 146.
6 | MS SMITH: -- this was a decision that related to the same party.
7 | CO-ARBITRATOR: I am just looking at the sentence in 146:
8 | "The court or tribunal which has to decide whether the findings of the earlier decision
9 | maker were correct, can only properly do so by making its own evaluation of the
10 | evidence on which they were based and any additional evidence."
11 | MS SMITH: Exactly, it has to make its own evaluation of the evidence --
12 | THE CHAIR: When you say "of the evidence", which evidence?
13 | MS SMITH: Well, the evidence -- I think how one would explain that is what the
14 | Supreme Court goes on to say in 159, which is that the Hollington v Hewthorn rule is
15 | not a rule that means you cannot rely on prior judgments insofar as they record
16 | evidence of relevant facts.
17 | THE CHAIR: Yes.
18 | MS SMITH: That is what, in my submission, the court is referring to in paragraph 146.
19 | THE CHAIR: 146 --
20 | MS SMITH: They have to reach their own assessment of the evidence.
21 | THE CHAIR: The word "they", is the evidence -- "they" is the earlier decisions were
22 | based. Its own evaluation of the evidence on which the earlier decisions were based
23 | and any additional evidence.
24 | MS SMITH: Yes, that's my reading, sir.
25 | THE CHAIR: So, you can look at those decisions for the evidence that they contain.
26 | MS SMITH: But you can't rely upon them for the findings that they did not reach on

1 | that evidence, yes?

2 | THE CHAIR: Yes.

3 | MS SMITH: Yes, I am asked to draw your attention to 148 of the Supreme Court's

4 | judgment, which is on AB/824, which is:

5 | "The Tribunal also referred at paragraph 30 to the difficulty if findings of another

6 | decision maker were treated as admissible."

7 | But that's another decision-maker. In this case relating to the same parties --

8 | THE CHAIR: Is this from Qualcomm?

9 | MS SMITH: Yes, deciding what weight to give to the other --

10 | THE CHAIR: The decision?

11 | MS SMITH: Yes, to the findings in the decision of a court and regulator.

12 | THE CHAIR: Yes. It is all a bit blurred, isn't it? Because the distinction between

13 | evidence of relevant facts and opinions on matters of fact --

14 | MS SMITH: Yes.

15 | THE CHAIR: -- is a pretty fine distinction when you get to something like you can have

16 | a primary fact of 90 to 100 per cent of people did X, Y and Z; to a finding that you have

17 | market power. There are going to be some pretty fine distinctions here.

18 | MS SMITH: I am just trying to take you, sir, to --

19 | THE CHAIR: I hear the point you are making, Ms Smith.

20 | MS SMITH: In that regard perhaps I can take you to paragraph -- I have taken you to

21 | 152. In our view the rule in *Hollington v Hewthorn* as explained in *Rogers v Hoyle* --

22 | so there is:

23 | "The incorporation of fairness principle as explained in *Rogers v Hoyle* does indeed

24 | apply to the Tribunal."

25 | The first sentence.

26 | THE CHAIR: Yes.

1 MS SMITH: And 153:
2 "The rule in Hollington v Hewthorn applies here in what may be called its 'strong form'."
3 THE CHAIR: Because that was in the context of that case.
4 MS SMITH: Yes.
5 Then if I can take you to page 827 --
6 THE CHAIR: One minute.
7 Where are you going now, sorry?
8 MS SMITH: Page 827, b under "The interlocutory proceedings", that's what we are
9 talking about when we get to this stage of the judgment.
10 You will recall that in paragraph 8 of Rodger's skeleton argument and in
11 Ms Blackwood's submissions this morning, she emphasised two exceptions -- well,
12 situations that the Supreme Court says are not strictly exceptions but two situations
13 that don't fall within the rule in Hollington v Hewthorn that are addressed in
14 paragraph 159 of the Supreme Court's judgment.
15 So, if I can ask you to look at 158/159. 158 is an argument that counsel for Ms Evans
16 put at the forefront of their submissions:
17 "That even if the rule in Hollington v Hewthorn or the principle underlying it would not
18 apply at a trial, it does not and would not in the High Court preclude reliance on
19 findings made by another decision maker for the purpose of defeating a strike out or
20 a summary judgment application."
21 THE CHAIR: Yes.
22 MS SMITH: "Or otherwise demonstrating the strength at the interlocutory stage."
23 And there are references to various cases which are all about the use of previous
24 decisions and judgments for showing that there is a serious issue to be tried.
25 THE CHAIR: Yes.
26 MS SMITH: Then in 159:

1 "We endorse this analysis save only to observe that reliance on findings of another
2 decision maker for the purpose of identifying evidence which can reasonably be
3 expected to be available at trial is not inconsistent with the rule in *Hollington v*
4 *Hewthorn* and therefore it is strictly not an exception to it."

5 So that's the first sort of non-exception or situation that falls outside the rule. The
6 second is:

7 "Likewise it is not inconsistent with the principle underlying that case to rely on prior
8 judgments or reports insofar as they record evidence of relevant facts. It is only insofar
9 as such material contains opinions on matters of facts as opposed to recording
10 evidence that the material is inadmissible."

11 So, we don't obviously dispute either of those, but we say they don't apply to the
12 present applications to amend.

13 THE CHAIR: Because?

14 MS SMITH: Because the first, which is the finding of the Supreme Court that reliance
15 on the findings of another decision maker for the purpose of identifying evidence which
16 can reasonably be expected to be available at trial, is made clear in paragraph 158 of
17 the Supreme Court's judgment, that that only applies at a preparatory stage of
18 proceedings, an interlocutory stage --

19 THE CHAIR: But that's what we are at.

20 MS SMITH: No, we are not, my Lord. It can be relied upon for resisting a strike out
21 or a summary judgment, or at the certification stage to show, yes, I have an arguable
22 case that, as a class rep, I will be able to put forward evidence at trial to show that
23 there have been these breaches of competition law. And I refer in that regard to the
24 judgments of other regulators or decisions of other courts or decisions of other
25 regulators.

26 So, at an interlocutory stage you can rely upon those other judgments.

1 THE CHAIR: I have the point you are making.

2 MS SMITH: The distinction -- which is made in paragraph 158 -- is that the rule in
3 Hollington v Hewthorn or the principle underlying it, applies at trial. You cannot rely
4 on previous judgments in order -- you cannot rely on findings by previous different
5 decision-makers at trial but you can at an interlocutory stage such as a strike out or
6 certification --

7 THE CHAIR: As an indication.

8 MS SMITH: As an indication of what evidence you are going to be able to get at trial.

9 THE CHAIR: Yes.

10 MS SMITH: That's the first point. That doesn't apply to this case. We are now well
11 past certification. The applicants are seeking to amend their pleadings and those
12 pleadings to sit as their pleaded case at trial.

13 The second point is that the Hollington v Hewthorn principle does not apply to
14 references or reliance on prior judgments if they simply record pre-existing evidence,
15 evidence of relevant facts that were as in front of the Tribunal: emails, documents, pre-
16 existing evidence. But we dare say again that that is not what the applicants are
17 seeking to do in their amendments that are presently before you, sir.

18 THE CHAIR: To be honest, we haven't gone to Rogers v Hoyle and paragraph 49 and
19 what that is referring to and whether that passage in Rogers v Hoyle that they cite is
20 limited to interlocutory applications and I am not asking you to do so now.

21 I am wondering whether that sentence applies more generally to the rule in Hollington.

22 In other words, never mind the interlocutory stage.

23 But if and insofar as the regulatory decisions in this case record evidence of relevant
24 facts, for example 90 to 100 per cent, I don't know whether --

25 MS SMITH: Insofar as they recall evidence --

26 THE CHAIR: Yes.

1 MS SMITH: -- we don't object to that. What we object to is the fact that in our
2 submission -- and I will show you this -- the claimants seek to rely on findings by other
3 courts and regulators.

4 The main argument that the claimants appear to make is they don't seek to rely upon
5 the decisions as evidence of these findings or insofar as they are findings. They simply
6 refer to them by way of relevant context or background. We say, with respect, this is
7 disingenuous. If they are not seeking to rely on these findings then why is it necessary
8 or relevant to include the findings in their pleadings? In effect they are seeking to
9 circumvent the Supreme Court's clear endorsement of the Hollington v Hewthorn rule
10 to get inadmissible material before the Tribunal for trial by arguing it is simply context
11 or background.

12 There was a further suggestion, as I said, that was made orally this morning by Epic's
13 counsel that I found slightly difficult to understand and wasn't made by him in his
14 skeleton. But I think the point was that they can plead these matters now -- or they
15 can plead the findings now --

16 THE CHAIR: I have left my copy of that judgment in the room, I think.

17 MS SMITH: Don't worry. I have found there is a better reference. I may not need to
18 refer you to it at all. There is a better reference, which is already in the authorities
19 bundle, in Qualcomm.

20 I think the point he's making is that we can plead these matters by way of relevant
21 background.

22 THE CHAIR: Yes.

23 MS SMITH: Or we can plead these matters in any event, and it is not a matter for you,
24 the Tribunal, at this stage -- the pleading stage -- to decide whether or not they are
25 inadmissible. That is a matter which we can argue at trial.

26 THE CHAIR: I think they make a distinction between questions of pleading and

1 allegation and admissibility of evidence.

2 MS SMITH: Yes, sir.

3 THE CHAIR: I think that's the distinction that's made.

4 MS SMITH: We say that is clearly a false distinction and there is good reason why
5 that is the case. If I can -- you can't plead them. The whole point of pleading is to rely
6 on them at trial and you should not be allowed to plead them for the reasons that the
7 CAT in fact summarises in Qualcomm.

8 THE CHAIR: Which is where?

9 MS SMITH: If we go back to tab 9, it starts on page 269 of the authorities bundle.

10 It is the judgment of the Tribunal in Consumers' Association v Qualcomm. This is the
11 case that the Supreme Court was talking about where the Tribunal said "Okay, we are
12 not bound by Hollington v Hewthorn but we will take the same approach."

13 THE CHAIR: Yes.

14 MS SMITH: Then page 278, paragraphs 29 to 33, the Tribunal effectively addresses
15 an argument that was being made to the same effect that Coll's counsel make now,
16 that you shouldn't exclude the findings now but you can decide at trial whether or not
17 to admit this, these findings.

18 If I could ask you, perhaps, to read paragraphs 29 to 33 to yourselves, then I will point
19 out the particular parts of those paragraphs that I rely upon.

20 THE CHAIR: We have read that.

21 MS SMITH: The point is at paragraph 33 of the judgment, where Mr Armitage makes
22 a final submission that it would be inappropriate now to rule on the admissibility of the
23 relevant findings and he said the question of admissibility should be determined at
24 trial. The CAT makes the argument, which we adopt and says the same approach
25 should be taken by this Tribunal, it would be entirely inappropriate to put the parties to
26 the expense of producing potentially voluminous evidence at trial as to what did and

1 didn't happen in the prior proceedings, because the weight to be given to that evidence
2 is not a debate which should properly form part of the decision making process of this
3 Tribunal.

4 So don't kick it off. Don't let the parties plead inadmissible findings and then decide at
5 trial whether or not they should be admitted. Strike out now, which is exactly what the
6 Tribunal did in paragraph 33 of the judgment.

7 So, the rule in *Hollington v Hewthorn*, as to inadmissibility, is a rule that is to be applied
8 to pleadings.

9 THE CHAIR: Okay. I just want to go back to.

10 MS SMITH: You should not be allowed to plead inadmissible findings of previous
11 courts and regulators.

12 THE CHAIR: In the old days there was a rule about not pleading evidence, but there
13 we are.

14 MS SMITH: Sir, that was the point I wanted to draw your attention to in the other
15 judgment.

16 THE CHAIR: I am very conscious of time, Ms Smith.

17 MS SMITH: It is 62, which is -- the judge says in 62 that in any event this would be
18 pleading evidence --

19 THE CHAIR: I just want to --

20 MS SMITH: I am not going to take you back to --

21 THE CHAIR: Just give me a moment, please. Sorry.

22 I am still struggling with how that all squares with paragraph 146. I am just throwing
23 that out as an observation. In *Evans*, which is the point which my colleague referred
24 to. But there we are.

25 Okay.

26 So, you say, one, not admissible. Findings not admissible. Two, not clear, if findings

1 are what they are being relied on for. And three, that can be decided at the pleadings
2 stage.

3 MS SMITH: My Lord, yes.

4 Then if I can take you, having made those preliminary points, on the approach that
5 you should take both to lateness and to inadmissibility. If I can take you to each party's
6 proposed amendments.

7 THE CHAIR: Yes.

8 MS SMITH: I don't think -- I will need to deal very briefly with Coll --

9 THE CHAIR: You are going to start with Epic, are you?

10 MS SMITH: I will start with Epic if I may and I think the easiest way to do it is by
11 reference to my skeleton. If I could ask you, sirs, to turn to that, my skeleton. It starts
12 on page 2 of my skeleton.

13 THE CHAIR: Yes, of course.

14 MS SMITH: It sets out Epic's four categories. I will address each of those in turn.

15 THE CHAIR: Can you give me page of your skeleton, please?

16 MS SMITH: Page 2, paragraph 6.

17 THE CHAIR: Yes.

18 MS SMITH: Having made the preliminary points in paragraph 2 through to 5 about the
19 lateness of these pleading amendments, I then address each of the categories of the
20 applications proposed.

21 So, category 1 are the applications to amend to introduce the findings from the CMA's
22 SMS decision.

23 THE CHAIR: Yes.

24 MS SMITH: I am not going to take you through all of them.

25 THE CHAIR: No.

26 MS SMITH: But if I can take you to, by way of example, the paragraphs that you were

1 taken to this morning by Epic's counsel. If I could ask you to have the core bundle
2 open next to my skeleton and ask you to turn to core bundle, page 58.

3 THE CHAIR: Yes.

4 MS SMITH: Paragraphs 114G and 114H. You have already seen these paragraphs.
5 In paragraph 114G, Epic seeks to describe the CMA's decision. Then the reason why
6 it is describing that we see in paragraph 114H, because it wishes to refer to the CMA's
7 finding: "The CMA found that Google has substantial and entrenched market power
8 in respect of the provision of its mobile platform, including" for the following reasons.

9
10 And this, we say, is a finding based on the CMA's evaluation of evidence. This is not
11 just recording evidence that was before the CMA. And that's the same, in fact, not just
12 for the finding as regards substantial and entrenched market power, but also the
13 finding as to relevant market shares for native app downloads. That's not a reference
14 to evidence, it's a finding as to market share.

15 Or it is a finding of a percentage of native app downloads. Perhaps market share is
16 not quite the right way of putting it, but it is a finding as to what the correct percentage
17 was.

18 THE CHAIR: The correct?

19 MS SMITH: Percentage. Based on the evidence.

20 THE CHAIR: Okay, all right.

21 MS SMITH: It is clear that it is not just factual background. Epic seeks to rely upon it
22 in order to rely upon the findings made. One asks oneself the rhetorical question: why
23 else would Epic seek to include these paragraphs in their pleading?

24 One makes the same point about 114D, which is on pages 56 and 57, which relates
25 to the CMA's decision not to accept proposed commitments in a different investigation,
26 the proposed commitments in its investigation into app distribution. The pink writing

1 at the bottom of page 56, paragraph 114D, cites what the CMA stated in its decision
2 not to accept the proposed commitments and you will see there, over the page, 57, in
3 purple Epic gives the game away, as it were. Why it has cited what is in pink; in purple
4 nevertheless Epic relies upon the proposed commitments --

5 THE CHAIR: Are you suggesting that's not permissible?

6 MS SMITH: The pink --

7 THE CHAIR: No, the purple.

8 MS SMITH: -- explanation beforehand --

9 THE CHAIR: There are two separate things, aren't there? One is the CMA's reasons
10 for not accepting the commitments.

11 MS SMITH: Yes.

12 THE CHAIR: The second is the terms of the commitments that were proposed.

13 MS SMITH: My point there on the pink amendments as to the CMA's reasoning, again
14 it is not background --

15 THE CHAIR: Yes, I was asking you about the purple sentence.

16 MS SMITH: Well, that is not at issue --

17 THE CHAIR: You don't object to that?

18 MS SMITH: It's not at issue at the moment.

19 THE CHAIR: You don't object to that.

20 MS SMITH: That perhaps takes me to the point about what the parties should do
21 about existing pleadings post the Supreme Court judgment in Hollington v Hewthorn.

22 I will come back to that if I may and I will deal with it in about ten seconds, but at the
23 moment we are dealing with the applications to amend, sir and I have been put under
24 quite a lot of pressure to address them, so I will address them step by step if I may.

25 We say that these paragraphs, 114G and 114H, and the pink insertion in 114D, are
26 inadmissible, and amendments should be rejected.

1 THE CHAIR: Yes.

2 MS SMITH: That's category 1.

3 THE CHAIR: Yes. Category 2.

4 MS SMITH: Paragraph 6 of my skeleton. Category 2 is paragraph 7 of my skeleton.

5 THE CHAIR: UCB.

6 MS SMITH: We say these amendments should be rejected as being brought too late
7 without good reason.

8 THE CHAIR: Yes.

9 MS SMITH: As I understand it, nothing was said in either oral submissions this
10 morning or in Coll's counsel's skeleton as to why these applications were brought so
11 late. They were brought after -- as I have said, the UCB pilot was introduced to the
12 UK in March. It was extended to the UK in March. In June and July there were
13 hearings before this Tribunal seeking disclosure, including as regards the UCB in other
14 jurisdictions. But Epic chose to wait until January to make this application for
15 amendments regarding the UCB pilot.

16 Mr Tricker in his evidence -- Tricker 4 -- seeks to rely upon a lack of clarity, as he put
17 it, as regards the meaning and effect of the UCB pilot. In particular as regards whether
18 developers could let users know about differentiated pricing. But it is notable that that
19 point was not made in Epic's skeleton but in any event in my submission it is a bad
20 point.

21 It has been clear since Mr Feng's first witness statement, submitted in March 2023,
22 and his second witness statement in June 2024 that differentiated pricing is allowed
23 under the UCB pilot in other jurisdictions. So, this is, in effect, before you click through
24 to using Google Play billing, under the UCB pilot developers can say "if you choose
25 our alternative billing solution, you can get a cheaper price." That is allowed in the
26 UCB pilot in every other jurisdiction. It was explained clearly in our evidence in 2023

1 and 2024, and Epic has known at least since June of last year that the UCB pilot was
2 extended to the UK on exactly the same terms as anywhere else, everywhere else.
3 So, there has not been any lack of clarity. In fact, as Mr Cran makes clear in his
4 witness statement -- his 11th witness statement -- paragraphs 8 and 16 to 20, Epic
5 has now accepted that that is the position.

6 So, there is no justification for making these amendments.

7 As regards the point that was made this morning orally by Coll's counsel that Google
8 has already pleaded in response to UCB, so there can be no prejudice arising out of
9 these proposed amendments, that is wrong. I will explain why first and then I will take
10 you to the pleadings.

11 In its defence Google has pleaded to the tying allegations as regards UCB --

12 THE CHAIR: Could you keep your voice up a bit?

13 MS SMITH: The tying allegations, that Google has engaged in a tying abuse by tying
14 its payment system, the use of its payment system, to distribution on Google Play.

15 THE CHAIR: Yes.

16 MS SMITH: Those are the allegations that we have responded to in the context of
17 previous pleadings on UCB.

18 The amendment that Epic now seeks to plead is a separate allegation of abuse that
19 the 26 per cent commission charged under the user choice billing pilot in itself is an
20 unfair price and an excessive price and an abuse.

21 THE CHAIR: Yes.

22 MS SMITH: It is a different abuse.

23 So, to make that good, can I -- I am not sure I have the right references that I was
24 putting together, because this again is another point, a new point made orally this
25 morning.

26 Google's defence in the Epic case, re-re-amended consolidated defence in the Epic

1 case, is in bundle B, tab 2. It starts on page 65.

2 THE CHAIR: Right, you will just have to bear with me a moment whilst I tidy up a little
3 bit. Page?

4 MS SMITH: It starts on page 65. The Google pleading is on page 75.

5 THE CHAIR: I am in the wrong bundle, sorry.
6 I have it.

7 MS SMITH: B, page 75. I believe that Epic's counsel took you to this this morning.

8 THE CHAIR: Yes.

9 MS SMITH: To say, well, Google has already pleaded in response to -- has pleaded
10 to the User Choice Billing. It has already referred to the User Choice Billing pilot in its
11 defence, so our amendment as regards the extension of the User Choice Billing pilot
12 to the UK don't cause it any prejudice.

13 You will see, if you look at page 75, paragraph 21(d)(4) --

14 THE CHAIR: Yes.

15 MS SMITH: The assertion or the allegation that's being referred to here is the
16 allegation that Google Play's billing system must be used by developers who wish to
17 offer digital content.

18 THE CHAIR: Yes.

19 MS SMITH: So, it is the tying allegation that's made in paragraph 28(c) of Epic's case.
20 It is in that regard we are saying, well, there is no tying for a number of reasons, as
21 set out in 21(d)4. You can go and purchase -- developers can get consumers to
22 purchase digital content through other channels and by the way there is also now the
23 User Choice Billing pilot.

24 THE CHAIR: Yes.

25 MS SMITH: But now the amendments that are being sought to be introduced by Epic -
26 - that's the only context in which we pleaded to the User Choice Billing pilot was in this

1 tying abuse context -- now Epic is seeking to introduce the amendments -- for
2 example, at paragraph 149(a)(1) of their proposed amended re-re-re-- however many
3 res -- amended claim form, page 74 of the core bundle.

4 So back to the core bundle.

5 THE CHAIR: I have it, page 74. 149(a)(1).

6 MS SMITH: 149(a)(1).

7 THE CHAIR: And this is excessive pricing.

8 MS SMITH: This is the excessive pricing. The tying is in 146. Abuse of dominant
9 position by charging excessive and unfair commissions is in 149. You will see now, in
10 149(a)(1), the introduction of the language in pink. Now as part of the excessive
11 pricing abuse is the introduction of UCB in relation to non-gaming apps in the UK.

12 So, they are using the UCB pilot as an extra allegation of --

13 THE CHAIR: Yes, an extra basis of the 26 to 27 per cent. But the 26 to 27 per cent
14 allegation is already there, isn't it?

15 MS SMITH: Well, previously there was the 30 per cent headline rate, an effective
16 rate -- because there were also other rates of 15 per cent, et cetera, et cetera, under
17 various programmes. The average rate of -- I think it went down, but there was
18 a 30 per cent headline rate. Now under the User Choice Billing there is a 26 per cent -
19 -

20 THE CHAIR: You are much more familiar with the detail of this than I am, but when
21 you read that paragraph, just looking at the colour coding, it's not just in relation to
22 UCB, there is an allegation of still charging 26 to 27 per cent. They had already made
23 that allegation:

24 "However, proposed commitments and its approach in other jurisdictions shows that
25 where it is not providing IAB Google still charges 26 or 27 per cent."

26 MS SMITH: Yes.

1 THE CHAIR: In other words -- and I am looking at this in a very facile way, for which
2 you will no doubt correct me -- that the allegation that they are charging 26 or
3 27 per cent has not been introduced purely because of the UCB pilot.

4 MS SMITH: Yes. 26 or 27 per cent commission is what is charged under the UCB.
5 Actually, it is 26 per cent under the UCB.

6 THE CHAIR: Okay.

7 MS SMITH: Previously, that was only charged -- the only -- it was charged in other
8 jurisdictions. You can see there its approach in other jurisdictions --

9 THE CHAIR: And the proposed commitments.

10 MS SMITH: The proposed commitments were a proposal to introduce that in the UK,
11 which was not taken up by the Commission. It was dropped.

12 THE CHAIR: Yes.

13 MS SMITH: So, now there is the actual charging of 26 per cent under the UCB in the
14 UK and that is now said to be abusive in and of itself.

15 THE CHAIR: Okay.

16 MS SMITH: But in any event, that's the point we have already pleaded to. We haven't
17 already pleaded to it in the way that they are now seeking to amend their pleading.
18 Quite apart from the fact that this is all too late without any justification or good reason
19 given.

20 But that point applies in even stronger terms when you get on to category 3.

21 THE CHAIR: This is the anti-steering.

22 MS SMITH: This is the anti-steering restriction.

23 In that regard can I take you to the core bundle.

24 THE CHAIR: Can I just check on the previous category. Just give me a moment,
25 please.

26 Just on that point, Ms Smith, Epic's skeleton at paragraph 17 suggests that the UCB

1 26 per cent bears no reasonable relationship to the service provided, is already
2 pleaded in the reply.

3 MS SMITH: Paragraph 17? That's the pleading in the reply. It now appears as
4 a positive case in their claim form that the --

5 THE CHAIR: So I will disallow that, this pleading in the claim form, but leave the reply
6 in. How will that affect anything?

7 MS SMITH: Because, my Lord, there may have been -- I haven't looked and I can go
8 back to them but I am not sure it is the best use of everyone's time -- there may have
9 been references to the UCB pilot in the reply. But the UCB pilot is now introduced in
10 the claim form as part of a positive allegation of abuse. An allegation that --

11 THE CHAIR: I have not looked at it, but according to the skeleton --

12 MS SMITH: I doubt there is --

13 THE CHAIR: I mean Epic pleads that the 26 per cent commission fee imposed
14 provides no meaningful incentive for developers to enrol in that and there is no
15 relationship to services provided by Google as it is unfair in itself. Anyway.

16 MS SMITH: We can go to that, if it is the best use of everybody's time, but it is part of
17 Epic's case as regards the tying allegation.

18 The fact that it has been mentioned in the reply, we say is -- well, it is no basis for
19 saying you can now put in amendments in the particular -- if the case is already live in
20 Epic's pre-existing -- the point perhaps rebounds on Epic. If the point is already live
21 in Epic's existing pleadings, why do they want to amend their claim form?

22 THE CHAIR: Right. Shall we move on to category 3?

23 MS SMITH: Particularly at this late stage.

24 Category 3 is the anti-steering restriction. If I can first make the point that is borne out
25 in our evidence -- I will take you to Mr Cran's witness statement if necessary -- but the
26 point has been conceded by Epic's counsel. The relevant policy which is contained in

1 paragraph 4 of the pricing section of the DPP was introduced or was announced in
2 September 2020.

3 THE CHAIR: Yes.

4 MS SMITH: They were brought into force in January 2021. So, September 2020 is
5 even before the start of the Epic proceedings. 2021 is before Epic's initial claim form
6 was served and were well known and available online. There is no justification for the
7 extraordinary delay in seeking to make these amendments, particularly when one
8 looks at what these amendments consist of.

9 If I can ask you to go to the core bundle at page 48.

10 THE CHAIR: Yes.

11 MS SMITH: Paragraph 97(c).

12 THE CHAIR: Yes.

13 MS SMITH: We have reference to paragraph 4 of the payment section. I have made
14 the point that this was in the policy way back in 2020 but was not pleaded.

15 THE CHAIR: Yes.

16 MS SMITH: I will make the second point, which is in response to a bad point made by
17 Epic's counsel this morning.

18 The rule in paragraph 4, the payment section of the DPP which Epic characterise as
19 the anti-steering restriction, is not inherent in the paragraphs set out and cited in
20 paragraph 97(b) of their pleading.

21 Paragraphs that appear in the middle of the page 48 in the words that appear as
22 pleaded in 97(b) --

23 THE CHAIR: Yes.

24 MS SMITH: -- relate to the requirement that Google Play's billing system must be
25 used when payment is made for in-app purchases on an app which has been
26 distributed via Google Play. So, if you are making your payment or buying in-app

1 purchases on an app distributed by Google Play, you to have to use Google Play's
2 billing system.

3 Paragraph 4 of the payment section of the DPP, which is set out in 97(c) of this
4 pleading, is a different restriction and a different prohibition. It is about, as said there,
5 prohibiting developers leading users to other ways of paying outside the app. So, it is
6 about steering users away from in-app purchases which use Google Play billing to
7 ways in which they can make these purchases outside the app. So, you are not
8 allowed to put in in-app promotions in relation to purchasable content or giving web
9 views and buttons. You are not allowed to say you can purchase this skin or this
10 gaming currency in-app, but look, you can also come out of the app and go on to our
11 website and buy it there at a cheaper price using a different payment system and then
12 use it in the game.

13 It is saying to -- it is steering users in that way outside the app to use payment systems
14 outside the app, which is what paragraph 4 of the payment section is about. It is a rule
15 in addition to paragraph 3, which says once you make purchases in-app you have to
16 use our billing system. It also says you can't steer users to make purchases outside
17 the app thereby avoiding using our billing system.

18 THE CHAIR: Are you therefore suggesting that 97(c) first sentence is wrongly
19 expressed?

20 MS SMITH: 97(c)?

21 THE CHAIR: 97(c), first sentence.

22 MS SMITH: I don't think so. There is in-app payment services other than Google IAB.

23 THE CHAIR: "Paragraph 4 of the 'Payments' section of the DPP requires developers
24 not to direct users towards in-app payments services other than Google IAB."

25 I think you just said --

26 MS SMITH: It is the anti-steering restriction which is a prohibition on leading users to

1 other payment services generally, so perhaps the second sentence is better
2 expressed. Then if you see what -- you cannot use other payment services. You can't
3 lead users to other --

4 THE CHAIR: You say it is a different restriction and a different prohibition.

5 MS SMITH: It is a different prohibition and it is a different abuse, apparently, because
6 it is called the anti-steering restriction, which is a different abuse which is based solely
7 on paragraph 4.

8 THE CHAIR: Okay.

9 MS SMITH: It is a new abuse, a new restriction which is also said now to enable
10 Google -- it is a new exclusory system -- said to enable Google to set unfair and
11 excessive commissions. That is page 73, paragraph 145. The amendment there.
12 Yes.

13 So, it clearly -- in paragraph 145 and 146 -- 145:

14 "Alternatively and in any event as a result of the Google IAB requirement ..."

15 That's the first requirement set out in 97(b):

16 "The anti-steering agreement [which is different] and/or the Clause 45 Conduct,
17 Google is able to set and maintain inflated prices."

18 So, my point is simply Epic is seeking to introduce a new alleged abuse and it is also
19 seeking on the back of that new injunctive relief. I can take you to page 80 of the core
20 bundle.

21 THE CHAIR: Yes, I have it.

22 MS SMITH: Page 80, paragraph 164(ba).

23 THE CHAIR: This is the additional injunctions.

24 MS SMITH: The additional injunction. It is seeking to introduce a new abuse, new
25 injunction, five years late with absolutely no good reason given for why it has taken so
26 long to put it in.

1 THE CHAIR: Yes. Ms Smith, I am looking at the clock --

2 MS SMITH: Yes.

3 THE CHAIR: -- only in terms of a break, which we must have, and also then for us to

4 stock take as to where we are going.

5 MS SMITH: Yes.

6 THE CHAIR: The Tribunal is not able to sit beyond 5.00 pm at the latest.

7 MS SMITH: Yes, sir.

8 THE CHAIR: We will need to give consideration as to where we are going generally.

9 Can you finish category 4?

10 MS SMITH: I can finish 4 and I hope 5. Well, there is more to say on 5.

11 THE CHAIR: Why don't you --

12 MS SMITH: Category 4.

13 THE CHAIR: I can't remember the points there. Miscellaneous.

14 MS SMITH: The points there, they are basically I would ask you to look at Cran 11,

15 paragraph 38, which sets out the various proposed amendments. We say effectively

16 these are too late or they are unnecessary or in the case of 114D, concerning the

17 CMA's views of proposed commitments that I have already taken you to, they are

18 inadmissible.

19 THE CHAIR: I just want to turn your skeleton up on that so that I am following.

20 MS SMITH: Category 4, bottom of page 3.

21 THE CHAIR: One of them has the Evans point.

22 MS SMITH: Yes. The others are too late. They are addressed perhaps most

23 efficiently in paragraph 38 of Cran 11, which is in the core bundle.

24 THE CHAIR: At?

25 MS SMITH: Page 426 to 427, looking at those is probably quicker than me going

26 through them. Perhaps I can just ask you to read paragraph 38, which is quite short,

1 pages 426 to 427.

2 THE CHAIR: Okay. It is 38.1, isn't it?

3 MS SMITH: Yes, 114D.

4 THE CHAIR: The 114D point is the same point.

5 MS SMITH: Yes. Sir, then category 5 as per my skeleton, bottom of page 3: we don't
6 raise any specific objections to those over and above the point on lateness.

7 THE CHAIR: Okay.

8 MS SMITH: The general point on lateness.

9 If I can just emphasise before we break, I think then I can finish off, hopefully, the Epic
10 application, which is what is at paragraph 11 of my skeleton: if the Tribunal is minded
11 to allow any of these proposed amendments --

12 THE CHAIR: I have that point. One is you want confirmation no disclosure will be
13 sought --

14 MS SMITH: Yes.

15 THE CHAIR: -- and you want permission now for further factual evidence.

16 MS SMITH: Yes. And there is a submission I think made by all of the claimants,
17 including Epic, that they can't say they will not seek any further disclosure as regards
18 any consequential amendments in the defence and reply, and we say that we need
19 that confirmation that no further disclosure applications will be made now, given the
20 very late putting in of these amendments without good reason. Google should not be
21 required to revisit previous steps, including disclosure steps, in these proceedings.

22 That would be consistent, I say, with the approach that has previously been taken in
23 these proceedings. Where such amendments have been allowed, there has been no
24 slicing up of saying, well, we won't seek disclosure on our amendments but we might
25 seek disclosure on your consequential amendments. That is Cran 11, paragraph 11
26 which I cite in paragraph 11 of my skeleton.

1 THE CHAIR: I think before we rise you said you would take ten seconds or
2 something --

3 MS SMITH: Yes.

4 THE CHAIR: -- on what you say about the existing pleading.

5 MS SMITH: Yes. You brought up the point, sir, earlier today: well, what about striking
6 out the existing pleadings --

7 THE CHAIR: It might have occurred to you as well as me.

8 MS SMITH: Yes, it did. We did, in fact, in correspondence request that the claimants
9 remove from their existing pleadings references to the regulatory decision from
10 judgments by other decision-makers that were inadmissible after Evans.

11 Just to give you a couple of references, that is a paragraph 6 of our letter to Hausfeld,
12 core bundle, page 481; paragraph 6 of our letter to Rodger --

13 THE CHAIR: What date were these letters?

14 MS SMITH: The Coll letter was 27 January.

15 THE CHAIR: Okay.

16 MS SMITH: This is paragraph 6.

17 THE CHAIR: I am not going to go to it.

18 MS SMITH: It is in response to the amendment applications. It is: we disagree with
19 these amendments on the grounds of inadmissibility, and in any event you should go
20 back and take out the other references to decisions which are now inadmissible as
21 confirmed by Evans.

22 THE CHAIR: Okay.

23 MS SMITH: There are similar letters to Coll on 29 January there. Paragraph 6 of the
24 letter to Geradin of the 29th. I have not, as yet, found the letter to Epic. I think that's
25 because we were engaged in correspondence prior to the Evans judgment --

26 THE CHAIR: You were dealing with it briefly.

1 MS SMITH: The point is that if necessary we have requested them to strike out or
2 remove the references that we say are inadmissible. The point is, however, they have
3 said "Well, they are not inadmissible."

4 THE CHAIR: Right.

5 MS SMITH: So, if necessary, we will, of course, make an application to strike out, but
6 hope that following guidance from the Tribunal at this hearing such application might
7 not be necessary.

8 THE CHAIR: We will break until 20 to 4. You may want to put your heads together.
9 I suspect we are not even going to finish all the other topics on the agenda. I may be
10 wrong.

11 We are certainly not going to be able to deal with the disclosure. I am imagining that
12 the two short disclosure matters can be dealt with. I imagine -- I am thinking aloud
13 now and I will confer -- it may be that the trial estimate issue might not take very long.
14 It might be.

15 I am not at the moment clear in my own mind that the litigation budget issue will be
16 able to be dealt with promptly. The main issue between the parties, I think, is the
17 question of whether or not there is a requirement to provide indications of costs
18 incurred to date, rather than projected forward. The impression I have at the moment
19 is that is fairly hotly disputed. But maybe not. I am just throwing those things out to
20 see where we are.

21 MS SMITH: Sir, perhaps I might be able to shorten matters, I hope.

22 THE CHAIR: Yes.

23 MS SMITH: I think that the trial timetable issue is important, and I am sure that Coll's
24 counsel will agree with me on that.

25 As regards the litigation budget, we raised that issue with the Tribunal because of the
26 previous statements in the judgments in Bulk Mail and Spottiswoode, but we are happy

1 for that to be a matter for the Tribunal and that we don't need to make any further
2 submissions on that or make a positive application this afternoon.

3 THE CHAIR: Okay.

4 MS SMITH: We think that is a matter for the Tribunal --

5 THE CHAIR: Fine.

6 MS SMITH: As to whether it thinks that an updated litigation budget would be
7 necessary, or budgets would be necessary --

8 THE CHAIR: I'm not quite fully on top of it. My understanding is that Rodger provided
9 one in December; Coll is prepared to provide an updated one, but is taking issue with
10 this specification of what has actually been incurred as against budget.

11 MR KENNEDY: That's correct, sir. As you anticipate, it is relatively involved in that
12 Google in their skeleton had drawn your attention to several authorities --

13 THE CHAIR: Yes, several authorities which when I read them I came away slightly
14 none the wiser in the sense that I would need to look at them in detail if that was going
15 to be an issue. Google are not pressing that.

16 Anyway let's see where we get to.

17 MS SMITH: Given the time available --

18 THE CHAIR: Sorry?

19 MS SMITH: Given the time available, I think we will not push it --

20 THE CHAIR: That's a helpful indication.

21 MR KENNEDY: The point that was not ventilated in those authorities, sir, is the
22 principle of strategic sensitivity, which is a principle that we rely on.

23 THE CHAIR: Yes. I absolutely get that on the one hand is some indication in cases
24 that there has been a requirement for incurred costs, from the Tribunal's point of view,
25 for the Tribunal to be able to see and to monitor; and on the other hand the concern
26 about tactical advantage, et cetera, that you have all adverted to and I have seen.

1 We will rise until quarter to now. We will give some thought as to where we are going
2 and see you then. Thank you very much.

3 (3.33 pm)

4 (A short break)

5 (3.52 pm)

6 THE CHAIR: Thank you.

7 MS SMITH: The pleading amendments application, that, I think, can be most
8 efficiently addressed by reference to my instructing solicitor's letter of 29 January,
9 which you will either have separately or it is in bundle D, tab 32, page 105.

10 THE CHAIR: Just bear with me.

11 MS SMITH: I believe Ms Blackwood handed you a copy of it.

12 THE CHAIR: I have it, I think. Could you just keep your voice up a bit.

13 MS SMITH: Yes, of course.

14 THE CHAIR: I think that amplifies, doesn't it?

15 Thank you.

16 MS SMITH: So, referring to my instructing solicitor's letter of 29 January, if we could
17 start perhaps with paragraph 10 of that letter. That makes our position clear that save
18 in respect of the paragraphs of the draft amended claim form referred to in paragraphs
19 2, 4 and 7 of this letter, and importantly subject to Professor Rodger providing the
20 confirmations in paragraphs 8 and 9 above, Google confirms it does not oppose the
21 remainder of Professor Rodger's proposed amendments.

22 That's without prejudice to our position on the factual accuracy of them. So, the
23 confirmations in paragraphs 8 and 9 are first that Professor Rodger has confirmed he
24 doesn't intend to seek further disclosure and we ask that they agree to that being
25 recorded in the recitals to the form of order permitting Professor Rodger's amendment.

26 THE CHAIR: This is confirmed "does not intend to seek further disclosure from Google

1 arising from the proposed amendments", but I am not sure that they agree to not seek
2 further disclosure in the event of any responding defence from you. I think that's right,
3 isn't it, Ms Blackwood?

4 MS BLACKWOOD: Yes.

5 THE CHAIR: Yes.

6 MS SMITH: Thank you for that clarification. In that case, we ask for an order by the
7 Tribunal along the lines that we have already asked for as regards Epic.

8 THE CHAIR: Right.

9 MS SMITH: Paragraph 9 is Professor Rodger has not confirmed he consents to
10 Google adducing factual and expert evidence relating to the proposed late
11 amendments, if so advised, at the same time as the responsive evidence due in early
12 April 2026.

13 So, I am not sure what Professor Rodger's position is on that.

14 THE CHAIR: Right.

15 MS BLACKWOOD: I did address this in my submissions earlier. Our point was that
16 Google already has the opportunity to put in further expert evidence because that is
17 due on 1 April. In relation to further factual evidence, our amendments are extremely
18 minor. We know that the issues have been broadly covered already in Google's
19 evidence. Therefore, we are not really sure what further factual evidence --

20 THE CHAIR: You are not consenting in relation to factual evidence?

21 MS SMITH: Two points on that. First of all, the order is that Google serve responsive
22 evidence on 1 April 2026.

23 THE CHAIR: Responsive expert evidence?

24 MS SMITH: No. It is not limited to expert evidence.

25 THE CHAIR: Okay.

26 MS SMITH: But in any event, we ask for an order that Google -- it is the timing of any

1 further evidence that we wish to put in. This is if so advised. We don't see what
2 prejudice that could possibly cause. In my submission, it is for Google to consider,
3 only having received these, whether we do need to put in any further evidence --

4 THE CHAIR: I am not quite sure I understand the point, given that you have liberty to
5 put in factual and responsive -- oh, it is responsive, is it?

6 MS SMITH: Responsive, yes.

7 THE CHAIR: And you might say that this would not be responsive, okay.

8 MS SMITH: Yes, expert evidence. We are asking for the freedom, if so advised, to
9 put in any further factual and expert evidence relating to their proposed --

10 THE CHAIR: Sorry, non-responsive factual evidence.

11 MS SMITH: Well, responsive to the amendments, not responsive -- the existing order
12 is that we put in evidence responsive to the expert reports submitted --

13 THE CHAIR: Yes.

14 MS SMITH: -- by, let me get this right, Rodger and Epic last year.

15 THE CHAIR: Responsive to the expert reports but that is evidence --

16 MS SMITH: By 1 April. We are taking the same deadline but saying that we should
17 be given permission at the same time, if so advised, to put in evidence responsive to
18 these late amendments.

19 THE CHAIR: Yes, okay.

20 MS SMITH: It is just the deadline is the same. So that it doesn't disrupt the trial
21 timetable.

22 THE CHAIR: Yes, okay.

23 MS SMITH: We are saying the same deadline.

24 THE CHAIR: Okay, let's move on.

25 MS SMITH: So, the amendments which we do oppose, first of all those at paragraph 2.

26 THE CHAIR: Yes.

1 MS SMITH: These are two sets of amendments which we say have been put in late
2 for no good reason. The first of those, paragraph 2 -- and should be refused on that
3 basis, that they have been put in late without good reason.

4 The first of those is paragraph 2(a).

5 THE CHAIR: Yes.

6 MS SMITH: Which are amendments relating to the introduction of the UCB in the UK.
7 We say that amendment could have been made some nine months ago and
8 Professor Rodger has not provided any good reason for that delay.

9 THE CHAIR: Right.

10 MS SMITH: If I can take you to that amendment, core bundle -- to address a point
11 made by Ms Blackwood on that particular amendment -- core bundle, page 547,
12 paragraph 135 of the draft amended claim form. It is the text in red in paragraph 135.
13 It starts on page 547 and then continues over the page --

14 THE CHAIR: Okay.

15 MS SMITH: -- on page 548.

16 THE CHAIR: I have it.

17 MS SMITH: The point as I understood Ms Blackwood to be making is that this, or at
18 least the last sentence of this proposed amended pleading, refers to
19 Professor Fletcher's expert report, and not to recent developments in UCB and the
20 extension of the UCB pilot to the UK, and she should be allowed to put it in for that
21 reason. But it may be a cross-reference in the footnote to Professor Fletcher's second
22 report.

23 But that Fletcher evidence, in itself, relies on the extension of the User Choice Billing
24 pilot to the UK. As can be seen from the last sentence that has been deleted in
25 paragraph 135, the previous position is that none of these exceptions are or ever have
26 been available in the UK. They are now. So, Professor Fletcher's evidence to the

1 effect that third party app developers don't have any or any material incentive to use
2 an alternative billing service where the reduction in Google's commission is insufficient
3 to cover the total cost, so she is saying third-party app developers don't have an
4 incentive to use User Choice Billing because the discount is not big enough.

5 That relies on the fact that the User Choice Billing pilot is now available to third party
6 app developers in the UK who are the app developers on behalf of which this claim is
7 now made. So, Professor Fletcher's evidence relies upon the extension of the UCB
8 pilot to the UK which took place in March, however, and therefore this amendment
9 could have been made some time ago and it wasn't. In fact, it should have been made
10 strictly before Professor Fletcher gave this evidence.

11 THE CHAIR: All right.

12 MS SMITH: She was giving evidence on unpleaded points.

13 The second point in paragraph 2(b) of our letter is a set of amendments that relate to
14 various app accelerator programmes.

15 THE CHAIR: Yes.

16 MS SMITH: The point there is made that previously the only developer programme
17 that had been pleaded by Professor Rodger was the LRAP programme, and
18 Professor Rodger now seeks to add six other developer programmes.

19 If I could take you to core bundle page 551, you will see paragraph 143A.

20 THE CHAIR: Yes, I have it.

21 MS SMITH: Which refers to the further programmes.

22 THE CHAIR: Yes.

23 MS SMITH: Six further programmes.

24 THE CHAIR: I can see that.

25 MS SMITH: The point of introducing those six further programmes you can find at
26 paragraph 177 of the draft amended claim form on page 567 of the core bundle. It is

1 under the fourth category of alleged abuse: "Agreements with developers that limit
2 the ability of rival app stores to compete". You see that amendment is now made to
3 include the projects, programmes and initiatives pleaded at paragraphs 137 to 143A
4 above and 143A introduces these six additional programmes.

5 The point is that Google has not previously pleaded a case in response to these
6 programmes, these six additional programmes. You can see that if you look at our
7 defence in bundle B, tab 10.

8 THE CHAIR: Do I need to go to it?

9 MS SMITH: Please if you could, sir. Bundle B, tab 10, page 650.

10 THE CHAIR: One minute. Wait, please.

11 Which paragraph?

12 MS SMITH: Paragraph 88 is where we plead to paragraph 142.

13 THE CHAIR: Yes.

14 MS SMITH: And 143 over the page in 89.

15 THE CHAIR: Yes.

16 MS SMITH: Which you will recall has now been amended to add 143A.

17 THE CHAIR: Yes.

18 MS SMITH: Importantly, if you look at page 679.

19 THE CHAIR: Okay, yes.

20 MS SMITH: Page 679 of the bundle B, paragraph 127 of our amended defence,
21 a response to paragraph 177 of Rodger's claim form which I took you to, and
22 paragraph (a) is important:

23 "The reference to 'various projects, programmes and initiatives' is vague and
24 unparticularised. Google cannot plead to it. The only conduct particularised in the CF
25 concerns Project Hug and the Living Room Accelerator Programme."

26 So those are the only programmes or that is the only programme pleaded to --

1 THE CHAIR: What date was that pleaded?

2 MS SMITH: The defence? Our defence was dated, good point, 25 April 2025.

3 THE CHAIR: One moment.

4 April 2025. Okay?

5 MS SMITH: So, we have not, as a matter of fact, pleaded to these new allegations of

6 abuse arising out of the six additional developer programmes. The programmes have

7 been in force for many years, as we say in our letter. They have been publicly known.

8 The dates, if you want them, the references are there, table 2 of Google's defence

9 gives the dates.

10 THE CHAIR: Table 2 of what, sorry?

11 MS SMITH: Our defence. It is in the letter. If you want the table --

12 THE CHAIR: No, thank you. So, they have been in force for many years, okay.

13 MS SMITH: Yes, the table is at page 633.

14 THE CHAIR: Yes.

15 MS SMITH: So going back to 2021, 2015, 2018 --

16 THE CHAIR: You don't need to take me to it.

17 MS SMITH: So, we have not previously pleaded to these programmes. We will need

18 to do so and it is very likely that they will need to be addressed further in evidence if

19 these amendments are allowed, because they will need to be addressed further.

20 THE CHAIR: Okay.

21 Those are the amendments, the late amendments under paragraph 2 of our letter.

22 THE CHAIR: Yes.

23 MS SMITH: Paragraph 4 of our letter are amendments following the judgment in

24 Evans. I don't repeat my submissions on inadmissibility.

25 THE CHAIR: No.

26 MS SMITH: But I would like to take you to two examples which we say show that

1 Rodger is not relying on these previous decisions simply by way of background, but
2 they are explicitly relying on them.

3 I am going to take you to two examples if I may.

4 THE CHAIR: Yes.

5 MS SMITH: Which Rodger's counsel already took you to.

6 THE CHAIR: Yes.

7 MS SMITH: If I can take you to core bundle, page 510. Core bundle, page 510.

8 THE CHAIR: Yes.

9 MS SMITH: The amendments that are proposed in paragraph 59.3 -- is that a wrong
10 reference? Just a second.

11 No, this is a correct reference. Paragraph 59.3. You were taken to this by
12 Ms Blackwood, and various subsequent amendments, paragraph 59.4 and various
13 other subsequent amendments where Rodger seeks to refer to or introduce
14 amendments referring to the CMA mobile browsers investigation et cetera.

15 THE CHAIR: Yes.

16 MS SMITH: These paragraphs follow on from paragraph 58 on page 509.
17 Paragraph 58, says -- you will see, comes under the heading "Part III, Rule 75(3)(f)-
18 (j)". So, these decisions were relied upon when Rodger was seeking to establish that
19 it had an arguable case for the purposes of certification.

20 THE CHAIR: Yes.

21 MS SMITH: It was fine, in our submission, to refer to these decisions at that stage,
22 that early stage, in order to prove that they would be able to find evidence to put there
23 to establish a claim against Google. And we didn't object to them then. But they are
24 now being added to and updated way past the certification stage. The only purpose
25 for which they can conceivably want to include these, as said in paragraph 58:

26 "conduct on Google's part that is the same as, similar to, or related to the conduct

1 impugned in these proceedings, is already the subject of many regulatory proceedings
2 et cetera."

3 THE CHAIR: I see that.

4 MS SMITH: So, in effect, although the word "reliance" is not referred to there, that is
5 in effect what is being done, why these amendments are being made and we say that
6 is inadmissible.

7 The second example that I would like to take you to is page 558 of the core bundle.

8 THE CHAIR: Yes.

9 MS SMITH: Page 558 of the core bundle, paragraph 153A.

10 THE CHAIR: I have it.

11 MS SMITH: I haven't. That's good. 558.

12 Yes, 153A --

13 THE CHAIR: Yes. They have deleted the words "relies on."

14 MS SMITH: And said it is consistent with.

15 THE CHAIR: Yes, consistent with.

16 MS SMITH: I mean, it's not clear what the purpose of this pleading is, except in our
17 submission that they want to rely upon it.

18 THE CHAIR: Right.

19 MS SMITH: That is the same with regards 152A on the previous page, page 557.

20 THE CHAIR: I have that.

21 MS SMITH: Although that's not explicitly referred to in our letter, that amendment
22 suffers from the same problems.

23 So, we say these proposed amendments are clearly put in for the purpose of relying
24 on the findings in these previous decisions and that is inadmissible.

25 So, the third and final category of amendments going back to our letter, to which we
26 object --

1 THE CHAIR: Paragraph 7.

2 MS SMITH: Paragraph 7. Further deficiencies in Professor Rodger's draft amended
3 claim form.

4 If I can take you first effectively --

5 THE CHAIR: Just give me a minute.

6 MS SMITH: Sorry --

7 THE CHAIR: It is all right. Go on.

8 MS SMITH: If I take you first of all to -- paragraph 7(a) of our letter refers to
9 paragraph --

10 THE CHAIR: Do you have that in front of you?

11 MS SMITH: 189.1 at core bundle page 573.

12 Here in this paragraph, section 189.1, it says section 7 of Fletcher 2, we rely upon:

13 In order to establish our case of exploitative abuse, and excessive pricing, we rely
14 upon "Section 7 of Fletcher 2 which concludes that the Commission is excessive".

15 THE CHAIR: Yes, on profitability grounds.

16 MS SMITH: Yes. The commission is excessive, it says. That is the only -- just before
17 we get to profitability, the only assertion in this pleading that a commission is excessive
18 is that contained at 189.1.

19 The Commission, with a capital C, is defined in paragraph 19 which is core
20 bundle 493. And the Commission is defined by Rodger as any commission --
21 page 493, do you have that, sir?

22 THE CHAIR: Yes.

23 MS SMITH: The Commission is defined as any commission charged by Google in
24 connection with any sale via the Play Store or within an app.

25 THE CHAIR: This is the first point you made vis-a-vis Coll as well.

26 MS SMITH: Exactly, sir.

1 THE CHAIR: This is the point you have not specified what commissions precisely.

2 MS SMITH: Effectively they are saying that by pleading that the commission is
3 excessive and then going on to rely on the expert accounting report of Harman as
4 regards profitability, what they appear to be saying is that the commission is excessive
5 even when -- and we know that Google charges a range of commissions, down from
6 7.5 per cent and in fact zero to some developers, up to 30 -- what they appear to be
7 saying is that the commission is excessive even when it is below the ranges set out
8 by their experts.

9 Just as Rodger, Coll -- too many parties against me -- just as Coll has amended its
10 pleading to make clear what level of commission they say is excessive --

11 THE CHAIR: Well, which commissions are excessive.

12 MS SMITH: Which commissions are excessive, which is necessary both for liability
13 and quantum, which I think, sir, you have appreciated --

14 THE CHAIR: No objection was taken to this first time round.

15 MS SMITH: Well --

16 THE CHAIR: Sorry, the original pleading is --

17 MS SMITH: This was pre-expert evidence, sir.

18 THE CHAIR: Nonetheless, you didn't say, "when you say the commission is
19 excessive, which commission are you referring to?"

20 I am not saying the point wouldn't benefit from clarification.

21 MS SMITH: Sir, well, that's our point --

22 THE CHAIR: But I am making the point that this is not a point you had alighted on
23 before. You knew, presumably, that there was a range of commissions.

24 MS SMITH: No, because there was no expert -- we didn't know -- we knew there was
25 a range of commissions charged by Google, yes.

26 THE CHAIR: You might have come back and said, "what commission are you referring

1 to?" You might have done.

2 MS SMITH: We might have.

3 THE CHAIR: It is a passing comment that maybe doesn't --

4 MS SMITH: The point is that --

5 THE CHAIR: You basically are saying that you should -- that Rodger should do what

6 Coll have done.

7 MS SMITH: Exactly, sir, yes. I think we don't need --

8 THE CHAIR: I am sure Ms Blackwood will hear what you are saying and I will hear

9 what she says.

10 MS SMITH: The same applies to paragraph 194 which is referred to in paragraph 7(b)

11 of our letter.

12 THE CHAIR: 194, this is slightly different, isn't it? That's the lawful counterfactual.

13 MS SMITH: Yes. Coll has also --

14 THE CHAIR: I think the argument is that when it comes to liability, it's not necessary

15 to plead a counterfactual level because you are going to determine that by reference

16 to profitability. I think.

17 But nonetheless, it would need to be pleaded, you say, at least for quantum.

18 MS SMITH: As it has by -- as Coll is now proposing to do.

19 THE CHAIR: Yes. Yes. I can't quite remember, I know that Coll, in relation to abuse,

20 have pleaded the profitability allegation but they have also pleaded a counterfactual

21 level.

22 MS SMITH: Yes.

23 THE CHAIR: I don't know whether that is also in the context of abuse as well as

24 quantum.

25 MS BLACKWOOD: Yes, it is.

26 MR KENNEDY: It is in the context of quantum, sir.

1 THE CHAIR: Only in the context of quantum. So, you are aligned effectively with
2 Ms Blackwood on the question on abuse. You can do it by reference to profitability.

3 MR KENNEDY: Yes. There are no references to the counterfactual position as
4 defined in limb 1, limb 2.1 and limb 2.2 in our pleading, sir. It is a separate section on
5 the counterfactual that uses the phrase counterfactual commission.

6 THE CHAIR: Relevant to what? Relevant to quantum or abuse and quantum?

7 MR KENNEDY: Relevant to quantum, sir. I am just turning behind me to check that
8 that is correct.

9 THE CHAIR: Let's leave that. Yes. Let's see where we go.

10 MS SMITH: Paragraph 194 talks about the relevant counterfactual at paragraph 194,
11 but that relevant counterfactual is subsequently used in paragraph 197 and
12 paragraph --

13 THE CHAIR: You are looking at Coll, are you?

14 MS SMITH: No, I am in Rodger. The relevant counterfactual is subsequently pleaded
15 in the Rodger pleadings for quantum purposes as well as liability purposes.

16 THE CHAIR: They have not specified.

17 MS SMITH: And they haven't specified it. This is Rodger I am dealing with at the
18 moment.

19 THE CHAIR: Okay. All right.

20 MS SMITH: So those are the Rodger amendments --

21 THE CHAIR: Yes.

22 MS SMITH: -- in our letter of 29 January. The Coll amendments, I think that we have
23 now almost come to agreement with Coll on this. I understand that in light of the
24 indication my learned friend gave earlier as regards paragraph 65, the amendment in
25 paragraph 65 about Aptoide, Coll are now not seeking to make that amendment. They
26 are going to strike out that proposed amendment.

1 | There is no amendment now to paragraph 65.

2 | MR KENNEDY: There is. The restructuring.

3 | MS SMITH: It is just the deletion, not additional text.

4 | As regards the remaining amendments we do not oppose those, subject to the same

5 | two points we have made as regards the Rodger and Coll amendments, which are,

6 | first, that we should be given leave -- if so advised -- to put in evidence in response to

7 | these amendments by 1 April.

8 | It appears it is possible we may not need to put in any evidence in response to these

9 | amendments, but given that we only received the amendments at 12.22 this morning,

10 | we have not had a chance to consider them in detail and have not received a red line

11 | against the previous proposed amendments.

12 | We did at lunchtime, sorry. But we will need time. We wish to have the normal order

13 | that if so advised we are able to put in evidence in response to these amendments by

14 | the deadline of 1 April.

15 | THE CHAIR: Okay.

16 | MS SMITH: As regards disclosure, we understand that Coll is happy to undertake not

17 | to seek any disclosure --

18 | THE CHAIR: Post defence? Post amended defence?

19 | MR KENNEDY: No. So, the same basis as the other claimants.

20 | THE CHAIR: That is, you don't seek more disclosure now, if you get the amendments,

21 | but you are reserving your position in respect of any amended defence.

22 | MR KENNEDY: One caveat to the now position.

23 | MS SMITH: Yes.

24 | MR KENNEDY: We will be asking -- if our relevant period of amendment is allowed,

25 | we will be asking for disclosure of transactional data.

26 | THE CHAIR: Oh yes.

1 MR KENNEDY: But that is a discrete category of disclosure and there are ongoing
2 discussions as to when that should happen and on what basis.

3 THE CHAIR: All right.

4 MS SMITH: Just one point on the transaction data. That should not appear in any
5 order made by the Tribunal today. Disclosure of transaction data is extremely costly
6 and involved. We currently -- the parties all currently have data up to March 2024 and
7 the expert reports were all prepared on that basis. If further transaction data is
8 required it would be sensible that it is all done in one chunk, that we don't have --

9 THE CHAIR: I thought Mr Kennedy said that as well, didn't he?

10 MS SMITH: He did, but he said he wants it -- he said originally he wanted the
11 transaction data up to April of this year, updating, and he will then need again
12 transaction data up to the date of the judgment.

13 THE CHAIR: I am not going to make any decision on that.

14 MS SMITH: We say in light of Kent you should leave it all and do it in one --

15 THE CHAIR: I am not going to make any decision.

16 MS SMITH: -- disclosure exercise just before judgment, as in fact is proposed, I think,
17 by Coll in paragraphs 11 and 12 of her skeleton. But we will discuss that off line with
18 Coll.

19 I think that's it on the Coll amendments.

20 Oh yes, the counterfactual rating. Coll is pleaded in liability and quantum, paragraphs
21 163 and 164 of Coll's most recent re-re-amended claim form.

22 THE CHAIR: Okay.

23 MS SMITH: I think, if I may have 30 seconds, I think that is it on the amendment
24 applications.

25 Sir, those are our submissions on the amendment applications.

26 THE CHAIR: I am very concerned about time.

1 Obviously I want to hear the claimants in reply, most specifically on the evidence point
2 but they may have other points. Perhaps you could each give me an indication of how
3 long you think you would be in principle in reply on the amendments.

4 Mr Scannell?

5 MR SCANNELL: I think I will be in or around 10 minutes.

6 THE CHAIR: Ms Blackwood.

7 MS BLACKWOOD: Ten minutes.

8 THE CHAIR: Ten minutes.

9 MR KENNEDY: Five or less.

10 THE CHAIR: Okay. That's 20 minutes.

11 We will hear you now, Mr Scannell and Ms Blackwood.

12 Reply submissions by MR SCANNELL

13 MR SCANNELL: I am grateful. I will begin with an answer to a question that you put
14 to me, my Lord chairman, relating to the disclosure that was made by Google to Epic
15 in the context of the SMS investigation.

16 You asked me what had been disclosed by Google to Epic under the Tribunal order
17 saying that Google must disclose all of the documents that it had already disclosed to
18 Coll.

19 THE CHAIR: Right.

20 MR SCANNELL: I was not able to answer that immediately. The answer is that
21 Google disclosed all of the internal documents that had been requested from Google
22 by the CMA. It didn't disclose its submissions to the CMA, as I understand it.

23 MS SMITH: I understand it was not all of the internal documents, it is those that are
24 relevant to the pleaded issues in these proceedings.

25 THE CHAIR: Okay.

26 MR SCANNELL: I will begin by addressing the CIP v Galliford case, the judgment of

1 Mr Justice Coulson in authorities bundle, tab 5. We don't disagree with any of the
2 points of principle highlighted by my learned friend. We simply disagree that any of
3 those points are actually engaged.

4 The pleading amendments are not late. They are not very late either. We have
5 explained our timing in some detail.

6 THE CHAIR: Yes.

7 MR SCANNELL: So, I am mystified as to why it is said that we did not.

8 As to that delay, it's said that we relied on "mere convenience" to bring the
9 amendments to the attention of Google when we did. That's simply not the case.

10 THE CHAIR: Okay.

11 MR SCANNELL: I have explained how we proceeded by reference to the SMS
12 Decision announcement.

13 If Epic had taken the iterative approach that Google now apparently claims it should
14 have taken, multiple amendments would have had to have been brought to Google's
15 attention. It seems fair to surmise that Google would not have consented to any of
16 those, given its opposition today, and so multiple contested applications would have
17 had to have been brought before the Tribunal.

18 THE CHAIR: Yes.

19 MR SCANNELL: I don't think I stray too far into the realm of speculation to say that
20 the Tribunal would not have been prepared to indulge that. It would have been
21 inconsistent with the overriding objective.

22 As to prejudice, in the context of that case, my learned friend with respect took that
23 matter no further. It does not matter that the amendments postdate the factual
24 evidence, because no further evidence is required. That's what we say. All of the
25 disclosure has taken place also and as things stand no further disclosure is required.

26 One final point. That is that Google has had our draft amended case for coming on to

1 three months now, and at no point have they pointed to a single amendment, a single
2 proposed amendment --

3 THE CHAIR: Your draft pleading was served three months ago, was it?

4 MR SCANNELL: It was in November, early November 2025.

5 MS SMITH: It has been amended twice since the version that was served in
6 November.

7 MR SCANNELL: Minor amendments.

8 At no point has Google pointed to one of the proposed amendments and said, "well
9 that's going to be a problem for us. We are definitely going to need to put in further
10 factual evidence on that, and there will have to be disclosure."

11 THE CHAIR: Yes.

12 MR SCANNELL: Turning to Evans --

13 THE CHAIR: Yes. We want to hear you on this.

14 MR SCANNELL: Yes. The big picture point in relation to Evans, and all of this, in fact,
15 is that the key question to bear in mind in relation to references to other decision
16 makers is: are any of the parties before the Tribunal purporting to rely on those findings
17 as evidence? And by "as evidence" I mean, are they suggesting that it will have to be
18 weighed in the balance by the Tribunal when it comes to assess the likelihood of the
19 allegations being made out.

20 THE CHAIR: Just give me a moment. I need to get -- Evans is in bundle 3, isn't it?

21 MR SCANNELL: Evans is in the authorities bundle.

22 THE CHAIR: Yes okay.

23 MR SCANNELL: If it is relied on as evidence, then it may be problematic under the
24 rule considered in Evans. We accept that. If it is relied on as evidence it may be
25 problematic under the rule considered in Evans.

26 But of course, none of that really matters --

1 THE CHAIR: What exactly is the test? You are not -- I just want to get clear in my
2 mind, because relying on as evidence, relying on as findings -- I just want to have
3 a look.

4 Findings made are not evidence of the facts found.

5 MR SCANNELL: Yes. I am using "as evidence" as a sort of shorthand for the question
6 that was considered by the Supreme Court, which is the rule in *Hollington v Hewthorn*.

7 THE CHAIR: Yes. "Findings made by another decision maker are not admissible as
8 evidence of the facts found."

9 MR SCANNELL: Yes, exactly.

10 THE CHAIR: So, the test is: are you relying on the findings made in the SMS, all right,
11 as evidence of the facts found, e.g. substantial market power, or whatever the phrase
12 is.

13 MR SCANNELL: In other words, when we come to consider questions of dominance,
14 for example, are we going to say, "here is some of the evidence that you have to
15 consider when you are considering whether or not our case is made out."

16 But we are not relying on the decisions for that reason. We are relying on the
17 decisions, as we have repeatedly said, because they form part of the facts of the case,
18 they form part of the context of the case --

19 THE CHAIR: What is the Tribunal to do with that context? It is very interesting -- I am
20 just asking rhetorically. When we come to trial, what are we -- okay, so they found --
21 what are we to do with it? What are you saying we are to do with it? That's the
22 difficulty.

23 MR SCANNELL: To take one example, there is no prohibition on the Tribunal including
24 a statement in its judgment in due course saying that a particular investigative process
25 took place.

26 THE CHAIR: Yes.

1 MR SCANNELL: Because that's a matter of historical fact.

2 THE CHAIR: Yes.

3 MR SCANNELL: There is no question that you are abdicating your evaluative
4 responsibilities by doing that. You are not using the findings that were relied on to
5 support a conclusion that the allegations that Epic makes are made out.

6 So, what I would say is that that is the key question: are any of the parties relying on
7 these findings as evidence? If they are, then I say that it may, but not necessarily, be
8 problematic under the rule considered in Evans.

9 The reason I say may be --

10 THE CHAIR: Yes, go on.

11 MR SCANNELL: -- is because it is subject to everything else that the Supreme Court
12 said in Evans. It is subject to how the Supreme Court put things in Evans --

13 THE CHAIR: Yes. For example, we have not looked at the final paragraph of Evans,
14 which is probably the ratio of the case, for example, which deals with third-party cases.

15 MR SCANNELL: Yes. Precisely. That is an uncertainty that arises in Evans. It is
16 meat for argument when it comes to trial. But they also said important things about
17 estoppel, about abuse of process, about expert evidence. And all of those things will
18 also have to be weighed, when it comes to debating what Evans actually found.

19 Critically, there is uncertainty in Evans. You, Mr Chairman, have hit the nail on the
20 head in this respect. There is an uncertainty as to whether they are actually
21 addressing the question whether Hollington v Hewthorn in its weak form applies. In
22 other words, where the relevant party did appear before the third-party decision maker.

23 Just in relation to that question, but obviously my primary submission in relation to all
24 of that is that ultimately this is a question that will have to be resolved at trial, is that
25 there are multiple indications in Evans that the Supreme Court was not in fact
26 considering the question of whether Hollington v Hewthorn applies in its weak form or

1 in a weak form case.

2 THE CHAIR: Weak form meaning when there is identity of parties.

3 MR SCANNELL: Yes, when the parties before the Tribunal also actually appeared
4 and made representations before the third-party decision maker.

5 THE CHAIR: Yes.

6 MR SCANNELL: If I can just give you a few paragraphs without turning it up.

7 THE CHAIR: Please do.

8 MR SCANNELL: Paragraph 146, the court there accepts that the defendants can
9 challenge the correctness of findings in earlier regulatory decisions. That point only
10 really makes sense if the earlier decision is admissible.

11 At paragraph 15 --

12 THE CHAIR: I just want to read that again:

13 "Where the follow-on jurisdiction is not in issue and there is no question of issue
14 estoppel or abuse of process, the defendants are entitled to challenge the correctness
15 of the findings and the principle of fairness considered in *Rogers v Hoyle* remains
16 relevant."

17 Sorry? I am not sure I am -- I am getting tired, frankly:

18 "In such circumstances, where the follow-on jurisdiction is not in issue and there is no
19 question of issue estoppel or abuse of process, the defendants are entitled to
20 challenge the correctness of the findings and the principle of fairness considered in
21 *Rogers v Hoyle* remains relevant."

22 Oh, I see, and the principle of fairness.

23 MR SCANNELL: Yes. Fairness is something that underpins a lot -- everything in fact -
24 - that was said by the Supreme Court in *Evans*. You have already been taken to the
25 paragraph of the Supreme Court's judgment --

26 THE CHAIR: Entitled to challenge the correctness of findings in the previous decision.

1 MR SCANNELL: Yes.

2 THE CHAIR: Yes. To decide whether the findings were correct. Can only do so by
3 making -- okay, on which they were based. That suggests again you are going to have
4 to look at the other, the earlier --

5 MR SCANNELL: Yes.

6 THE CHAIR: But then you have the oddity, because the next paragraph, the last bit
7 of the quote which reads "the previous decision itself cannot be relied on." I mean
8 these are nuances upon nuances. But anyway, carry on.

9 MR SCANNELL: They are nuances on nuances which will have to be debated and
10 this is not the time for that.

11 THE CHAIR: Yes.

12 MR SCANNELL: You have already been shown paragraph 153. 153, I fully accept
13 that that can be read -- I am looking for the fundamental --

14 Sorry, 145. It would be particularly unfair.

15 THE CHAIR: Yes.

16 MR SCANNELL: I fully accept that that, too, can be read two ways. Is the court there
17 saying it would be particularly unfair if people who were not before the third-party
18 decision maker had to have the Hollington v Hewthorn rule applied to them?

19 THE CHAIR: Yes, but it would be less than very unfair for the other case.

20 MR SCANNELL: Yes. But there is actually a significant uncertainty there as to how
21 exactly to read that. Because the Supreme Court may in fact be saying that Hollington
22 v Hewthorn is only truly engaged when there is fundamental unfairness, because
23 fundamental unfairness is inconsistent with natural law.

24 THE CHAIR: Yes.

25 MR SCANNELL: They make references in their judgment to natural law being the fons
26 et origo of everything that they are saying.

1 THE CHAIR: Yes.

2 MR SCANNELL: I also refer to paragraph 160 for a very particular point. Again, I am
3 not proposing to turn it up, but when you consider Evans it is worth considering that.
4 Because what the Supreme Court seems to be doing in that paragraph is using the
5 relevance, the possible relevance, of the decision in question as a sort of cross-check
6 for the purposes of admissibility. They were obviously impressed, the Supreme Court,
7 by the fact that in Evans the decision wasn't actually all that relevant. So it supported
8 the finding of inadmissibility.

9 But just thinking about it, were the same sense check to be run in this case, it is
10 actually highly unlikely that any of decisions would be found to be irrelevant, and
11 therefore they wouldn't support a finding of inadmissibility.

12 THE CHAIR: Okay.

13 MR SCANNELL: Now, I said at the outset that really Evans is not what the Tribunal
14 needs to consider first and foremost right now when it is considering the amendments,
15 so long as the Tribunal is satisfied that no one is relying on these decisions as
16 evidence anyway.

17 If they are not relying on it as evidence, but just as part of context and fact, then it
18 seems to be common ground that Evans is not truly engaged.

19 THE CHAIR: Okay.

20 MR SCANNELL: That key unlocks quite a lot of the thinking in relation to how to
21 approach references that are made by parties at all stages in the proceedings to
22 decisions that are taken by third-party adjudicative bodies.

23 So, when, for example, you take a look at the Qualcomm case, for example, my
24 learned friend completely ignored what was actually being considered in that case.
25 What was being considered in Qualcomm was the question whether a decision which
26 definitely was being relied on as evidence could be admitted. The finding was, well it

1 is plain as a pikestaff that you are relying on it as evidence, and that's not admissible.

2 THE CHAIR: As evidence of the facts found.

3 MR SCANNELL: Yes.

4 THE CHAIR: Right.

5 MR SCANNELL: So, the way it was put at paragraph 9 of the Tribunal's judgment in
6 Qualcomm was that which -- the particular sentence in paragraph 4 of Which's reply
7 to which objection is taken is -- and that is what Which have said in its pleading:

8 "Reasoned findings made by foreign courts and regulators may be taken into account
9 in proceedings before the Tribunal, at least to the extent that such findings have not
10 been reversed on appeal."

11 So, it was much clearer in that case that it was being put forward by Which that they
12 could rely on foreign regulators as evidence to support their claims at trial and that
13 was not accepted.

14 Equally, my learned friend drew your attention to a case called Jinxin, which ultimately
15 she didn't go to but she did make some submissions on. I won't go to it either, but I do
16 want to make this point. It was abundantly clear in Jinxin that the claimant sought to
17 rely on a foreign decision as evidence. And that can be conclusively demonstrated in
18 Jinxin for a very particular reason and that is that it was a fraud case, it was a deceit
19 case.

20 What the deciding deputy High Court judge said in that case is "we have special rules
21 in deceit and fraud cases. You can't simply say I believe it because a regulator said
22 it, you have to put forward facts and evidence in support of a fraud case. So, you must
23 be relying on this as evidence. And given that you are relying on it as evidence, and
24 given that it is not a competition case and therefore not within the follow-on damages
25 exception, I have to strike it out."

26 THE CHAIR: Okay.

1 MR SCANNELL: A brief word on what my learned friend addressed you on in relation
2 to the specific amendments. Just two need to be addressed.

3 The first is that my learned friend explained that the UCB amendment is proposed to
4 be relied on for the first time as a plea in support of excessive pricing. That is hopeless
5 and not true.

6 THE CHAIR: Wasn't that the point I picked out.

7 MR SCANNELL: That's the point you picked out. The relevant reference is bundle B,
8 tab 3, page 149, paragraph 11(a).

9 THE CHAIR: Of the reply.

10 MR SCANNELL: That's our reply, and that's us saying, all right, that UCB --

11 THE CHAIR: I have that point.

12 MR SCANNELL: -- goes directly to excessive pricing.

13 THE CHAIR: Okay.

14 MR SCANNELL: Secondly, the anti-steering amendment. We are not putting that
15 forward as a new abuse. My learned friend drew your attention to one paragraph of
16 the amended pleading, paragraph 146. I don't need to take it any further than that,
17 146 proves the point that it is not a new case. 146 says "we are relying on the tie as
18 the abuse and anti-steering reinforces the tie."

19 THE CHAIR: Okay.

20 MR SCANNELL: I am grateful.

21 THE CHAIR: Thank you very much.

22 Yes, Ms Blackwood.

23 MS BLACKWOOD: Sir.

24 Reply submissions by MS BLACKWOOD

25 THE CHAIR: I mean you may have general points, but you can add what you wish to
26 add about Evans, if you have anything to add, and I would like to hear you on your

1 position about the pleading of the commission et cetera and the actual commissions
2 and the counterfactual, i.e. in the light of what Coll have done. You may have other
3 points, but, yes --

4 MS BLACKWOOD: The first point I had was just touched on orally I think to some
5 extent by Mr Scannell, the Qualcomm decision.

6 Just to flag, in their amended claim form, there was detailed pleading and referred to -
7 -

8 THE CHAIR: In whose amended claim form, sorry?

9 MS BLACKWOOD: Which's. In Which's claim form there was pleading which was
10 referring to a number of foreign decisions by regulators such as the European
11 Commission, US District Court, South Korea Fair Trade Commission, et cetera.

12 No objection was taken to those pleadings. The only thing that Qualcomm was
13 objecting to was this reliance on reasoned findings. So that very specific point --

14 THE CHAIR: I think I better have a quick look at it. It is in bundle?

15 MS BLACKWOOD: It is authorities bundle, tab 9 --

16 THE CHAIR: I am not sure I understand this distinction you are making.

17 MS BLACKWOOD: 271.

18 THE CHAIR: Just to identify it, you said they pleaded X, Y and Z and it was not struck
19 out.

20 MS BLACKWOOD: If I may take you to paragraph 5, you can see from this paragraph
21 that there was a fairly extensive pleading about the decisions. Then for paragraph 9
22 you can see that Qualcomm did not object to any of that pleading. All that was being
23 objected to was the pleading that is quoted there, that the reasoned findings would be
24 taken into account.

25 THE CHAIR: Okay.

26 MS BLACKWOOD: Then in paragraph 10, Qualcomm goes on to accept that --

1 THE CHAIR: The sentence offends.

2 MS BLACKWOOD: That the sentence offends, but accepts that reference can be
3 made to foreign judgments for the purposes of identifying as a matter of record
4 evidence and submissions that were before the relevant court or regulator.

5 THE CHAIR: But account may not be taken of a reasoned decision.

6 MS BLACKWOOD: Of a reasoned decision.

7 THE CHAIR: And the decision was that that was accepted.

8 MS BLACKWOOD: And the point that I am making is I think that mirrors the language
9 that you will see in paragraph 159 of Evans.

10 THE CHAIR: Paragraph?

11 MS BLACKWOOD: 159 of Evans. Page 827 of the authorities bundle, tab 15.

12 THE CHAIR: One minute.

13 159?

14 MS BLACKWOOD: 159. You will see that this is a sentence starting:
15 "Likewise, it is not inconsistent with the principle underlying [in *Hollington v Hewthorn*]
16 that case to rely on prior judgments or reports in so far as they record evidence of
17 relevant facts [...] It is only in so far as such material contains opinions of matters of
18 fact [...] that the material is inadmissible."

19 So, the only point that I am making there is that although Google place reliance on it,
20 it was actually a very narrow point that the pleading was struck out, not on the wider
21 reference to regulatory decisions.

22 THE CHAIR: So, you say Qualcomm says you can plead reference to a foreign
23 decision identifying evidence and submissions that were made, but not the decision?

24 MS BLACKWOOD: Well, I was --

25 THE CHAIR: Is that what you say Qualcomm finds?

26 MS BLACKWOOD: I am saying Qualcomm is focused on --

1 THE CHAIR: The reasons.

2 MS BLACKWOOD: It echoes the comments that are made by the Supreme Court in
3 paragraph 159 of the Evans judgment, that it is only insofar as such material contains
4 opinions on matters of fact that that material is inadmissible. Therefore you can see
5 why in Qualcomm concern was taken with that particular pleading but the wider
6 pleading about the regulatory decisions and the other material pleaded --

7 THE CHAIR: Okay.

8 MS BLACKWOOD: -- was admissible.

9 THE CHAIR: All right.

10 MS BLACKWOOD: Sir, I will take the remaining points, I hope, very quickly.
11 Google said that convenience was not a good reason for the late amendments. We
12 have already explained why, particularly in relation to paragraphs 143A and the
13 amendment in relation to UCB, why there are aspects of those pleadings that we did
14 not know about prior to either having gone through disclosure or factual evidence, and
15 to the extent that there is some material in those paragraphs of the pleadings --

16 THE CHAIR: Just slow down a bit. The 143A point and the further programmes, is
17 that what you are dealing with?

18 MS BLACKWOOD: I was trying to take it perhaps too quickly.
19 143A --

20 THE CHAIR: Forget UCB for the moment, I am interested in the 143A point.

21 MS BLACKWOOD: So, the alternative programmes, as I submitted earlier --

22 THE CHAIR: Yes.

23 MS BLACKWOOD: -- there was pleading in there about the presence of specific
24 clauses about content, pricing and material parity that we did not know about until we
25 had gone through our disclosure.

26 THE CHAIR: Right, okay.

1 MS BLACKWOOD: The point that I am making is it's not a question of convenience
2 that we put in some of the other amendments later. It is part of the overriding objective
3 that you would gather your amendments together and sensibly do them in one go,
4 rather than repeatedly trying to amend your --

5 THE CHAIR: Can you just take me to your pleading, please?

6 MS BLACKWOOD: Yes, sir.

7 THE CHAIR: Is it in tab 33?

8 MS BLACKWOOD: It is in tab 33 of the core bundle.

9 THE CHAIR: I just want to look at 143A. The point that was made is that these
10 programmes have been in place for a long, long time and you ought to have known
11 about them earlier, right.

12 Your point in response is that it is the bit about using GPB and conditions maintaining
13 content, features and pricing parity. You say that is only recently been known when
14 you have seen disclosure.

15 MS BLACKWOOD: Well, these programmes aren't publicly available information.

16 THE CHAIR: Sorry, just --

17 MS BLACKWOOD: That specific bit is something that we highlighted as coming out
18 of disclosure.

19 THE CHAIR: Yes, okay. So, you say it is not -- as far as you are concerned, it is new.

20 MS BLACKWOOD: Google lists in table 2 of its defence some of these programmes.

21 THE CHAIR: Yes.

22 MS BLACKWOOD: But details as to what those entailed, we didn't fully know about
23 until we had disclosure.

24 THE CHAIR: Okay. Got the point.

25 MS BLACKWOOD: So, we say that's not late.

26 THE CHAIR: Okay.

1 MS BLACKWOOD: UCB, you were taken to --

2 THE CHAIR: I am not sure you need --

3 MS BLACKWOOD: Sir, the only point was issue was being taken with the last

4 sentence of that paragraph saying, well, this is all just about UCB. But the pleading in

5 that paragraph relates to uptake of UCB and the incentives upon developers to use

6 UCB. That is material that was fleshed out and developed in Professor Fletcher's

7 second report. So, it is wrong to say "well, it is just about UCB, you should have

8 pleaded that earlier." That's incorrect.

9 THE CHAIR: Okay.

10 MS BLACKWOOD: I note that -- I am conscious of the time.

11 THE CHAIR: It is all right.

12 MS BLACKWOOD: The only prejudice that Google appeared to identify in its

13 submissions was that it might have to adduce further evidence, but it didn't go further

14 than that. So, we say that's not sufficient.

15 THE CHAIR: Yes.

16 MS BLACKWOOD: And --

17 THE CHAIR: I am more interested by your point about the commissions. I want to

18 hear what you say, and particularly why you wouldn't be able to do what Coll has done,

19 if that's what you are saying.

20 MS BLACKWOOD: Well, I think in relation to the different commission levels --

21 THE CHAIR: Yes, the existing commission levels.

22 MS BLACKWOOD: The reality is in Professor Harman's report he examines

23 profitability. If you take into account Google's advertising profits that there is a link to

24 the Play Store, you could actually set a commission below zero and the Play Store

25 would still be profitable. Because they are drawing in --

26 THE CHAIR: You are talking about the counterfactual fee. I am talking about the

1 contention that you haven't identified which commissions you are talking about. And
2 that has been clarified by an amendment to the pleading in Coll, in their definitions
3 section. That's the first point I think that's taken against you. That you need to identify,
4 because some of the commissions are lower than what you say they should be.

5 So that's the first point.

6 The second point is the counterfactual point, which has two limbs to it. I don't think
7 you have pleaded a counterfactual level at all in relation to damages. Query whether
8 you need to now. And, secondly, the question of whether or not, on this point I am
9 less convinced at the moment, I have not spoken to my colleague here, that you need
10 to specify the counterfactual lawful fee for the purposes of the excessive pricing. You
11 rely on what was said in Kent v Apple and Coll cover both limbs in relation to the
12 abuse.

13 But the two points I really need to hear from you on are, are you able -- should you
14 actually specify what commissions you are talking about, and, secondly, should you at
15 this stage be pleading a counterfactual level for the purposes of damages.

16 MS BLACKWOOD: Sir, no issue was taken on our damages section of our pleading.
17 There is no amendment --

18 THE CHAIR: There is no amendment.

19 MS BLACKWOOD: They are complaining about in relation to --

20 THE CHAIR: I don't think they can force you to -- yes.

21 MS BLACKWOOD: In that section of the pleading. The counterfactual levels that we
22 refer to are all set out in Professor Fletcher's report for the purpose of assessing
23 quantum. So, it is not as if Google are unsighted --

24 THE CHAIR: Okay. So, you say you do have a counterfactual level but it is in the
25 expert report?

26 MS BLACKWOOD: We say that for the purposes of quantum, Professor Fletcher

1 identifies the reasonable commission level to calculate damages.

2 THE CHAIR: Yes.

3 MS BLACKWOOD: That's in her report. That's not news to Google.

4 THE CHAIR: Okay. Anyway, you are not making an application to amend. There is

5 not a cross application --

6 MS BLACKWOOD: I think that would be a pedant point there. But in terms of pleading

7 the counterfactual lawful rate of the Commission, we have already taken you to

8 Kent v Apple on that.

9 THE CHAIR: You have already what, sorry?

10 MS BLACKWOOD: Taken you, sir, to the judgment of Kent v Apple where it says you

11 don't need to --

12 THE CHAIR: I have that point.

13 MS BLACKWOOD: For liability. And Google have pointed to no authority at all that

14 requires us to plead that for the purposes of establishing liability --

15 THE CHAIR: I have that point. I am directing your attention to whether or not you

16 need -- I mean, I am not sure it is an amendment. Whether you need to specify the

17 commission you are talking about. The commission that's being attacked.

18 MS BLACKWOOD: May I just take instructions?

19 THE CHAIR: You can take instructions on it. Perhaps we can deal with that offline,

20 and you can discuss it with Google and whether it is necessary.

21 I am not sure it arises from an amendment. Maybe it does, but, yes, you see the point

22 I am making?

23 MS BLACKWOOD: I don't think --

24 THE CHAIR: Given the time, I am not going to press you on it any further, but I am

25 not very clear at the moment (a) about your position and (b) about whether or not it is

26 something that has to be decided now in terms of an amendment. I would have to

1 look again at Google's objection and whether it actually arises on the amendment.

2 MS BLACKWOOD: Well, I am afraid that Google's objection has slightly pivoted
3 during the course of this hearing. It was set out -- at least in our reading -- slightly
4 differently, where they said we needed to specify the specific unlawful commission,
5 not which commission rates -- or that there was any ambiguity about the definition of
6 commission rates in our pleadings. So that is new to us.

7 THE CHAIR: That's what I am saying.

8 MS BLACKWOOD: I do need time to take instructions on that.

9 THE CHAIR: Yes. Okay.

10 Are there any other points you wish to make?

11 MS BLACKWOOD: No, sir, thank you.

12 THE CHAIR: Mr Kennedy, do you have anything to say?

13 Reply submissions by MR KENNEDY

14 MR KENNEDY: Two short points. The first is in relation to paragraph 163 and 164 of
15 our draft amended --

16 THE CHAIR: Can you just remind me?

17 MR KENNEDY: Of course, sir. This is "unfair in comparison to other products" within
18 the excessive pricing allegation.

19 Mr Williams pointed out -- perhaps not audibly to the Tribunal -- that there is a slight
20 lack of clarity in 163 and 164. I am not in a position to fix that on my feet now, sir, but
21 we will write to Google early next week and attempt to clarify that.

22 Two points are being maintained against us. One is about further factual evidence,
23 and it is said that Google didn't have sufficient time to consider whether they wanted
24 additional factual evidence. We don't accept that. They have had our amendment
25 since 20 January, and the only additions that were made were 65, which has been
26 dealt with, and 115aA. So, we say they were in a position to be more specific about

1 whether or not they did require further factual or expert evidence, and in circumstances
2 where the highest it is put is that it is possible, we say that's not a factor to be weighed
3 against us.

4 Finally, on disclosure we accept that no order can be made today about the transaction
5 data, but we would ask that any future decision about that be dealt with on the papers,
6 sir. We think it is not necessary to trouble the Tribunal with a further hearing.

7 Likewise, sir, we are not going to get on to the timetable application, but we would
8 similarly ask that that application be determined on the papers by the Tribunal if no one
9 else objects to that proposal.

10 THE CHAIR: We are going to have to rise and consider where we are, and take a few
11 minutes and how we deal with everything if that is all right. We will obviously be a little
12 later than 5 o'clock now, but we will rise and just discuss where we are. Thank you
13 very much.

14 (4.57 pm)

15 (A short break)

16 (5.13 pm)

17
18 Decision

19 THE CHAIR: I will let you know where the Tribunal is at.

20 The decision to this extent is that all the amendments sought by the claimants are
21 allowed, except in relation to those which are objected to on the grounds of Evans.
22 I will come to that in a moment.

23 In relation to the other amendments, we are not satisfied that they are late and we are
24 not satisfied that Google will sustain material prejudice such that the balance should
25 be against granting them.

26 So that deals with most of the amendments.

1 We grant liberty to Google to respond by evidence to any of those amendments,
2 responsive to the amendments, and to do so within the time. We think it is 1 April.

3 We do not make a direction that the claimants are precluded from seeking further
4 disclosure following the amended defence responding to the amended claims. We
5 note the various indications given that the parties are not seeking disclosure now and
6 no doubt will consider carefully the need for any further disclosure, but we are not
7 barring it.

8 Now, as regards the Evans point, we are not satisfied -- or I am not satisfied -- that
9 this point has been fully argued in the detail which it requires. We do make an
10 observation that the point is mentioned in effectively one paragraph of Google's
11 skeleton, paragraph 6, and that the scope of the argument that has ensued today
12 orally has extended way beyond that written submission on the point and has raised
13 on both sides interesting and complex points.

14 The Tribunal is not satisfied that it is able to give the consideration that the point
15 requires either today or on the basis of what has been submitted today. The position,
16 therefore, in relation to those amendments to which the Evans objection is taken is
17 that we are both not going to allow the amendment and we are not going to refuse it.

18 We raise the observation that it is a matter for Epic and Professor Rodger to decide
19 whether it should adopt the approach which Coll has adopted of not seeking the
20 amendment now but without prejudice to wishing to rely on the material at a later
21 stage. That is as far as the Tribunal is prepared to go at this stage, subject to adding
22 this: the parties are to liaise and write to the Tribunal as to how they consider that the
23 issue should proceed, because at some stage in this case it will require further
24 consideration. We say no more about it than that at this stage but you have
25 understood why we feel unable to make that decision now.

26 So that deals with the amendments.

1 Can I just deal with the rest of the agenda.

2 It is possible that I may have some availability for a further hearing in the second half
3 of February. That is between 16 February and those two weeks, and possibly the
4 beginning of the week of 2 March, although that might be more difficult. That may be,
5 subject to you providing your availability, an opportunity for the Tribunal to consider
6 any other or all other outstanding matters.

7 I wish to make two observations in relation to those outstanding matters. The Sensor
8 Tower issue, we completely recognise that the parties are ad idem about the order,
9 but we have, I think, two concerns.

10 As I understand it this is an order against a third-party to disclose information which is
11 a fourth party's information, or which the third-party have received from the fourth
12 party. My understanding is that in November the fourth party objected to it being
13 disclosed. There is some reference to a November letter. There is shaking of the
14 head.

15 Anyway, more recently, the fourth party is Sensor Tower, isn't it, themselves? Fideres
16 is the third party -- I am getting nods -- and the fourth party is Sensor Tower. Sensor
17 Tower have been written to but haven't responded. I don't know whether there has
18 been a more recent response but in the skeletons -- I am looking at paragraph 15 of
19 somebody's skeleton -- I can't remember is it Epic's or is it Professor Rodger --

20 MS BLACKWOOD: They have been written to be warned that this application is going
21 to be made, and they have been sent a copy of this application and told this hearing
22 was happening today. They have not responded to us or to --

23 THE CHAIR: Later in your skeleton at paragraph 20 or something, you refer to some
24 correspondence in November where there was an objection.

25 MS BLACKWOOD: Yes, so Sensor Tower was asked by Fideres if they would give
26 them permission to disclose this material to us. And they refused.

1 THE CHAIR: Yes.

2 MS BLACKWOOD: They have now been told about this application, but they haven't
3 sought to resist.

4 THE CHAIR: Yes, I understand that.

5 I mean this material is something that Google effectively is asking for. We do
6 question -- and I am not asking for it to be resolved now, but I want you to take this
7 into account -- given that the data is no longer relied upon by Professor Rodger --
8 that's right, isn't it, Rodger --

9 MS BLACKWOOD: Yes, that's right.

10 THE CHAIR: We wonder how relevant it is, and on the whole balance how strong its
11 relevance is, against the fact that we are going to be making an order in respect of
12 a fourth party who is not party to the proceedings and not present, and their
13 confidentiality concerns.

14 I mean, I am thinking now way back to proceedings in this Tribunal a long time ago
15 when we were talking about confidential information of third parties and disclosure
16 orders. We, as a Tribunal, raise a concern in relation to Sensor's position. We might
17 want you to consider that.

18 One option is we make the order but conditional upon no objection being received
19 from Sensor Tower, or getting some response from them. That's one option. I am not
20 going to make the order now, but I could do that on the papers.

21 But the point I am raising is that we, as a Tribunal -- dealing with the information of
22 somebody who is not present and hasn't responded -- are just a little bit cautious about
23 making a formal court order for disclosure. I don't know whether that's a helpful
24 indication that it can be taken forward and you can come up with a solution. I would
25 be much happier if they had written back and said "We don't mind", if I am perfectly
26 honest.

1 MS BLACKWOOD: We are in a slightly difficult position, because we don't think this
2 data is at all relevant for trial. We are just trying to be cooperative.

3 THE CHAIR: I don't know, Ms Smith, whether you have any observations on it?

4 MS SMITH: I don't want to start arguing given the time. We don't accept it is third or
5 fourth party data anyway because it is in the control of Professor Rodger. Leaving
6 that to one side, let's see if we can sort something out to address the Tribunal's
7 concerns about Sensor Tower --

8 THE CHAIR: Yes.

9 MS SMITH: -- giving consent or not.

10 THE CHAIR: Yes, yes. Thank you.

11 The final observation in relation to the outstanding matters is that as matters presently
12 stand -- and having read the arguments but not heard oral argument -- the Tribunal
13 would not be minded to alter the trial length at this stage. That's an indication. If you
14 wish to come back and argue that in February, if you have time, you can argue it. But
15 that's the way we view it at the moment. We note there are a couple of days where
16 we probably can't sit anyway, and we are also very cognisant of the position in relation
17 to the US Epic proceedings.

18 I know people say, well, we have to proceed as is; but all we would say about that is
19 the Tribunal would like to be kept informed of what is going on in that as soon as
20 something happens. I understand that the further submissions deadline is in March.
21 We just have to live with the uncertainty, but any further information in relation to that
22 will obviously have a big impact.

23 So that is where we are today. It may be that in the light of the decisions we have
24 made today that an order of what we have done now can be made and then you can
25 come back and see how we deal with the other matters.

26 Does anybody have any observations on that?

1 Ms Smith, yes?

2 MS SMITH: Can I just clarify that the outstanding issues on witness statement
3 disclosure are going to be addressed at that further hearing towards the end of
4 February?

5 THE CHAIR: If we can find one.

6 MS SMITH: Possibly towards the beginning of March.

7 In that case, please can I make the following request. A number of Google's requests
8 of Epic have now been agreed by Epic.

9 THE CHAIR: Okay.

10 MS SMITH: And they are in green in the latest version of the Redfern Schedule.

11 THE CHAIR: Okay.

12 MS SMITH: Given your indication we will not be coming back until end of February
13 perhaps beginning of March, and given the approaching deadline for our expert
14 reports, we would ask for an order for disclosure of the agreed green -- I will hand this
15 up. It has obviously been a product of both parties --

16 THE CHAIR: Has it been upgraded since my last version?

17 MS SMITH: It has been slightly upgraded but it has been shared between the parties,
18 between Epic and Google. It is the combined result of negotiations that continued until
19 this morning. But I would ask that on those green requests that have been agreed by
20 Epic, could we have an order for disclosure within 14 days so that we have that
21 material in good time for our experts to be able to consider it and include it in their
22 reports.

23 THE CHAIR: I don't know whether Epic have any observations on that. It is Epic, isn't
24 it?

25 MS SMITH: Yes, it is Epic.

26 MR SCANNELL: Epic would prefer to liaise with Google as to the timing, because

1 | there will be a difficulty with at least one of the subsets if there is a two week period.

2 | THE CHAIR: Fine.

3 | MS SMITH: If we can be told what that subset is, then we might, you know, the rest
4 | of it --

5 | THE CHAIR: In principle, I would be happy to make an order. You are going to
6 | presumably put an order together between you in the light of the decisions that have
7 | been made so far, one of which will be Epic to provide disclosure of categories A, B,
8 | C and D within X days. If one of the categories is a problem, you can sort that out
9 | between the two of you. If you say, well, category X we can't do for 28 days, you can
10 | do it offline and either you can reach an agreement on that particular category, which
11 | I very much encourage you to do, obviously --

12 | MR SCANNELL: Yes.

13 | THE CHAIR: -- and if not, you will have to put it in a letter with the draft order with the
14 | alternative dates and I will make a decision.

15 | MR SCANNELL: That is understood.

16 | THE CHAIR: Yes.

17 | MR SCANNELL: I am grateful.

18 | THE CHAIR: Any other observations from anybody?

19 | No, thank you all very much. It has been a very long day. It is a shame we have not
20 | got through everything, but sometimes it's not surprising. I will rise, thank you very
21 | much.

22 | (5.28 pm)

23 | (The case management hearing concluded)

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Key to punctuation used in transcript

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

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