IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1601/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 6th May 2026

Before:

James Wolffe KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr Sean Ennis

Class Representative

v

Apple Inc and Others.

Defendants

A P P E A R AN C E S

Daniel Carall-Green and Sam Hussaini on behalf of Dr Sean Ennis (Instructed by Scott+Scott UK LLP)

Daniel Piccinin KC, Hugo Leith and Natasha Simonsen on behalf of Apple Inc & Others (Instructed by Gibson Dunn & Crutcher UK LLP)

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

Wednesday, 6 May 2026

(10.30 am)

(Proceedings delayed)

(10.31 am)

Housekeeping

THE CHAIR: Good morning. Mr Carall-Green, is it?

Before we make a start, I'll give the usual warning. Some of you are joining us livestream on our website so I start with the usual warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court. Thank you.

MR CARALL-GREEN: Sorry, I apologise for throwing you off (inaudible).

THE CHAIR: No, not at all.

I suppose just three other preliminary points. We'll take the usual break at a suitable point in the morning, so if whoever's speaking could alert me, if I don't draw that to your attention. I'm not sure that there's anything confidential that's likely to need to be referred to, but if by chance there is, parties will no doubt let me know if I need to do anything about clearing the court.

MR CARALL-GREEN: Yes, I don't think it's likely to come up, and if it does, then I suspect we shall ask you to read the information before you rather than read it out loud.

THE CHAIR: Indeed. I'm very conscious that the Tribunal has not yet made a decision on Apple's decertification application and that that application has significance for the future progress of the case. But we, I think, have lost about five months since the timetable that was set last April, so it seemed to me that we should make what

progress we can today, recognising that if the decertification decision were to go in Apple's favour that there may be a need to regroup or revisit.

MR CARALL-GREEN: Yes, sir. Well, the pending nature of the decertification judgment may have a bearing on a couple of the items.

THE CHAIR: Okay.

MR CARALL-GREEN: But we can, perhaps, come to that as we go through.

THE CHAIR: Indeed. Okay. Thank you for the agenda. Shall we just take the items in the order that they're set?

MR CARALL-GREEN: Yes, so I think that means: claim form amendment, disclosure, class disclosure, expert evidence, survey evidence, and cost budgeting. That was my order but if the Tribunal prefers otherwise, I can mix it up.

THE CHAIR: No, that's absolutely fine.

MR CARALL-GREEN: Very good. And, sir, can I just check: you should have one main bundle, one supplementary bundle, and one authorities bundle?

THE CHAIR: That seems to be correct. I have them both in hard copy and on the screen, so --

MR CARALL-GREEN: Very good. Thank you, sir.

Claim form amendment, disclosure

MR CARALL-GREEN: Well, the first item then is the claim form amendment application. So, I've spoken about this with my learned friend just a moment ago, and there's a threshold point here which is that most of this now appears to be agreed, save that there is an outstanding point about the application of the rule in *Hollington*. My learned friend and I are both very conscious that you've heard about the rule in *Hollington*, from persons greater than either of us, two weeks ago. So, there is a suggestion it might be appropriate to stand the issue over because if the Tribunal is about to give a view on the importance and effect of that rule, then that may effectively

resolve any outstanding dispute as to whether or not the amendments are permissible. Now, I'm in the Tribunal's hands on this in that, if the Tribunal would prefer, we can of course argue the point by specific reference to the amendments that are now proposed, and I think my learned friend is prepared to do that as well. But it may be that that is not the right use of time, given that the Tribunal has already heard from the parties on the *Hollington* point.

THE CHAIR: Yes. I suppose the question in my mind, both parties may take it that the Tribunal is well alive to the point and -- well, having heard the argument already -- the potential for further argument in due course about *Hollington*. I wondered -- but I may need to hear from you, Mr Piccinin, on this -- how far it's a point that one takes at this stage in terms of a pleading point and how far one simply accepts that the parties refer to, particularly the claimant, a variety of decisions by other bodies and quotes from them, the relevance or otherwise of which will be a matter for debate, no doubt, in due course; it may or may not fall away. I just wondered how far it was an issue that it would be helpful or necessary to bite on at the stage of pleading, but I don't want to deflect you, Mr Piccinin, if you take the view that it's a point that you would wish to insist on.

MR PICCININ: Yes, sir. I should say as well, it's Piccinin.

THE CHAIR: Piccinin. I'm so sorry, I should have clarified that first.

MR PICCININ: No need for apologies at all, sir.

Yes, the reason we take it as a pleading point, and, actually, the reason that the current president of the Tribunal dealt with it as a pleading point and struck out similar pleadings in the *Qualcomm* case, was that it's important that the parties know what is going to be live at trial. And if there is going to be the possibility of relying on this sort of material at trial, then one thing that the defendant might want to do is put in evidence on what kind of evidence there was before that decision-making. That leads to exactly

the kind of satellite disputes that are an important part of the rationale for the rule in *Hollington v Hewthorn*, excluding this material.

That said, where I do agree with Mr Carall-Green is that it's not urgent that this be resolved today. So, if it's possible that the judgment that the Tribunal gives on the decertification application will shed some light on the issue, then it may be that the issue goes away entirely or is substantially narrowed. So, the trial is in 2028. It's not essential that we reach a resolution.

THE CHAIR: I can see that. Is the logic of your position that you would also potentially be seeking to have struck out or -- you know, as I say, there are various quotes from various other decisions, and I don't feel you need to answer this one way or the other, but it struck me that if you were seeking to prevent the amendment being made on that basis, there's a logic in relation to the other parts of the pleadings which, if it's a good objection, would be subject to the same objection.

MR PICCININ: That's right. So, the way this came up in correspondence was that not long before the applications were due for the CMC, we received a copy of their amended claim form. When we wrote back to them and said, "You shouldn't be pleading all of this *Kent* material because of *Hollington*", we also said, "On the contrary, what you should be doing is stripping out all of the other material that is also offensive to the rule in *Hollington*".

Now, we don't have a strike-out application before you, but you're obviously right that that is the consequence. I suppose another benefit of waiting for your judgment on decertification is that we can then take everything in the round.

THE CHAIR: Okay. Well, if neither party considers it’s necessary to resolve the amendment issue today, in order to make progress, I'm content to defer your application to amend until after the decertification judgment is available, and then you can renew it or not, as the case may be. No doubt, that may depend on the judgment.

MR CARALL-GREEN: Okay. I'll just confirm with those behind me that there's nothing further to raise on that, sir. Thank you, sir. Well, that was an efficient disposition of topic 1.

Topic 2, sir, is disclosure inter partes, and specifically disclosure from Apple. Now, as we say in our skeleton argument, the legal principles surrounding disclosure have been conveniently summarised by this Tribunal in the case of *Roger*. I'll assume familiarity with those principles, sir, because they're not unusual or bespoke.

I'd first like, in the context of disclosure, to address two scene-setting issues that Apple raises when resisting the further disclosure that Dr Ennis seeks. First, Apple says that it has already provided a lot of documents from *Kent* even though *Kent* was, in a sense, a broader case, i.e., it had an exclusionary abuse case alongside the unfair pricing case. So, that's what Apple says.

Now, we have never said that the *Kent* disclosure is useless, or that Apple has done the wrong thing by providing it. But we say that the raw number of documents disclosed from *Kent*, and the raw fact that one thing came up in *Kent* that doesn't arise here, doesn't really tell you whether the disclosure properly covers the issues in this dispute. That is for three reasons.

Reason 1: the *Kent* disclosure was mostly based on something that you will have seen in the document, sir, it's called the US production set. One of the parents of the *Kent* disclosure is the US production set. I think around 1.6 million of the 1.7 million documents disclosed in *Kent* came from that US production set.

Now, the US production set was generally compiled between October 2019 and December 2020. Sir, you'll see that from the disclosure report at paragraph 9(b), I don't think we need to turn it up. At least one of the three cases that led to the generation of the US production set went to trial in May 2021, and we see that from Watson (4) at 27. Again, I don't think that's contentious, so we needn't turn it up. Also,

the disclosure report at (10). So, as I say, based on the US production set from 2019 to 2020, the *Kent* disclosure was then given in 2023 and 2024 between 2 May 2023 and 17 October 2024.

In addition, sir, we can see from the latest Redfern schedule – this, I will ask you to turn up in the supplementary bundle, tab 40, at page 1322. This is the colourful Redfern schedule. If we look at Apple's response to the Class Representative's request 2, which is the second column and the final paragraph on that page. Apple here is discussing the productions in the prior proceedings which led to the compilation of the US production set and the *Kent* disclosure. It confirms that -- in the beginning of that paragraph:

"No further productions have been made in matters listed at ..." [as read]

Then, it gives a number of matters: (1), (2), (3), (4), (5) and (8). So, we infer, sir, that there have been further productions in some cases which we say are relevant to or related to this case.

So, the simple point, sir, is that the US production set and the *Kent* disclosure are quite stale. They are several years old, and we know that there have been further productions in proceedings that are said to be relevant to this case. But where three years have gone by since the disclosure was started in *Kent*, we don't see why a reasonable search wouldn't include updating and refreshing the document pool in relation to the issues that Dr Ennis has identified.

We say that this is especially significant because there have been some changes in Apple's practices in recent years. Those are described in the letter from Mr Perkins that the Tribunal will have seen. I don't think we need to turn that up, sir, because it's not contentious that Apple has changed its practices in relation to the commission charged in the European Union, in June of last year. So, that's reason 1: the US production set and the *Kent* disclosure are simply quite stale.

Reason number 2 --

THE CHAIR: The relevant period here, on the basis of the approach you take in the amendment, you're proposing, will be up to the date of the re-amended pleadings.

MR CARALL-GREEN: That's correct, sir. I think, in fact, the intention would be that the relevant period would go up to something like the first day of trial. As I understand it, it's agreed that that is a permissible approach, i.e. it makes sense to sweep into the class as many people as possible and therefore to amend at, say, the PTR or day 1 of trial.

So, that's reason number 1. Reason number 2: Dr Ennis has identified other proceedings in which Apple has been involved. So, these are other proceedings that were not caught up in the US production set or the *Kent* disclosure that are likely to have led to the production of documents relevant to this case. So, it's not entirely unrelated to reason number 1, but it is more specific. Mr Perkins, who is Dr Ennis' economist, explains that the proceedings that we have alighted on, which are CMA proceedings and European Commission proceedings, are likely to have led to the production of documents that will be relevant to his analysis. So, perhaps, it would be helpful to turn up his letter which is in the core bundle, tab 8, page 156.

If we begin at point 2, sir, this is the letter from Mr Perkins and you'll see he writes four paragraphs there in which he says that he's considered the CMA and the European Commission proceedings that happened recently, and considers that they are likely to have led to the production of documents that he would find helpful.

THE CHAIR: And just so I connect the dates of those to the dates covered by the US production set and the *Kent* disclosure, the CMA investigation concluded in October 2025 --

MR CARALL-GREEN: Correct.

THE CHAIR: -- and the Commission decision was issued in April 2025.

MR CARALL-GREEN: Correct. So, reason number 1, generally stale.

Reason number 2, some specific additional events have taken place that we think are likely to be helpful.

Reason number 3: it's likely that the US production set and the *Kent* disclosure will not cover the substantive topics in this case. There are two examples, sir, that I want to give to illustrate. The first example is the question of applicable law and territorial scope. The Tribunal will have well in mind that that is an issue in these proceedings and, as Dr Ennis understands it, that's not something that has been specifically examined in any of the other proceedings of which he is aware and, therefore, pointing to the pre-existing document repositories when responding to Dr Ennis' request doesn't really advance the discussion. It may, of course, be that some documents that are relevant to the question happen to crop up in a large pool of documents that has been assembled for another purpose. But that doesn't constitute a basis for saying that Apple has carried out a reasonable search for documents going to this point.

So that's one example. The other example I wanted to give was the impact on UK developers specifically, as opposed to US developers. Now, the US production set was compiled partly on the basis of what I referred to as RFPs: requests for production. Those can be seen, sir, in the supplementary bundle, tab 22, starting at page 735.

(Pause)

Sir, we can see from the wording of the requests for production that many relate only to US developers. So, I highlight, purely by way of example, request for production 13, which is on page 738:

"This seeks all documents relating to commissions or fees you charge US developers."

[as read]

Similarly, request for production 14:

"Documents that specify and explain the purpose of fees charged to US developers".

[as read]

Request for production 31, which is over a few pages on page 741:

"All documents setting forth and otherwise relating to the commissions or fees you collect from US developers". [as read]

Similarly, request for production 40:

"Please produce all communications with any US developer." [as read]

Similarly, --

THE CHAIR: Are you able to assist me on whether the *Kent* disclosure contains material relating to UK developers and whether you've been able to undertake any assessment of the extent to which these limitations feed through into the *Kent* disclosure.

MR CARALL-GREEN: I wouldn't go so far as to say that there's nothing in there that's relevant. That's clearly not the case, and Apple has helpfully pointed to some requests for production that contain wording that is not limited to US developers. So that is true. The point I make is not that the *Kent* disclosure is useless, it's simply that it has not been produced with UK developers in mind. What that means is not that we ignore it. It means that we make a modest proposal to expand the universe of documents in which we wish to search, so as to capture some things that might be more on point, for example, the CMA and the Commission investigation. We say that that would be a sensible and proportionate remedy as a way of boosting the scope of what we're looking through, to make sure that UK developers are captured.

THE CHAIR: Yes. I mean, it sounds to me as though there are three stages. Correct me if I'm wrong. First of all, there's the question of what heads of documents are relevant and necessary and appropriate to search for. Then, separately, there's a question of what data set is to be searched and, if I understood the point in paragraph 2 of the helpful Redfern schedule, that's really focusing on the second point.

MR CARALL-GREEN: It is.

THE CHAIR: There's an issue between you as to which data set should be the data set to be searched. But I take it from the way you're approaching this that, if it was a search of the US production set, you would have a search string or a request for production, however you like to define it, but a set of searches that would seek to focus on whether there's anything in the US production set which would deal with UK developers that hasn't already been covered.

MR CARALL-GREEN: Well, I think the reason that I have, as it were, slightly skipped over from question 1 to question 2 is because, as I understand it, the parties are both quite loose or open minded about what search strings would be applied. In the sense that, on Apple's proposal, we can propose some search terms and they're happy to run them. On our proposal, we'd also like to run various search terms. Neither party has been specific at the minute about what those should be. The real debate is the pond that we should fish in.

THE CHAIR: Indeed.

MR CARALL-GREEN: We say that what Apple is doing is artificially constraining the pond for the reasons that I'm taking you through now.

THE CHAIR: Sorry, I didn't mean to interrupt you.

MR CARALL-GREEN: No -- helpful. Thank you, sir.

So, that was the first scene-setting point which was about why the offered pond was not enough.

The second scene-setting point is that Apple complains that Dr Ennis has not done enough to review the *Kent* disclosure to graduate, as it were, to being allowed to ask for more things. There are three responses that I want to make to that. The first is that it rather misses the point because what Dr Ennis is getting at is categories of documents that are unlikely to have been captured properly at all in the *Kent* disclosure

or, indeed, the US production set. No amount of review is going to change that or solve that problem. If there are documents that postdate the terminus, then we're never going to find them.

Second, it's rather an uncharitable criticism because we have made significant progress through the *Kent* disclosure. Dr Ennis has a small team of people who are dedicated to the task.

The third, we perceive that we are, in this situation, somewhat damned if we do and damned if we don't. Because if we ask for disclosure promptly, we're told that we should wait until we've finished reading all 1.7 million documents. But if we wait until we've read all of them, we'll be told that we're too late to ask for further disclosure before the trial begins. So, what we would like to do is adopt a sensible and constructive approach which is to review and request in parallel.

THE CHAIR: One thing that was going through my mind as I was reading the material is whether there was scope for an iterative approach to the question, but I can see that your fundamental point is: the US production set, it simply stops too early and that there's, you would say, a potential relevance of documents for later periods.

MR CARALL-GREEN: That's what I'm saying, and an iterative approach is actually not that far away from what we propose. So perhaps I can show you, our proposal.

The competing proposals are that Apple offers to run search strings over the US production set. Dr Ennis's proposal is a five-step plan which can also be seen in the Redfern schedule, sir, starting at 1323. You can see step 1 at the bottom of that page.

The steps are reasonably simple and somewhat iterative, and this is how it works.

Step 1, Apple tells us how many documents have been provided in certain proceedings, a limited number of proceedings that we say are relevant. They are the proceedings on which the US production set and the *Kent* disclosure was based, plus the CMA and Commission proceedings that I've described to you. Apple tells us how

many documents have been provided in them after the productions in *Kent*. So, they just give us a sense of what the incremental productions look like. Just to stress, we're not going back to the drawing board here. We're still using pre-existing production work that Apple has done. On this specific area, there are some exceptions to this, but in this area, we're not asking Apple to conduct some giant exercise within its business. We're just asking it to go back to the productions it has made in other proceedings. So that's step 1. They tell us the volumes of those productions.

Step 2 of the party's proposed searches run through those productions.

Step 3, Apple gives the number of documents that would be produced by those searches.

Step 4, we then collaborate to refine the results.

Then, step 5, we actually have the production of documents. So, we say that this kind of iterative approach that we are proposing is important because we don't see volume alone as being really the answer. So, if there are very large numbers of documents that have been produced in these other proceedings, that are at least prima facie relevant, we have no interest in being given untold millions of documents. We want to propose a sensible way of searching through them and, if those searches yield, again, vast numbers of documents, we may want to work with Apple to refine the search terms. This is --

THE CHAIR: So that's the reason for asking for the numbers of documents at the various stages. So that, if what is revealed by a particular search term is a very large number of documents, you at least have an opportunity to consider whether you want to refine the search term with a view to reducing the volume of material.

MR CARALL-GREEN: Exactly. When we propose a search term that says the App Store, but it turns out that the canteen at Cupertino is called the App Store and so there are millions of emails between employees saying, "See you at the App Store",

we don't want those. We want to get a sensible number of documents.

So, sir, just three things by way of commending that plan to you. First, as we have already discussed, there's no reason to believe that the US production set adequately covers everything. As we've said, in my submission, Apple is artificially reducing the pool that we're fishing in.

Second, Apple's plan has no structure to it but there's no proposal to refine and improve the searches. Dr Ennis is just required to fire search terms blind into the US production set and that's the point we've already discussed about the canteen, sir.

Third, a related point, Apple's plan is more liable than Dr Ennis's to lead to overproduction of irrelevant documents. So, we do think that this plan is, all told, rather modest and it's a sensible way of increasing the pool of documents that we're searching in and a sensible way of conducting the search through it. So, that's what I wanted to say by way of introduction. It now falls me to sort of go through each of the seven.

THE CHAIR: Okay.

MR CARALL-GREEN: But I can pause there if you wish to ask any questions before I do that, or to give particular guidance on which you want to handle in what order.

THE CHAIR: I suppose my first question is: would it be helpful to hear parties on each particular issue as it comes along --

MR CARALL-GREEN: It may well be.

THE CHAIR: -- or would it be more sensible for me to hear everything, and then (overspeaking).

MR CARALL-GREEN: I fear that if we do everything, we will have forgotten what we said at the beginning.

THE CHAIR: I rather fear that's a risk, so should we at least do that for this issue, and then see how it goes. Mr Piccinin.

MR PICCININ: Yes. I'm fairly sure, I would have forgotten what I was saying (inaudible) by the time we got to category 7.

THE CHAIR: I also have the impression, but you will both correct me if I'm wrong, that the outcome on this question, the pool that we're fishing in, may or may not resolve some of the other specific issues, presumably on the basis that depending on what we do with this issue, if I understand it, you've both agreed that there'll be some sort of process of agreeing search terms and adopting a reasonably proactive approach to the search process, which presumably would reduce the issues that will need to be resolved at this stage.

MR PICCININ: (Overspeaking) I would put it slightly differently, sir, which is actually that it would be better not to make a decision on this point, and instead to consider this point, where it comes up in each of the categories. I just want to explain why that is our position.

You said a few moments ago that you have a three-step analytical framework for thinking about these issues. I think you only got as far as two before discussion moved on, but the two I got were, firstly: what are the categories? What are the topics on which we want disclosure? Then the second is: what universe -- then it shifted to becoming a pond -- should we be fishing in to look for those documents?

Mr Carall-Green frames this issue as being Apple trying to limit the ponds in which we can fish to the US production set, and seems to be suggesting that our position is: we won't give him materials on any new topics from outside of that set. That's neither correct nor, in my submission, the right way to think about this issue.

You were right, sir, in thinking about the order in which the issues arise. First: what categories? Secondly, if I can put it more broadly: what are you going to do to find the documents that we need from this category?

THE CHAIR: Well, it's a question of: what are the relevant categories, and then, what's

a proportionate approach to narrowing those down?

MR PICCININ: Exactly, sir.

THE CHAIR: There might be, as it were, a generic approach to the universe of documents that one might regard as appropriate to search in, but still have to resolve what the categories are, so --

MR PICCININ: There isn't, sir, a single answer to that question. That's our position, so --

THE CHAIR: So, your position is that the universe will --

MR PICCININ: Be different.

THE CHAIR: -- be larger or smaller depending on what the class of documents is.

MR PICCININ: That's right. To be clear, our proposal is that first we should go through the list of categories and say: is this one that is adequately covered, or sufficiently covered, by the existing disclosure, bearing in mind the nature of the issue; whether it's something on which there's likely to have been significant developments, and also how much disclosure was already given on that topic? If it's something for which it would be proportionate to go get more, then of course we should go get more. We've agreed to that in respect of several of these, including some of the points that my learned friend made, like there have been changes to our business model in various places around the world, and we have agreed to go provide additional documents reporting on the implementation of those changes. That's not from the US production set, sir. We've essentially agreed to, in the disclosure parlance, go get them from the places, make reasonable searches to go and find them from the business.

If it were the case that you went through the list of categories and you found one where you said, "This is one where we should get some more, and the proportionate way to get some more, like the place to find the more documents, is in one of the 25 lists of the proceedings that Dr Ennis has identified, then that might be the answer to that

question. But, my submission, when we work through them is going to be that that is actually not the answer to any of the categories, because for the ones where it's genuinely something new, and something new is justified, they're actually all quite specific things, and the most efficient way for us to do it is just to go out and find those things effectively from the business.

THE CHAIR: Yes. In those categories, you would say, the search shouldn't be delimited at all.

MR PICCININ: At all. No.

THE CHAIR: You should be required, in effect, to make reasonable searches in all your repositories to produce documents in those categories.

MR PICCININ: Yes. It's not custodial searching. It's not the kind of exercise that was done to create a US production set. It's a much more targeted exercise. Like I said, "go get" is the jargon that we use when we're talking about these kinds of things.

THE CHAIR: Yes.

MR PICCININ: But we say what would be wrong would be to do it backwards, like Dr Ennis is doing, and choose the ponds to swim around in, in the abstract. Because we've done the big job already, and I did want to just tell you a little bit more about the big job that we've done. There's no need to update that in a generic kind of way, because actually a lot of the issues are just fixed, and there's been huge amounts of material already produced and very little of it used. That's what I was going to go on to show you. But it really does depend, we say, what fish you're looking for should inform which pond you go fishing in.

THE CHAIR: (Overspeaking)

MR PICCININ: I did want to make some preliminary remarks about where we are on disclosure. This won't take very long, but I think it is important to put this in perspective.

You've already heard that we have already given the class representative the 1.7 million disclosure documents that we've provided in *Kent*. He says that our position is they need to read all of those before they get anything else. That's not our position, and on the contrary, they haven't read anything like that, and yet we are agreeing to give them more on several of the categories that we're going to see.

In addition, it's really important to bear in mind that we are also in the process of providing Dr Ennis with an updated transaction dataset. I stress that that really is an extraordinary venture and an extraordinary dataset. It is individualised data on every single individual transaction on the App Store storefronts around the world that involve the UK-domiciled developers over a very long period, that goes, I think, from 25 July 2017 up to 5 April 2026. That is a vast amount of incredibly rich data about the UK-domiciled developers that Dr Ennis is so interested in. You can see everything that they've done. It's actually very uncommon, in any kind of litigation, even in this forum, to be given a dataset as rich as that and a set of materials that the economists can work with.

THE CHAIR: That was originally request one, which is agreed.

MR PICCININ: It is agreed. The only other thing I need to say about that, and I told my learned friend about this before the hearing, is there has been a slight hitch in that there'll be an extra week's delay in providing it. So, it won't be tomorrow, but it will be a week from then (overspeaking).

THE CHAIR: One thing I just wanted to check is whether the Tribunal needs to make any directions in relation to the matters that are agreed --

MR PICCININ: No.

THE CHAIR: -- or whether the Tribunal can simply leave the agreed issues to proceed between the parties.

MR PICCININ: I think (inaudible) throw something at me, but the one other point on

that is that the parties are still in discussions about the special confidentiality arrangements that are necessary for this, and I think the ball is in my learned friend's court. When the ball comes back to us, I hope it can be agreed but, it's possible that the Tribunal will need to be involved in that.

THE CHAIR: Okay. But --

MR PICCININ: There's nothing for today.

THE CHAIR: -- at this point, no need. Sorry, that was just confirmed.

MR PICCININ: That's right.

Then it's also right that we've offered to conduct further searches on the wider six million document set -- that's the US production set -- from which the *Kent* disclosure was taken, not because any of that is actually necessary. My main submission to you is that the issues that we say are covered, are covered; have been covered. But it's just, if that's what they want to do, that's fine. What we don't agree is that as a generic blanket approach, we should be going off fishing in 25 other ponds. It is easy, sometimes, in my submission -- easy but wrong -- to gloss over what goes into producing a document set like this. If I could just show you very briefly, in the supplemental bundle at page 691, you've got the disclosure report, the amended disclosure report, from the *Kent* proceedings. If you turn to page 693, you can see in paragraph 7, we explain the US production -- the US proceedings document production from which the *Kent* disclosure was largely taken. There was the US Epic proceedings, which was a developer claim, and that's important. It's a claim by a developer, Epic, complaining that Apple's rules were excluding third-party distribution -- sorry -- that those rules were anti-competitive. Then there were two class actions as well.

Then over the page, you can see at A, the number of custodians that we collect the data from, and we've told Dr Ennis who they are and what their job involved, so that

they can understand why they are the relevant custodians.

Then at B, you can see that we collected 12 million documents in the class actions and 11 million in Epic. That involved hundreds of document reviewers working through those documents, in addition to technological tools being used. Then even beyond those hundreds of document reviewers, there were thousands of hours of work from more senior lawyers overseeing the project.

Then over the page at C, you can see that in Epic alone, there were more than 450 people working as the reviewers and a staggering aggregate of more than 120,000 hours of work. Then at paragraph 10, you can see that the fruits of that were six million documents running into 20 million pages.

I say that really just to emphasise, sir, that we have opened our books and we have spent millions and millions of dollars doing that.

Those documents are not the only sources for the *Kent* disclosure, because in addition we've provided documents from the Australian Epic proceedings, and the CMA investigation, and one of the European Commission's investigations into Spotify.

But the other point I wanted to make is not just the work that we've done and what we produced, but it's also quite important to think about what was ever done with that work. As you can see in paragraph 10, on the page 695, that just 219 documents were actually adduced by Epic at trial in the Epic proceedings. It wasn't much more than that in *Kent* either. Mr Mansfield, solicitor for Dr Ennis, has spent some time with the index page for the *Kent* trial bundle and he concluded that there were just 815 disclosure documents, I think, in the *Kent* trial. I don't actually know if they were all disclosure documents or if that was the total. But in any event, it's not a big number.

Just for your reference, that's core bundle, page 31, paragraph 35. That's the trial bundle, sir. Obviously only a fraction of those got any airtime at all at trial.

Then going right to the end, to the judgment. If you read through the *Kent* judgment

looking for discussion of disclosure documents, you'll find very little indeed. The reason I say that is that in reality, despite the vast amount of money that gets spent in these cases and the oceans of ink that get spilled, the claims against my clients are just not grounded in any nuanced or granular examination of facts or documentary evidence. The gist of the allegations of dominance is essentially that Apple doesn't allow third-party distribution or payments on iOS for digital content, and that's common ground. There is no dispute about that.

Then it said that Apple charges more for some transactions than some PC game distributors, like Epic, charge. Again, there's no dispute about that fact.

Then it said that Apple makes very large profit margins on the App Store. Now, that isn't common ground. But again, it's not the kind of debate that turns upon review of an extensive set of documents. Actually, nothing in dispute between us today is about that topic of finances at all.

So, while I'm sure that our interlocutors in these cases would love to bolster their case with juicy internal documents in which Apple admits to being a monopolist or to charging vast sums to developers for very little value in return, the reality is that lots of very experienced litigators here and around the world have now spent frankly obscene amounts of money looking for those types of documents, and they don't exist.

Now, I would say they don't exist because those propositions are simply untrue. My clients operate in highly competitive markets and have created and provided the technology that has enabled the people that Dr Ennis is purporting to represent, to earn spectacular amounts of profits in activities that simply would never have existed without the work that my clients have done. So, that's why our case at trial is that the returns that my clients make are very well earned and fully justified by the value that they provide. But whoever is right or wrong about those issues, you're not going to discover the answer by reading through large numbers of contemporary documents.

Sir, I will debate the pros and cons of each of these Redfern items, but my overarching point that I'd like the Tribunal to bear in mind is really this: while there may be some narrow categories of documents that might be useful -- we accept that because we've agreed that there are quite a few of these -- that's usually going to be the case where they're really quite specific identifiable documents that we can just go get in the disclosure. But doing that kind of search string exercise where you find, you know, a new repository of documents from some other set of proceedings, is really not the way to do it. That's only likely to produce costs and documents that don't make their way to the trial bundle at all.

Yes, I should say as well that, I think my learned friend gave the impression that the disclosure that we gave in *Kent* is all stale. That's actually not quite true. There was a refresh done on the Australian materials, I'm told, in April 2024. But, essentially our response to this category is the response that I gave them at the start which is that: what we need to do is work through each of the categories they're actually seeking disclosure on and see whether the answer to any of them is: "This is a category of documents for which more disclosure is necessary and proportionate"; that's the test. And these other ponds are a useful place to go fishing for them in.

My learned friend gave three examples of why he thought the *Kent* set was insufficient. The first example was changes to our business models around the world. As I've said, that is actually one of the categories for disclosure and it's one that is now agreed because we've agreed to provide them with documents and -- subject to one point we'll come to -- they're satisfied with it. But it's certainly not the case that going fishing in one of these ponds would provide the answers to any of that.

The second one was "applicable law" where there is a dispute in these proceedings, which I think is unique, about whether UK competition law can regulate the commission that various Apple entities around the world charge on the distribution of

apps and transactions for digital content around the world. So, "Does UK competition law regulate the commission in Brazil?" for, example. Again, there are some specific document requests that Dr Ennis has made which he says relate to that topic. Again, we've agreed to provide some of them, and to some of them -- others are disputed, but again, you're not going to find the answer to those in any of these other repositories because this isn't an issue in any of those other repositories either -- or rather, to the extent that you find that it's because it's also relevant to another issue on which disclosure has already been given.

Then the third reason was looking for material about UK developers specifically. As to that, there are really three points, I think. One is that, as my learned friend fairly accepted, there is already a lot of material in the *Kent* disclosure about UK developers; they were not systematically excluded from the production sets in the US. There were some RFPs that were specific to US developers, but by no means all of them.

The second point is that most of the other proceedings -- I will show you them in a minute --

THE CHAIR: If I can just pick that up: if there were specific RFPs in relation to the US production set that on the face of it is restricted to US developers, which Dr Ennis wanted to have in a sense redone without that restriction and could justify, presumably, that would not be problematic.

MR PICCININ: Well, if it were justified, then the answer is built into the question. But what I would say -- this was going to be my second point -- is that these other repositories overwhelmingly are pretty funny places to go look for things that are specific to UK developers and I'll show you them in a moment. They're mostly not UK proceedings for investigations. So again, that really isn't a topic that is a justification for this category 2 approach.

Then the third point is -- of course it sounds superficially attractive to say, "Oh, we're

interested in UK developers", but you do actually need to look at that on an issue by issue basis because a lot of the issues are fairly generic. So, for each one you do need to ask yourself: "Is this actually an issue where there is something specific to UK developers?" that means you want to go and look for their evidence. I think when you actually do the job of going through the list, you're not going to find any, in my submission, other than the ones that we've already agreed.

So, I did want to show you the list, just briefly. It's in the core bundle at page 362. This is the Annex B. These are the additional proceedings where they want us to go fishing. Many of these aren't actually litigation proceedings at all, they're regulatory in nature, and they often consider matters that are pretty far removed from the issues in this case. So, some of them, for example, are on quite specific points that have nothing, or at least very little, to do with these proceedings.

If you look at item 6, for example, it's a French investigation in relation to advertisements on mobile apps -- or item 3 is a European Commission investigation under the DMA, the Digital Markets Act. But on some particular requirements in that legislation, that they have to do with connectivity features. So, it's nothing to do with the App Store at all; it's just not about that topic.

Others still are really incredibly broad. Number 1, for example, is the CMA's investigation under a new piece of legislation, called the DMCC, in relation to Apple's mobile platform as a whole, that's not -- sorry, I've lost the page --

THE CHAIR: That's one of the ones that --

MR PICCININ: That Mr Carall-Green mentioned, yes.

THE CHAIR: -- the expert specifically identifies as potentially having material that would be useful to his analysis.

MR PICCININ: That's what he says, sir. But I mean, we looked at that before and it's incredibly broad what he says. He doesn't identify any particular analysis that he

needs to conduct and any particular types of documents that he expects have been produced there that will be helpful for that analysis.

But the point I'm making is a different one, which isn't that if we looked through all of these ponds you would find literally no relevant documents; that's not the point. The point is that these ponds contain lots of things that are irrelevant and they're not obvious places to go looking for top up material.

So, the CMA's investigation, for example, as I said, relates to Apple's mobile platform as a whole. That includes some points about the App Store, but it's not an investigation that is mostly about the App Store, for example. The same is true for items 7 and 8.

So, Dr Ennis really has taken a maximal approach here. It seems like he's found every set of proceedings that involve Apple -- I'm not sure what limitation is applied on it beyond that really because he obviously hasn't applied a filter to make sure that it's limited to things that are focused on the App Store. So, this is just not a helpful way -- it's a different kind of fishing, sir. It's a "fishing expedition", is another bit of disclosure jargon. That's what's really going on here.

So, as I say, what we should do instead is work through the categories, see what they are -- in the Redfern schedule we have, actually, colour coded them now. The ones that hinge on this issue are colour coded blue. So, when we go through those, on each one I was proposing to explain why they're adequately covered by what we've got, and we don't need to go fishing here. But unless you had any questions about that, sir, those are my submissions on this topic.

THE CHAIR: That's very helpful.

Mr Carall-Green, is there anything you want to say at this stage? I mean, given the fundamentally different starting points that you're coming from, I think we have no option but to go through the various categories and see where that takes us in terms

of the issues we've discussed. But if there's anything in particular you want to pick up, please do.

MR CARALL-GREEN: I'll pick it up en route.

THE CHAIR: En route, okay. I'm in, again, very much your hands as to whether it's sensible to take category by category. That might be helpful unless it poses problems for the way you present matters.

MR CARALL-GREEN: As I'll come on to, I think in a way we're now almost into category 2 anyway --

THE CHAIR: Right.

MR CARALL-GREEN: -- because, on category 1 I think there's nothing to say. We will sort out the confidentiality issues and that will provide further data.

On category 2, the debate really is about the pool of documents that we're fishing in because -- I agree with my learned friend that the pool will be larger or smaller depending on which category we're talking about -- what exercise we're undertaking. Now, as I said earlier, there are some areas where we think one ought to look beyond the fishing pond, and we'll come on to those.

THE CHAIR: Yes. I think, picking up Mr Piccinin's comment a moment ago, fishing is perhaps not a good analogy or metaphor in the present context.

MR CARALL-GREEN: Performing reasonable searches through a predefined universe of documents.

THE CHAIR: It was a useful metaphor --

MR CARALL-GREEN: But I'll leave it now. I'll leave it. I'll leave it for the time being.

THE CHAIR: Yes. I appreciate your position is "none of this is fishing".

MR CARALL-GREEN: In the jargon.

THE CHAIR: Yes.

MR CARALL-GREEN: The question is where we should look for relevant documents.

Now, as I say, we agree that the universe ought to depend on what we are looking for. This question of how to define the universe is really most relevant to categories 2, 5 and 7.

Category 2

We start now with category 2. So, just to put this in context, the way that disclosure has happened in these proceedings and the way that it often happens in proceedings of this nature -- that is to say, where the defendant has already participated in proceedings that are relevant to the issues in the Tribunal -- is that there is an easy access bankof disclosure that can be given early. Then there is a question about whether or not further disclosure ought to be made. So, we have had the bank, and now the question is whether or not the universe should be expanded on all relevant issues. As a matter of generality, whether or not the universe of documents ought to be broadened for the reasons that I gave earlier.

THE CHAIR: Your point would be anything which is time related or related to the period because the universe that you've had is up to a particular date. On the face of it, would need to be extended at least in relation to time.

MR CARALL-GREEN: That's correct.

THE CHAIR: Yes.

MR CARALL-GREEN: So, the *Kent* disclosure covers all relevant issues in *Kent*: why was the commission set at that level? What services does Apple supply? What value does it provide? What alternatives do developers have? Does Apple have market power? So on and so forth. All of the core issues. The question is, why should that not be updated?

Now we know that it takes a long time to compile document repositories of this nature and that is why we, wherever possible, are asking for a modest amount of further work, again, using pre-existing repositories. So, we have not taken a maximalist approach

on request 2, the updating request, if you like. We have said, thank you very much for *Kent*. Let's bring into scope the productions that postdate *Kent*, but were made in the proceedings on which the *Kent* disclosure was based, and let's bring into scope four new sets of proceedings that we think are a reasonable place to look.

THE CHAIR: Do you have a response to Mr Piccinin's point that a number of the proceedings in your Annex B --

MR CARALL-GREEN: We are only now asking for four.

THE CHAIR: Oh, sorry.

MR CARALL-GREEN: One of the main answers, if one looks at our latest position --

THE CHAIR: Okay, sorry.

MR CARALL-GREEN: So, if we look at our -- I beg your pardon, sir, I'm --

THE CHAIR: Not at all.

MR CARALL-GREEN: Yes, so, sir, in Annex A, we see the proceedings that were used to generate the disclosure in *Kent*.

THE CHAIR: Yes.

MR CARALL-GREEN: We say that those should be updated. So, Annex A, we bank. We say, "Well those were clearly thought to be relevant to *Kent*, so we'd like those, but they need to be refreshed and updated because we know that further productions were made after the *Kent* disclosure was given". That's the passage I took you to earlier, where Apple says, "We've not made any further productions in 1, 2, 3, 4, 5 or 8, but we would like the refreshed 6, 7 and 9".

Then on Annex B, all we're asking for is the first four. Just to give you a flavour of those, sir, to explain why we think that those are sensible, we have the CMA strategic market status investigation, which is about, essentially, whether or not Apple has market power. What power does it have? What status in the market does it have?

We have case number 2, which is an investigation by the European Commission about

preventing app developers from freely steering consumers to alternative channels for offers and content. So, this is about the rules that developers have to comply with when they distribute via the App Store.

Case number 3, which is about -- again, it's another European Commission investigation about Apple's interoperability practices, including the processes that Apple has set up to address interoperability requests submitted by developers. So again, this is about the interactions that Apple has with developers. What Apple does provide, what it doesn't provide, how Apple interacts with the developer community.

Then, case number 4, that's another European Commission compliance investigation about constraints on developers' ability to freely communicate and promote offers with their customers. So again, it's about the rules to which developers are subject when they distribute via the App Store. It's about the conditions and environment in which they operate as developers.

So, we say that if one takes a modest and reasonable approach to updating the universe through which one is searching, this is a good way to do it. We'll have the productions from Annex A which post-date the *Kent* disclosure because all have agreed that those proceedings are relevant. Then we have a careful and limited selection from Annex B which we hope will bring the documents up to date because those proceedings are more recent and they have a decent chance of containing documents that are relevant to the broad range of issues in these proceedings. We are acutely aware -- you wanted to ask a question, sir.

THE CHAIR: No, you were going to say you were acutely aware of something.

MR CARALL-GREEN: We are acutely aware that the end product of disclosure reviews in some other cases has been a limited number of documents. But that is why our proposed solution involves this collaborative approach to understand: how many documents are there in this disclosure set? Apple hasn't even told us how many it has

produced. It has refused to provide that limited information. So, we're totally in the dark about how aggressive one would have to be to pare down the documents from these further productions. So, we have suggested, "Please tell us that limited amount of information: how many documents have you produced?" And then we have suggested, "If you run these search terms, which we would suggest are relevant, how many documents do you get?" If it's going to be far too many, then we are very likely to turn around and say, "Well, that's far too many. Can we please try again? Do you have any suggestions on search terms that would yield a lower number?"

THE CHAIR: Yes.

MR CARALL-GREEN: So, our approach is calculated to avoid landslides of document production. It is also calculated to work off Apple's pre-existing work, having produced these document repositories in the past.

THE CHAIR: It would be helpful to know -- I don't know, Mr Piccinin, whether you're able to help me.

Sorry to interrupt you, Mr Carall-Green, but are we dealing with datasets, each one of which is, in a sense, available as a dataset of material to which search terms could be applied?

MR PICCININ: I don't have information on the numbers or how they're stored at my fingertips, sir.

THE CHAIR: Yes. But should I be proceeding or not proceeding on the basis that, for example, where there's a case where further disclosure has been made which postdates the US production set, that set of documents will be identifiable and searchable in a digital form. Or is that simply not information that you have?

MR PICCININ: I think that's the kind of conversation that Mr Carall Green is proposing that the parties should have, if you do decide that we should go down this route. But my position is that we should just look at the categories and see where --

THE CHAIR: I understand that, but --

MR PICCININ: But I'm not saying we can't do that.

THE CHAIR: -- I'm inferring that we may get to a point -- or we may not get to a point -- where there's a category where further searches would be justified and it could be helpful, useful, to know what actually is involved and whether the kind of exercise that Mr Carall-Green is suggesting of -- and I appreciate what you've shown me about the amount of work involved in making disclosure. That's not lost on me at all. But if it's a digital dataset where you could plug in a search term and at least disclose how many documents that has generated with a view, potentially, to search terms being narrowed and limited. You know, on one view that sounds like rather a sort of sensible way of trying to reduce the amount of work involved rather than expanding it, if we're in a category where that search is relevant. So, it might be quite useful to know whether, you know, the kind of approach that Mr Carall-Green is postulating over the particular datasets that he's referred to, is something that would, in principle, be capable of being done.

MR PICCININ: Sir, just looking at the time, it might be a good time for a transcriber break.

THE CHAIR: Yes, actually that's helpful. If you can't, well, so be it. I'll just proceed on what you're able to give me today.

Mr Carall-Green, is there anything else you want to say before we break or should we break now?

MR CARALL-GREEN: Let's break.

THE CHAIR: Let's take ten minutes. Thank you very much.

(11.46 am)

(A short break)

(12.00 pm)

MR PICCININ: Just finishing up on the point that we were discussing just before the break. So, I've taken instructions and my understanding is that, insofar as you wanted us to carry out searches on these materials, there's no practical difficulty in doing that. So, they're available in searchable terms.

If I could just finish up with two small points on what my learned friend was just saying about these particular investigations.

If you've got the core bundle there, page 361. That's the Annex A, the ones from which *Kent* was taken.

THE CHAIR: Yes.

MR PICCININ: I think it's just 6, 7 and 9 that we're actually talking about. Of those, if you were talking about a general update exercise, and we don't accept that there's any need for a general update exercise, but if you were going to do one, the one that would give you that is really 9. 9 is the class action in the US that raises the same issues, essentially, as in *Kent* about exclusive distribution and payments. So, it's those same issues that were the focus of the previous disclosure.

I've just mentioned 7. 7 might sound like it's an obvious place to go because that's where this all started in Epic. But, actually, the Epic trial was a long time ago. So, what those documents are about is not the underlying issues in the case, but those are documents from a subsequent proceeding concerned with the injunction that was granted in California for breach of Californian consumer law. So, it's particular issues about compliance with that injunction. It's not about the underlying issues in the case. Whereas 9, you know, there is a collection of documents which are on the same kinds of things that are already in the *Kent* proceedings.

Then just on --

THE CHAIR: Just from that, that's an ongoing litigation; is it? Or ... I mean it may not matter. It has certainly run past the point where the --

MR PICCININ: (Inaudible)

THE CHAIR: The productions in that will run past the date at which the *Kent* disclosure closes.

MR PICCININ: That's why we've identified it. It is a source where there are documents that were provided after disclosure.

In relation to Annex B, my learned friend focused now on 1 to 4. The point I wanted to make about that was, firstly, his characterisation of item 3 was really not right. At 3, as you can see, it's about connectivity features. It's about interoperability with the operating system. So being able to connect headphones and TVs and that sort of thing. It's really got nothing to do with the issues in this case that are concerned with the App Store and in-app payments. So, that's a different issue.

As for 2 and 4, those are concerned with the alternative distribution and payments business models that now operate in the EU as a result of the DMA. That is a particular issue where we accept there should be more disclosure, but we've made a proposal which has been accepted. So, there's no need to go digging into the files in which there's back and forth between Apple and the European Commission about the technical requirements of the DMA in relation to those things. You know, the question of whether what's been done there complies with the DMA is not an issue in these proceedings.

THE CHAIR: But from what you've said, if the search terms were appropriately targeted, the likelihood is you get a nil or very small return from --

MR PICCININ: Well, it depends on what the search terms are, sir, and that's (overspeaking).

THE CHAIR: I understand.

MR PICCININ: That's why I come back to where I was before. I mean, my learned friend says, "Well, why shouldn't the set be updated, and updated to include all of

these things?" Well, the short answer to that is time, money and irrelevant fishing expedition. It's actually the wrong question. You don't say, "Why shouldn't it be updated?" The right question is, "What do you actually need?" That's why I come back to -- you'll find there are some things that have changed, and where we come to those, you'll see we have made proposals. But there are other things that really haven't changed, and for those, you don't need us to go get more of the same.

I think that's all I need to say about category 2 and --

THE CHAIR: That's helpful.

MR CARALL-GREEN: Can I just clarify one point, sir, because I think it might be helpful just to draw a line under category 2 in a moment. But I just wanted to make sure that something hadn't been misunderstood.

I think we might be okay on it, but the point is that category 2 is the general updating amendment. I think my learned friend has this point -- I want to make sure that we're all clear on it -- is that the category 2 request is designed to update on all issues generally. You might say that the starting point on that would be to go back to the drawing board and to go through all of the pleadings, all of the custodians, and to build from the ground up an appropriate dataset. But what we're suggesting -- we're trying to do something which is more proportionate. We're trying to do something which is more proportionate. If there is not a general updating procedure, then we will have to go back to the drawing board on a more granular issue by issue basis, and I emphasise, not just on the issues that are in the Redfern schedule today.

THE CHAIR: Well, that was the question I was asking.

MR CARALL-GREEN: Yes.

THE CHAIR: Is the point you're making that I would have been wrong if I'd got the impression that category 2 was about the universe to be searched on the issues in the subsequent course. Category 2, you say, is a different --

MR CARALL-GREEN: (Overspeaking).

THE CHAIR: -- it's a different exercise where you, you're envisaging proposing search terms, which are on issues which are not encompassed within the other. Okay.

MR CARALL-GREEN: That's right. We are proposing that as a way of dealing with the vast majority of the topics that will be relevant to this litigation, because we will say, in the vast majority of instances, the topics that I've mentioned earlier: what alternatives do developers have? Why is the commission being set at that level? What value do developers get from -- all of the core issues. We've obviously seen a data set from *Kent*. We think it should be updated. That will deal with most of the topics, and then there are these other topics, 3 to 7, whatever they are in our Redfern schedule, that require a little bit more thought at this stage.

But if topic 2 is not done -- so we are confined to what we regard as a somewhat stale dataset -- then we will need to come back again and propose another process to elicit disclosure that is up to date on all of the other core issues in this litigation. That is one of the reasons that we commend our suggestion, because we say that it solves a number of complicated issues relatively straightforwardly, relatively easily, because it gives Dr Ennis access to a reasonable and proportionate dataset from which to get disclosure on the broad run of the core issues.

That was the clarification I wanted to give.

THE CHAIR: No, that's helpful, because I hadn't fully appreciated that. Mr Piccinin, I'm anticipating what your response may be, but you had better --

MR PICCININ: Yes. My response to that is that that is a completely unjustified request, and it's the wrong approach to take. The right approach to take is the one that's set out in our skeleton argument at paragraph 4, by reference to the authorities in Trucks. It's particularly at the end of the page, the end of page 2, where we say:

"Where disclosure proceeds in stages, after each stage, the party receiving disclosure

should assess those documents and data with assistance from their expert, and frame a subsequent request in light of and informed by the analysis of that material". [as read]

Transposing that to the present context, it's not enough to say that the dataset comes from the particular periods and times where it comes from. Of course, it was updated through the *Kent* proceedings as well. It's not true that it's all very old. Some of it is from 2024.

But if you want to say that there's a problem of it being stale and it's not up to date, then you need to identify particular issues in the case on which disclosure is necessary, where things are likely to have changed, such that more material is needed. Actually, when you run through the -- I'm surprised by my learned friend saying that there are other categories that are not covered here, because when we run through the Redfern schedule, it's actually striking the extent to which they are already just raking over old ground. There are whole topics there that are really just about market definition, and not focused at all on anything that is even alleged to have changed since the period in which these documents were produced.

I am concerned by the idea that we just go out and produce more documents of the same kind that we've already produced, which nobody wanted to refer to at trial the first time anyway. That does seem to me to be not a good use of anyone's time or money, and wholly inconsistent with the approach that this Tribunal takes to disclosure exercises in cases like this. But if you were going to do it, the one repository you would do it from is the Pepper repository. But I do say that it is entirely wrongheaded. It's just going to produce more costs, more pages, that don't even make it to the trial bundle.

THE CHAIR: Now I'm conscious that what gets into the trial bundle may not be the only full picture of the use made of documentary disclosure. I mean, experts may --

MR PICCININ: In theory -- well, actually, no, sir. You might think that, but that's not the way the trial bundle was put together. I think I'm right in saying that the trial bundle contained all of the documents that the experts referred to.

THE CHAIR: Okay.

MR PICCININ: So even then, it just wasn't that much.

THE CHAIR: Yes. So, what you're really flagging up is, you say the right approach is: work out the categories which are relevant. If they require updating disclosure, there's then a question about whether it's simply an order to you to make reasonable searches, or whether it should be confined to particular repositories. If I were to go down the line that Mr Carall-Green is inviting me to, I suppose what you're foreshadowing is that when he produces his search terms, there might well simply be a fight as to whether these were issues that --

MR PICCININ: Sir, I missed that (inaudible).

THE CHAIR: When he produced his search terms under that approach, there would simply be a fight about whether these were search terms that --

MR PICCININ: That were really necessary.

THE CHAIR: -- justified the search.

MR PICCININ: Yes. But also, that if you were going to do it, as I keep saying, you don't need to do it on 25 repositories. There's one.

THE CHAIR: Okay. That's number 9 in Annex A.

MR PICCININ: It is.

THE CHAIR: Okay. No, that's very helpful. Thank you. Mr Carall-Green, sorry. Is that as far as we can go on the generic question? I think it is important that you've clarified what it is you're envisaging. I don't know if there's anything else you want to say on --

MR CARALL-GREEN: Well, I will make one final point, because I recognise that

you've heard from both of us at length now. The final point is that you are right, sir, that the fight that is foreshadowed is a fight about the search terms being wrong; too broad, not relevant. But that fight will come anyway. If you choose a path other than the one that Dr Ennis commends, we will take a step backwards and go back to: well, we now have to draw up the issues, and then there will be a debate about the issues, and then we will go ahead again to the question of what terms are to be run against those issues.

THE CHAIR: Yes.

MR CARALL-GREEN: We will go to custodians and we will get -- so what I'm suggesting to you is that although -- I don't deny that the kind of debate that Mr Piccinin adverts to is possible, but I suggest that if we get to it a bit quicker, that might be helpful.

THE CHAIR: Yes, and there's just one point that's occurring to me, which I'm afraid I should ask Mr Piccinin on this before we move on and perhaps look at this through the lens of the individual calls.

Mr Piccinin, I think your position articulated in the Redfern schedule is that you're not resisting the proposition, or this sort of exercise being undertaken on what you describe as the US production set.

MR PICCININ: Yes. That's true.

THE CHAIR: But does it follow, from what you said just a moment ago, about the number 9, repository in relation to number 9 in Annex A, being actually the one that will update -- that would be the right dataset, rather than the US production set, to which to apply search terms that Mr Carall-Green wished to search.

MR PICCININ: If, and only if, you formed the view that it was necessary to do the updating exercise.

THE CHAIR: Right.

MR PICCININ: As I say, it is important to go issue by issue, and when you look at them, you're not going to see that.

THE CHAIR: No, I understand that.

MR PICCININ: But if you were going to do that, that is the one way you would do it.

THE CHAIR: It's simply that I don't, and correct me; had I misunderstood the Redfern schedule, that you were making an active offer of doing updated searches on the US production set?

MR PICCININ: We were. We did. We said, essentially the logic was, since we've already -- that's the way we produced a large part of the *Kent* production set, essentially applying search terms that were agreed with Dr *Kent*. Essentially, the logic of our offer was, we can see Dr Ennis may say it's a little bit unfair that he should be stuck with what Dr *Kent* agreed. Maybe he's got better ideas as to how to search that repository. So, if you wanted to do that, then we were open to him doing that. That was the nature of that. It wasn't about updating. It was just, if you wanted a different cut of that same set, then okay.

THE CHAIR: Okay. Is there any material difference in the practicability or the consequences of searching on the US production set, versus the data set for litigation 9 in Annex A?

MR PICCININ: The (inaudible)? No. It's just more documents.

THE CHAIR: Okay. Yes. That's very helpful. Thank you.

Sorry, Mr Carall-Green.

MR CARALL-GREEN: Sir, shall we --

THE CHAIR: I think it might --

MR CARALL-GREEN: (Overspeaking) preference, shall we move on to something --

THE CHAIR: I think let's. I'm afraid I've been hopeful that if I were able to take a view on this, that would cut through things. But I think we're going to have to go through

each head, so that I get a better flavour of the nature of the debate between the parties.

Category 3

MR CARALL-GREEN: Yes, sir. Well, then, let's go to category 3.

Category 3 is about applicable law and territorial scope. The parties have agreed, I think, that this does not arise in any of the other proceedings. I think my learned friend described that as, "This is a unique issue arising in this case".

We do not pursue at this CMC subcategories 3(2) or 3(3), sir. So, we're just talking about 3(1). But this is one of those areas where Dr Ennis would seek to go beyond the defined universe, as it were, and specifically because if the defined universe is defined by reference to prior proceedings, and it is common ground that the prior proceedings do not cover this, then the defined universe is not a good place to look for documents on this issue.

3(1) is composed of five requests, and I will briefly introduce you to them, sir. They can be found on page 1326 in the far left column.

The first request is documents identifying the nature of the services provided to developers. These documents are likely to be relevant to the question, because if, for example, they show that Apple renders to developers services that are supplied and consumed where the developers are located, and that do not depend on the location of the device user purchasing the app, that may indicate that the place where the market is affected, which is the relevant test, is the place where the developers are located and not the place where the device users are located.

Request 2 is documents identifying how Apple markets its services.

THE CHAIR: Sorry, just to interject there -- this may be going to a level of detail that isn't necessary -- but I did wonder whether -- if that's what you're looking for -- "including" should actually be "showing". As I say, this may be a point --

MR CARALL-GREEN: I see -- I've lost the line there, but I see what you mean.

THE CHAIR: Sorry, yes. That rather than generically every document identifying the nature of the services, what you really want are documents which show whether or not these vary, by reference to the storefront. As I say, this may be a level of textual detail that you don't --

MR CARALL-GREEN: It may also be whether or not it varies by the location of the developer, sir. So, I'm not sure that's fully exhaustive although that's the direction of travel.

THE CHAIR: Okay. So Mr Carall-Green please give me two.

MR CARALL-GREEN: The second request is documents identifying how Apple markets its services to developers and its associated strategy. These documents are likely to be relevant because if, for example, they show that Apple does not market its services to developers in a way that varies by location of device user, but may vary by location of developer, then again that may have some bearing on the analysis of where the market is affected. It's a similar point.

The third request is documents identifying the location of employees, if any, of the first to sixth defendants who provide services to class members. And, sir, just to explain: the "first to sixth defendants" act as what are known as agents or commissionaires. So, in the DPLA, which is the contract between Apple and developers, these entities act as the sales agent or the sales commissionaires -- which is a comparable European term -- in relation to the sale of the digital goods.

Now, these documents are likely to be relevant because if, for example, they show that Apple does not place employees where the device users are, well that may undermine the argument that that's the place where the market is affected, because Dr Ennis may want to say, for example, that that's not where the economic activity is focused.

The fourth request is about the identity, employing entity and location of the account managers for the class members i.e., the UK app developers. Again, this is about the location of the economic activity. So, these documents could, for example, show that Apple does not place employees in the locations where the device users are, but rather in the territories where the developers are located. That may tend to suggest that the place where the market is affected is where the developers are.

The fifth request is about the roles and functions of the seventh and eighth defendants and their employees insofar as concerned with the App Store or the provision of services to class members. So, the seventh and eighth defendants are UK companies within Apple's group; the first to sixth are not. These documents are potentially relevant because if they show that the seventh and eighth defendants help run the business of the App Store, either generally or in the UK, again that may be relevant to the question of where the market is affected because it is relevant to the question of where the economic activity takes place.

Sir, I would add that Mr Perkins in his letter has commented that this kind of information is relevant to an economic assessment, and I quote from him now -- we can turn it up if you wish, sir --

THE CHAIR: Could you give me the reference?

MR CARALL-GREEN: The reference is (2.5) of his letter, and that's on page 157 of the core bundle. He says:

"This information is relevant for an economic assessment of the extent to which the storefront categorisation ..." [as read]

That is, splitting Apple storefronts: the UK version of the App Store, the French version of the App Store, and so on.

"... is that an economically important one or merely an artefact of how Apple chooses to organise itself?" [as read]

That's what he says.

Now, Apple's position takes the first two requests as one and then the last three, so I can adopt that bundling. On the first two requests, Apple points to an RFP from the US proceedings. That RFP says:

"Please produce all documents or other materials that you have provided to developers, including [x, y, and z] (a) describing the differences or benefits between iOS and any other operating system, or (b) explaining why developers ought to develop for the iOS platform and distribute their iOS products via your App Store." [as read]

There are three observations. So, observation 1: that appears to be calculated to respond to request 2 only since it's really about the marketing and not the actual services supplied. It's not really getting at the economic reality.

Observation 2: this RFP really appears to be about distinguishing between the App Store and other distribution channels, such as perhaps Google's Android and Play Store platform. It asks why do you use iOS instead of Android? But that's not really what we're talking about here. The Play Store, and Google's platform, has a similar global functionality to the functionality of the App Store. The question, for present purposes that we're really getting at, is whether and how the services vary by location under Apple's organisation of its business.

Then observation 3, sir, is that the US production set is stale, for the reasons I've given earlier.

Then turning to requests 3, 4, 5 -- the third, fourth, and fifth requests -- Apple says that the issues I have described are to be discussed in witness evidence rather than by disclosure. We say that this is rather self-serving because the notion, apparently, is that Apple should be able to write a witness statement on these topics, but not give us any documents by which to test that evidence.

THE CHAIR: They also say:

"By trial witness evidence, to the extent such issues are relevant to its arguments on territorial scope." [as read]

MR PICCININ: That's quite right.

THE CHAIR: Okay.

MR CARALL-GREEN: So, it doesn't actually flush out what we say is important, it addresses what Apple says is important in the way that Apple chooses to address it. We say that that's unfair and also unprincipled because if Apple is going to do a witness statement, then it presumably accepts that these issues are relevant enough and important enough to be addressed in evidence. It's therefore unclear why a reasonable search for relevant documents would not also be justified. That's what I wanted to say about topic 3.

THE CHAIR: Thank you very much. (Inaudible) take as long as you like, Mr Piccinin.

MR PICCININ: Sir, this one is a game of two halves. It's a split between 1 and 2, and then 3 to 5. But I did just want to clarify: my understanding now, from the way this is being pursued, is that it is limited to the documents in (i) to (v), notwithstanding that the words immediately before that:

"This includes but is not limited to ..." [as read]

But as I understood my learned friend, he was presenting it as: (i) to (v) are the document requests that are being pursued.

So, beginning with 1 and 2, although it's right that the overall issue here is a novel one concerning applicable law, the question we need to ask is what documents do you actually need to address that question, and do we already have those documents somewhere else. The actual request that has been made at 1 and 2 is actually incredibly broad and is not focused in any way, really, on the issues relating to applicable law, it's the nature of services provided to developers. I think then, sir, you

suggested an edit so that it would then say "showing" whether these vary on a transaction by transaction basis depending on the storefront.

THE CHAIR: It wasn't meant to be prescriptive, but I think the point I was trying to flush out is really the point that you're making, that: on the face of it, the first part of the category identified is very general and it's only the "including" bit which seems to focus on the issue, and that's the sort of issue that one would have thought could be addressed by some sensible adjustment of the wording. That's really the point that's being taken.

MR PICCININ: That certainly does help, sir, but I'm still left puzzled as to what kind of documents it is that we're actually looking for here, because of course there is an extensive section of Apple's website, which is for developers, that explains all of the services that we make available to them. The contractual documentation that governs the relationship between Apple and the developers is also all in the public domain and on the website available to be downloaded and has been provided in the *Kent* disclosure as well. So, beyond all of that, it's really not clear to me what is being asked for in relation to 1.

In relation to 2, that's about how Apple markets its services to developers and its associated strategy. Again, there are two aspects to that. One is the actual marketing, which again is all in the public domain. Then as to its strategy, that has been well and truly covered in the existing proceedings.

I want to refer to two points there. One is the RFPs -- the requests for production -- that are on the right hand side of the page just in front of you. My learned friend said those aren't really focused on the particular points that he's asking for in 1 and 2. That's true to an extent, but they're broader than -- particularly the second one -- all documents setting forth or explaining the technical marketing or other expertise needed to open and operate a digital product or App Store such as Apple's

App Store. Then likewise the marketing materials above, that's from the US proceedings.

In addition to that I did just want to show you from the Australian proceedings -- if we go to page 820 in the bundle.

THE CHAIR: The core bundle?

MR PICCININ: Sorry, in the supplemental bundle, page 820. So, this is from the order of the federal court of Australia. There's a whole list of categories that were ordered in those proceedings. In paragraph 9, which is in the middle of that page, is Apple pricing strategies and service provision strategies over a particular period of time.

THE CHAIR: And the end point, the date that that's up to?

MR PICCININ: To date -- the date is probably at the beginning of the document. Hopefully someone can find it for me. 2022, that one was.

THE CHAIR: Yes.

MR PICCININ: But again, this isn't a point where there's any suggestion that something has changed in the way that Apple markets its services to developers. That's not a point that is made.

THE CHAIR: Is your point that (inaudible) relevant material is in the public domain or available to the claimant or the class representative (inaudible) --

MR PICCININ: (Inaudible) already been produced.

THE CHAIR: -- sufficient that, in effect, he could plead facts insofar as they're relevant, which you would then have to answer?

MR PICCININ: Well, sir, let's put it this way: the core facts of what Apple actually does for developers are well known to everyone; they're on the website and they've already been pleaded. This part of the issue in relation to applicable law and territorial scope is really one of characterisation. So, you know where the developer is. You know where Apple is. You know where the storefront is. You know the respects in which

the storefront is different and the respects in which it's the same. You can see that just by using an iPhone. So, all of the primary facts are known and then the question is, well, what do you make of that? When you're asking, as my learned friend says, where is the real economic centre of activity, for example, if you want to make that (inaudible) point. Running through lots of disclosure documents on particular bits of marketing to developers is really not going to shed a lot of light on that.

THE CHAIR: You see, what I'm wondering is if, on the basis of material already available, the class representative were able to plead that it made no difference -- or the essential fact that he, the class representative, ultimately wishes to advance -- well, you would have to answer that and you would either admit it, in which case it would become a fact in the case without needing any disclosure, or you would offer some explanation which might or might not result in a need for some disclosure. So, I'm wondering if there's a way of cutting through the point.

MR PICCININ: Yes, I mean, maybe so. But we already have pleaded on this issue, and we've identified, for example, the fact that the storefronts are targeted and differently curated around the world. That's really the service that they're talking about. It's a distribution service. What we're marketing is the apps to consumers and that's different on each of the storefronts. That's our point. I'm not saying that they shouldn't get any information on this point because when we go on to 3 to 5, I think those are the points they really want to make, which is, "Well, where are the people in Apple who are actually doing this work?" We say that's not really very relevant but if they want to make those points -- on 3 to 5, our answer is different, which is that we're happy to provide that information. But it's really a request for information rather than for documents. Trying to work out the location of the employees who are doing the actual work through a disclosure exercise is a very difficult thing to understand.

THE CHAIR: Just closing off 1 and 2.

MR PICCININ: 1 and 2, yes.

THE CHAIR: You're not saying that these are irrelevant, that these are not calls that should be answered. Your real point is about the breadth and whether it's necessary, given what's --

MR PICCININ: And it's already been answered, sir, because --

THE CHAIR: -- already available. So that's --

MR PICCININ: Just to give you an example.

THE CHAIR: Yes.

MR PICCININ: So, I've shown you the RFPs which resulted in material coming into the *Kent* production set. In our letter of 20 March -- I don't think we need to turn it up but just for reference it's core bundle tab 25, / page 914, paragraph 12 -- we provided examples of documents that fell within that search and one of them is a document called "Expanding your App to New Markets" which is exactly -- it's a developer facing -- I think it's an excerpt from our website actually. “Expanding your App to New Markets" and discusses structuring an app for localisation. Exactly the kinds of things that they're asking about and it's already been covered. The reason it was already covered, the reason you have those RFPs, despite the fact that there was no issue about applicable law in any of those cases, is that what they were concerned about is Apple's relationships with developers. That was at the core of all of the cases, really, that led to the production of the *Kent* set. So that's why, for these very generalised ones, at (i) and (ii), they're already covered. That's the point. There's nothing that they're missing. There's no particular aspect of the service that is provided from Apple to developers that they're asking about that they can't find out about from any of those sources. It's like they're starting from a blank page here, when really, they're not. They're starting from a swimming pool of documents.

THE CHAIR: 3, 4 and 5, your basic point is there should be other ways of providing

information.

MR PICCININ: And we're happy to do it, so --

THE CHAIR: Well, that was going to be my question because --

MR PICCININ: That's a fair question, sir. If it's going to help the Tribunal then we're happy to do it.

THE CHAIR: I mean, if you're envisaging a trial witness statement, would there be any difficulty in producing either a witness statement or simply an answer to a request for information on these matters?

MR PICCININ: That would have been a different way to do it. But it is information they're looking for. It's not --

THE CHAIR: Yes. I mean, I think that does strike me as a fair point in relation to categories 3, 4 and 5.

MR PICCININ: Yes. Because I have sympathy for the argument that you can't just solve every problem with witness statements because sometimes you need documents to test them, but when it's objective facts like this, when that's what we're talking about, it's just black and white, then that's not really an issue. Indeed, trying to answer any of these questions -- I don't even know how you'd go about doing that with disclosure.

THE CHAIR: Yes, and if there were a concern about the witness statement then, no doubt, that could be followed up.

MR PICCININ: If there's an assertion in the witness statement that they want to ask for disclosure in relation to, they can ask and we can look at it. The nice thing about having this CMC now, sir, is that there is actually a long time between now and trial.

THE CHAIR: Indeed.

MR PICCININ: So, there is time to do things in stages.

THE CHAIR: Yes, okay, good. No, that's very helpful. Is there anything else you want

to say on 3?

MR PICCININ: No. No, no, that's it.

THE CHAIR: Thank you.

Mr Carall-Green, anything arising from what you've heard before we move on to category 4?

MR CARALL-GREEN: Yes, sir. Just a couple of points by way of reply on category 3. My learned friend says that there's no suggestion that anything has changed about the way that Apple organises its business, but the fact is we just don't know, which is one of the reasons that disclosure might be helpful. The core issue of what Apple provides, the services that Apple provides, is said to be in the public domain. My learned friend took you to a disclosure document that's not exactly a disclosure document because, as he said, it's from the website. But that makes the point that what's in the public domain is what Apple wants people to know. What we would like to know is what the economic reality of this is.

Sir, you made a point about pleading. It might be helpful -- I could take you to the pleadings where we've tried to flush this out already.

THE CHAIR: Yes. Well, I apologise if I haven't quite grasped all the nuances of all of the pleadings.

MR CARALL-GREEN: No apology is necessary.

THE CHAIR: But, yes, it might actually be helpful to see where the issue is focused because, ultimately, relevance needs to be tested against what's actually an issue in the case.

MR CARALL-GREEN: That's right, sir. To give you an example I could take you to… it's in the supplementary bundle, tab 1, page 41. (Pause)

You'll see there at paragraph 77, there's no need to read the whole thing but that's about the 7th and 8th defendants' roles.

If one moves on to how Apple responds in the defence, that's on page 99. Apple says there, if you see at paragraph 19.2, well, there are some broad functions for which Apple is said to employ staff in the UK but that's too vague to plead to.

Then, in 19.3, we're told that the services provided by the 7th and 8th defendants will be a matter for evidence in due course. Then, in the reply at page 151, we say Apple ought to have pleaded back to this and it's relevant.

I give that by way of an example just to illustrate how this has come about as a disclosure request because, we have attempted to flush this out insofar as possible, but Apple has not been forthcoming with the information that we have sought. I would add, sir, that some of these points have been raised by way of defence, to which we've then replied, but of course there's no rejoinder and therefore there's not been the opportunity to have the back and forth as there has been on the 7th and 8th defendants, as I've showed you.

So, I would say that the last point I can make on instructions is that, as regards requests 3, 4, 5, if the Tribunal were prepared to make an order requiring Apple to respond by giving information along the lines that we have suggested instead of giving disclosure, then we would be content with that.

I don't wish to rush the other side so I could move to 5, or 4 and 5.

THE CHAIR: Yes. Let's move on to 4 and 5, unless ...?

MR PICCININ: Yes, I'm told we can do that. We can provide that information in an RFI response instead of a witness statement. We'd need a month to do it.

THE CHAIR: Thank you. That's very helpful.

4 and 5.

Category 4

MR CARALL-GREEN: On category 4, I don't think there's anything to say.

THE CHAIR: Ah.

MR CARALL-GREEN: I thought you'd like that, sir.

THE CHAIR: Well done. I've put my pen through a number of pages. Nothing you need from me to support 4? No?

MR CARALL-GREEN: I don't think so, sir.

THE CHAIR: Good.

Category 5

MR CARALL-GREEN: 5. So this category is about Apple's dealings with developers. It's broken into seven subcategories. We can organise those into 1 to 5, 6 and 7. The reason I break them out that way is because 1 to 5 really turn on -- they are coloured blue in the schedule because it really turns on the solution to the universe of documents, in the sense that this is one of those areas where Dr Ennis considers that if he is allowed to run search terms over the expanded universe, then that will be a satisfactory way of dealing with 5(1) to 5(5), at least for the time being. So, I can address you on those now, but I'm in your hands, sir, as to how best to handle it.

THE CHAIR: Do I take it from the way you put it, then, that if I were not with you on the expanded universe, you would want me to deal with --

MR CARALL-GREEN: Want to go into more detail on these.

THE CHAIR: -- 1 to 5.

MR CARALL-GREEN: Perhaps put it this way, sir. If you were with me on the expanded universe, just insofar as it pertains to 5.1 to 5.5, then I think I'm right in saying that Dr Ennis's position would be, well, he'd have a look at what could be gleaned on that basis, and that would be enough for now. As my learned friend says, we are some time away from trial. So, Dr Ennis has the time to have a look and if it's not enough, if there are big holes, then there is time to come back. We of course reserve the right to do that if necessary.

THE CHAIR: Yes. I wonder if this might be, though, an example which helps to

illustrate the point that Mr Piccinin has made, that one tests the universe of documents point by looking at the specific calls. So, I think it might be necessary, I'm afraid, for you to give me some submissions on 1 to 5.

MR CARALL-GREEN: Yes, sir. (Pause)

So, the first category within 5 is the economic value Apple receives from app developers outside the commission and other payments made by developers to Apple. So, sir, the reason this is relevant is because the Tribunal will be aware that the test for an unfair price is whether or not it bears a proper relation to the economic value of the good or service that's being provided. The debate between the parties in this case is not only about the economic value that Apple provides but also about the economic value that Apple receives.

Apple's point is, "We provide developers with this wonderful technology", and the developers' point is, "We provide Apple with this wonderful multiplicity of functionality that can be achieved on the iPhones". So, it goes to one of the core questions in these proceedings but, obviously, the value that Apple gets is something that it continues to get. It's not something that ended in 2023 or 2024, insofar as there are documents that help to assess, quantify, understand what value Apple gets from app developers. There's every reason to suppose that they will be created in 2026, just as probably as they will be created in 2021.

It's also relevant that, as we've seen earlier, Apple's practices have recently changed in this regard. For example, Apple has been under regulatory compulsion in the European Union to change the way that it charges, and now charges a commission that I think is either 10 per cent or 17 per cent, depending on the circumstances. One can well imagine that there will have been intense discussions around changes in the commission, about whether or not this still works for Apple. Actually, the question of the value proposition is something that's been, if one can call it, a hot topic in a more

recent period that's not covered by the *Kent* universe.

So, the second category in 5: 5(2). The risk associated with losing developers --

THE CHAIR: Is there anything you want to say about the point taken about the breadth of the term economic value? One of the points made against this call is simply that the phrase "economic value" is a pretty vague phrase.

MR CARALL-GREEN: It is. In a sense, though, we're stuck with that because that is what the case law asks us to look at. So, while I would be willing to sit with my learned friend over a glass of red wine, parsing out what it means. The reality is that the case law invites a broad approach. We don't ask for more than a reasonable search. As I've said earlier, the way that we propose to do this is just to expand the *Kent* universe by bolting on some additional productions. So, we're not off on an adventure on this one.

THE CHAIR: You're asking to expand the *Kent* universe and for a process whereby you will propose search terms which presumably would or could further limit the question of economic value.

MR CARALL-GREEN: Yes. For example, we said in our skeleton argument that one of the things that economic value can encompass is things like brand value. One can imagine that there might be search terms that would help to elicit information around that kind of thing.

THE CHAIR: Yes.

MR CARALL-GREEN: The second of the 5, the 5(2), is the risk associated with losing developers from the Apple platform. Again, sir, this is really the same point in the sense that it's a lens through which one can see economic value. This has become more significant in recent times, because again, in the European Union and in various jurisdictions, Apple has had to do things like open up the ecosystem so as to allow alternative payment processing and service to allow developers to point their

customers to their websites, as opposed to the Apple platform. Again, one can imagine, therefore, that the topic of "what will happen if users depart from the Apple platform" will have been a more intense discussion in recent years than it may have been in 2020. Quite apart from anything else, it's something that continues to be relevant to Apple's business model, the value that it gets from its developers.

THE CHAIR: Again, that's on the face of it a pretty imprecise request. But just so I understand what you're asking for, you're asking for the opportunity to apply appropriate search terms to be discussed between you to whichever universe of documents the Tribunal considers is the right universe of documents for this particular request?

MR CARALL-GREEN: That's right. We don't seek to impose a burden on Apple to design some sophisticated procedure or to target custodians or anything like this. It's partially because we are aware that some of the questions in this case are open-textured that we have sought to design an approach that will limit the amount of work and satellite disputes that can generate.

Sir, I'm bearing in mind the time. I'm hoping just to get to the end of the five before asking you whether to break.

THE CHAIR: Sure. Yes. We've got about 30 seconds for each of the remaining three.

MR CARALL-GREEN: I might go into injury time a touch, if that's all right.

The third is Apple's approach to attracting apps and ensuring an appropriate selection of apps are available to iOS device users. But really, sir, the same point again, just looked at through another lens: the risk of losing the developer and the importance of attracting the developer.

The fourth point is slightly different: Apple's approach to offering concessions to third-party app developers. That goes to the same core question, which is what Apple is getting from the developer, but it uses actions rather than words to make that

inference, because it says, if Apple is willing to make very significant concessions to important developers, then one can infer from that that Apple sees it as important to its business model to ensure that whatever important brand name or developer remains on the platform.

THE CHAIR: You say that all of these points are aspects of an issue in which it cannot be assumed, to put it no higher, that things have not changed in the period since the *Kent* disclosure was closed.

MR CARALL-GREEN: That's right, sir. I would say it actually is to be inferred that even if the position has not changed, it is to be inferred that these topics will have been considered in the context of the regulatory changes to which Apple has been subject. The last one of the five is the benefit derived by developers from the app review process. That's the mirror image. Now we're no longer talking about what Apple gets from developers, but we're talking about what developers get from Apple. There is pleading on the question of the app review process. Apple pleads that the review process is part of the service that developers get. For your note, sir, that is Apple's defence at 16.., 26(1) and 47.

Dr Ennis replies that the review process is not valuable and potentially damaging to developers, and that is the reply at 7.2.4 and 20. On that one, sir, I think we can say that is a more squarely defined topic. But in any event, we still seek the same arrangements in relation to eliciting documents connected with that topic.

I'm two minutes into my injury time, sir.

THE CHAIR: Thank you very much. How are we getting on for time?

MR CARALL-GREEN: It may be wise to take a slightly curtailed break, sir, just because we are on topic 5 of 7 on disclosure and there is a range of other topics (overspeaking).

THE CHAIR: There are some other agenda items which --

MR CARALL-GREEN: (Overspeaking)

THE CHAIR: -- perhaps optimistically, I thought might take less time than disclosure. I think that is probably reasonable.

MR PICCININ: I think, sir, mostly it will. In particular, some of them aren't really -- the class disclosure one, for example, is one where we're not actually seeking --

THE CHAIR: Well, there's no application, and it's fair to say I think I'll just listen to what you would like to raise, but I'm disinclined to be giving directions in respect of matters which have not been brought before me.

MR PICCININ: The whole point of that performance, sir, was to see whether you were inclined, to which "no" is a perfectly acceptable answer from our perspective.

THE CHAIR: Yes.

MR PICCININ: In that case, I don't think there's anything to say (overspeaking).

THE CHAIR: I think the only thing I was inclined to say on that -- but this is very much just a preliminary reaction, and I would obviously be happy to hear both parties -- is that if the matter is to be pursued, I would have thought the right course would be to bring an application before the Tribunal so that the Tribunal can regulate matters.

MR PICCININ: Sir, I'm happy to discuss that briefly, then.

THE CHAIR: Yes. I'm very much happy to do that.

Shall we come back at 1.45. Thank you.

(1.03 pm)

(The short adjournment)

(1.47 pm)

MR PICCININ: Subject to your preferences, I thought it might be helpful if I just respond on categories 1 to 5, and then we move on to 6, which is different. I think I can do this very briefly, really, because the answer to all five of them is the same.

THE CHAIR: Okay.

MR PICCININ: There are three parts to my answer. The first part is: yes, Mr Carall-Green is right to say that these issues, at least 1 to 4 anyway, are central and core issues to the Ennis case. The economic value, that is what it's all about. The risk associated with losing developers is not just relevant to that. It's also relevant to market definition, Apple's approach to attracting apps, and so on. All of this is very important. But because it's very important, and because it's central, it was also central and also very important in *Kent*. So, all of that is extremely well covered by the existing disclosure sets. Mr Carall-Green doesn't say in relation to this topic that there's something different about the Ennis claim other than the time period, which is my next point. Other than the time period, he doesn't say that these are issues that didn't arise in *Kent*, because they did.

What that means is that in order to justify any more disclosure, Dr Ennis really does need to explain what it is that has changed in relation to these issues. So that's my second point.

THE CHAIR: I suppose, if it's accepted they are central and core issues, then would it be wrong to say that they are central and core issues across the whole of the relevant period, where at least at the level of relevance, documents going to show these matters across the whole period are relevant, and then -- onus is perhaps not a very helpful way to think about it -- where is the burden of persuasion in terms of whether it's necessary to order more disclosure than they've already had?

MR PICCININ: Yes. (Inaudible) We do say, in circumstances where we have produced a 1.7 million document disclosure set covering these issues, virtually none of which makes its way into trial bundles and judgments, going out and doing that kind of exercise and updating that kind of exercise on these general topics is really not something that is proportionate to do, unless you've got some reason to think that -- (Pause)

I was saying, unless there's some reason to think that things have changed or that there will be some new light that can be shed on these issues (inaudible) from looking at additional productions, you say it's not sensible to go off and do a further job.

Mr Carall-Green, to his credit, did deal with that issue on his feet. It's not really the focus of anything in their skeleton argument, but on his feet he did. What he identified is the thing we're calling the territorial exceptions, so the various instances in which around the world, regulators have required us to do things differently, and so we have. But as I keep saying, that is the subject of request 6, category 6, that we're coming to, and we have made an offer on that which has been accepted. So, they don't actually need any more than that.

That takes me to the final point, which is that even if you did go down the route that you just put to me, sir, of saying, "Oh, well, it's all important. It's important now too. Let's look at the more recent period. Go to -Pepper and look at the Pepper repository"; well, still, these issues are framed very broadly. They're framed in the kind of way that you might frame issues if you were starting from a blank slate, like we were last time, and that they're not targeted at what might be different or what might be new or what more light could be shed by more recent documents. They're not targeted, for example, at the territorial exceptions, the one point that Mr Carall-Green made. So, they should have been focused on what is additional to the ground that has already been well and truly covered.

Still on this topic, this third point of going down that approach of searching Pepper, the reason we say you shouldn't do it, you shouldn't treat it as something light, you know. You shouldn't treat it as, "Oh, well, while we're here, why don't we go look in, in the Pepper repository?", because what is going to be involved is firstly a process of identifying search terms -- that shouldn't be too difficult -- then applying them to that repository. Then we're going to have to review the documents that are produced in

response to those search terms for relevance, either against these particular items or against the issues in the case more generally, depending on which route you take.

We can do that, but that is the kind of exercise that we did the first time around in *Kent*. So that's why I say that's not something to be ordered lightly, because it is a significant enterprise that will involve significant resources, and unless you have some confidence that more is really needed here, then that's not something we should do. That's my position on these five.

THE CHAIR: That's very helpful. Thank you.

MR CARALL-GREEN: Sir, briefly on category 5, by way of clarification. I think it is true that the question of value came up in *Kent* and was important to *Kent*. But on this side of the room, we don't understand that the value provided by developers was in focus or covered in that case.

MR PICCININ: You know, just if I can help there, it certainly was -- I sat through -- what was it -- a six-week, eight-week trial with so much cross-examination and submission on that point, and to hear that it wasn't covered in *Kent* is bewildering.

MR CARALL-GREEN: So, the Tribunal makes the point that the issues we are talking about here are ongoing issues, and Dr Ennis agrees. We're not talking about events that happened at a particular time, but about the value that moves across the line at all times during the relevant period.

My learned friend makes the point that the disclosure offered in relation to category 6 does the trick. But if we look at what Apple has actually offered to provide -- it's summarised in its skeleton argument at paragraph 11:

"Apple is proposing to undertake reasonable and proportionate searches to identify and disclose presentations to senior individuals which track Apple's implementation of the territorial exceptions." [as read]

My learned friend is right that we have agreed that that is useful in relation to

category 6. But category 5, here, we're focused here on the value or otherwise of doing it. So, in a sense it's lexically prior. We're not tracking the implementation of the territorial exceptions and seeing what is the result of that. What we're interested in is whether or not, for example, dropping the commission to 10 per cent has a significant effect on the value proposition of the App Store. So, we do say that documents of that nature are likely to be scattered around Apple generally, and therefore that in principle a reasonable search could arguably encompass Apple's business more broadly. But again, on this particular set of requests we are suggesting, at the minute, only searching documents that have already been produced in other proceedings.

Now that leads me to subcategory 5.6 which is different, because in this instance --

MR PICCININ: I hesitate to interrupt, but just since you mentioned the offer that we've made on category 6, I just want to show you what it is because that was slightly truncated. If you look in supplemental bundle at page 1316.

THE CHAIR: Yes.

MR PICCININ: It's a letter from the 1 May and it's paragraph 4. (Inaudible):

"... its reasonable and proportionate searches to identify and disclose to the class representative presentations or similar documents sent to senior individuals which track the implementation of the business model changes in the jurisdictions where the territorial exceptions apply." [as read]

That, I think, is where my learned friend stopped. But it says:

"... such as data on take up rates and effects on (1) developers, and (2) safety, security and privacy." [as read]

So, we are looking at the effects on developers as well. That's all I wanted to say. Sorry to interrupt.

MR CARALL-GREEN: No apologies required. Thank you.

THE CHAIR: Indeed, am I not right, annex A, paragraph 3 -- is annex A part of the offer? . Sorry, annex A was what was sought?

MR PICCININ: That's right, and this is what --

THE CHAIR: And paragraph 4 is what you're offering?

MR PICCININ: Yes, exactly.

THE CHAIR: So, yes. Okay. That's helpful. Thank you.

MR CARALL-GREEN: Sir, in light of that clarification, and further clarification, the effects on developers does not cover the value derived by Apple, which is what most of the requests that I've taken you through are about.

Subcategory 5.6 relates to pricing tiers. Just to explain that, sir, Apple does not allow developers to sell at whatever price they wish, but instead prescribes a menu of prices from which developers have to choose. The issue in dispute is whether Apple should search for and disclose documents showing the impact of changes to the pricing tiers. I think the rest of this is agreed.

Mr Perkins has explained that this information is relevant to market definition and dominance. Sir, you have already seen his letter -- this is paragraph 2.14. The point being made here is about the SSNIP test and the Tribunal will know that the snip test seeks to establish the smallest set of products the hypothetical monopolist would seek to control. If the SSNIP, which is the small but substantial non-transitory increase in price, would lead to switching away, then you are not looking at a monopoly in the sense that it's not worth having market power and charging an exorbitant price in that sphere of products.

So, changes in pricing tiers are potentially a real life SSNIP test, because if a price tier is changed, meaning that a developer has to pay more commission and thus incur higher costs, that may furnish some relevant data about how developers respond to the snip. That is Mr Perkins' point.

Apple's position is that: if that's what Dr Ennis wants, he can ask Apple to run search terms in the US production set, which returns us to the question about whether or not the US production set is enough. In this context, I do say that the staleness of the US production set is particularly acute because, as we discussed earlier, some of the most significant and important changes to Apple's pricing have taken place relatively recently. But in any event, as I said earlier, this is one of those areas where Dr Ennis seeks to go beyond the defined universe because this is a targeted request for documents charting, setting out, understanding, the effect of changes in pricing tiers. That will be something which ought to be amenable to a reasonable search because Apple will know when it's changed the pricing tiers and will know when it has or had started the effects of that. I could rest there, sir, if the Tribunal wishes to just consider 5.6.

MR PICCININ: Once again there are two points. One point is that: if what Dr Ennis is interested in here is the effect of increases in developers' prices on volumes of transactions on the App Store, well, he's going to have the data on what the changes to developers' prices were -- we're giving him that in the price tiers, that's the part of it that's agreed -- and he's going to have data on every individual transaction that any of these developers made anywhere in the world over a really very extended period. And there's no need for him to restrict himself to looking at the price tier changes either. He can look at all of the price changes because of course those are all in the transaction data too.

As to whether there was an impact, or what it was, or what conclusions should be drawn from that, I don't accept anything that he says, but that's a matter that he can investigate using the usual econometric tools, that he'll be very familiar with, for looking at the impact of a price change on quantities. So that's the first point. This isn't something they really need disclosure on at all.

The second point is that, to the extent that anyone's interested in this, there was material on this in *Kent*. It's actually one of the very few documents that is discussed in the judgment. Of course, these issues of market definition were central in all of the cases from which the *Kent* production were drawn. This is not one where Dr Ennis identifies any change of circumstance that is going to be relevant to the extent to which consumers respond to changes in developer (inaudible). But if there is, he's got transaction data that's bang up to date. So, he'll see that in the data, and he can test that too. So, this is one on which there's no need for any disclosure at all.

THE CHAIR: Thank you. (Pause)

MR CARALL-GREEN: Sir, I think you have everything on 5.6 now.

THE CHAIR: Yes. Mr Carall-Green, do you have anything you want to say in relation to Mr Piccinin's point about transactional data, that in effect you have a vast dataset across which you can scrutinise and examine for anything which changes as a result of price changes?

MR CARALL-GREEN: We do, but why would it be disproportionate, or not reasonably necessary, to have in our hands the analyses that Apple has produced on that data?

THE CHAIR: Is it your point that if there are analyses that have been undertaken by Apple of that, it would in a sense be disproportionate for you to have to reinvent the wheel; is that really the point?

MR CARALL-GREEN: Yes. And it would only be fair for both sides to have access to the pre-existing analysis of the data, such as it exists.

I should also say that I can't at this moment guarantee that what Mr Piccinin says is correct. He's undoubtedly right that there'll be plenty of analysis that we can do with the data. But it can't be said, for example, that the data will necessarily allow us to understand certain qualitative aspects of developer behaviour that Apple itself may have observed as a result of the changes to its pricing tiers that are not captured in

the data. I simply couldn't say that.

There's a small point that I should raise about the *Kent* data as well, sir, which is that we are looking here at the changes in pricing tiers in relation to all storefronts. Now, of course, Apple doesn't accept that all storefronts are relevant to this case because it says only the UK storefront is relevant. But we are looking at, potentially, the impact of changes to pricing tiers globally.

THE CHAIR: Yes, and Apple's agreed to disclose the non-UK pricing tiers for the relevant period, but your point is again about impact.

MR CARALL-GREEN: Of the changes in pricing tiers.

THE CHAIR: Yes. Okay. Specifically on UK developers.

MR CARALL-GREEN: Yes. It may be that the documents are more general than that, in the sense that there are no price tiers that are specific to UK developers. That's just not how the App Store works, which is one of our points. Yes.

On 5.7, I think there's nothing to say because Apple is performing some more work on what it can provide.

THE CHAIR: Okay.

Category 6

MR CARALL-GREEN: So, we are at 6. Category 6 is about exceptions to Apple's usual rules. To explain this category, sir, Apple's headline commission rate is 30 per cent, but it's subject to some exceptions. There are what are known as the program exceptions and the territorial exceptions.

The program exceptions essentially are based on what kind of thing is being done. So, for example, if a developer offers a certain kind of product, like a video, it may be able to qualify for a certain exception.

Then the territorial exceptions are about where certain activities are happening. So if, for example, device users are located in a certain place, Apple may charge a different

commission.

Now, there is a debate between the parties about the use of these exceptions and what they mean for unfairness. So, I can take you through the pleadings, sir, but I think it ought to be relatively straightforward to see. One can see, for example, that if the exceptions are not easy to use and the uptake is low, and if developers do not generally get the benefit of them, then it may be that they have minimal overall impact in the analysis. That's one way in which all of this could be relevant.

Mr Perkins also explains that this information about the exceptions would help his analysis. You see that in his letter at 2.21 on the program exceptions and 2.16 in relation to the territorial exceptions. (Pause)

THE CHAIR: Okay.

MR CARALL-GREEN: Sir, would you give me just a moment, please? My learned friend is saying that much of this is agreed. I just want to make sure we understand each other and what is and is not agreed.

THE CHAIR: Yes, actually reading across in 6.1, Apple's already agreed to provide updated versions of documents on program exceptions. Territorial exceptions, Apple's considering the request. (Pause)

MR CARALL-GREEN: I apologise for that interruption, sir. Some of this is agreed but some of it is not and I'll try to explain as I go through. On category 6.1, I don't think we need to trouble you because there is a very small point -- an important one, but a small one -- about the information that the spreadsheets provide and I understand that we're in dialogue about that.

On 6.2, the question is essentially whether the public domain information in the *Kent* disclosure is sufficient. Now, the category is documents and/or data showing the eligibility for the territorial exceptions and the program exceptions, their terms, the reasons for their introduction and the approach to their publication. So it may be that

the public domain information answers questions such as the terms. But part of the request is about the reasons why the exceptions were introduced and that is not information that's likely to be in the public domain.

As for *Kent*, Mr Perkins says in his letter at 2.20:

"I understand that the *Kent* proceedings did not explore Apple's rationale for introducing the program exceptions or their impact on developer behaviour in detail." [as read]

6.3, sir, is a request for any surveys or other analyses conducted by Apple of the effects on app developers of the territorial exceptions and the program exceptions, including in relation to the ease of take up. Sir, I think I should clarify at this point that because Apple has made an offer in relation to the territorial exceptions, which we are content to accept for the time being, on category 6, all of the territorial exception questions are resolved for now. So, we focus here only on the program exceptions.

THE CHAIR: Yes.

MR CARALL-GREEN: Apple's position here again is to refer to the US production set, which again takes us back to the question of whether or not that is enough as a universe of documents to explore. In any event, if one looks at the detail of what Apple says in its response to 6.3 -- I'm in the Redfern schedule now, sir -- one can see that Apple says that documents regarding the App Store Small Business Program are supposedly covered. But even if that is accurate, there are several more program exceptions. These are set out in the letter from Scott+Scott on 20 February, which can be seen on page 358 of the core bundle. It's not necessary to turn it up if you'll take it from me that the program exceptions also include a number of other programs: the Video Partner Program, the News Partner Program, the reader and multi-platform rules, the App Store Small Business Program and more. So, we do say in relation to this category of documents, it would be appropriate to go beyond the predefined

universe. Again, we are asking for a specific category of document: a survey or an analysis of the effects of the program exceptions. So, it should be possible for Apple to conduct a reasonable search for documents of that nature within that limited category.

6.4, sir, is only about the territorial exceptions, and therefore I don't think we need to address it because, as I've said, we have agreed the next step forward on the territorial exceptions.

Then under 6.5:

"The documents sought here are documents relating to the operation of Apple's review and notarisation of apps distributed by means other than through the App Store, for example, on macOS and/or for apps distributed via alternative means under the AEUTA." [as read]

The AEUTA, sir, is the Alternative EU Terms Addendum, which is the contractual mechanism by which Apple gives effect to the reduced commission rates and other changes it's had to make under the European Digital Markets Act.

Sir, on this, I think the position is that Apple will say that at least the AEUTA part is covered by its offer in relation to the territorial exceptions. But, as far as we can see, the example of macOS is not covered. To explain this, sir, the point that this is going to is that the Tribunal know that apps can be distributed to some Apple devices, specifically Mac computers, without going through an App Store. They can be directly downloaded, for example, from a developer's website. This is a point that is pleaded in the reply, specifically in relation to macOS, at 3.1.1, at 20.3.1, and 50.2. So, the example of macOS not using an App Store process is specifically pleaded. And we do request disclosure of documents explaining how the process works in relation to macOS, because we say that an exploration of Apple's own conduct in relation to iOS and macOS will elucidate whether or not the processes that Apple mandates in relation

to iOS are genuinely justified by concerns such as privacy and security. That's all I want to say about 6.

THE CHAIR: Thank you.

Mr Piccinin.

MR PICCININ: In relation to 6.2 and 6.3, not sure I need to do any more than read out a series of dates. The reader rule, introduced in 2011, the 15 per cent rate on second year of subscriptions. The next one we can just call the ARS, auto-renewable subscriptions rate. That's June 2016. The multi-platform rule is 2018. The 15 per cent rate for Video Partner Program is 2016. The News Partner Program is 2021, and the Small Business Program is 2021 as well.

In the *Kent* trial, Mr Phil Schiller sat in that box and he was cross-examined uphill and down dale about all this material, the reasons for them, what the point was, all of that. It was well and truly covered in the *Kent* proceedings. I'm sure it was well and truly covered in the rest of it as well, but the key point is, this is really not one where you can say, "Oh, we need to update", because it's all in the past. None of this is post *Kent*. These issues were absolutely covered in *Kent*, and nothing has changed.

So that's 6.2 and 6.3. I think on 6.3, there was also a point taken about whether we had covered surveys or analyses. If you just look at page 1340 of the bundle and you look at the right-hand side, and we look at some RFPs. This is specifically on the Small Business Program, looking at the consequences of the program and the reception of it. So, we say that that is covered.

Then 6.4 was agreed so that takes me to 6.5. This is the one:

"Documents relating to the operation of Apple's review and notarisation of apps distributed by means other than through the App Store."

Then there are two examples: macOS and the apps distributed via alternative means under AEUTA. I'll deal with those separately.

In relation to macOS, that was front and centre of all of the previous cases. Because remember, unlike Dr Ennis, all of those other claimants wanted to say that Apple should be compelled by competition law to run iOS in much the same way that it runs macOS. And Apple's response to that was -- there were many layers to it, but one of them was -- that that would be bad for privacy and security. And so there was a central issue in all of those cases about whether the additional protection that you get from centralised distribution on iOS actually adds something beyond what you get on macOS, where it's possible to download software directly from a web browser. There's reference to it -- I haven't found them all, I've lost it. *Kent* judgment. Anyway, it was absolutely central and, again, it wasn't so much Mr Schiller who was cross-examined uphill and down dale on that, as Mr Federighi.

Oh, yes, if you've got the authorities bundle and you turn to page 1577, for example, you can see in section 4, which is dealing with the security counterfactual, which is more or less what I've just said. Dr *Kent* was saying, "Why don't you do something on iOS which is similar to what you do elsewhere". You can see reference there to arguments that were had between the class representative and Apple's Mr Federighi, and Professor Rubin who was an expert, about the differences between iOS, Android, Windows, and macOS, how that was connected with centralised app distribution. So that certainly was covered.

There was also quite a lot of discussion about notarisation generally, but when we get on to the second limb of what is being sought here, which is the notarisation of apps that Apple conducts under the system that operates now in the EU, then we say that the details of that are really not relevant to these proceedings in circumstances where Dr Ennis accepts that Apple should be free to continue to operate iOS in exactly the way it does. His only concern is about price, what commission is charged to developers for those services. So, the ins and outs of what's involved in notarisation

in the EU are really neither here nor there.

But, in any event, insofar as any of this matters, it's the impact on privacy and security that matters because those are the outcomes that matter for developers and that matter for end users. That's how you connect any of this back to a discussion about value. Insofar as we're talking about the impact on privacy and security, well, that is covered by the offer that we've made on the territorial exceptions which you've seen before.

Then the final point I would make about this is -- I mean, it shouldn't be entertained at all, but if you were going to entertain it -- this is a very broad set of wordings, documents relating to the operation of Apple's review. I don't know what the limits of that are supposed to be. On one view, it could compass each individual instance of an app being considered by Apple's teams, which would obviously be mad and totally disproportionate. So, this doesn't seem to us to be focused on anything that leads you back to where we're actually going to be at trial, which is a discussion about value that Apple provides to developers and end users. So, we say this one is not needed.

(Pause)

MR CARALL-GREEN: Sir, just briefly on 6 before we conclude that one. It's not only the introduction of the programs that's caught within this request. The introduction of them is not the whole story. The request is drafted so as to, for example -- I'm thinking now about 6.2, documents capturing the approach to the publication of these programs. The point I made to you at the beginning was that, insofar as the programs are not well known, well understood, there's poor uptake, they're not of much use, then they may be of less relevance to the question of whether or not developers are charged a fair price because they will not easily gain access to the lower prices that the programs supposedly afford them. So, documents throughout the relevant period about how easy it is for developers to access these programs are relevant.

Much the same point can be made in relation to 6.5 and the question of Mac security versus iOS security. There is no particular reason to suppose that more up to date and relevant documents do not continue to be produced -- or created, I should say. So really, this just returns to the debate we're having about whether or not it's sufficient to stick with what we've already had from *Kent*, or whether it is desirable, in some way or another, to look beyond that, for example, on the basis that interesting material may have been created in the last 3 years. I think that's all I want to say about 6, sir, and so I can move on to 7 which I think is quite brief. The only outstanding items here are 7.2 and 7.3.

THE CHAIR: Okay.

Category 7

MR CARALL-GREEN: What we're looking at here is documents relating to a couple of specific incidents having to do with exclusion, or threatened exclusion, from the App Store for breach, or alleged breach, of the App Store rules concerning Epic and Facebook. Apple's answer is that these topics are covered by the US production set, and I think the point is that, because these events took place before the US production set was compiled, everything should be in the US production set.

Now, Dr Ennis says that his proposal is to be preferred for two reasons. First, as I explained earlier, we know from Apple's schedule -- you'll recall the answer given in relation to request 2 -- that after the disclosure was provided, Apple made further productions in the Epic proceedings. So, if we are talking about the exclusion of Epic, which is request 7.2, there are real reasons to believe that more documents might be out there than were captured in *Kent*. If Apple can give an assurance now, that it can guarantee that there are no documents that were produced in Epic that were relevant to Epic's exclusion from the App Store, that postdate *Kent*, then we would very much like to hear that. But if that guarantee cannot be given, then it stands to reason that

searches ought to be performed across the expanded universe that we have proposed.

My second reason, sir, is that, in any event, a structured process along the lines that we have suggested is better than Apple's proposal for the reasons I gave earlier. It's a more controlled process. It's less liable to yield large volumes of documents being produced when they're not actually going to be very helpful. That's all I wanted to say.

MR PICCININ: Sir, Mr Carall-Green has correctly anticipated my response to this, which is, it's ancient history. This was very old news, even during the *Kent* trial. It was so old, it was boring.

The exclusion of Epic in particular was the subject of the Epic proceedings. That trial happened -- what was it -- half a decade ago? Thereabouts? I'm getting nods.

It's true that more recently, documents have been disclosed in the Epic proceedings in California, and I explained what they were earlier. They were concerned with the question of whether Apple had complied with the injunction that the learned judge in California had given, which required a change in Apple's business terms and business model in that jurisdiction. The trial about whether it was right or wrong for Epic to be ejected from the App Store is the one that concluded a very long time ago, and it really doesn't make any sense to go looking for more material on that elsewhere now, particularly not in the full list of 25 proceedings that Dr Ennis has identified.

Similarly, Facebook: ancient history, well and truly covered in the previous cases, and no reason to think you would find something new in a more recent repository.

MR CARALL-GREEN: Sir, I think we might be at the end of disclosure.

THE CHAIR: Good. I had hoped I might be able to make some decisions as we went along, but I think I had better reflect on the submissions that you have both made, with a view to giving directions in as early course as I can, rather than on the hoof.

Shall we go on to the next item on the agenda?

MR CARALL-GREEN: Yes, sir. On my list, it's Apple's proposal for disclosure by the class.

THE CHAIR: Yes, and Mr Piccinin, if we have a very brief exchange about that issue.

Class disclosure

MR PICCININ: Yes. I should say, the approach that we are taking to this issue was, we formed the view that it would be appropriate and necessary and proportionate and all of those things for us to go out and seek documents from class members, because really otherwise this is a bit like Hamlet without the prince. We're talking about the value that developers receive in exchange for the commission that they pay, and so we need documents from them in relation to that.

It's not just on the question of economic value. It's also on other points, including market definition, where again one of the important questions is: do developers have realistic options available to them to switch away from transactions that attract Apple's commission to other transactions through other channels, like their own websites, that are sufficient to constrain Apple? Again, you need to know from developers about what they do and what they think and the analyses that they've conducted of all of those things, and we don't have visibility on that. But what we do have is our transactional data set, which tells us about everything that happens on our platform. But what we don't know is: what are they doing on all of the other platforms? We can see the offers that are there, but we can't see how much commerce flows through, and we can't see the things they do to shift commerce from one channel to another. That's at a very high level why we thought this was a useful exercise.

The way it works procedurally is -- and I can show you the authority if it's helpful -- is that the Court of Appeal has clarified -- I should take a step back. There was a period of time in which a judgment had been given in the Tribunal in the McLaren case,

suggesting that there was a blanket ban on defendants communicating with class members, including for the purposes of obtaining disclosure from them. The permission needed to be sought, and application needed to be made just to go and talk to them.

The Court of Appeal overturned that decision, and I can show that to you, if it's helpful. That's in authorities bundle tab 20. (Pause)

It starts at 869, but actually the key bit I wanted to show you was at page 900, because this is the one that explains one of the key reasons why it was overturned, and that reason is relevant to what I was about to say next, which was an argument about litigation privilege; because what the defendants/appellants in that case argued was that a rule that required defendants to come to the Tribunal to obtain permission, and then to show drafts of letters and that kind of thing, is actually an invasion of litigation privilege, and of course, as I am sure you know, litigation privilege is an absolute right. So not only is it not provided for in the rules, it's not a thing that could be provided for in the rules.

The discussion on that begins at paragraph 102, when Lord Justice Popplewell said that at the forefront of -- it was Ms Demetriou KC's argument -- was that that rule, which he called the restriction, brings unacceptable and unfair consequences because it interferes with litigation privilege, because the defendants in that case had to disclose the detail of their approach to class members in seeking disclosure of relevant evidence, notwithstanding that such an approach had been sanctioned as appropriate in principle by an earlier order. The court says:

"There is considerable force in this argument, that the Tribunal's scrutiny of such an approach is an invasion of litigation privilege, because it forces defendants to disclose to their opponents' details of their pursuit of evidence for the purposes of defending the claim. That is a class of communications which attracts litigation privilege,

because the communications are for the dominant purpose of the litigation. The vice in litigation privilege being invaded in respect of the conduct of a party's case in preparations for trial is that it may involve a party having to reveal to its opponent aspects of its litigation strategy or its unused material [which I think is the term used in criminal proceedings]. But the right to maintain privilege does not depend on whether it does so in a particular case [as in whether it reveals that in a particular case]. The privilege attaches to a class of communications. Moreover, where legal professional privilege exists, it is inviolate. [That's the point I made before.] There is no balancing exercise to be undertaken between the interests in maintaining privilege and competing public interests in disclosure of the communications. It is a right which cannot be overridden". [as read]

The ruling in that case actually resulted in a breach of those fundamental rights and would potentially do so in many other collective proceedings before the CAT. It's unfair.

There was then an argument over the page, at paragraph 104, where the class representative in that case said, "Ah, well, litigation privilege can't exist when you are talking about communications with the class, because the class are your opponents". But of course, that's not the position. Dr Ennis is our opponent. The class are not our opponents. In any event, while there's no confidentiality and therefore no privilege in our communications with a particular developer vis a vis that developer, that doesn't mean that the class representative is entitled to see that material as well. The privilege is maintained.

That is where that got to. We could have just gone off and written to developers and made our requests to them and asked them to produce what they would like to, and we could have done all of that under the cover of litigation privilege without bringing it to the Tribunal's attention or to the class representatives' attention.

Obviously, we haven't wanted to do that yet in circumstances where we have a decertification application live. We don't want to trouble people unnecessarily, if it turns out to be unnecessary. On that, I think the Tribunal can take comfort from the fact that these are our customers, and obviously imposing burdens on our customers is the last thing that we want to do.

But what we thought we could use the time available for before that is decided is to come to the Tribunal and explain what it was we were going to be doing, in case someone had some comments on it. In particular, had it been the case that Dr Ennis had responded to our proposal by saying that Dr Ennis was also very interested in investigating these matters and could see the benefit in getting documents from class members, but actually, "Have you thought about these four additional categories?", then at least in principle we would have been open to a collaborative approach where we go and do that together so we don't bother the same developers twice. That was one point.

The other point is that obviously where this is heading, after we write to the developers, we hope that they can see the logic in what we're proposing and agree to provide the documents. But if they don't, then we may need to make an application for disclosure against them, which would be under rule 89(1)(c). In that case, there would be a contested application before the Tribunal, potentially with multiple separately represented developers. What I didn't want, what we didn't want, was a situation where we turn up at that contested hearing, and that's the first you've heard of it, and you say, "Oh, gosh, if only you'd done it slightly differently, this would all have been much better". We wanted to just provide an opportunity in case you did have views on that. But if you don't have views on that, on the "how" it should be done, then our proposal now -- since Dr Ennis has made very clear that he's not interested, that he thinks this whole exercise is a waste of time, and frankly is not being very collaborative

about it -- then we think that the best way forward now is for us just to, crawl back into our litigation privilege shells and write to developers and see where we get to. Then, of course, we will come back to you with an application if we need the Tribunal to do anything.

THE CHAIR: Just, I suppose, picking up on my observation earlier about "if you want to make an application, you can make an application", the difficulty in this case is because it would be a third-party application, it's not simply an application between yourself and Dr Ennis. So that wouldn't be the appropriate procedural approach to take.

MR PICCININ: Sorry?

THE CHAIR: For you simply to bring forward an application.

MR PICCININ: Well, in my submission, it is, sir, under rule 89(1)(c) --

THE CHAIR: Yes.

MR PICCININ: -- the Tribunal has a specific power to -- let me just find it. Authorities bundle: the rules are at tab 3 and page 62. Thank you.

Actually, perhaps we should go back and look at rule 63 first, because my learned friends have pointed to that.

THE CHAIR: I mean, I had in mind rule 63, and --

MR PICCININ: Yes. We say it's not rule 63, sir. Let's look at them both.

THE CHAIR: Yeah.

MR PICCININ: Rule 63 forms part of the general rules, the proceedings in the Tribunal. It's not limited to, or it's not specific to, collective proceedings. It's headed "Orders for disclosure against a person not a party". Then it says:

"This rule applies where an application is made to a Tribunal by a party for disclosure by a person who is not a party to the proceedings ..." [as read]

And then, so on. There are some particular rules.

But if you go on to then look at rule 89, which is on page 62, this is in a section of the rules that is specific to collective proceedings. The key words are the first ones, rule 89(1), "In addition to the Tribunal's general powers under the rules to order disclosure ..."

What follows is in addition to rule 63 and all of the other rules on disclosure, and it says:

"The Tribunal may order, on any terms it thinks fit disclosure, to be given by any party to the collective proceedings, to any other party by the class representative, to any or all representative persons, and by any represented person to any other represented person, the class representative or the defendant". [as read]

That's the governing rule. I'll just make the point as well that that doesn't actually distinguish between opt-in and opt-out proceedings. "Represented person" is just a class member who has opted in or hasn't opted out, as the case may be. Obviously, in opt-in proceedings, like the *Interchange Fee* proceedings, for example, which are being heard in this Tribunal, where disclosure -- we recently had a CMC in which disclosure was being discussed for the opt-in class members, where they are treated in exactly the same way as the other actual parties, like the claimants who brought individual claims, which is obviously right in those circumstances.

Obviously, every case is different, and there will be a spectrum of cases and of attitudes that the Tribunal will take to disclosure from represented persons, depending on what they are. At the far end of the spectrum, you've got the *Merricks*-type case, where your class consists of 60-odd million individuals, where one can immediately see it would be a bit difficult to have disclosure against them, and that might end up being similar to -- it's not the same as third-party disclosure, but the approach of the Tribunal might be similar to third-party disclosure.

This case is very much at the other end of the spectrum. I mean, you heard what

Ms Demetriou had to say about the distribution of commerce. Some of these are truly massive enterprises, global businesses, and they each individually -- many of them -- account for quite significant chunks of the claim. So, dealing with those, we say, is much closer to dealing with the party. But all of that is really for argument on another day.

The point I'm making is just that: when we hit the end of the road on the correspondence, if there's a dispute -- which we hope there won't be -- the right course, we say, is an application to the Tribunal to which those represented persons would be the respondents to that application -- obviously we'd serve it on Dr Ennis as well -- but they would be responding and it would be seeking an order under the provision that we have in front of us.

THE CHAIR: That's helpful. So, the key point you're making is that such an application is not an application, you say, between yourself and Dr Ennis.

MR PICCININ: Well, of course he can --

THE CHAIR: Although he may be of an interest in the application.

MR PICCININ: Yes.

THE CHAIR: Is that different from 63?

MR PICCININ: I think in that respect it probably has that in common with 63 actually.

THE CHAIR: Yes. Yes, because -- yes.

MR PICCININ: Yes. So that's not the point of difference between them, it's just the test that you applied it (inaudible).

THE CHAIR: Yes. Okay.

MR PICCININ: I'm not sure there's really anything else to be done on this topic. We just didn't want to surprise you with it a couple of months from now, that's all.

THE CHAIR: Okay. No, that's very helpful.

I'll hear from Mr Carall-Green on whether there's anything he wishes to say.

MR CARALL-GREEN: Yes, sir. The basic point that I want to make is that it's important -- Dr Ennis considers it very important that what doesn't happen is what my learned friend has suggested will now happen, which is for Apple to go off and canvass app developers for documents without any input from Dr Ennis. We do say that that is contrary to the Court of Appeal case on which my learned friend relies. I will take you to that.

THE CHAIR: Okay.

MR CARALL-GREEN: So, if we go back to the judgment of the Court of Appeal in the authority's bundle -- tab 19, page 857 -- and we look at paragraph 99, you see:

"The appellants in that case recognised that if there is no a priori restriction ..." [as read]

And just pausing there, the a priori restriction was the alleged implied restriction under the rules which prevented class members from being contacted by defendants as a blanket or default ban.

THE CHAIR: Mm-hmm.

MR CARALL-GREEN: Right.

"[If there's no blanket ban], the CAT can nevertheless impose a restriction by way of its case management powers in appropriate circumstances in individual cases." [as read]

Then the Court of Appeal confirmed that later when it said at paragraph 134 -- that is on page 868. Here the Court of Appeal is disposing of the matter and saying there is no a priori blanket default restriction, but it says, between little (d) and (e):

"It remains open to MMR [which is the class representative in that case] to invite the CAT to make an order on a case management basis in the light of our decision on the interpretation of the rules." [as read]

So where does that leave us? Well, the Court of Appeal considered that. For that, if

we turn back to page 862. Starting at paragraph 111, the Court of Appeal is here considering the jurisprudence from Canada. At paragraph 112, it considers the significance of the case and says that:

"The case illustrates that [as my learned friend says] there's no blanket prohibition on defendants communicating with class members." [as read]

But then at 113, it refers to another judgment from Canada called *Del Giudice*, where the court wrote a postface which you then see quoted, sir.

THE CHAIR: Yeah.

MR CARALL-GREEN: Could I ask you to read the postface, please, which is pages 862 up to 863. (Pause)

Then at 115 the Court of Appeal says:

"I've set out the postface in full because it might be regarded as helpful for the CAT, either to issue a practice direction or to make orders at the first CMC, or when making a CPO, to guide the parties as to communications from defendants in an appropriate case, and the postface might form a helpful starting point." [as read]

So, I do want to pick up briefly on the Canadian court's suggestion that contact from defendants could alarm class members. In this case, sir, we do say that that is of particular concern. The Tribunal saw two weeks ago extensive evidence on the fact that class members apprehend a risk of retaliation if they act contrary to Apple's wishes. Or, sir, even if one is to couch it in more neutral terms, it is at least true that app developers are, because of the economics involved, heavily dependent on Apple for their livelihoods. Therefore, living in the real world, we must understand that if a developer, large or small, receives a letter from Apple or from Gibson Dunn seeking that developer's documentation and intimating a court application in relation to proceedings in which that developer is not participating actively, that might well be rather alarming. We do say, sir, that that is a factor that will militate generally against

disclosure from class members and in this case specifically. But we don't need to decide that now.

The point is that contacting class members directly presents real downsides, and that where it is suggested that disclosure is to be sought from class members, it is entirely appropriate for the Tribunal to put in place a controlled and proper process to ensure that contact with class members is only made to the extent that disclosure from them would comply with the rules, and in a way that mitigates the negative effects of defendants contacting class members. Sir, I should say that this has been considered by the Tribunal at first instance as well.

If I could draw the Tribunal's attention, please, to the judgment of Bridget Lucas KC in *McLaren* that my learned friend cites in his skeleton argument, which is available at paragraph 813 of the bundle.

THE CHAIR: Yes.

MR CARALL-GREEN: Sir, you may be familiar with this. But perhaps I could ask you to refresh your memory of paragraphs 27 and 29. (Pause)

So, I emphasise what the Tribunal said there, which is that:

"[Class disclosure] is intended to be the exception rather than the norm ... it will be subject to careful scrutiny by the Tribunal." The risk is that imposing document requests on class members leads them to opt out for bad reasons, and so undermines the purpose of the collective proceedings regime. Parties are generally permitted to prepare and frame their cases as they see fit. But the Tribunal will exercise its supervisory jurisdiction. [as read]

I do see that the practical guidance there about defendants liaising with class representatives in advance of any class disclosure requests being made in paragraph 29 is entirely consistent with the guidance given in the Canadian case of *Del Giudice*, which the Court of Appeal expressly endorsed is a good idea in its

judgment.

So, just to deal with the --

THE CHAIR: The point you're making there is that, you know, there may be a variety of different routes of communication, and that the Tribunal may wish to exercise what is described as a supervisory jurisdiction about the content and approach taken to -- I'm putting that very broadly -- the communication, yes?

MR CARALL-GREEN: That's right.

Just to deal with the point that that was the decision made against what you might call a false background, because my learned friend has made the point that the law moved on with the Court of Appeal's judgment.

If we look at paragraph 30, please, of this ruling of Bridget Lucas KC. What she records there is that in that case the Tribunal had already made an order effectively reversing the default position. So that was already a case where the defendants were generally permitted to speak to the class members. So, the difference between, as it were, the background in that case and the background today should not be overstated.

So, in view of that, sir, I do commend to you the comments of Bridget Lucas KC in that ruling. I say that they are, insofar as I have drawn your attention to them in paragraphs 27 and 29, consistent with what the Court of Appeal says in the judgment on which my learned friend relies. There are real risks that, if Apple adopts a freewheeling approach to contacting class members, this process will get out of control. As Bridget Lucas KC says, it could encourage opt out.

But it also is liable to produce particular problems associated with meeting the disclosure test. I don't really want to get into the nitty gritty of all the requests because I perceive that we don't have the time, and also because this is likely to be a matter for another day. But there are real questions to be asked about, for example, the reasonable necessity and proportionality tests. So, in circumstances where many of

the questions that are supposedly answered by the disclosure like "market definition" could be answered by Apple's disclosure and expert evidence, there is a question to be answered about why the class should be approached, given the downsides of class disclosure that I have suggested to you. So, there are real questions around that.

There are then questions around the third-party disclosure test specifically. Now, I think there is probably some difference between me and my learned friend on what the applicable test is. We do say that rule 63 is correct. It is the correct rule that applies here, sir. If authority for that is needed, it is available in the *Rodger* case, the judgment of Hodge Malek KC. You can see that in the authorities bundle, tab 23, page 1264.

But I'm not sure that much turns on exactly what rule one goes under. The question is whether or not the request is appropriately framed so as not to impose an undue burden on the non-party or the class member, or however we're going to describe them.

Sir, you'll be familiar with this test from ordinary non-party disclosure applications, where essentially the problem that one faces is that because the non-party is not represented by lawyers, it doesn't actually know what the case is about. The disclosure request needs to be framed in a way which makes it extremely easy to execute. So, one would have to meet that test so as to avoid imposing unreasonable burdens on non-parties.

We say that in the context of class disclosure that has a particular flavour to it, because some class members will have claims that are rather modest in comparison to the amount of work that might have to be done to respond to a disclosure request requiring searches and review and judgment and all the rest of it.

THE CHAIR: I think the points you're making are all ones which are for another day. I mean, on no view have I got any view as to whether or not third-party disclosure

would be granted or not. I'm not being asked to address that. But I suppose the point you're making is that there is a set of issues that one would want to see flushed out and dealt with.

MR CARALL-GREEN: That's right, and I do say that those issues are not -- in a way, I'm raising them now to make the point that they're not issues for the application. They're actually issues that the Tribunal will want to grapple with in advance, even, of the class being approached. Because if the class is going to be approached -- who knows what it's going to be, a dozen or 30 or 300 developers are all going to be approached -- and they're going to be told, "Please hand over documents of this nature", the Tribunal, in the exercise of its supervisory jurisdiction, will want to be astute to ensure that that mere request doesn't endanger the integrity of the proceedings, impose undue burdens on class members, alarm them, prompt opt outs for the wrong reasons and so on.

Then there's finally, after the normal disclosure test and the third-party disclosure test, the particular considerations around disclosure from the class that would have to be grappled with. They include the risks of alarm that I've alluded to, but they also include risks around, for example, representativeness. So, one of the issues that comes up in the case law is whether or not disclosure from the class would really be of any probative value. Because, until one has a good sense of who you're going to ask and whether or not they would be able to provide a representative sample, one has no idea whether or not the answers that you're going to get are going to be helpful. Again, that's the kind of thing that needs to be addressed right at the top of this discussion, not after Apple has had responses from, you know, 45 developers that are saying that they're going to give this, 7 objecting, 5 making some other suggestion and so on and so forth. In order to prevent this from becoming a difficult, complicated and troublesome exercise, proper engagement between the parties -- between Apple and

Dr Ennis and the Tribunal -- in advance of the process starting, is important.

THE CHAIR: To be fair, what Mr Piccinin is --

MR CARALL-GREEN: Well, no, sir.

THE CHAIR: -- prompting by bringing (overspeaking).

MR CARALL-GREEN: Well, yes, exactly. I do say that, in a way, they've done the right thing which is to say that this must be ventilated first. But what I say is wrong about what he is suggesting is the idea that, having ventilated it, that means that he will now, as he puts it, retreat into his privileged shell and conduct whatever communications with the class he wishes. I say that that is a recipe for many bad results.

So just to illustrate the point that the court can and should control the class disclosure process. We have an example of the Tribunal controlling the class disclosure process from another recent case. We have the directions order in the case of *Spottiswoode v Airwave* which Mr Hussaini is handing around at the moment. (Handed)

THE CHAIR: Thank you.

MR CARALL-GREEN: So, you'll see from this order, I'll just draw your attention to paragraphs 6, 7, 9(b), 10(c) and 11(b) that the Tribunal in this case made an order effectively requiring the parties to exchange proposals on disclosure from a sample of class members before they could proceed. So, this, in my submission, represents not only following the Court of Appeal's guidance in *Del Giudice*, but also now an established practice in this Tribunal for how this sort of thing should work.

So, what I would invite the Tribunal to do now, sir, is not to, obviously, as you rightly say, decide anything but to make an order effectively requiring a structured process to be followed. Or at least, at the very minimum, to give an indication that before Apple goes off and contacts class members about eliciting documents, contact should be made with Dr Ennis and the Tribunal to ensure that the supervisory function is properly

engaged. Thank you sir.

THE CHAIR: Thank you.

Mr Piccinin.

MR PICCININ: Sir, that is frankly quite extraordinary that what this has morphed into is an application for an order from the Tribunal that has not been foreshadowed in an application in the proper way. But --

THE CHAIR: Do you accept, in light of the way the Court of Appeal expressed itself, that the Tribunal does have power to exercise the kind of supervisory jurisdiction which is described and which it looks as if the president has been concerned to exercise in the *Spottiswoode* case?

MR PICCININ: No, sir. The word is "inviolate" and that has a very clear meaning. Litigation privileged communications are inviolate.

Sir, take the point in this way. Firstly, this order that we've just been handed from the *Spottiswoode* case shows a series of directions that have been made in relation to a sampling exercise from the class. But what I don't know is what application was made, I don't know whether it was resisted, I don't know what submissions were made, I don't know what authorities were drawn to the Tribunal's attention. This is not an authority. An authority would be a ruling explaining that the Tribunal had power to compel the defendant to go down a route like this against their wishes. That is what an authority would be and that's not one.

As for the ruling from Bridget Lucas KC in the *McLaren* case, if you could just go back to page 816 in the authorities bundle. My learned friend rightly made the point that I would say that this was bad law, because it was overturned.

THE CHAIR: Well, it long predates -- well, the Court of Appeal --

MR PICCININ: Quashed this order.

THE CHAIR: This was the very decision that the Court of Appeal was dealing with.

MR PICCININ: No, there was a prior order. Sorry, it was a prior decision which said that defendants were prohibited from communicating, which said what is in paragraph 30 here. That's the prior order. The order that's described in paragraph 30 is the one that was quashed by the Court of Appeal and it's not true that it gave the defendants freedom to communicate with class members for the purpose of gathering evidence generally because of the last clause of that paragraph, which was a requirement that they must seek specific permission from the Tribunal before sending a letter which even made reference to the possibility of a formal application being made against the class member, and that is inconsistent with the Court of Appeal's judgment in *McLaren*.

I do want to go back to the Court of Appeal's judgment in *McLaren* because the one thing I do agree with my learned friend on is that it does contain the answer. I was taking it shortly because I thought this wasn't an application in which anyone was asking you to do anything, but I do just need to go back over.

THE CHAIR: As you heard before lunch, that was my immediate reaction, but I certainly also had in mind, rightly or wrongly, that this would become focused by reason of you bringing an application so that the Tribunal could address some of the kinds of issues that Mr Carall-Green has raised. Now, I may be wrong in the sense that I have no power, you would say, to do that. Mr Carall-Green says I do have the power to do that. That may be the thing that I do have to decide.

MR PICCININ: Yes. It probably is. Though it would have been nice to have had an application to be responding to on that.

But, yes, if we could take up the Court of Appeal's decision that's at page 862 of the bundle. At the bottom, it refers to the postface from *Del Giudice* which my learned friend showed you, which the Court of Appeal endorsed. Just to tell you what the answer is here, I absolutely accept that the Competition Appeal Tribunal does have

jurisdiction to regulate some communications between defendants and class members, if there's a particular reason to do so. There hasn't been a practice direction despite the years that have passed since this decision. But, if a problem arises, it certainly is the case that the Tribunal can give directions in relation to communications between defendants and class members of some kinds.

You might have noticed, one of the slightly odd things about the postface is the repeated reference to details of the notice. It's a slightly funny way, certainly, to refer to correspondence seeking disclosure. The reason is because that's not what it was about at all. It certainly wasn't the limit of the order that was made in *McLaren* or that was being discussed in those cases.

The context can be seen on page 862 at the top, when you look at what those Canadian cases were actually about. What they were about was a situation where there are opt-out proceedings. Anytime you have opt-out proceedings, of course, the class representative needs to put out a notice that explains what the proceedings are about and explains the rights that people have to opt out of them. What happened in those cases was that the defendants put out a rival notice, a multimedia campaign they instituted, seeking to persuade members -- actively, expressly -- to opt out of the class. It had nothing to do with gathering evidence at all. It had nothing to do with litigation privilege. As it says, it's a multimedia campaign, they were actually public communications. Now, of course, it can catch private communications too, but that's just not what we're talking about here.

So what the Court of Appeal was saying and endorsing is that, in the unlikely event that in this jurisdiction, with the responsible, professional conducting litigation, someone embarked on a strategy of trying to coerce or unduly influence or however you want to put it and communicate in an inappropriate way, probably a way that might be inconsistent with professional conduct rules, for example, then of course the

Tribunal in a supervisory jurisdiction has power to give directions to control that.

Equally, it should be obvious that if you were going to make a communication like that, it might be a good idea to canvass it first, because you should be able to say, you comment about the litigation in some circumstances. So, all the Court of Appeal is saying is that in some of those circumstances you might want to comment on it and, of course, the Tribunal could rule on it. But this is all subject to what is said in the paragraphs that I showed you and that my learned friend didn't go back to.

Paragraph 103 was absolutely crystal clear that litigation privilege is engaged here, if what we're doing is communicating with class members for the purpose of gathering evidence, and it's inviolate. It had been invaded, violated, by this Tribunal in that case. That was wrong. I simply do not understand how Dr Ennis can come to this Tribunal now, particularly without having made an application, and ask for an order to violate our litigation privilege, having just been told by the Court of Appeal a couple of years ago. It'd be a shame to have to go back and do it again. So that is wrong.

A couple of other points just to wrap it up. There is also nothing to be alarmed about here. I did make the point before that these are our customers. We obviously have no interests in overburdening them with disclosure requests that are unnecessary.

Equally, obviously, my clients are represented by an experienced and responsible firm of solicitors who have lots of experience in this area and can be relied on to conduct themselves in accordance with their professional obligations, which include obligations concerning the way they communicate with third parties, as we all do.

It would also be entirely contrary to our interests to take what my learned friend called a free-wheeling approach to the exercise because, of course, what we want, ideally, is cooperation from these developers. What we want is not to have to come back to the Tribunal and make an application compelling disclosure. We want to have a productive, cooperative discussion with them about what they have, what's easy to

find, what's difficult, what's unsuitable, all of that, so that we can gather, in a voluntary way from them, materials that would be useful for these proceedings.

Of course, we also have to bear in mind that, at the end of the day, if the developers refuse to provide us with the material we need and we make the decision that we do need to make an application to this Tribunal, then we are going to have to front up before you and explain ourselves and they'll be there too: explaining themselves. And of course, if we have conducted that process in a way that is oppressive or burdensome or disproportionate or whatever it is, then we can expect that to have consequences at that hearing.

THE CHAIR: Can I ask you, Mr Piccinin, if you're right that the Tribunal has no power even to issue directions to regulate this process, why are you raising this with me at all?

MR PICCININ: I explained that at the beginning of my submissions on this, sir. It was twofold. One was, it was possible, we hoped in vain, that Dr Ennis might want to participate in this process in a constructive way, in the sense that he might also be looking for documents and we could do it together. That was one reason. The other reason was that if you had views on the procedure or what you'd like to see in any application or anything of that kind --

THE CHAIR: But on the hypothesis that you're presenting to me; no application arises unless and until you've already been through the process of speaking to the representative members of the class.

MR PICCININ: That is right. But we do need to have one eye on -- that's what I was saying before -- one eye on the end of the process, which is that if there does need to be a contested application, we will be here in front of you. What I didn't want was to get to that situation and have you say, "Oh, you know, why didn't you -- I don't know -- first ask for disclosure reports from them". That's something that

Bridget Lucas KC said in the case that my learned friend showed you before. Or -- I don't know what else you might have said, but something -- that if we had only known about it before, we could have taken it into account and done things slightly differently.

THE CHAIR: I mean, I suppose what you have flushed out is an issue of law between you about what the Court of Appeal has said --

MR PICCININ: Yes.

THE CHAIR: -- and I do intend to go away and think about that. You both put passages from the judgment in front of me, and I clearly need to read it carefully and make a decision about how they fall to be read together. I think you'll be detecting from my reaction, Mr Piccinin, that if I have the power to do so, I would certainly favour an approach which took these things in, as it were, an orderly way which allowed the Tribunal to regulate the process. But if I have no power to do that, then I have no power to do that. That's really the question I think you're putting in front of me.

MR PICCININ: Equally, though, sir, I don't want you to think we stand on ceremony for no reason. So, if you have thoughts on what process would be helpful to the Tribunal, then, as I said before, I would be very interested to hear what they are.

THE CHAIR: Yes. Well, instinctively I favour the idea that the Tribunal should -- if it has the power to do so -- should be able to give the kind of directions, and I appreciate that we don't know the background, that (inaudible) gave in *Spottiswoode* with a view to enabling a discussion between the parties about the scope of any requests, the manner of request, and how that's to be regulated in a way that is fair to both parties and the represented parties. As I said earlier, I'm certainly not for a moment taking any view as to the merits or otherwise of that process, what the outcome of that would be.

That would be, in a sense, my instinct in terms of the approach, if the Tribunal has the

power to do that, but if the Tribunal doesn't have the power to do that, well, I'm not sure that I can take that any further.

MR PICCININ: Just two things. One is that I'm told by my learned junior, for which I'm very grateful, that in *Spottiswoode* it was actually the defendant's proposal --

THE CHAIR: Right.

MR PICCININ: -- and that, I think, they required some information from the class representative, and that's why they approached it in that way.

Of course, that chimes with the position here too, in that also in this case, our instinct was the same as yours, in that I would have been delighted to have had a collaborative approach with Dr Ennis about this. But the problem is that Dr Ennis seems to be approaching this tactically, and remarkably for someone who is acting in the name of these developers, seems to have no interest at all in what they have to say on the key issues in the case, which are about them. My concern, sir, is that now having seen the response, the vociferous response that we've got on this issue, actually a process of doing this together with Dr Ennis is going to be more expensive and less helpful.

THE CHAIR: Well, I don't think what Mr Carall-Green was envisaging, was a process of doing it together, much as the Tribunal might have an obligation to seek to encourage parties to do that. I think what he's suggesting is a process where the Tribunal gives directions about procedure, and then directions that regulate whatever approach may be made in due course.

I don't think it's right to say that the reaction is one of non-cooperation in that sense. I think the reactions as I have taken it is one of making a submission that the Tribunal, I think Mr Carall-Green would say, actually has an obligation to take control of matters. There's clearly an issue of law between you about what the Tribunal can do.

MR PICCININ: Yes.

THE CHAIR: I suppose the question for you is, you know, if you choose to stand on

the submission, the Tribunal can do nothing. Well, so be it. I will have to go away and adjudicate on whether that's right or wrong as a matter of law and, you know, we'll take it from there, depending on what the answer is.

MR PICCININ: Yes. I suppose the other issue is, I'm not entirely clear on what the alternative is, so what the directions (inaudible) have in mind. We have explained the approach that we want to do. We've written down all of the requests that we propose to make.

THE CHAIR: Yes.

MR PICCININ: Of course, one of the issues --

THE CHAIR: Well, at the same time, I think you're making a submission to me that I have no jurisdiction, in effect, to --

MR PICCININ: What you have no jurisdiction to do, sir, is to invade the litigation privilege.

THE CHAIR: Yes.

MR PICCININ: What you can't do is ask to see our correspondence with developers, where we're seeking to gather evidence from them. The other thing you can't do is order us not to send letters to developers asking them to provide documents. Those are the two things you can't do.

Obviously, beyond that, we fully support the Tribunal's jurisdiction to regulate its procedure and to deal with whatever comes after that. That's what the Court of Appeal said.

If you had a procedure in mind for how we should deal with any contested applications, for example, then that's really what I'm asking. That's why we made this proposal.

THE CHAIR: It's very helpful, Mr Piccinin, and I think it is a good thing that you've raised it, even if you present me with an interesting legal question to resolve. You have identified two things the Tribunal can't do. What, if anything, do you say the

Tribunal can do by way of seeking to ensure that if there is a mischief -- and I'm not saying there is a mischief here -- if there is a mischief, the Tribunal can at least regulate the way in which matters proceed from here. Or is the Tribunal's jurisdiction, in your submission, limited to the procedure for any application that you might bring in due course?

MR PICCININ: Sir, it's difficult to articulate a treatise on the full scope of the set things the Tribunal can do. I don't know exactly what mischief it is that is the source of concern. But one obvious point is that if anyone has any concerns about the correspondence that they receive from us, they can raise it with you and you can deal with it as you see fit.

I would say, as well, this is a case where we're talking about a business class and many of them are large, sophisticated organisations.

THE CHAIR: You don't need to labour that point, Mr Piccinin.

MR PICCININ: We're not talking about writing to individuals.

THE CHAIR: Yes. I suppose the question is whether, given the submissions that parties have made, there's anything I can usefully do other than adjudicate on the question of the Tribunal's powers. You know, if I take the view that I have no power to do anything, well, then, so be it. If I take the view that I have a power, then I can reflect that in a judgment and know that parties can decide how to proceed from there.

MR PICCININ: I think that's right. I'm not sure there's anything much else. I hope they are as clear as to the limitations that we say exist. We are not saying that you don't have powers generally to manage the proceedings, obviously.

THE CHAIR: No.

MR PICCININ: There are two things you can't do, and they are the two things I articulated.

THE CHAIR: As I said a moment ago, Mr Piccinin, I think it's actually very helpful that

you have raised it. I think it's helpful that we've flushed out the difference between the parties, whatever the outcome of that might be in terms of the law.

Okay. Can we take that any further just now, unless ... Mr Carall-Green, is there anything you want to raise?

MR CARALL-GREEN: I'm going to rejoinder here, so I'm conscious that I think you have points, and I think I've got a few more topics to cover in the remaining hour.

THE CHAIR: Yes. Okay. Thank you. Expert evidence.

MR CARALL-GREEN: Sir, is that a convenient moment for a transcriber break?

THE CHAIR: Yes, that probably is a good moment. Thank you.

(3.33 pm)

(A short break)

(3.47 pm)

Expert evidence

THE CHAIR: Right. Experts.

MR CARALL-GREEN: We're on experts, sir. Yes. There is some common ground here about the fields that we will adduce expert evidence in. I'm not proposing to address you on those, in the interests of time. (Overspeaking)

THE CHAIR: I take it you've no objection on the two classes of expert that you've asked for but Apple didn't, if they instruct a counter-expert.

MR CARALL-GREEN: Yes, that's right, sir.

THE CHAIR: Yes.

MR CARALL-GREEN: That's right.

THE CHAIR: The experts. I think one of the documents suggests that it was for the app development and the third and fourth class, that it was a one way only, but I'm assuming that's not what's intended.

MR CARALL-GREEN: Well, I think some of them might be one way only because it may be that Apple is planning to adduce evidence by way of internal witness evidence --

THE CHAIR: Right.

MR CARALL-GREEN: -- because Apple has, for example, its own employees who might be able to speak to things about the app industry, for example. I think that may be the explanation for that.

THE CHAIR: Okay.

MR CARALL-GREEN: Is that right?

MR PICCININ: Just to clarify, I don't think there's any objection to us having an expert in those fields as well.

THE CHAIR: Yes. If I authorise expert evidence on the four categories of subject, then either party can instruct an expert. Obviously, they're not obliged to if they don't wish to.

MR CARALL-GREEN: Yes, that's right. (Overspeaking)

THE CHAIR: That must be right.

MR CARALL-GREEN: (Overspeaking) would seem to suggest that that's appropriate.

THE CHAIR: Yes. In relation to those agreed items, are there procedural directions that I could usefully give? It struck me that I don't think either party, with the exception of your economist, has disclosed the identity of their experts. In your letter at tab 9 of the core bundle, you have helpfully set out a list of issues that you suggest that the four experts should address. I don't know whether that list of issues is agreed, and if it's not, whether I ought to give directions to allow there to be a sort of exchange of positions in relation to the issues to be covered by the expert evidence. Then I would be interested in parties' submissions on the point at which I might impose page number limits on expert reports.

MR CARALL-GREEN: May I take instructions, sir?

THE CHAIR: Yes.

MR CARALL-GREEN: Right, sir, in terms of the issues to be covered, the way that it's currently framed is that the issues to be covered are headline issues, which then give examples of sub-issues. We don't feel strongly about seeking to agree a long list of specific sub-issues. If the Tribunal wants us to engage in that process, then of course we will do so. Apple has not engaged in that kind of granular discussion with us either. The parties have not headed in that direction, if you like.

THE CHAIR: It's simply that I've seen examples in the papers you produced of the Tribunal seeking to ensure that it buttons down just what's covered by, you know, competition economics or whatever. You know, it's easy to identify a headline area of expertise, but I think the Tribunal has an interest in ensuring that the issues that are covered -- and intended to be covered -- are commonly understood and are appropriate. So, unless the parties had submissions to the contrary, I think I'd be inclined to give directions which I can reflect on to encourage a process of dialogue, if that makes sense, with a view to agreement and ultimately resolution by the Tribunal if necessary.

MR CARALL-GREEN: We wouldn't object to that. It may be that a simpler way to cut through it - i.e., to stop debate that is not needful -- is one of the suggestions you made after, which was to impose a page limit. The reason I suggest that that is an easier way of dealing with it is that, if one is subject to the discipline of a page limit, it can be that naturally, non-core issues fall out. So that is just a very straightforward and simple way of doing it, although I appreciate it doesn't necessarily have the fine-grained detail that you might be looking for.

THE CHAIR: Mr Piccinin, do you have any views on ...

MR PICCININ: No, we're keen to do whatever is helpful to the Tribunal, as you'd

appreciate. The only thing I would say is that the expert reports are due in May next year. I don't think we can do it very quickly, if very quickly is what you had in mind. I mean it'd be quite important to get input from the experts in particular.

THE CHAIR: Indeed. I'm not clear if parties have -- and don't feel that you need to tell me if you don't think you should -- already instructed and identified experts in these various topics, or whether that's an exercise yet to be undertaken. I mean, the question is, are you looking for approval in principle today that these are areas of expertise that you can go off and instruct?

MR CARALL-GREEN: Exactly. I think that's closer to the position in relation to most of the topics, albeit that the Tribunal will know that our competition economist has already been instructed.

THE CHAIR: That's understood. Okay. In relation to page limits, until you've actually identified experts and they've had a chance to think about it, and we have whatever process of identifying issues, it's probably not a terribly helpful exercise to try and grapple with page limits at this stage.

MR CARALL-GREEN: Yes, agreed.

THE CHAIR: Okay. Well, let's look at the three issues that are controversial.

MR CARALL-GREEN: Yes. So, we start with app security and privacy.

THE CHAIR: Yes. Now, I noticed that in your letter of 9 January 2026 that's at pages 169 to 170 of the core bundle, the issues that you propose this expert should deal with are also within the list of issues to be dealt with under the heading of software and technical aspects of app development. Does that mean it's intended that you would need two experts, in effect, covering this issue?

MR CARALL-GREEN: It would be non-duplicative, sir. I mean, part of the question for us is about whether or not -- there's either a topic issue or perhaps an expertise issue, which is that there are parts of this that are, if you like, having to do with coding

or software. And there are parts of this that are having to do with the way that security and privacy work. It may in fact be that the same person can deal with that because the person who understands the software also understands the privacy and security aspects; that is possible. But we do not have, at the moment, confidence that that is true. It may be that the person that we instruct who has expertise in the field, who can tell us about things like software and coding, is not the same person who can tell us about things like keeping data safe. But you're right to point that out, sir.

THE CHAIR: I wondered was whether it's premature to consider a separate expert until you've had a chance to engage with the software and technical expert and find out whether there's a need for a separate --

MR CARALL-GREEN: If it was possible that you might not want to rule now on whether or not we would be permitted to have two separate individuals -- but, because there is a conceptual difference between these two things, we would want permission for the conceptual difference to be covered.

We have said on a number of occasions that if it can be done by consolidating many things within the same brain, within the same report, within the same individual expert, then we would seek to do so. But insofar as it is said, for example, that this part of analysing Apple's restrictions is really to do with the way the software works, whereas this aspect of dealing with the restrictions is to do with concerns around individual privacy -- as I say, it may be that that is capable of being dealt with by one person, but it may have to be dealt with by two -- we seek permission today, only in relation to the topic area, rather than having a separate expert.

So, sir, if I could take you to the pleadings to explain how the security and privacy issue comes up. If we start in the claim form which is in the supplemental bundle, page 47, paragraph 101. We say that:

"Apple maintains the App Store is the only mechanism by which apps can be

distributed or monetized." [as read]

Then we, at paragraph 102, identify various provisions of the contract called the DPLA and a document called the "Guidelines", as set out in paragraph 102. We call those the App Distribution Conditions. They are set out at paragraph 101 and defined at paragraph 102 as the App Distribution Conditions. We say at paragraph 122 that Apple has ensured that no alternative can exist. Then finally, at paragraph 140, we say that:

"The App Distribution Conditions contribute to two, out of the various factors, on which we rely to establish that the price is unfair." [as read]

Now, in its defence -- for this we skip forward to page 96 -- Apple says that the DPLA, the guidelines, and the App Distribution Conditions are actually a good thing because they promote things like reliability, security, quality and privacy. That's there at 16.1. It's there at paragraph 47 of the defence, which is on page 109, and it's at paragraph 85.1, which is on page 131.

Then Dr Ennis contests that in his reply. The dispute between the parties is, therefore, whether the App Distribution Conditions are unfair -- they go to the factors of unfairness -- or are they a good thing for promoting privacy and security?

More generally, I should say, that Apple's defence at page 136, paragraph 97.4. Apple says:

"Developers choose Apple because of the value that it provides, including the safe, secure, private, reliable, high quality and innovative App Store that Apple facilitates." [as read]

So, within the mix is privacy and security. Now, we say that digital safety and security is a technical area in which expert evidence will be of assistance. The Tribunal will know that digital safety and security around data, also around banking and payments, is a highly technical area in which there is considerable expertise out there. The

Tribunal will want to understand whether Apple does not need to restrict the way that apps are distributed in order to promote security and privacy, because if it does not, then that will support Dr Ennis's case that these conditions contribute to the unfairness of which he complains.

There is also an equality of arms issue here because, if the parties are limited to factual evidence in this field, Apple will have something of an upper hand. But since it has access to factual witnesses with relevant expertise, and if confirmation of that is required, we can see that from the *Kent* judgment, which is in the authorities bundle. We can see, for example, paragraph 13 of that judgment on page 1315. My learned friend mentioned earlier the evidence of Mr Federighi, and that paragraph of the judgment records that Mr Federighi oversees the overall security architecture for iOS. So, in order to ensure equality of arms, we say it's fair that Dr Ennis has somebody who can give testimony on privacy and security. So, shall I move to payment systems and digital banking?

THE CHAIR: Yes.

MR CARALL-GREEN: So, if we go back to the pleadings, sir, and back to the claim form, page 53 of the supplementary bundle. Paragraph 106:

"Dr Ennis pleads that Apple requires that all payments for relevant sales are made using Apple's proprietary payment system." [as read]

The claim form uses the term ASPPS; that's not been adopted because I don't think Apple uses that nomenclature, but that's what that means. He again identifies aspects of the DPLA and the guidelines on this, as well as identifying the point at 1063, that it is technically impossible to circumvent the use of Apple's payment system. So, at paragraph 109, he defines those as the Payment System Conditions. And he says at paragraph 132 that, by the Payment System Conditions, Apple has ensured that developers are unable to avoid payment of the commission.

Then once again, a bit like the distribution conditions, he relies on the Payment System Conditions in paragraph 140 to support the first two factors of unfairness.

Now, on payment systems and digital banking, Dr Ennis has proposed that the expert evidence would address three quite discrete topics. The first issue -- and, sir, you will have seen this, I think, from the expert proposal schedule. The first issue is the costs to app developers associated with providing alternative payment systems including commission structures offered by third-party providers. The point here is that, because Apple requires developers to use its payment services, a relevant question may be how much those are worth, because that goes to what developers are getting from Apple.

This can be answered by expert evidence because an expert can say what kind of price one would usually expect for payment services, what Apple's service looks like, and therefore how one would expect to see Apple's service priced. So, for example, if the market for payment services has a range -- I don't know what it will be: 1 per cent to 10 per cent or something -- but Apple's service can be explained as being a very basic one or a very sophisticated one, then that will affect where in the range we pitch it.

Now, Apple says that this is a factual question, but we say there are a couple of downsides to approaching it in that way. First, we could scrape through the internet to find lists of prices or seek disclosure from -- well, I'm not really sure -- who knows where, but we don't think that that's likely to give a comprehensive or representative view of the market. An easier and more proportionate way is to ask an expert what sort of price one would expect to pay for this kind of service.

Second, just looking at other prices doesn't tell you where to situate Apple in the pack in the way that I have just described. Now, there was a debate about this in the *Kent* judgment. If we can go back to that, sir, at page 1613, we will see that at

paragraph 858 the class representative put forward a comparator called Paddle, which it said was a good benchmark for the price that payment services should be charged at. Apple responded to that at paragraph 860, saying that Paddle is not a good comparator because its services are narrower and less attractive. So, the argument about where to pitch Apple services in the pack was live in *Kent*. We say that some evidence on this discrete issue from an expert would assist the Tribunal to resolve that issue.

THE CHAIR: Can we tell whether it was dealt with by way of expert evidence in *Kent*?

MR CARALL-GREEN: Mr Piccinin may be able to assist on that question, but perhaps --

THE CHAIR: I'll let him think.

MR CARALL-GREEN: He will illuminate us shortly.

The second issue is the security and privacy standards of alternative payment systems providers. Now, I've already explained that Apple says that the DPLA and the guidelines do good things for privacy and security. For further examples of this, we can refer to the defence at paragraph 32 on page 103 of the supplementary bundle, where Apple pleads:

"The App Store business structure opened iOS to third-party app developers while at the same time protecting product quality, performance, device and iOS app reliability, security and privacy for consumers." [as read]

The defence at 56 specifically pleads that the payment system includes fraud detection and fraud prevention checks and, again, the defence at 97.4 I've showed you. Apple says that developers choose Apple because of its safety, security, reliability and all the rest of it. An important aspect of safety, security and privacy that I've already alluded to is safety, security and privacy surrounding banking and financial transactions. So, we say that some expert evidence on this is likely to be helpful.

The third issue that we say the expert would opine on would be the introduction and significance of the ability for app developers to offer alternative payment systems. We have discussed earlier today, and it is also pleaded in the claim form, that Apple has been required to allow third-party payment processing systems in certain places. In the claim form, we've noted the Netherlands and Korea. Now, Dr Ennis suggests that a good way of exploring the first two issues, i.e. costs and security standards. The costs of payment processing, the security standards of payment processing. A good way of accessing those issues would be to explore how developers' experiences have changed in places like the Netherlands and Korea where they have been allowed to use those alternative payment processors. So, issue 3 is effectively trying to elucidate issues 1 and 2.

If I could answer, briefly, one of Apple's points, which is that Apple says in its skeleton argument that not every pleaded issue warrants expert evidence and essentially makes the point that this is on the small side as issues come. Dr Ennis' reply to that is that his application on the payment systems issue is very modest since he only wants evidence on three discrete points. In fact, this issue is not unimportant because it does go to part of the way in which Apple seeks to justify its price. (Pause)

That's all I wanted to say about those two, sir.

THE CHAIR: Thank you.

Mr Piccinin?

MR PICCININ: Our position on this application -- or our perspective on it -- is really one of trying to help the Tribunal avoid an unnecessary headache down the line. This is a very complicated area of evidence to allow into a set of proceedings. (Inaudible) generate a lot of work, and a lot of expense and then a lot of disputes about the issues that arise under them for consideration at trial. The question is, where does it actually go? Our position is, we can't see how it goes anywhere and that's why we're resisting

this. But, ultimately, it's for the Tribunal. If the Tribunal would find it helpful, having heard us both on this, then, in that sense, fine.

But just to explain. There's a key distinction that is being elided in my learned friend's submissions. One question is, how safe and secure and private is the ecosystem and the App Store and the payment service that Apple offers to developers and customers? How much do developers value the high security and safety and privacy and characteristics that we offer? That is the issue that my learned friends rely on in paragraph 50 of their skeleton argument as being the basis for this evidence. But that's not the issue. It's not the same as the issue that my learned friend just addressed by reference to the pleadings and by reference to what his expert is going to do. Because, actually, that's not the question that he's asking the experts to look at all.

A different question -- it sounds similar because it's got some of the same words in it -- is whether Apple's business model, the way that the App Store works, the fact that you can only distribute native apps for iOS through the App Store and you can only do payments for digital content in iOS native apps through Apple's commerce engine, are those restrictions necessary to achieve the high levels of privacy and security and safety that we offer to developers and customers? Or would it be possible to achieve those high levels of privacy and security, et cetera, in some other way, with a different security counterfactual and different set of restrictions?

That second question is the one that the expert evidence that's proposed will go to. That is, as I said, a very complicated question. That was in issue in *Kent* and it's been in issue in quite a few of the other cases. And the reason it was an issue -- and that's why we know how painful it is to deal with -- is because, in those cases, it was being said that the competition law prohibited Apple from operating the system that it did and Apple had an objective justification defence based on ... (overspeaking).

THE CHAIR: So, in those cases, it's not going to the price question?

MR PICCININ: No, exactly. The price question is a separate thing. So, in *Kent*, there was also a price question, but it was separate from the question of whether the restrictions are actually necessary to achieve the benefits.

Now, my learned friend is right that the pleadings do refer to this question of the restrictions and whether they're necessary. But actually, the only way in which they are relevant to the claim -- if we just go back to the key paragraph that my learned friend showed you in supplemental bundle, page 72. This is in the claim form. This is the punchline that draws on the earlier bit of the claim. They say that the payment of commission is effectively inescapable. So, because of the App Distribution Conditions and because of the Payment System Conditions, third-party app developers are required to distribute their third-party apps exclusively via the App Store, et cetera. And so, essentially, the argument is: because you don't give developers any other way of doing this, that's relevant to your assessment of whether it's fair or unfair. But I suppose the relevance of it is that if, in a different universe, developers could deal and transact in totally different ways, then you might infer from the fact that they're choosing to transact in this way that they like it. So, they're saying, "Well, you can't do that because they don't have the choice".

Now, to be clear, we do take issue with the underlined wording at the start of 140.1, because the commission is not inescapable at all. There are lots of other ways that developers can transact, even with iOS device users for digital content that those device users will consume on their iOS devices. You can sell it on your website, you can sell it on completely different platforms and then it can be accessed in a game that you play on your iPhone. Or you can have a subscription to a video streaming service on the website, and you can watch it on your iPad without paying any commission to Apple. So, we do disagree with that. But that disagreement -- that's the market

definition disagreement -- has nothing at all to do with privacy or security or safety.

Now, it's true -- and my learned friend showed you -- that when we were responding to these paragraphs that said, "Apple, you forced developers to transact only through the App Store", it's true that we pleaded by way of context -- we didn't just leave that standing -- that, of course, the reason we do that is for privacy and security and safety reasons. But we're really pleading that by way of context. It actually doesn't matter whether we're right or wrong about that. What does matter is that we deliver a high level of privacy and security and safety because that is relevant to value. But that can be assessed in other ways, and my learned friends don't propose to ask their experts to opine on that. So that's, in a nutshell, why we object to the first one, the privacy and security one.

For the same reason, we object to the privacy and security element of the payment systems and digital banking one, which is dealt with in paragraph 51 of my learned friend's skeleton. It's essentially the same point. Again, there's no dispute about what the restrictions are. My learned friend then draws the conclusion that, "Well, that's relevant to unfairness", but again, there's no dispute about any of the primary facts there. But then when you come to say, well, what's the expert evidence going to be? Well, insofar as it's relevant to the necessity of those restrictions, it just hits a brick wall. It doesn't go anywhere beyond that in the case.

There were two other points that my learned friend said he wants a payments expert for, and if we can just pick that up. I've got it at page 953, I think, of the core bundle but I think you might have had a different reference. (Inaudible) the draft order was it (inaudible). In any event, the first one was the one you remember which was to opine on what it costs developers to use alternative payment systems. What does it cost for a developer on their website, for example, I guess, to get an alternative payment system?

The answer to your question, sir, about whether that was addressed in *Kent* by way of expert evidence is yes and no. There were two things. There was Mr Owens, to whom you saw reference in the judgment, who was a factual witness talking about his own company, Paddle, that provides those kinds of services. There was also a payments expert, but the primary purpose of the payments expert was to address the privacy and security type issues. In passing, he did also just provide a neat summary of publicly-available material on what the costs of alternative payment systems are. So that was dealt with by way of expert evidence, but that's not really the main problem here. I mean, we do say that since an expert can just look around the internet and pull out all of the prices that people pay for these services, you could appoint them to do that and then what you're really deploying is what they found. You don't need an expert for that, but that's not really the problem here. That's not the reason why this is going to cause headaches to everyone at trial. (Pause)

Yes, the third reason he gave was that they wanted to address the question of how third-party payment processing systems in the Netherlands and Korea have affected developers' costs and security as well, but we don't really see where that goes or why that calls for expert evidence either. It's funny how many of these topics actually seem to call for asking developers questions about their experience. It is surprising that Dr Ennis doesn't want to go down that route.

But, standing back, really the issue here is that it seems to us that these issues and these areas of expertise have just been lifted and dropped from what they've seen happened in *Kent*, without regard for the fact that what they were relevant to in *Kent* was an exclusionary abuse allegation, which is not pursued here.

Ultimately, coming back to where I started, if, having heard all of that, what you're thinking is, "Oh, I'd really be delighted to see some expert reports that talk about the very detailed ins and outs of whether the undoubted privacy and security

achievements of Apple's systems are really caused by this or that or the other thing". Well, then that's a matter for you, sir.

THE CHAIR: Thank you. Yes, thank you. And on the equality of arms point which Mr Carall-Green made, is your answer essentially that it doesn't arise because you say it's not of sufficient relevance to trouble the Tribunal?

MR PICCININ: Of course, we'll adduce evidence on the question that is important in the case, which is the privacy and security and safety benefits that we offer to developers and consumers. That is relevant, but that's not the subject of my learned friend's application when you actually look at it.

THE CHAIR: Thank you.

Mr Carall-Green, anything you wish to say in reply?

MR CARALL-GREEN: I think the brief point, sir, is that I think my learned friend is right that we say, because you don't give anybody a choice, that's relevant to unfairness. So, the question is whether or not we're right about that, that that contributes to unfairness. If not giving you a choice is actually a benefit because it achieves some privacy and security goal, then that may be an answer and that appears to be Apple's answer because Apple says that this goes to value. So it may be that this can be assessed through the lens of value, i.e. are these restrictions, as we say, detractors from value or, as Apple says, contributors to value? And for that, what you effectively are looking for, sir -- what will be of assistance -- is effectively considered opinion about a broad cross section of the market.

I think that might be it on Dr Ennis's expert evidence so I think we might go to Apple's expert evidence. (Pause)

MR PICCININ: Finally, we come to our application, which is for valuation evidence. Essentially what we would like permission to do is adduce a report from an expert who can value the tools and technologies and services that Apple provides to developers.

We say that is highly relevant to the unfair pricing analysis, and to adopt my learned friend's characterisation of -- I'll just wait for you to plug that in, sir.

THE CHAIR: I suppose the question I had on this topic was just how much clarity there is on the nature of the expertise and the nature of the valuation question that you're going to ask them to address. I've seen in the *Kent* judgment reference to valuation, and I can understand why that is an issue that you would wish to lead evidence on. My question at this stage is whether the proposition is sufficiently well defined to be one that I can really determine at this stage, or whether it's something that might require a bit more work in order to present the Tribunal with a proposition that's got clarity about the type of expert and the question or questions that that expert is going to address.

MR PICCININ: Yes. I mean, that's entirely fair, sir, if I may say so. It ties back to the discussion we had earlier before we got onto the contested ones in relation to the economist as well, which is you will at some stage want a proposal about who exactly the expert is, and also you will want more detail on the issues that they're going to address with some precision, and then to consider those and say whatever you have to say about them. That's the modern practice of the Tribunal. But at this stage, consistent with the approach that we've taken to everything else, all we're really doing is raising the topic. But that is of course still subject to the control of the Tribunal in considering those later stages, exactly who it is and why we say their qualifications qualify them to opine on these issues. Exactly.

THE CHAIR: It was more at the level of concept here, that I had a question, which is: what is the nature of the valuation expertise? I mean, you get valuers who value all sorts of things for lots of different purposes, and they come from different backgrounds, disciplines and expertise. Associated was a question that I, would welcome help with, which is what it is that is being valued. I understand the headline proposition that

you've given me, that it's to express a view on the value to developers of the tools, technology and other aspects, no doubt, of the ecosystem. But it's just what that valuation exercise involves that I think I would welcome some assistance on.

MR PICCININ: Yes. I think the frank answer to it is that we don't yet have a particular person with a particular set of methodologies that I can present to you today, in short. We do envisage presenting that to you in due course.

THE CHAIR: Yes.

MR PICCININ: If where you are is that in general having evidence on this topic, broadly construed, might be a good idea but you'd like to see the details, then I don't think we would have any objections to that.

THE CHAIR: I think my thinking, subject to anything either party wishes to say on this one, I'm not going to prejudge it. If I put it this way, having read *Kent*, I entirely understand why you wish to explore leading expert evidence of this sort. But it's quite hard for the Tribunal to express our view at all until we see something more concrete. If that involves instructing someone who can then, as it were, allow you to flesh out the proposition, I wonder whether that's the right way to go, and then you actually bring the Tribunal a more robust application. You have fulfilled the obligation that was, I think, laid down in the procedural directions of putting the issue on the agenda. I'm certainly not, you know, foreclosing you bringing the application forward once you've got a proposition, consistent, of course, with the broad timetable that we have in mind.

MR PICCININ: Exactly. Yes.

THE CHAIR: Obviously, the later it's left, the more difficult it may be for the Tribunal to agree to an application.

MR PICCININ: Yes.

THE CHAIR: I don't know whether that sounds sensible.

MR PICCININ: I'm perfectly content with that. I know my friend had some principled

objections to valuation evidence --

THE CHAIR: Yes.

MR PICCININ: -- which I certainly don't accept and would want to deal with if they were being pressed (overspeaking).

THE CHAIR: But I wonder whether given the time, Mr Carall-Green, the better approach is the one I've suggested.

MR CARALL-GREEN: Yes, sir.

THE CHAIR: It does occur to me in relation to your two contested topics also that there might be benefit if you had already identified an expert. Sometimes I think one sees a sort of short, you know, short two-page document from the expert which helps the Tribunal to understand just what it is that the expert is going to speak to. As I was reflecting on what you were saying, it occurred to me that that might be a more sensible view, so again the Tribunal has a greater clarity on just what it is that you're envisaging.

MR CARALL-GREEN: Yes, I understand, sir.

THE CHAIR: But I have both parties' submissions on those, and I'll reflect on them. But it does strike me that may be the proportionate way forward at this point.

MR CARALL-GREEN: To be clear, in terms of the evaluation evidence, there's a sense in which I don't want to blow too many holes in it, because if the Tribunal is minded to order it, then Dr Ennis will wish to have his own expert in the same field, and one of the things that he would say ought to be covered is not just the value that Apple provides, but also the value that developers provide. So, it's important, from an equality of arms perspective, that we cover everything. But Dr Ennis essentially, I think, has the same questions as the Tribunal, which is: what precisely is being valued, and in what sense is that something that is not properly done by the competition economist?

THE CHAIR: Yes.

MR CARALL-GREEN: Those are the key questions.

THE CHAIR: Yes. I mean, it's also a fair observation until we've got clarity about the proposition. It's quite hard for you to -- you can't instruct a counter-expert, at least in the directly comparable field.

I'm conscious we're a long way out from a trial and a long way out from the exchange of expert reports. Nevertheless, it does strike me that if this is going to become an issue, it's going to absorb potentially quite significant time and resource, and I wonder whether fixing some sort of date for an application in relation to valuation evidence, and potentially if I take the view that it's the right thing to do, brief summary reports from you would be a sensible thing to do.

I don't want, Mr Piccinin, to put you and your side under any undue pressure. At the same time, I would be, I think, disappointed if we ended up a long way into the year without an application. I'm sure you wouldn't do that anyway. I wonder if it would be helpful for the Tribunal to perhaps either fix a deadline or even fix a CMC at which you can bring that application forward.

MR PICCININ: Yes. Perhaps I can just take instructions on that.

THE CHAIR: Yes. Because timing, I think, is the important point there. (Pause)

MR PICCININ: I'm being asked whether we can propose to have a hearing on this just on the other side of summer; so, in September, say, with the proposals to come over the summer break, so end of August.

THE CHAIR: You're confident that will allow enough time for --

MR PICCININ: I should clarify exactly what it's for as well. My understanding of what you were saying was identifying who the experts are, and a more granular account of what it is they're going to do.

THE CHAIR: And a more concrete proposition from you in relation to methodology.

MR PICCININ: Yes.

THE CHAIR: Or, you know, the exercise that is being embarked on.

I'm conscious that Dr Ennis, if you're bringing forward that sort of application, may have a -- Mr Carall-Green has foreshadowed that he may have his own application to bring forward, and I wonder whether we could fix a hearing but have an earlier date where there's some exchange of proposals or application.

MR PICCININ: That's the (overspeaking).

THE CHAIR: I think I would -- yes.

MR PICCININ: We'll aim for that kind of after the summer landing point, but then work out between us what the steps are.

MR CARALL-GREEN: We have a preference for bringing it a little bit earlier, just because we agree with the Tribunal that this is likely to be -- if expert evidence is laid on in the field of valuation, from a separate individual who's perhaps not yet familiar with the case, that's quite a considerable exercise, potentially, and if it is left until, for example, October for us to decide whether that's happening --

THE CHAIR: It might depend what people think of as the other side of the summer. I don't know what people's views are. I suspect the options are late July, which I suspect would be too soon from what you say, Mr Piccinin.

MR PICCININ: I think late July sounds nice, but it's actually closer than you think.

THE CHAIR: Yes. But equally, I'm not sure you envisage October, at the other end.

MR PICCININ: No. I did say September, I think. Beginning of September.

THE CHAIR: Yes.

MR CARALL-GREEN: The point is the same point. We would quite like more time to do the work, as opposed to planning what the work might be, given the option.

THE CHAIR: Yes. No, I take that point. Well, we'll look at diaries.

I don't know whether this feeds into it, but I had rather the same thought in relation to

your proposition in relation to survey evidence, Mr Piccinin.

MR PICCININ: Sorry?

THE CHAIR: The next agenda item, which is the proposed survey evidence, where again, you're not bringing an application before me.

MR PICCININ: We don't have an application.

THE CHAIR: You're foreshadowing. You may wish to --

MR PICCININ: Depending on what the economist says.

THE CHAIR: Depending on what your economist says. Again, I would have thought the sooner that there's a degree of clarity about what you're proposing and can bring that to the Tribunal, the better. Obviously, if it depends on input from the economist, then that needs to be put in train.

MR PICCININ: Yes.

THE CHAIR: But on that, I don't think you're asking for anything from the Tribunal today. But again, I think it would be helpful for that to be brought to the Tribunal within the same --

MR PICCININ: The same sort of time, yes. I think that is what we had in mind.

THE CHAIR: Same sort of time scale, again, subject to anything you have to say, Mr Carall-Green.

MR CARALL-GREEN: Well, it's grist to my mill that a bit more time on the work side, as opposed to the planning side, is helpful, because we're now talking about potentially quite a lot of expert evidence, valuation, perhaps the two topics that I've addressed you on, and potentially also the survey as well, where there's no clarity on what work will be done or whether it will be done at all until the other side of the long vacation, which is not optimal, sir.

THE CHAIR: Yes. I suppose the difficult thing, Mr Piccinin, is with the survey evidence. Am I right to understand the economists will wish to have access to that

evidence?

MR PICCININ: Yes.

THE CHAIR: I would guess that undertaking a survey of this sort is not a short or trivial undertaking, and I suppose I'm thinking ahead to -- I think it's May 2027 for expert reports. If we don't even know until September whether there's a survey going to be proposed, I just wonder whether that leaves time for a survey to be undertaken, experts to absorb it, and for that to be absorbed into a report from the economists.

MR PICCININ: Yes. I mean, that is still quite a significant period of time. The five months in 2027 and a couple of months in 2026, that is not a short period of --

THE CHAIR: No.

MR PICCININ: The other point is that, of course, the factual evidence is being done before then, and the burden on that is really on our side, and so it's not like we don't have a lot to be doing as well.

THE CHAIR: If we were to try and deal with this ahead of the long vacation, is that something that would be doable in terms of identifying a valuation expert and getting some clarity about the proposition?

MR PICCININ: I mean, if you set a deadline, that's your deadline. But equally, this is the kind of thing where if you rush it then you get less information and it's less ideal in terms of the consideration of it.

THE CHAIR: I'm keen though that we know whether this is going to be a chunky issue of the case sooner rather than later.

MR PICCININ: I understand.

THE CHAIR: I'm minded, subject to diaries, to envisage a CMC just before the long vacation and with a view to addressing this issue. I think that would be better from the point of view of keeping the Tribunal, keeping tabs on what the case is going to look like. Okay. I think that leaves cost budgeting.

MR CARALL-GREEN: Sir, there's one point that my learned friend may wish to raise, because there is an issue that I don't think we've covered that's raised in Apple'sskeleton, which is whether evidence on quantum should address pass-on. I don't know if he wants to say anything about that, but it might be worth mentioning.

MR PICCININ: I'm not sure there's any need for it. It's not an additional expert, it's just something that the economists may need to address, that's all. But I think that will be swept up in the process that --

THE CHAIR: If we're doing an exchange of issues and buttoning that down, then that can be resolved if there are any questions at that point.

Mr Carall-Green, cost budgeting?

Cost budgeting

MR CARALL-GREEN: Cost budgeting, yes, sir. So, Dr Ennis seeks an order that Apple prepare a cost budget showing incurred costs and estimated future costs. So just to be clear, what Dr Ennis is seeking is not the full cost budgeting orchestra that comes out in High Court with all of the attendant agreement and comments and all the rest of it, just seeking a degree of transparency and understanding about what Apple has done and what it's planning. He may wish to seek further orders on the basis of that, but at the moment all he's seeking is information.

We do say, sir, you will have these in mind because they're cited in the skeleton argument, but you'll have in mind the *Bulk Mail* and the *Spottiswoode* cases where cost budgeting was ordered in the Tribunal, in collective proceedings. And we draw attention to the observations made by the president in *Spottiswoode* where she said:

"We think it's right to put the parties on equal footing in terms of the Tribunal's cost management. There is a general concern within the Tribunal about the management of the costs of collective actions, and it is important that the Tribunal has oversight of

the costs of collective actions along the way if the Tribunal is going to meaningfully exercise control over the costs that are being incurred." [as read]

THE CHAIR: Now, I take it from your reference to that quote from the president that you would be inviting me to order you to produce a cost budget as well.

MR CARALL-GREEN: I would have no problem with that. So, it's certainly again, the equality of arms applies --

THE CHAIR: You're envisaging a reciprocal level of transparency?

MR CARALL-GREEN: Yes. I'm aware of the time, sir. I suppose the quickest thing to say is we don't really see any downside to that. It seems only sensible and appropriate, given that Dr Ennis has been transparent and is willing to be transparent, that Apple could be similarly transparent. Then if there are orders that Dr Ennis wishes to seek on the basis of the information that has been given, we can take it from there.

THE CHAIR: Yes. I suppose just one question: you're not putting before me any particular practical consequence or reason from Dr Ennis's point of view that would flow from transparency; it's simply an interest in mutual transparency, the Tribunal having visibility on the overall costs being incurred, and the opportunity for either party, if so advised, to seek some further direction?

MR CARALL-GREEN: Yes, I think that's right. I mean, I would say that if your question is "What practical benefit is it to Dr Ennis?", one point that is quite important for class representatives to understand is they will have a view on what the potential upside is from class proceedings. Understanding what their adverse costs exposure could potentially be is not irrelevant to questions such as settlement. It's a factor. So, it has an ongoing practical benefit to be aware of what the downside risk looks like.

THE CHAIR: Yes. Of course, even if you have visibility of the costs being incurred, they may not be recoverable costs.

MR CARALL-GREEN: That's right, sir. But again, having the information gives

a sensible starting point to have that discussion. We can say, well, these costs look like they potentially might be recoverable and therefore we know what the downside looks like.

THE CHAIR: Thank you. Mr Piccinin.

MR PICCININ: Yes, sir. The context for this application is somewhat ironic in that Dr Ennis has spent £7.4 million, which is almost half of what he budgeted for the whole of the proceedings -- you can see that on page 942 of the core bundle -- and what we have told them is that, although we haven't got as far as working out what our recoverable costs would be up to this point in these proceedings, but that we have spent significantly less than Dr Ennis has spent on these proceedings. So, we say that there is no basis for there to be any concern about the level of Apple's costs.

Indeed, there is a fundamental difference between the position of a class representative and a real client like the one I have, which is that they are spending their own money that they could otherwise be spending on innovation, developing new products for their customers. They have no interest at all in spending more on me, although they're sitting behind me, than is absolutely necessary. That's why it's not surprising that what you see here is a company that is disciplined in its legal spending, and it's come in significantly under what the class representative -- who is of course spending someone else's money and paying himself handsomely in the process -- has spent which is £7.4 million, getting to this stage of the proceedings. So, we say there's just no warrant for this from the defendant at all.

Now, my learned friend asks what the downside is. I don't know, perhaps he hasn't done one of these recently, but producing cost budgets is itself a costly and, with the best will in the world, highly uncertain process. Particularly --

THE CHAIR: In terms of the uncertainty, I did read the class representative's initial cost budget, and it was, unsurprisingly, a very brief, high-level document.

MR PICCININ: Much more brief and more high level than they usually are, sir, in collective proceedings claim forms.

But then there are lots of uncertainties about how the class disclosure process is going to develop, how many more CMCs will need to be listed, what will happen in the *Kent* appeal and what impact that will have on the evidence that we need for this trial. There are just lots of contingencies. So, trying to work out what the future costs are going to be with any kind of accuracy is quite difficult.

THE CHAIR: And you would presumably also say -- but correct me if this is wrong -- that at the end of the day, of course, Apple as the defendant can choose to spend what it chooses to spend.

MR PICCININ: Of course, there's no question of that.

THE CHAIR: And there is a separate question about what would be recoverable.

MR PICCININ: Yes.

THE CHAIR: So that even if you're giving transparency about actual spend, that would require further interrogation before it gives the kind of usefulness that Mr Carall-Green seeks to --

MR PICCININ: That's right, and that is another point of distinction between the position of defendants and the position of the class representatives. That, if what you see on the class representative side is budgets being blown, vast amounts of money being spent for not much purpose, then that is well within your supervisory jurisdiction. But that's not something you need anything from us on.

Now, my learned friend says he's not proposing, at least for the moment, the kind of bells and whistles, full circus of a Precedent H kind of process. A cost budgeting process of the kind you get in the High Court. But this does seem to me to be a situation of trying to sail between Scylla and Charybdis then, sir, because when we produce these budgets and we spend a whole lot of time and a whole lot of money

producing them, either you then put them in a drawer and do nothing with them, in which case we have just wasted quite a lot of time and money for no particular purpose. Or you scrutinise them, in which case you have all the problems that come with any kind of process where you go through and test that.

In contrast, what we accept is reasonable, is to ask us to provide updates from time to time on what we've actually spent, which is something concrete, something that doesn't require a crystal ball and is something that's useful because they can then both see the trajectory and also see what the level is and whether they need to make an adjustment to their ATE. But getting our forecasts of what the spending in the back end of 2027 is going to be, is frankly not a good use of that time.

THE CHAIR: I take it from that that you wouldn't object to a mutual disclosure from time to time of the actual spend on each side.

MR PICCININ: I said that in my skeleton, we could do that.

THE CHAIR: Yes.

MR PICCININ: It's not something that requires an order from the Tribunal but if you wanted to supervise it, you could, sir.

THE CHAIR: Thank you.

MR PICCININ: Those are my submissions.

THE CHAIR: That's very helpful.

I just have one question relevant to the issue of costs. You're here with two junior counsel; is there a particular reason why, from a cost perspective, you need to have two juniors for this CMC.

MR PICCININ: Yes. So, I don't know if you recall the way in which the two hearings that we've had in these proceedings were listed recently but, essentially, it's got to do with availability. So that's why the people you see in front of us, that are with you today, none of us were there at the decertification hearing and vice versa. It's just

a question of quite a lot of agenda items, quite a lot of juggling between other hearings.

THE CHAIR: Yes. No, it's not a question -- also, I don't have any doubt about the contribution that individual counsel will make. It's just something that, from time to time, the Tribunal raises, which is whether it's appropriate for the costs of multiple counsel to be borne by the other side. If you've got particular reasons why you've had both your juniors here today, that would be helpful to know.

MR PICCININ: Yes. On this occasion, I simply couldn't have done it without both of them, that's the truth of it. I'm in court tomorrow on another matter, on another case, and I couldn't have prepared this hearing without the contributions of both of them. Both of them were also in other hearings at different times over the past couple of weeks so one person couldn't have covered it.

THE CHAIR: That's helpful.

Is there anything else that I need to deal with today?

MR PICCININ: Sir, there was the one point at the end of our skeleton where we floated -- it's not something you need to decide today -- the potential consequences of the listing of the *Kent* appeal, because --

THE CHAIR: Yes, what I didn't entirely understand is why the listing of the *Kent* appeal would have an implication. I can well understand that the outcome of the *Kent* appeal, depending on what the Court of Appeal says, could have implications in due course. But --

MR PICCININ: That's (overspeaking) the point. My recollection of the logic of the dates that we've currently got, with expert reports in particular going in May 2027. So, I think we were all envisaging that *Kent* might be fully wrapped up by then and so we would all know what the legal lay of the land was going to be. Then the experts could be doing the analysis, and they need to hit the right legal target. As things happen, the Court of Appeal process has just gone a little bit more slowly than it otherwise

might have and, depending on where it's listed. The one thing you can say about the Court of Appeal, you can say many things, but it's that they often produce judgments quite quickly after the hearings. So, when you know when it's going to be listed for, you could make an assessment of whether the judgment is likely to come before or after those expert reports and if it's after rather than before, or too close to them to take it into account --

THE CHAIR: Yes, that's very helpful.

MR PICCININ: -- that would be unfortunate.

THE CHAIR: Very helpful to have that marker put down. I think all we can really do is keep an eye on that and if it looks as if it's going to cause difficulty, we'll have to adjust the timetable accordingly.

MR PICCININ: Yes.

THE CHAIR: Good. Thank you.

Anything else from you, Mr Carall-Green?

MR CARALL-GREEN: I'll take instructions, sir, but I think that's a wrap.

THE CHAIR: Good.

MR PICCININ: In the meantime, sir, I'm very grateful to you and also to the judging staff for staying late.

THE CHAIR: No, not at all. I was just going to say, well, Mr Carall-Green is --

MR PICCININ: There may be another point.

THE CHAIR: And I should just say I'm going to take the various issues you've raised at today's hearing.

MR CARALL-GREEN: Apologies sir, thank you for your patience.

THE CHAIR: Not at all.

MR CARALL-GREEN: There are no further items to raise, we just want to make clear that once Apple says what the implications of *Kent* ought to be, we don't accept that

necessarily the timetable will have to be disturbed as a result of that. So, it's just a question for another day. Just didn't want it to be misunderstood as being an agreed point.

THE CHAIR: Yes. No, thank you for that. I'm just going to take away all the issues you put in front of me. You've given me one interesting issue of law which I'm looking forward to grappling with. You've given me quite a lot of practical decisions to make. I'll do that just as quickly as I can. But in the meantime, I'm grateful to both counsel, indeed all counsel and those who have been responsible for preparing the papers and supporting you for the way you've conducted this hearing today. So, thank you very much.

(4.57 pm)

(The hearing adjourned)

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Key to punctuation used in transcript

--	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?