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4 record.

5
6 **IN THE COMPETITION**
7 **APPEAL TRIBUNAL**
8

9 Case No: 1673/7/7/24, 1408/7/7/21

10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP

13 4th June 2026
14

15 Before:
16 The Honourable Mrs Justice Bacon
17 Tim Frazer
18 Andrew Taylor
19 (Sitting as a Tribunal in England and Wales)
20

21 BETWEEN:
22

23 **Professor Barry Rodger**

24 **Class Representative**
25

26 &
27

28 **Elizabeth Coll**

29 **Class Representative**
30

31 - V -
32

33 **Alphabet Inc., Google LLC and Others**

34 **Defendants**
35
36
37

38 **A P P E A R A N C E S**
39

40 Robert O'Donoghue KC & Daniel Carall-Green (instructed by Geradin Partners) on behalf of
41 Professor Barry Rodger

42 Mark Hoskins KC & Gideon Cohen (instructed by Hausfeld) on behalf of Ms Coll

43 Kassie Smith KC & Josh Holmes KC (instructed by RPC) on behalf of Google
44

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Thursday, 4 June 2026

1 (10.30 am)

2

3 Housekeeping

4 THE CHAIR: Good morning. Some of you are joining us live stream on our website,
5 so I'll start with the usual warning. An official recording is being made and
6 an authorised transcript will be produced, but it is strictly prohibited for anyone else
7 to make an unauthorised recording, whether audio or visual, of the proceedings, and
8 breach of that provision is punishable as a contempt of court.

9 Thank you very much.

10 We have I think a broad running order, and I'm just going to tell you what I have on
11 my list today, and the order in which I think we can deal with things. I should say it's
12 possible that we could finish today. We'll see where we get to at lunchtime. If it
13 looks like we're going to be sitting say beyond about 5 o'clock then obviously I am
14 not going to keep everyone here and we can come back tomorrow, but we'll see
15 where we get to.

16 I have on my list first of all expert reports, following the communication from the
17 Tribunal that you will have received, and the question as to how we progress those.
18 Secondly, trial timetable. I'm not going to micromanage at this stage, but I think we
19 can give an indicative view as to what amendments we think will need to be made to
20 the timetable and then we'll send you off to have another go. Thirdly, the objections
21 to Singer 4 and Krein 3, I am just giving directions for that to be dealt with, I'm not
22 expecting to give a ruling on that today. Fourthly, consideration of Coll's objection to
23 the schedule of *Evans* objections. We will see where we get to on that. It may be
24 that directions are required or we will even be able to deal with that today. Fifthly,
25 the costs of Coll's transaction data application and expert evidence application. Is
26 that still live, or has it now been agreed?

1 MS SMITH: I understand that's now been agreed between Coll and Google.

2 THE CHAIR: Now been agreed.

3 MS SMITH: So you can take that off your agenda.

4 THE CHAIR: Okay, I'll take that off my list. That will need to go in the Order.

5 Okay, then, fifthly, Google's CPO variation application -- sorry, I should say after

6 number 4 then the Coll parties can leave, because I don't think that you should be

7 kept here for the rest of the day and/or tomorrow if there's nothing that concerns you.

8 So then you can leave, Mr Hoskins, and then we will deal with Google's CPO

9 variation application, Rodger's amendment application, and then finally the costs of

10 Rodger's CPO application.

11 Is that everything, or have I omitted anything? That's it, all right.

12 By way of housekeeping, we've had numerous bundles, including last night we

13 received supplemental bundles 1 and 2, so we'll use those if necessary. We have

14 had everyone's skeleton arguments. We've read the skeleton arguments. One

15 reason why I suggested maybe optimistically we might be able to finish today is

16 we've done the prereading required and we don't expect anybody to say anything

17 that repeats their skeleton arguments. I don't need taking through the background.

18 You don't need to assume that we've read nothing and therefore take us slowly

19 through what you've already said. There's been a lot that's been said on both sides,

20 particularly in relation to the variation application that doesn't need rehearsing, and

21 we can just get to whether there's anything additional that anyone wants to say that

22 isn't already in their skeleton arguments, and then hopefully we can give a ruling on

23 that in short order. We do intend to give a ruling. We're not intending to reserve

24 judgment on that application. It's too close to trial. Everyone needs to know where

25 they stand on it. So there will be a ruling today, whether or not we need to amplify

26 our reasons afterwards, we'll see where we get to. Sorry, there will be a ruling on

1 that at this hearing, whether it's today or tomorrow. If we don't finish today, we'll
2 have to go into tomorrow.

3 So is there anything else by way of housekeeping, or can we get on with the
4 discussion of the expert witness reports? No. All right.

5
6 Discussion re expert reports

7 THE CHAIR: Expert reports. Now, you had an Order at the start of the week which
8 very much reflected the debate between the parties and what had previously been
9 ordered in terms of production of joint reports. Having seen the skeleton arguments,
10 the proposals for cross-examination at trial and having had a look at some of the
11 underlying evidence, I'm afraid to say that there is at the moment too much evidence.
12 I did a quick count, and I got to over 5,000 pages of witness evidence, even before
13 the joint reports, and even not including I think some of the evidence. That's
14 impossible. 5,000 pages will not be read by the Tribunal at any point, I emphasise,
15 at any point, during these proceedings. There is not time for the three members of
16 this panel to read 5,000 pages of factual witness statements and expert reports.
17 So that is why I proposed a rethink of what's going on, and also in light of the experts
18 Practice Direction. My suggestion is therefore, and we may need to think about the
19 timings instead of going away and producing yet more material for the Tribunal to
20 read and yet more material that is going to have to be used at trial, we try to get this
21 down to a manageable subset of material which will then be the only material that
22 anyone refers to in principle at the trial, by first of all having a very short, and I mean
23 a couple of pages, summary of what is agreed and what is not agreed, so that we
24 can see in very headline form, probably bullet points only, the issues upon which
25 there's dispute, and then having the experts going away and not producing new
26 material, but essentially rewriting in shorter form, what is already there, in the form of

1 trial reports, which then form the only reports that are referred to at trial in principle,
2 with the expectation that (a) the Tribunal will not read any of the initial reports, but
3 will only read the trial reports, and will only be referred to them at the trial for the
4 disputed matters. There will be no coming back, saying well you didn't deal with
5 footnote 23 in report number 9 previously. The expectation will be that we will read
6 nothing other than the trial reports which cover the disputed material. Obviously if
7 there's some point which is actually agreed that is in an earlier report you can refer
8 us to it, but on the disputed points all we are going to read is the trial reports and
9 they will be very, very much shorter than the original reports and in a form that is
10 going to enable us sensibly to do prereading before trial, and post reading after the
11 trial when we come to write the judgment.

12 So that's the suggestion. Is everyone content with that suggestion as a matter of
13 principle, as a way forward?

14 MR HOSKINS: I'd like to address you on it. Can I start by showing my age a bit?

15 I remember the very first hearings of this Tribunal, which took place in the terrible
16 OFT building, when we all sat in a meeting room, and the then President,
17 Christopher Bellamy, now Lord Bellamy, said, I remember it very well, we all have to
18 make this work. The reason why I say that to you is we're absolutely singing from
19 the same hymn sheet on this issue. There are too many pages. I'm ahead of you in
20 the sense that I sat down to start preparing this four or five weeks ago and thought
21 God, how do I get into this? So we are absolutely in the same place. So the spirit of
22 the submissions I'm about to make are for us all to come up with a solution which is
23 the best solution to the problem that clearly exists. I just want to make that
24 absolutely clear, we must all make this work.

25 In relation to the proposal floated by the Tribunal, can I just go through some of the
26 implications of that and what it would mean, and obviously you can factor that in

1 when you come to take your decision. I'll also suggest another possible way to deal
2 with this so you can take that into account. But looking first at this proposal for new
3 expert reports.

4 The first point is this: the existing directions, culminating in the joint expert
5 statements, have been in place since at least August 2025. I didn't go back through
6 all the pre-history, but I could see that it was at least set by then. All the parties have
7 obviously been planning and preparing for the trial by reference to that timetable.
8 Counsels' availability, the experts setting aside time, everybody's been working to
9 that timetable. On our side, and I'm sure it's the same for all the other parties,
10 a material amount of work has already been done in preparation for the trial and by
11 definition that's been based on the existing expert evidence, but without -- this is not
12 a special plea for me but for example I've already produced the large part of a draft
13 skeleton, I've already produced quite a lot of pages of cross-examination notes, and
14 they're all based, because they have to be, on the existing evidence, and I'm sure
15 that's the same for everyone else in the room.

16 The second point is this: if we do go down the new report route that's obviously going
17 to have substantial cost implications, because there are a number of different
18 groupings of experts, as you have seen. Some will be more expensive than others.
19 I'm simply sticking my finger in the air. This is not -- we've not managed to get a bill
20 from them all as to what it would cost, but you're probably talking in the region of
21 half a million and up on our side, and you can repeat that for the other parties. So it
22 is going to be a substantial exercise.

23 The third point. The process of producing the joint expert statements has already
24 started, because obviously the deadline for filing those statements is 30 June, the
25 end of this month. So the meetings are already in train, they've started.

26 THE CHAIR: Nothing we've said cuts through that process, because they're going to

1 have to do that in any event. What hasn't, I presume, started is the process of
2 writing up the joint expert reports.

3 MR HOSKINS: Well, the process that has started is the one envisaged by the
4 existing directions, which is to have meetings joint to try to identify the issues and to
5 start setting out the positions.

6 THE CHAIR: Are you telling me they've started to write up the joint reports already?

7 MR HOSKINS: I don't know that because we're not privy to what the experts are
8 doing.

9 We've had initial contact with our experts, and I mean it's fair to say there have been
10 varying degrees of horror at the prospect of having to produce the new reports.

11 That's me being frank, that's their position. I think it's necessary to have a degree of
12 sympathy for them, because all the experts are busy professionals, some are
13 professional witnesses who have other trial commitments, some of them are
14 academics with day jobs, et cetera.

15 THE CHAIR: All right. So you've given a number of reasons why you think our
16 proposal won't work. What's your alternative proposal, because it's not going to be
17 us reading 5,000 pages?

18 MR HOSKINS: No, I understand that, of course, I am not suggesting that.

19 THE CHAIR: Ever.

20 MR HOSKINS: I understand that. That's fine. That's fine.

21 THE CHAIR: What's your proposal?

22 MR HOSKINS: Our proposal is that we use the existing framework to try to solve the
23 problem, and the obvious vehicle for that would be the joint expert statement
24 process. The trouble with joint expert statements, as in the past, is sometimes you
25 get these things and they're monolithic, you get 120 pages of columns, it's all a bit
26 cryptic, and I for one was very grateful to see a Practice Direction suggesting that we

1 move away from that. We're not suggesting that's not a good thing to do, we're just
2 saying in this case given where we have reached it is problematic. So can we use
3 the joint expert statements, where we are, to solve this problem. Well, we already
4 have the page limits you established, which as you know we welcome.

5 THE CHAIR: And I'm assuming it's not going to be in a tabular form, it's going to be
6 in narrative form.

7 MR HOSKINS: That is one of the things I was going to say as well, the JES should
8 be produced in a way which is most helpful to the Tribunal.

9 THE CHAIR: Yes, that's not tabular form, because that just requires us to go back to
10 the underlying expert evidence which we are not going to read.

11 MR HOSKINS: So we were going to suggest that the format would be headings,
12 ideally with key issues, and narrative text, rather than some sort of table.

13 THE CHAIR: Yes.

14 MR HOSKINS: It would be helpful if the Tribunal made it crystal clear to the experts
15 that the Tribunal only wants the key issues in the joint expert statements. Again one
16 of the problems with joint expert statements traditionally is they go down into the
17 minutiae, and it just doesn't matter. The experts should be forced, directed, only the
18 key issues, and then to set out their positions in relation to those.

19 Now, I appreciate that the Tribunal does not want to read all of the thousands of
20 pages, you cannot read all of them, I absolutely understand that. But I do submit
21 that in this process, the experts should be allowed to make specific references to
22 relevant parts of the existing reports, and I don't mean just blanket statements,
23 "Read chapter 3 of my second report", it's specific paragraphs. The reason why
24 I say that is really for two reasons. One is it will make the document more digestible
25 and manageable if you have the principle and if the experts aren't trying to set out
26 potentially some quite detailed works or some reference to tables, they can't do that

1 in this format, but it might be important that that evidence is in the case. So it should
2 be done with a degree of specificity.

3 THE CHAIR: But what you're proposing isn't actually very much different from -- I
4 mean the document will end up as a single document, but it's not actually very much
5 different in substance to what we had in mind, because it's going to be, on the
6 disputed issues, each expert setting out their position with, at the most, very brief
7 references back to their earlier material, but in essence this is not going to be one
8 sentence and then "See 10 pages of my earlier report", you know, if it's "See the
9 table at whatever in my earlier report", then I'm not sure whether it helps then,
10 because we're still going to have to be going back and forth between the earlier
11 report and this document. What we had in mind is something very similar, except
12 that if you had a table that you needed to set out, you just incorporate it, so it's in one
13 place.

14 MR HOSKINS: Well, the problem with that -- I've already identified some of the
15 problems and if this is to be a new document, and it is to be self contained, there's
16 obviously an issue of the page limit, because I'm presuming it is not going to be 50
17 pages.

18 THE CHAIR: We'll talk about page limits.

19 MR HOSKINS: There's a question of timing, because everyone in this room has to
20 prepare for the trial, and this is not going to be done quickly. We still have meetings
21 between the experts --

22 THE CHAIR: I'm just trying to work out what is different in substance in your
23 proposal, because you are still proposing, and it would have always been the case,
24 that following the expert meetings a new document is going to be produced. Now, if
25 actually you find it more helpful to have a single document in which on each key
26 issue the position of each expert is set out, then I'm certainly not going to push back

1 against that, because actually one document's probably easier to read than two, and
2 it enables the key issues to be dealt with together by each expert, and then you
3 avoid the problem of ships passing in the night. But at the end of the day, you are
4 proposing that there will be a narrative document in which the position of each expert
5 is set out fully, and I anticipate that you're going to say that all we will need to read is
6 the joint expert report.

7 MR HOSKINS: No, I think that's where we differ.

8 THE CHAIR: So how do we know what to read of the underlying reports? Because
9 it's going to take a very large amount of time for us to be reading this joint expert
10 report and then continually flipping back to -- and where is report number 8 of this
11 expert in the bundle?

12 MR HOSKINS: Well, the physical location of the bundles shouldn't be --

13 THE CHAIR: But it takes time, doesn't it? If every sentence is followed by
14 a footnote, or another reference taking us back to another document, that's going to
15 be extremely unwieldy.

16 MR HOSKINS: In a case of this complexity, it's inevitable that, I'm sorry, the Tribunal
17 is going to have to get into the weeds to a certain extent. It's not possible simply to
18 gloss the issues into some high level document and say it's fine, this case can be
19 dealt with on the basis of 50, 60, 70 pages. It's inevitable that there is going to have
20 to be some reference to the detail. And also, in order for the cross-examination, and
21 indeed the hot tub, which I imagine you're probably going to want for at least some of
22 the expert pairings, in order to make that effective, we're all going to have to get into
23 the detail to be able to challenge experts' positions because an expert being
24 cross-examined, or in the hot tub, being asked a question at a high level, will say
25 "Well, in my second report I did an analysis, I produced a table", and it can't be the
26 case that the experts aren't permitted to refer to that sort of material. So my point is

1 that I understand the attractiveness of a single document, and no reference to
2 everything that's gone before, but it's not just practical. We are going to have to be
3 able to refer to -- the experts are going to have to be able to refer to the work they've
4 already done, and what I'm trying to do is propose a way in which you are directed to
5 what matters, so that that is limited, because I understand you cannot and do not
6 want to read everything, but this process will have the benefit that it doesn't go over
7 everything which has gone before which is going to be necessary to refer to, but only
8 directs you to the stuff that is necessary for you to read. That's the benefit of this.

9 THE CHAIR: And how extensive do you think the references to what has gone
10 before will be? Because as I said, you might be saying to me, if we're going to use
11 this as the main document and assume that the Tribunal hasn't read any of the
12 underlying expert reports, save for some specific references back, I assume that you
13 will then want to say that the joint expert reports should be perhaps a bit longer than
14 we have ordered so far.

15 MR HOSKINS: No, I don't think so. I think it's -- I think the Tribunal has to make
16 absolutely clear to the experts what the Tribunal expects if we use this process, and
17 the process is only key issues and only references for material that is necessary for
18 the Tribunal to read. And if the experts don't do that, you can throw the book at
19 them.

20 THE CHAIR: But it will be a bit late then.

21 MR HOSKINS: Yes. The other option, the one you've floated, has the
22 disadvantages I've already identified. I'm not suggesting either of these is perfect,
23 but I'm suggesting that this approach is better. Not as a general approach to all
24 cases, but given where we are now, which is what, 12/13/14 weeks from trial.

25 THE CHAIR: All right. I understand your proposal. Does anyone have any different
26 proposals to make?

1 Well, Mr O'Donoghue.

2 MR O'DONOGHUE: Madam, three very quick things if I may. First, I respectfully
3 adopt what counsel has said. Secondly on the question of preparations, the Rodger
4 counsel team have been on brief since I think January or February this year, so we
5 are deep in the weeds already in the case. On the question of costs, I'm --

6 THE CHAIR: If you're just agreeing then you don't need to stand up. Do you have
7 a different proposal?

8 MR O'DONOGHUE: Madam, no.

9 THE CHAIR: All right, thank you. Mr Holmes.

10 MR O'DONOGHUE: One thing if I may. There's a particular difficulty with
11 Professor Fletcher in that Fletcher 2 and Fletcher 3 adopt in significant respects to
12 avoid duplication, significant parts of Holt and Singer, and if she were to be required
13 to produce a self-contained final report, she would either be starting from scratch on
14 several issues, or would have to effectively rely on Mr Holt and Dr Singer in relation
15 to actually having seen. That's a particular problem for Professor Fletcher.

16 THE CHAIR: Right. Okay.

17 MS SMITH: Yes, Madam, with your permission I will be addressing you on the Coll
18 issues. Mr Holmes will be addressing on you the CPO variation application. We've
19 carefully considered the Tribunal's proposal, as we understand it, first for a summary
20 form agreed and disagreed issues list, followed by final trial reports by the experts on
21 the outstanding disputed points, and we think that this is a sensible and efficient way
22 of proceeding. It is true joint expert meetings have commenced, but they've only
23 been ongoing since 1 June. In our submission, if the Tribunal goes down this route,
24 the time for the meetings could be shortened.

25 As to what is needed to be produced by the experts, following the meeting, the
26 summary, is much shorter than originally anticipated, which would leave time for the

1 production of the final trial reports, we say, by for example one week before the PTR
2 of 24 July. We think it would be sensible to produce separate reports. Ms Coll's
3 proposal of one joint document with cross-references in our submission is unclear as
4 to how that's going to work, efficiently and cleanly. We say the Tribunal's proposal
5 for separate reports is much clearer and easier to manage and much better for the
6 purposes of trial prep, hot tub management and cross-examination, because the
7 parties' positions are clearly and succinctly set out in manageable reports which can
8 then form a very sensible basis for hot tubs on those issues and cross-examination.
9 Our initial view, but this is obviously subject to discussion with the Tribunal, is it
10 might be most efficient for example for the parties to each produce separate final trial
11 reports on the areas of expertise as regards which the joint meetings are taking
12 place. So for example, a report for each party on economics, one on payments, one
13 on security and one on accountancy, for example, just as an opening gambit. As to
14 the problems indicated by my learned friend Mr Hoskins, again we're not convinced
15 by those. Trial prep, we take what he's saying, but we don't think those issues are
16 not able to be overcome. As to costs implication, we're very surprised by his
17 suggestion of half a million extra costs per party. I'm not going to pluck a figure out
18 of the air on my feet, but we were surprised by those sorts of figures.
19 So that's the position for my client, Google.

20 THE CHAIR: Can I just say this to all the parties, what Mr Hoskins said is he doesn't
21 want something new to be produced. If instead of having a shortish joint report with
22 cross-references back -- I mean in that joint report you will have a series of
23 headings. Under each heading you would have each party's position. Let's
24 supposing you were just to bifurcate that, this is essentially what we're asking for.
25 You agree the headings, that's all done in the joint experts' statement, you agree the
26 headings and those headings would encompass the key issues, and they would

1 have to, because we don't want to be given any material on something that isn't the
2 absolutely key issues. So the joint meeting would do everything that you say, up to
3 the point of producing a single document, and at that point, rather than producing
4 a single document, you take the headings and each party produces their report on
5 the basis of the headings and simply rather than cross-referencing back to what they
6 said earlier, you just incorporate what has been said earlier.

7 MR HOSKINS: That would work. You understand my concern that we can't pretend
8 what happened earlier didn't happen?

9 THE CHAIR: No.

10 MR HOSKINS: That's a narrative JES -- just so we're both on the same page.

11 THE CHAIR: Or two documents.

12 MR HOSKINS: Sure. Which has in it the evidence referred to, and cut and pasted
13 to meet your --

14 THE CHAIR: So what you have is -- and the only reason for suggesting that this is
15 done separately is to actually save the parties the time and cost of having to stitch
16 the two together. Each party can then go off and do their own report, but taking the
17 headings that have been agreed, so that you're not having the parties setting out
18 their reports in a completely different structure.

19 MR HOSKINS: It needs to be the same structure.

20 THE CHAIR: Exactly. So what you get is a trial statement with an agreed set of
21 headings on the key issues only, and we absolutely agree, and when I said at the
22 start we weren't expecting new material, we absolutely are not expecting new
23 material, but rather a single, shorter document, which has the material that we
24 actually need from the earlier reports in one place. I think that that will be a lot more
25 workable. Now, if that means that there is some changing of the numbering of your
26 cross-examination notes, we wouldn't expect that to be a vast amount of work.

1 MR HOSKINS: No, I understand that. We will work with the Tribunal to make it
2 work.

3 THE CHAIR: Yes.

4 MR HOSKINS: But my concern was practical. Really the fundamental one is we
5 can't jettison all the work that's gone before but what you're putting to me doesn't do
6 that.

7 THE CHAIR: What we're not expecting is vast swathes of cutting and pasting,
8 because a lot of the earlier reports will not be necessary. What we would expect is
9 for it to be all in one place and reduced to the absolute minimum.

10 MR HOSKINS: May I turn behind and see if my team are shaking their heads or
11 nodding?

12 MS SMITH: Can I just clarify, Madam, when you say two reports, do you mean a
13 report for each -- is it in fact one for each party, or is it one report for claimants and
14 one report for Google?

15 THE CHAIR: No, we have in mind everyone who has produced initial expert reports
16 will produce a single expert report. So if somebody's produced nine reports, what
17 we'll end up at trial with is one trial report, but we will have a very, very short joint
18 statement for each grouping, which would effectively set out the issues that are
19 agreed, and that -- and we don't mind cross-references back, because we know
20 we're not going to have to essentially look at those very much, but issues which are
21 agreed which might have cross-referencing back, you know, all the following
22 paragraphs are all agreed, and then a list of agreed headings which would then form
23 the structure for the individual reports that will then be produced.

24 MS SMITH: That's clear. So it's a report for each expert rather than for each
25 discipline, because that's important because our expert, as you will be aware,
26 Mr Noble, responds to I think about four experts produced by the other parties. So

1 that's useful for the purposes of page limits, et cetera, to understand that.

2 THE CHAIR: And the headings would be agreed, and we would expect that the trial
3 expert reports will strictly follow those headings, so that we have reports that are set
4 out using the same structure and addressing the same key issues.

5 MS SMITH: Yes. It's useful to know for the purposes of the next stage, in effect,
6 which is how long will these be, et cetera, that we may have Mr Noble producing one
7 report, but that will have to address the evidence from I think about four or five
8 experts on behalf of the claimants. So that's a useful indication to understand.

9 THE CHAIR: Yes.

10 MR HOSKINS: There's general nodding.

11 THE CHAIR: All right.

12 MR HOSKINS: There's points of detail, obviously, to be discussed, but they are
13 points of detail if we're going down this route.

14 THE CHAIR: So if there's general agreement on that, that's what we'll order. Now,
15 I think we can't usefully use this time to set page limits, but we would invite you to
16 write in with your suggestions of page limits, and they must be a lot shorter than the
17 original reports.

18 Just to give you an idea, we have one week set aside for pre-reading. On the
19 assumption that you will all be putting in substantial skeleton arguments, we assume
20 that we will need to spend at least half of that week, if not three days, just reading
21 the skeleton arguments. That leaves two days. I am minded to direct that the
22 remaining pre-reading will be no more than 500 pages. So you will have to think in
23 the page limits that you're producing for us, when we are realistically going to read
24 those reports, because as I said, if you were to do a pre-reading list that had
25 everything on your very helpful skeleton argument for today's hearing, it's never
26 going to be done, ever. So I think you need to think about when we are going to

1 read the reports, and when we can feasibly read whatever reports are produced, and
2 factor in time to do that in the trial timetable.

3 Now if that means saying that you want us to read the factual reports before the start
4 of the trial, but then read the expert reports as we go along, then you need to think
5 about when we're going to do the reading of the expert reports.

6 MR HOSKINS: The Fridays, are they available, or not available?

7 THE CHAIR: They are available.

8 MR HOSKINS: As non-sitting days. But ...

9 THE CHAIR: There are some non-sitting days which you should not assume are
10 available because the Tribunal has other commitments, but just think carefully about
11 that, because for my part, and in general, the judicial panel member will only have
12 available the pre-reading time that is provided for in the trial timetable. So if there's
13 a week of pre-reading, the judicial panel member will only have that, will not have
14 a month before to plough their way through 50 expert reports.

15 MR HOSKINS: Obviously we're not going to try to micromanage your time. You will
16 tell us, we will make suggestions on page limits and you will tell us what you want to
17 work, and that will be on the basis that you have the week and you have some
18 Fridays and that is where we are.

19 THE CHAIR: Exactly. So what we'll do is we will proceed on that basis, and you can
20 then write, I would suggest, by the start of next week, let's say by midday on
21 Monday, with your suggestions as to how long each of the expert reports should be.
22 Because you all have been under brief for some time, you will now know what the
23 key issues are, and what issues are not really relevant, and I do not want a repeat of
24 what happened in the Qualcomm hearing, when we went through a process of
25 reduction of the industry expert reports, and ultimately at trial none of that was
26 relevant, it was a complete waste of time and money on everyone's part to have

1 a vast amount of industry expert material that no-one then referred to at trial. So
2 now that you're all advanced in your preparation, I would expect that you would be
3 able to give very robust direction to the experts as to what is actually necessary for
4 the issues in the case.

5 MR HOSKINS: That's one of the points I wanted to raise with you, because you'd
6 raised the question of the legal team involvement in the expert process and it
7 seemed to us it was important that the lawyers should have input into the list of
8 issues. We're not suggesting anything else.

9 THE CHAIR: No. I had envisaged that. That is why I raised the question.

10 MR HOSKINS: I think in the first instance we should see what the experts come up
11 with between themselves, and then the legal teams should be able to comment on
12 that.

13 THE CHAIR: I'm not sure that's the right way round, because the experts will not
14 actually know what issues are relevant for the case. If they're asked to go away and
15 just have a discussion at large on the issues that are in their reports, they may come
16 up with a very long list of issues. I think that probably the legal teams need to give
17 the experts direction in advance as to what issues are actually still relevant for the
18 framing of the case as it's now progressed, and give them a steer in advance, in the
19 same way that one gives instructions to the experts at the outset of proceedings as
20 to what issues you want them to address. I would have thought that the lawyers
21 ought to be able to agree those issues to a large extent, rather than the experts
22 getting different instructions from each side. It would actually be helpful if the
23 lawyers could between them agree what general issues need to be addressed and
24 what no longer need to be addressed.

25 MR HOSKINS: There will also be issues that are still in dispute that just don't matter
26 that much, and the trouble is the parties get attached to these things.

1 THE CHAIR: Yes.

2 MR HOSKINS: On our part, we'd very happy if it was understood that the list of
3 issues is not every issue, it's just the key issues. We don't want to take up time
4 arguing about minutiae.

5 THE CHAIR: No, I agree. It needs to be the key issues for the case to be decided
6 and if there are some issues which realistically aren't going to make much difference,
7 we don't want to have to spend our time reading into them. So I would suggest that
8 there's a process where the lawyers initially give direction to the experts as to the
9 issues which really need to be addressed by them. The experts then come up with
10 their joint -- the agree/disagree list of headings. The lawyers can have input into the
11 headings, obviously not into the content of the experts' evidence, and the experts
12 then go away and write their statements. But in this, I think it's inevitable that there
13 will need to be liaison with the legal teams as to what issues actually need to be
14 decided. Otherwise the expert evidence isn't going to be useful to you.

15 MS SMITH: Absolutely, Madam. That all sounds, if I may say so, very sensible, and
16 we'll take that away. But there is one point arising from your decision on that first
17 issue which intersects with item 3 on your agenda, Singer 4 and Krein 3, and that
18 was your indication that in these final trial reports you're not expecting any new
19 material. You will have seen that in Singer 4 he has introduced a number, 11, of
20 completely new natural experiments on issues of pass-on, which Mr Noble has not
21 had an opportunity to -- well he's had an opportunity to consider them, obviously, but
22 not yet had an opportunity to set out what his positions on those are in any written
23 form. If Mr Noble can address those issues, those new natural experiments in
24 Singer 4, in his final trial report, then it may be that we don't need to pursue our
25 application for any further response by Mr Noble to Singer 4.

26 THE CHAIR: Is there any objection to that?

1 MR HOSKINS: No objection on our side, Madam.

2 MS SMITH: That is very helpful, thank you, Madam. We'll come back to Krein 3 if
3 I may, but it sounds like Singer 4 is fine.

4 THE CHAIR: Now, in terms of the timetable for this, because we will not be
5 expecting joint reports in the format that's been ordered so far, it struck me that the
6 agree/disagree statements, and which again I don't think -- I find these tables
7 impenetrable. I would expect the agree/disagree statement to be in portrait form and
8 as a narrative with lists of headings or bullet points.

9 MR HOSKINS: Sorry, I've lost track of what we are ...

10 THE CHAIR: We're talking about the summary by which the experts set out the
11 issues that they agree and the issues that they disagree.

12 MR HOSKINS: So we still have that?

13 THE CHAIR: Very short. A few pages.

14 MR HOSKINS: I understand.

15 THE CHAIR: That's basically a road map then through the trial statements that are
16 then produced.

17 MR HOSKINS: I think there's going to be a lot of disagrees and not many agrees,
18 but if it's going to be useful we can produce it.

19 THE CHAIR: That's effectively the process by which you agree the headings and the
20 key issues. So that sets out the key issues upon which there's disagreement. You
21 strip out any issues that really don't matter and you indicate where there are areas of
22 agreement.

23 MR HOSKINS: So this is the list of issues.

24 THE CHAIR: It's the list of issues, yes. And for the areas of agreement, I think that
25 it's fine and helpful if you want to then say the following paragraphs of the expert
26 reports go to these issues and are agreed, because that gives us a list of

1 paragraphs. If anything turns on it we can then go back and see what the experts
2 have said about it.

3 MR HOSKINS: On agreed issues.

4 THE CHAIR: On agreed issues, yes. Nobody is then going to look at -- we're not
5 going to be asking for cross-examination on that, obviously. But we know what's
6 agreed. And then on the disagreed issues, you just have a list of issues for which
7 we'll then get separate statements. Can you then do that before the end of June,
8 because you're not going to have to then be writing up joint reports on the disagreed
9 issues?

10 MS SMITH: Madam, we've considered that with our experts, and we think that as
11 we're not going to have to be writing up full joint expert statements but it's going to
12 be a shortened summary, in order to enable the experts to then have time to produce
13 the subsequent final trial reports, which it's going to be important they have good
14 time to do that before trial, we were going to suggest that the time for the meetings,
15 which as I say have been ongoing since 1 June, and production of the summary list
16 of headings and key issues could be -- the deadline could be moved from 30 June to
17 Friday, 19 June. That would then give us time to produce final trial reports on the
18 disputed issues by, say, 24 July, which is one week before the pre-trial review. So
19 those would be our suggestions.

20 THE CHAIR: Does anyone have anything to say about the timing proposal?

21 MR HOSKINS: Sorry, I thought the Tribunal's question was can this all be done by
22 the end of June.

23 THE CHAIR: No, my question was can you advance the agree/disagree summary
24 document before the end of June.

25 MR HOSKINS: I see, sorry. Of course we can. My slight concern is -- I have two
26 problems and they cut against themselves. One is I want this to be done as quickly

1 as possible because we all need to prepare the trial, and you're probably in a similar
2 position. The flip side of that is we haven't gone to our experts with a detailed
3 proposal and said this is what you have to do, and this is how long it takes. Some of
4 the experts don't have massive teams on our side. Mr Burelli has one assistant,
5 Dr Lee has no assistant. They literally have to do this themselves, and they have
6 other commitments. What I suggest is we set down an indicative set of dates, and if
7 we have problems with any of those we will come back to you in the next week,
8 because it has to be sorted, and we will tell you if we have a problem.

9 THE CHAIR: So the indicative dates. 19th for the agree/disagree summaries on
10 each of the groupings.

11 MR HOSKINS: Let me just check with those behind me. (Pause)

12 We're happy with that in principle, and if we have any problems we'll come back to
13 you within the next seven days.

14 THE CHAIR: And then the trial reports. Ms Smith suggests 24 July, but on the basis
15 of what we're actually ordering is simply a somewhat expended version of what we're
16 suggesting, your suggestion would have been to do this by the end of June?

17 MR HOSKINS: I'm keener to have them quicker if it can be done.

18 THE CHAIR: The only difference is that rather than cross referring back to some
19 earlier reports, if there's a few paragraphs you cut and paste them in.

20 On that basis, is it really necessary to wait until 24 July? Could we not say
21 something like 10 or 17 July?

22 MS SMITH: My Lady, as I understood what the Tribunal wanted to avoid was cutting
23 and pasting large parts of previous reports. Instead a condensation and
24 summarising process needs to happen --

25 THE CHAIR: Yes, if that is possible.

26 MS SMITH: -- and that, I speak from bitter experience, sometimes takes a little

1 longer than just taking what's already there and putting it in another document.

2 That's not what I understood the Tribunal wants.

3 THE CHAIR: If it's a table, for example, it can be cut and pasted, that was

4 Mr Hoskins' main example. If it's five paragraphs of text that can be summarised into

5 a single paragraph, that will obviously take a bit more time.

6 MS SMITH: That's what I anticipated. So for example on market definition, it may

7 be that the positions have developed over time and one wants to now produce what

8 is the relevant market, in a couple of paragraphs.

9 THE CHAIR: Exactly.

10 MS SMITH: But we will need to look at, or the experts will need to take

11 10/20 paragraphs from previous reports and reduce it down into a helpful one or two

12 paragraphs, and that will take a little time in my submission.

13 THE CHAIR: All right.

14 MR HOSKINS: Madam, we have the benefit, of course, because it's not now a joint

15 process, that that will save time, because time is inevitably taken up with them trying

16 to reach agreement and not reaching agreement.

17 THE CHAIR: Yes. What about setting an indicative date of 17 July, which would be

18 two weeks before the PTR? If you all go away and come back, and your experts

19 have heart attacks and say that they can't do it, then you had better come back and

20 tell us that.

21 MR O'DONOGHUE: Madam, we are content with the 17th.

22 THE CHAIR: All right.

23 MR HOSKINS: We're fine with 17 July, as long as we can come back to you if

24 there's a particular problem.

25 THE CHAIR: All right.

26 MS SMITH: My Lady, subject to checking the availability of Mr Noble for that period,

1 because I'd already spoken to him when he came up with 24 July, we'll take on
2 board the 17th, but if we can come back to you on that then we will. There may be
3 issues with his availability.

4 THE CHAIR: Yes.

5 MR HOSKINS: Can I just flag up one issue for us again. Dr Krein is our industry
6 expert who replies to a lot of Google factual evidence, so his --

7 MS SMITH: Madam, he's not been involved in the joint expert meetings, or any of
8 that process. I had understood him to be totally separate.

9 THE CHAIR: We understood him to be separate from that process. He is not in the
10 experts grouping. This is those experts in the experts grouping.

11 All right. Does that deal then with the first item on the agenda?

12

13 Discussion re trial timetable

14 THE CHAIR: All right. Let's go to the second agenda item. Again, this is not
15 something where we're going to be able to reach a landing point, but we can then
16 provide an indicative view now. We've looked at the trial timetable. There are a few
17 points I need to raise regarding non-sitting days, and I might as well get those out
18 now. If at all possible, 13 October needs to be a non-sitting day. That's because of
19 other commitments of the Tribunal, in terms of courtroom space, we just need that, if
20 at all possible, for a hearing.

21 15 October needs to be a non-sitting day because of my prior commitments
22 unfortunately in the diary before I took over the case. There are a couple of other
23 non-sitting days that are in that category and I'm going to come to those now. 5 and
24 6 November are also non-sitting days, because of my prior commitments. Finally,
25 26 November is an internal training day, we will need the courtroom, and we will all
26 be attending that. So that's a problem for both the panel and the court.

1 26 November will also be a non-sitting day.
2 For the week of 26 November, that had been a non-sitting day anyway, for
3 production of closings, we'll see where we get to on the timetable, but that may still
4 be a non-sitting day anyway. For the week starting 2 November, we envisage -- the
5 Friday would have been a non-sitting day anyway, so we will just have the extra
6 non-sitting day on the Thursday. For the week beginning 12 October the effect of
7 having non-sitting days on the 13th and the 15th would be a Friday would be a sitting
8 day. We wouldn't maintain a non-sitting day that Friday. So we would sit Monday,
9 Wednesday, Friday that week.

10 So those are non-sitting days, and it may be that you consider that it has an impact
11 on the rest of the timetable, so some of the other non-sitting days may fall away
12 because of that. But in general we think there does need to be a non-sitting day
13 every week in order to enable everyone to catch up and the Tribunal to do reading
14 where we haven't been able to earlier in the timetable.

15 We think that overall the timetable can be reduced to at least 11 weeks, and maybe
16 even shorter than that. In terms of the time that's given over to witnesses, and I think
17 this is the issue that's going to contribute to the majority of the trial timetable savings
18 that can be made, I'd like you to have another look at the time that is needed for the
19 cross-examination of Google's witnesses. We think that it can probably be shorter
20 than 6.5 days.

21 In relation to expert evidence, I'll tell you what we have provisionally in mind, and I'm
22 taking Mr Hoskins' skeleton argument on this, not as a default but just to give me
23 some headings. Security experts, we think that it will probably be sufficient to have
24 a single day for the cross-examination of those experts, especially once the evidence
25 is reduced to the trial reports. Payments experts, ditto. Or it may be that you want
26 a little bit more with security than payments, but we don't really envisage that we

1 | would need to hear more than a couple of days on cross-examination of the security
2 | and payments experts between them.

3 | The non-EP economic issues. What we suggest is to split these into two. First of all,
4 | to deal with market definition, dominance, exclusionary abuse and objective
5 | justification and to have a hot tub on that, which is followed by -- the hot tub being no
6 | more than two days, possibly even less, but no more than two days. And then
7 | supplemental cross-examination of no more than one day, and you may go away
8 | and think about it and think that you can do it in less, but those are the absolute
9 | maximums at this point, before we've seen the trial expert reports. It may be when
10 | we've seen the trial expert reports --

11 | MR HOSKINS: Is that one day for all of us or one day each?

12 | THE CHAIR: No, one day for all of the supplemental cross-examination, for all of the
13 | experts, on those issues.

14 | And then quantum, hot tub followed by -- sorry, actually, what we would then do,
15 | most logically, is to go to excessive and unfair pricing. So the economists are going
16 | to be divided into three blocks, if you like. The market definition, dominance,
17 | exclusionary abuse, objective justification block; hot tub followed by
18 | cross-examination. Then the excessive and unfair pricing, hot tub followed by
19 | cross-examination. Probably not more than a day, maybe a day and a half
20 | maximum for the hot tub. Absolutely no more than a day for the cross-examination.

21 | That's the second block.

22 | Then the third block would be quantum, a short hot tub --

23 | MS SMITH: Including pass-on?

24 | THE CHAIR: Including pass-on, then. That will be -- we're in your hands to suggest
25 | how long you think I mean commensurate with the other blocks that we've given,
26 | how long you think that needs to be. I would have thought no more than a day for

1 the hot tub and no more than a day for the supplemental cross-examination.
2 Those are very broad and indicative timings, to give you the idea of the kind of scale
3 of the evidence that we would envisage. If we did that, then we would end up
4 dealing with the economists in about seven days of court time.

5 MS SMITH: Madam, I'll take those away if I may, but that does sound sensible so
6 far. We certainly agree splitting into three hot tubs along those lines will be the most
7 useful. We think we can probably live with the securities experts simply being
8 cross-examined, and the payments experts being cross-examined but of course we
9 still then have the accounting experts.

10 THE CHAIR: I was going to get on to the accounting. That leaves the accounting
11 experts. At the moment, we haven't seen what they are going to produce in the trial
12 reports. It may be that one and a half days is an overestimate. I think maybe you
13 proposed less.

14 MS SMITH: We proposed a hot tub for the accountants, because we do think that
15 could be useful. We proposed a --

16 THE CHAIR: How long did you envisage in total?

17 MS SMITH: I think we had a one day hot tub for the accountants. Our timetable,
18 sorry, just so you have it open, is in supplementary bundle 2, page 628 to 629 if you
19 want it. But if not, we had a one day hot tub for the accountants and then half a day
20 for each party for cross-examination of Dudney, Harman, Easton. So that was one
21 and a half days of cross-examination. In light of your indication, we might be able to
22 cut that back.

23 THE CHAIR: I think you might just want to reduce that. We'll take it away, and
24 I think maybe at the PTR we'll decide whether we are going to do that by way of
25 a hot tub or cross-examination. Our provisional view had been that it would be
26 cross-examination only, but if you think that there are some issues, or all of the

1 | issues upon which you think that it would be more efficient to have a hot tub, then
2 | why don't you suggest that, and we will review that at the PTR. If we can, we'll
3 | review it before then, once we've had the final trial reports on those and we can see
4 | the extent of dispute.

5 | MS SMITH: At the moment we think it is, but we will definitely be guided by the
6 | headings in the final trial reports for the accountants.

7 | THE CHAIR: So provisionally then. Securities and payments, just
8 | cross-examination; economists mainly hot tub with some supplemental
9 | cross-examination; accounting, parked, TBC. But unlikely we're going to need more
10 | than a day and a half for the accounting. Looking at the volume of the accountancy
11 | evidence, I would have thought that a day and a half in total, divided between hot tub
12 | and cross-examination, would be appropriate. It may be that for accounting we
13 | could have a short hot tub on some of the issues followed by a slightly longer
14 | cross-examination by comparison with the economists, where I think it will definitely
15 | be useful to have the meat of that done in the hot tub.

16 | So that's just an indication of the trial timetable that we envisaged. What I would
17 | suggest is that you take that away and come up with, between you, revised
18 | proposals to the trial timetable. I'm not sure that we should wait until the PTR to get
19 | your revised proposals. Is it possible at some earlier stage to get a single document
20 | with the competing proposals? Not least so that from the point of view of Tribunal
21 | availability, if we know that it's going to be significantly reduced, we can make
22 | provision for that, because we all have other things to do.

23 | MS SMITH: It might be that we can produce that alongside the headings that are
24 | going to be produced as a result of the joint expert meetings.

25 | THE CHAIR: Yes.

26 | MS SMITH: So perhaps mid -- I had proposed 19 June, so perhaps mid to late June

1 for those proposals.

2 THE CHAIR: I think that would be helpful, because by that point you will have
3 an idea of the scope of disputed material on points of actual importance.

4 MS SMITH: Yes.

5 THE CHAIR: All right. Could we then ask for that to be in a single consolidated
6 document that indicates areas of agreement and disagreement, so that we can see
7 in one place what everyone is proposing? I don't envisage that we're going to
8 condescend at this point to the detail of who is exactly giving evidence, when and
9 exactly how long each person's cross-examination will be, we can look at that at the
10 PTR, but I think what we will want then to do is to give a direction as to the overall
11 trial length, so that we then know the total Tribunal commitment.

12 MR HOSKINS: Just on that, are we saying it's going to be 11 weeks or less at this
13 stage?

14 THE CHAIR: 11 weeks or less, yes.

15 MR HOSKINS: So we can take January out of our diaries.

16 THE CHAIR: Absolutely. And preferably less than 11 weeks.

17

18 Discussion re objections to Dr Krein's report

19 THE CHAIR: All right. Does that get us to Singer and Krein, or rather, just Krein?

20 Let's try to deal with Krein, and then I think -- yes, then we just have the *Evans*
21 objections, and then, Mr Hoskins, you and your team can leave.

22 All right, Krein. Can you just explain what the issue is?

23 MS SMITH: The issue, as I indicated, is that Krein is not engaged in the joint expert
24 meetings and so no agreed/disagreed list is to be produced by him. It's also a live
25 matter still as to whether the evidence that he is giving is factual or expert. That was
26 ordered back on 15 September 2023, an Order of the Tribunal. That issue was to be

1 dealt with at the PTR, whether the evidence he is giving as an industry expert
2 effectively is factual or expert. But we object to Krein 3 as inadmissible on
3 effectively, essentially, three grounds. First, Ms Coll does not have permission to
4 adduce a further report from Krein, a third report. Second, Krein's third report
5 addresses matters upon which he has not been permitted to produce evidence
6 pursuant to the Tribunal-approved list of issues; and three, the production of the third
7 Krein report would cause procedural unfairness to Google at this stage. I very briefly
8 just want to make good each of those points.

9 The first point, Coll's permission was limited to the production of a further report from
10 Dr Singer on pass-on. I will if I may take you to the Order which Ms Coll also relies
11 upon, the 4 August 2025 Order, which is in bundle E, page 63. If you have that,
12 that's an Order of 4 August, which followed from a CMC that took place on 1 May.
13 Ms Coll relies on paragraph 21.2 of that order, which is on page 70, which you'll see
14 reads:

15 "The Coll Class rep...shall file and serve evidence in reply to the Defendants' expert
16 evidence...pursuant to paragraph 19 above, on the issue of pass-on / incidence
17 only."

18 They say we're allowed to put in evidence on pass-on and we can if we want put it in
19 from not just Dr Singer but also Krein. We are in effect allowed to serve whatever
20 evidence we wish in reply on pass-on. But in my submission that is not the case. It
21 ignores the other parts of the Order and it ignores the context in which the Order was
22 made and the application in response to which the Order was made, importantly.

23 First of all, if I can take you to paragraph 13 of the Order, which is on page 68. You
24 will see there that Ms Coll is required to serve her reply accounting evidence in
25 response by Mr Dudney and her reply payments evidence in response by Mr Burelli
26 by 4.00 pm on 6 June, and by 4.00 pm on 13 June she is required to file and serve

1 her remaining reply expert reports, save for, and I would ask you to underline save
2 for, Dr Singer's reply evidence concerning pass-on. So Ms Coll did serve her further
3 expert evidence on 13 June, including a second report from Mr Krein on the issues
4 upon which he was given permission. That is app development issues, effectively,
5 technical issues. As I said, Ms Coll's pass-on application, which gave rise to this
6 Order and was considered at the 1 May CMC, was clearly limited to an application to
7 adduce a further report from Dr Singer alone on pass-on. If I can take you to
8 supplementary bundle 2, page 549. You will see the letter from Ms Coll's solicitors,
9 Hausfeld, of 17 April, and that contains, you'll see from paragraph 3, her application,
10 paragraph 3(b):

11 "For evidence in reply on incidence or pass-on to be filed separately from the main
12 body of her reply expert reports and on the same date as the reply expert reports in
13 Epic v Rodger."

14 What she was actually asking for as regards evidence in reply on pass-on is set out
15 in paragraph 16 on page 551. She indicates that she proposes this later report on
16 pass-on in the interests of efficiency, and then she explains, effectively, instead of
17 Dr Singer having to serve two reports, one in response to Google's expert evidence
18 on pass-on and then one in response to Rodger's expert evidence on pass-on,
19 effectively they're saying let's do it all at the end and Dr Singer can put in his reply
20 report on pass-on at the end. That's what's made clear in paragraph 20:

21 "It would be inefficient for Dr Singer to file his reply evidence addressing pass-on at
22 this point when he will be clearly entitled to respond to Rodger's and/or Google's
23 further expert evidence on the point once it's been filed. To avoid a proliferation of
24 expert reports on the issue of pass-on, Ms Coll proposes a single reply from her
25 expert on the issue of pass-on which would address Noble's response to Singer and
26 any evidence from Rodger's expert. This is precisely the sort of efficiency that

1 | should be encouraged following the joint case management of the proceedings."
2 | So the proposal was for a single reply from Dr Singer, and that was made absolutely
3 | clear --
4 | THE CHAIR: So your objection is that --
5 | MS SMITH: There is no permission for this.
6 | THE CHAIR: -- not just Singer but also Krein.
7 | MS SMITH: The point is there is no permission for Coll to serve a further report from
8 | Mr Krein on the issue of pass-on. The application was simply for a single report from
9 | Dr Singer in reply on pass-on. That's made clear in the application itself, and also at
10 | the hearing on 1 May 2025, which is in this bundle, SB2. It starts on page 186, the
11 | transcript.
12 | Ms Kreisberger was acting for Ms Coll at that CMC and she made it absolutely clear
13 | that what was being proposed was simply an efficiency, whereby Dr Singer would
14 | not be saying anything new, he would simply be replying on the issues of pass-on to
15 | both Rodger's and Google's expert evidence on pass-on and there would be a single
16 | report from him.
17 | On page 201 in the bundle, just asking you to read what Mr Justice Morris says.
18 | Can we hear the argument on the other point, which is the Coll reply pass-on, and
19 | Mr Justice Morris says at the very bottom of the page:
20 | "The real question is whether or not effectively you should reply once or twice or your
21 | expert should reply once or twice on pass-on."
22 | And Ms Kreisberger says:
23 | "Yes, that's right, I'm very grateful. As you say, a choice between once or twice.
24 | Everyone agrees Dr Singer will reply ...(Reading to the words)...on incidence
25 | after...Professor Fletcher for Professor Rodger."
26 | So it's Dr Singer replying. And again on page --

1 THE CHAIR: All right, we have the point. You're saying there was no permission for
2 this. Do you want to move on to your second point because we need to deal with
3 this issue.

4 MS SMITH: Yes, my second point is Krein addresses matters outside the matters
5 that he's permitted to address in his evidence. I can take this very shortly. If I could
6 take you to the ruling of -- Google had raised concerns about the breadth of the
7 evidence proposed to be addressed by Krein and in a Ruling of 12 July 2023, which
8 is in this bundle at page 415, the Ruling of the Tribunal on expert evidence and
9 disclosure, paragraphs 36 and 37 at page 431. Paragraph 36 I don't need to read
10 out, but you can see there Google had raised a concern as to Dr Krein's evidence
11 effectively being factual, or at least a blend of factual and expert. And then in
12 paragraph 37, two further points, first, in accordance with the expert process, the
13 class representative, which is Coll's class representative, should liaise to seek to
14 agree the issues that would require expert evidence, and that was the agreed list of
15 issues that the Tribunal adopted at Annex A of that Ruling, starting on page 443.
16 You will see the issues that Mr Krein is permitted to address are set out starting on
17 page 453 through to page 455. I don't need to read them out but they're all app
18 development type issues. There's nothing there about economic issues such as
19 pass-on or marginal cost, which is what he seeks to address in his third report. On
20 the contrary, the issue of pass-on is clearly identified as an issue to be addressed by
21 the economists, page 445 of the list of issues. Issue 14 is an economist's point, not
22 a point to be addressed by the app digital content industry expert.
23 So the second point, he's not permitted to address these issues in his evidence in
24 any event.

25 The third point is that in our submission it would be unfair for Google for this
26 evidence to be permitted at this late stage. The third report of Krein seeks to

1 introduce completely new evidence on pass-on and effectively developers' marginal
2 costs, matters which --

3 THE CHAIR: Can you give us an example of that? Let's have a look at it.

4 MS SMITH: Krein 3 --

5 THE CHAIR: Do you want to give us the bundle reference so we can at least just get
6 it open. Which bundle is it in?

7 MS SMITH: It's in SB1. Page 506 is where it starts. You will see the evidence that
8 he seeks to put in, just from the table of contents on page 507, how app developers
9 view and manage costs in relation to app pricing and revenue, the practical
10 differences between a cost increase and cost decrease, and these are matters which
11 he has never addressed before in any of his previous reports, and which, if -- well,
12 it's in effect impossible at this stage for Google, and one would assume Professor
13 Rodger is also interested in these issues, to be able to respond to them. As I have
14 indicated in the past, the evidence produced by Mr Krein in the past has been
15 responded to by way of factual evidence from Google, which of course closed some
16 time ago now. So there is no proper opportunity for Google or Rodger to respond to
17 this evidence, which is wholly new. So we say that it is therefore unfair, and in fact
18 there is no permission in any event for Mr Krein to produce evidence which is outside
19 the permitted scope of his evidence and his purported expertise in these
20 proceedings in any event. He is purporting to give evidence on behalf of how
21 generally app developers view these issues, and there is no evidence, as far as I'm
22 aware -- well, Google has not addressed these issues, and it's unfair to allow him to
23 introduce this material at this very late stage.

24 THE CHAIR: Yes, all right. Thank you very much.

25 We'll take a five-minute break now, and then we'll have Mr Hoskins. All right, we'll
26 have submissions from Mr Cohen after the break. Thank you.

1 (11.45 am)

2 (A short break)

3 (11.55 am)

4 THE CHAIR: Yes, Mr Cohen.

5 MR COHEN: Thank you, Madam. I will come on to directions, which I think is where
6 this was supposed to be going, but given the submissions that have been made and
7 although there isn't actually an application to strike out as it were live, I ought to say
8 something I think about the nature of Google's objection. The starting point here, as
9 my learned friend showed you, is the Tribunal's Order from 4 August last year. The
10 relevant part of which you will have already seen at bundle E, tab 6, page 70 and
11 I won't take you back to that. As you will see at paragraph 21.2 that says that
12 Ms Coll is, if so advised, to file evidence responsive to the evidence filed by Google
13 and Professor Rodger. It does not specify -- it specifies that that evidence should be
14 confined to pass-on. It does not specify any --

15 THE CHAIR: So which page of which bundle?

16 MR COHEN: My apologies, Madam. Bundle E, tab 6, at tab 70.

17 THE CHAIR: All right.

18 MR COHEN: I don't think this is a point that's disputed, but paragraph 21.2, which is
19 what gives Ms Coll permission to or says when Ms Coll is to file her responsive
20 evidence, does not specify who is to provide -- or does not limit who should provide
21 that responsive evidence. Now, it is perfectly fair to say, as my learned friend
22 pointed out, by reference in particular to what was said at the CMC, that the
23 assumption was that this evidence would be at least overwhelmingly given by
24 Dr Singer, and indeed that is what's happened, and none of that is terribly surprising.
25 But just as a general comment, we would say that if there is evidence which properly
26 arises in response to specific things Mr Noble has said, has chosen to say, in his

1 evidence, and that evidence lies outside Dr Singer's expertise but within Dr Krein's
2 expertise, it could not be right for that evidence to be given by Dr Singer, rather than
3 Dr Krein, nor could it be right for that evidence be given by no-one, just by virtue of
4 the happenstance that it falls within Dr Krein's expertise and not within Dr Singer's.
5 I won't take you now to the detail of the various expert reports for obvious reasons,
6 but if we go through, if you did a word search through Dr Singer's previous report,
7 you will see that he relies very heavily on, or refers frequently, to what Dr Krein has
8 said. And the way that this point then emerges in his responsive evidence, I would
9 submit, is significant. So if we look at the relevant report that's in question here,
10 which is Mr Krein's third report, we find that at supplemental bundle 1, tab 3, if the
11 Tribunal has that.

12 THE CHAIR: Yes.

13 MR COHEN: If you then wouldn't mind looking at paragraph 8, which is on
14 page 510, you will see there the core genesis of this statement from Dr Krein. You
15 will see he refers back to evidence he gave in Krein 1, without objection from
16 anybody, about the costs which app developers incur, and I should note, I don't think
17 it was -- although it was requested, I don't think it's actually included in the bundles,
18 but the original order setting out the various relevant areas of expertise for the
19 different experts included, as against the person who came to be Dr Krein, app
20 monetisation and development. So it's perhaps unsurprising that none of this
21 evidence from Dr Krein was objected to, the evidence that he there refers back to in
22 paragraph 8. Mr Noble has pointed out in paragraph 9, in effect responded to that
23 evidence. He did so by way of response to Dr Singer, who was himself citing
24 Dr Krein, and you can see, if you wouldn't mind, looking at paragraph 9 there, some
25 of the evidence which Mr Noble gives on the question of how in fact developers set
26 their prices. We could look equally --

1 THE CHAIR: But it's not for Dr Krein to be commenting at all on what Mr Noble is
2 saying. He's not the economic expert. He's not been given permission to adduce
3 any economic evidence.

4 MR COHEN: He's not seeking, to be clear here, to adduce economic evidence in
5 the sense that evidence is given by Dr Singer. But in the same way as in Dr Singer's
6 previous reports there are certain factual questions as to how developers set prices,
7 for which he has made reference to what Dr Krein has said, there's then a continuum
8 of development here where Mr Noble in effect responds to the points that Dr Krein
9 has made about factual evidence. Now we could, I suppose, have an argument
10 about whether Mr Noble ought to have been within the scope of what he was doing,
11 opining on how in fact he believes developers set prices. But having done so, all
12 that's then happening in Krein 3 is Dr Krein is in effect responding to the evidence
13 which Mr Noble gave, which was itself in substance in response to what Dr Krein had
14 said.

15 THE CHAIR: How is Google going to reply to this? There is an understanding that
16 Mr Noble will be able to respond to Singer. But what about this evidence? I think
17 what you're saying is Singer 4 relies on this, and it's put in in order to set up what
18 Dr Singer is saying. Mr Noble is not a factual expert, he's an economist, so who is
19 going to respond to this, and when? What's your proposal? You put this in, there
20 isn't, ostensibly, any specific permission for Dr Krein to put in anything else. You
21 fairly acknowledge that the assumption was that the evidence would be given by
22 Dr Singer. That was what was referred to at the hearing. There was no suggestion
23 there that Dr Krein was going to do anything else. So we have this report that comes
24 in out of the blue. How do you propose that we deal with this, in the time available to
25 trial?

26 MR COHEN: Just to clarify one point, Madam, the point I was making was less

1 about the reliance on Dr Krein's evidence in Dr Singer's latest report and more about
2 the fact that considerably earlier in this process, Dr Krein's evidence was being
3 heavily referred to by Dr Singer in a way which Mr Noble then responded to.

4 THE CHAIR: Yes, all right. Just cutting to my question, how are we properly to deal
5 with this?

6 MR COHEN: I think the answer to that we would suggest, Madam, is that in the
7 same way that Mr Noble felt able to respond in effect to Dr Krein's evidence by giving
8 his own evidence on what he considers app developers take into account; if that
9 was, and I don't think there was any suggestion it wasn't, was admissible evidence
10 for Mr Noble to give in his second and third expert reports, there's nothing which
11 would stop Mr Noble from similarly responding to these points which are in effect
12 points which sit within Dr Singer's umbrella and I suppose could theoretically have
13 been given as hearsay evidence by Dr Singer from Dr Krein, but which, as matters
14 have turned out, Mr Noble has addressed already, and Mr Noble, as you can see
15 from the --

16 THE CHAIR: But hang on, you are saying that this is expert evidence, because you
17 are saying it was put in under the banner of a permission for reply expert evidence.

18 MR COHEN: Yes.

19 THE CHAIR: But Mr Noble is not an expert on app development so how could he
20 even properly, within the scope of his expertise, respond to this?

21 MR COHEN: This doesn't relate so much, Madam, to app development as app
22 monetisation, and I think the answer to that, if I could turn you back to paragraphs 8
23 and 9 of Dr Krein's report, which I showed you earlier, show that what is happening
24 here very squarely is that Dr Krein has made a point adopted by Dr Singer.
25 Mr Noble has then responded to it and then instead of having Dr Singer as it were
26 asking Dr Krein what to say we've put in something directly from Dr Krein responding

1 in turn to what Mr Noble has said. So there's nothing we would suggest to stop that
2 same process from culminating in the documents which, pursuant to the discussion
3 you had early this morning are going to be produced, and which would enable
4 Mr Noble, whose points are being responded to here, to say whether he in turn has
5 any response to the arguments being made against him. It's the same approach that
6 he has adopted until now, we would say. He has chosen to pick up the gauntlet as it
7 were and say why he thinks Dr Krein in substance is wrong. Dr Krein says well, here
8 is my response to that. If they wish to have a further opportunity to say this is why
9 Dr Krein is not correct, then the short document that the Tribunal's already directed
10 will be put in, will be his opportunity to do that. In the same way that he responded
11 initially in his previous reports.

12 THE CHAIR: And what other evidence would be relevant, for example, from
13 Professor Rodger?

14 MR COHEN: I'm not aware, unless somebody suggests otherwise, that there's
15 anything that Professor Rodger says that touches on this.

16 THE CHAIR: You think that this is solely between you Google?

17 MR COHEN: Sorry to have provoked any hilarity. We say that this is a point which
18 has been raised, as Dr Krein's evidence doesn't address Professor Rodger's
19 evidence, but for that very reason it's a point that was raised by Dr Krein, responded
20 to in substance by Mr Noble, and now responded to in turn by Dr Krein.

21 MR O'DONOGHUE: Professor Rodger's position on pass-on is fully aligned with
22 Google, save for the narrow point on subscription.

23 THE CHAIR: Okay, but that doesn't mean that you're not going to want to say
24 anything about it.

25 MR O'DONOGHUE: Indeed.

26 THE CHAIR: Are you going to want to say anything about it, that is my question?

1 Yes or no.

2 MR O'DONOGHUE: As things stand we will rely on what Google would say.

3 THE CHAIR: But Google doesn't have an expert on app development. You might.

4 I don't know. Do you have any evidence on this at all or are you just relying on what

5 Google say?

6 MR O'DONOGHUE: We will be relying on Google.

7 THE CHAIR: Okay. You have no evidence on this.

8 MR O'DONOGHUE: We have pass-on evidence, yes, but not on this narrow point,

9 no.

10 THE CHAIR: Okay, you don't have any evidence on this. You have no-one who

11 could respond to it?

12 MR O'DONOGHUE: No.

13 THE CHAIR: All right. And I'm being told that Google doesn't have anyone to

14 respond to it. So at the moment what I'm being told is, as I understand from your

15 and Google's side, you are both saying that there is nobody who will be able to

16 respond to it, is that right? We'll come back to Ms Smith.

17 MR O'DONOGHUE: Madam, we have evidence from xigxag which does touch on

18 pass-on. But that is factual evidence. So potentially, is maybe the way I would put

19 it.

20 THE CHAIR: Okay. So there might potentially also be a question as to whether

21 Professor Rodger is going to say something about this. The problem is that this

22 seems to be a mix of factual and expert evidence and that's not easy to deal with

23 when we have a process for factual evidence to be given and expert evidence to be

24 given, which have been separated.

25 MR COHEN: I fully take that point, Madam, and as I say, our answer that too, I don't

26 want to repeat myself, of course, but our answer to be that is this was already

1 an issue, the issue you identified, Madam, was already an issue at the stage at
2 which Dr Krein put in his first report. As my learned friend said, there may be
3 a discussion about the extent to which that mixes factual and expert evidence, if
4 that's being suggested. The response to that was not to complain that there was
5 some issue, but to have Mr Noble set out his own views on the factual questions of
6 how -- not in the sense of saying whether it's a question of fact or expert in this
7 context, but it is ultimately a factual question, as to how app developers determine
8 prices. The ordinary course of events there would be Dr Krein sets out his position,
9 which is then in effect responded to by Mr Noble, and Dr Krein has an opportunity,
10 briefly, to respond, which is all this brief statement does, to the points Mr Noble
11 makes as against Dr Krein. If it were necessary for Mr Noble to respond further,
12 I would be very surprised if we are told he can't do so.

13 THE CHAIR: All right. Thank you. So you say your proposal is that this stays in,
14 and then Noble responds insofar as he's able to do so in his further evidence, which
15 is given, at this stage it won't be a separate report, it would be in his trial report?

16 MR COHEN: Yes, and just more generally, I would reiterate the point I made at the
17 outset, that we had understood that this was going to be the subject of
18 an application, and if it is, no doubt we'll see where this goes to, but at the moment
19 there is no application to strike out, and the points that have been made today for the
20 first time --

21 THE CHAIR: No, Ms Smith doesn't say that she needs, because she says you just
22 don't have permission to adduce the report.

23 MR COHEN: Right, but as I would put in terms of the batting order, as it were, if a
24 report is put in and the position taken, certainly on our side, is this is within the scope
25 of the permission that was given, that's then a point which has to be determined in
26 my learned friend's favour, if it really is the case that it shouldn't be allowed.

1 THE CHAIR: That's what she's saying.

2 MR COHEN: That is what she's saying.

3 THE CHAIR: And I think this should be clear, going forward, no-one is to put in any
4 report from any expert without having had prior permission from the Tribunal. If she
5 is right that you didn't have permission to put in this report, then that's the end of the
6 matter, unless you ask for permission. Which I assume you're doing implicitly. But it
7 doesn't seem to me she needs to apply to strike it out if you don't have permission
8 for it.

9 MR COHEN: Yes, I would only say, Madam, that rather as it were I would say begs
10 the question of whether we do have permission. But clearly we are taking the
11 position, and we have always taken the position, that we do have permission and
12 you've seen the relevant part of the Order. If that is going to be gainsaid then in the
13 same way as there would have had to have been an application to strike out the
14 relevant parts of Dr Singer's report, if that point was still live, it can't, we would say,
15 be any different in that respect for Dr Krein, merely because the debate is located in
16 a slightly different place.

17 THE CHAIR: All right. Thank you. Is that all want to say about this?

18 MR O'DONOGHUE: Unless there's anything else I can assist with.

19 THE CHAIR: All right. (Pause).

20 Ms Smith, do you have anything to say in response?

21 MS SMITH: Madam, simply just one very short point. You were right in identifying
22 that the crux of this issue is that Krein 3 effectively opens up factual issues as to how
23 developers take into account marginal costs in fixing their prices. Mr Noble has
24 responded to the economic evidence in Singer and is able to respond to the
25 economic evidence, but he cannot respond to the factual evidence. In our
26 submission it's not at all clear how this factual evidence can be dealt with in the time

1 available before trial, let alone before the experts produce their final trial reports
2 which we were discussing earlier. So in that situation we say there had been no
3 permission for Krein 3 on the basis I set out, and Krein 3 should not be given
4 permission in line with paragraph 24 of your Practice Direction on expert evidence.

5 THE CHAIR: Yes.

6 MR COHEN: I apologise, can I make one very brief point just in response to that
7 very specific point. If you wouldn't mind looking briefly at supplemental bundle 2,
8 tab 13, and page 479. This is the section where Mr Noble is dealing with pass-on.
9 You can get a flavour of what I'm talking about from paragraphs 10.65 and 10.66.
10 The point he makes, not as a matter of economic theory, but as a matter of fact, as it
11 were, at the beginning of paragraph 10.66. This is a question of fact. If you flick
12 onwards from there, I won't take you to particular paragraphs, you will see that
13 Mr Noble does go on to opine in some detail on what he thinks the answer to that
14 factual question is. That is why this point arises.

15 THE CHAIR: [redacted for confidentiality]. Now, that's a matter of submission, it
16 would be a matter of submission at trial, if there was any material in the documents
17 which went to that point. But his point is if these types of costs are not taken into
18 account then on the basis of the economic theory, that's what he would expect.

19 MR COHEN: Yes, but it's a point he makes, and I say I won't take you to it, but if
20 you look at section 10(c) of his report, which is dealing again with this factual
21 question, he makes it by reference to particular documents but he does make it as
22 an observation of fact. He makes various suggestions as to where he thinks -- I will
23 be careful as to what I refer to, because I know there are some parts of this are
24 highlighted confidential --

25 THE CHAIR: I'm sorry, if that needs to be struck out from the transcript and
26 redacted, you'll tell us.

1 MR COHEN: Indeed, Madam. The detail of what he goes into in section 10(c) of his
2 report, you will see if you glance at that, is wholly occupied with these factual
3 questions. Yes, by reference to documents that are in disclosure, there's a debate to
4 be had about, but nonetheless opinions on factual -- on this, what one might call
5 hybrid expert factual question.

6 THE CHAIR: Well, all right. Look, it seems to us that at the moment there isn't
7 permission to put this in, and so the question is how we deal with this. There was no
8 discussion at the relevant hearing which suggested that Dr Krein would be serving
9 either factual or expert evidence on this issue. Mr Noble does not seem to me to be
10 giving any factual evidence himself. What he does is refer to what he's seen in the
11 materials before him and comments on the basis of the assumptions that he sets out
12 on the basis of what he has seen. If your position is that you wish to serve limited
13 factual evidence to address some particular point, then I think what you need to do is
14 to make an application to put in further factual evidence, and that would then need to
15 be responded to by the other parties. But it seems to me that it's not satisfactory to
16 be putting in something which is a mixture of factual and expert evidence when
17 neither of those things has been provided for in the orders that have been made so
18 far on the part of Dr Krein. I am aware that Dr Krein occupies a slightly hybrid
19 position in these proceedings, and the evidence that he gives seems to fall partly into
20 the factual camp and partly into the expert evidence camp, but it is important for the
21 good management of the proceedings for everyone to be clear about what evidence
22 is to be provided and by whom. So I think where we are at the moment is that
23 permission has been given for Dr Singer's evidence. There is now agreement as to
24 how Dr Singer's evidence is going to be dealt with by Mr Noble. If you, or indeed
25 anyone else, thinks that for some reason the factual record that we have before us,
26 and the pretty voluminous material that everyone already has, is incomplete in some

1 | important respect, then I think it's for whoever wants to adduce further factual
2 | evidence to make an application to do so and to explain fairly circumscribed confines
3 | of the evidence, exactly what that evidence is going to go to, and what is going to be
4 | said, and how lengthy that evidence is going to be. In Dr Krein's case that's the
5 | procedure that you would need to follow if you want to apply for this to go in to be
6 | considered at trial. I don't think it's fair for Mr Noble to have to respond to that at this
7 | stage, when it's been put in without permission having been given. So if you want to
8 | make that application, do so, but it may be that what you're putting in is more
9 | confined than what is currently there, and what is currently a mixture of comment on
10 | Mr Noble and indeed comment on Mr Noble's economic evidence, and what seems
11 | to be factual evidence.

12 | MR COHEN: Thank you, Madam.

13 | THE CHAIR: Thank you. That deals with I think both Singer and Krein.

14 |

15 | Discussion re *Evans* objection schedule

16 | THE CHAIR: We now get to the *Evans* objections schedule. Can I just tell you what
17 | we think, provisionally, about this? We understand that, Mr Hoskins, you object to
18 | the Google schedule. We've had a look at the Google schedule. We are
19 | unenthusiastic about making an order that requires everyone to go away and do
20 | even more work, which we are not sure is going to go anywhere. We are also aware
21 | that in any event the original expert reports are, following the directions that we've
22 | already given, going to be superseded. So our proposal is that the Google schedule
23 | stands, you make of it what you will, you have some identification of what Google
24 | objects to. We are not attracted by the idea of asking Google to go away and redo
25 | that on some basis, and that everyone is sensible about this. You will both have
26 | seen the issues that have been ventilated by both sides on this point, and those

1 points are taken into account when the trial expert reports are produced, and then
2 we can have a debate at trial if necessary, if there is some glaring passage in the
3 revised expert report that breaches the principles that are now set out by the
4 Supreme Court in *Evans*. That is what we are minded to order, rather than asking
5 some junior member of the team to go away and have another go at what may be
6 a not very fruitful exercise in the long term. Do you disagree with that approach?

7 MR HOSKINS: May I turn my back?

8 (Pause)

9 MS SMITH: While Mr Hoskins is taking instructions, I can indicate that we agree
10 with that. We think the process is otiose, given the order that we're going to be
11 proceeding with final expert trial reports.

12 MR HOSKINS: There's nodding again.

13 THE CHAIR: All right, very good. Thank you very much.

14 So I think that that means that --

15 MR HOSKINS: (Overspeaking) there's an order that we respond by a certain date.

16 THE CHAIR: Yes, you will have to vary it to say that nothing further is to be done on
17 that bit.

18 Yes. Does that mean that you and Mr Cohen and your team can now leave?

19 MR HOSKINS: Absolutely.

20 THE CHAIR: All right, thank you. Thank you for coming along.

21

22 Discussion re Google's variation application

23 THE CHAIR: So then we will proceed to Google's variation application. Yes,
24 Mr Holmes. Can I just say at the start, just reiterate the point, we don't need you to
25 repeat anything that is said in your skeleton argument, in the pleadings and in the
26 evidence, all of which we've read.

1 MR HOLMES: Madam, we heard what you said, I'm planning to take this very
2 shortly. I may not require much more than half an hour to make my points.

3 THE CHAIR: All the better, thank you.

4 MR HOLMES: I won't address you on the law or the context, unless you or the other
5 members of the Tribunal would find that helpful.

6 THE CHAIR: No.

7 MR HOLMES: Instead I plan to make a few headline points, trying to avoid repetition
8 of what we've already said. First, as to why we say that the variation we seek is fair
9 in the circumstances of the case. Second, as to practicability at this stage. Third, as
10 to the strength of the claims, the other specified factor to be considered when
11 deciding between opt-in and opt-out. Fourthly, a few words on the homogeneity of
12 the class, which is one of the points that is taken against me, only because of the
13 additional material from Professor Fletcher which was not covered in the skeleton
14 arguments.

15 I won't address you on any of the other points, including the allegation of abuse of
16 process, unless you would find that helpful.

17 THE CHAIR: No. That's very helpful, thank you.

18 One thing that you might want to consider and address is, if your application were
19 not to be granted, how alternatively you would seek to get the material that you say
20 that you need, because part of what you are saying is that you need a limited
21 amount of further material. Is that something that you can get in any event, or is
22 there some reason why your application has to be granted?

23 I'm looking at, for example, paragraph 11 of your reply, which says that only limited
24 disclosure is required from certain developers on the discrete issues of whether they
25 fall within the class definition. Is there some reason why you can't get that unless the
26 class definition is amended, and if so why? Your answer may be that you can get

1 that.

2 Anyway, that was just one point.

3 MR HOLMES: That's absolutely a point I intend to address, madam, and to be clear,
4 if this application were to fail, we would still be seeking disclosure of that limited
5 amount of material.

6 THE CHAIR: Yes, so you would be asking for it anyway.

7 MR HOLMES: Yes. There are reasons of efficiency and practicality which still, we
8 say, favour the variation that we seek in relation to obtaining that material, which I'll
9 develop in a moment.

10 So you've seen what we're asking for. The variation would require a small number of
11 large international developers to opt into the proceedings in advance of trial. Those
12 developers comprise the overwhelming majority of the alleged claim value.

13 On this point, I know that you will have these figures in mind, but just briefly to
14 refresh your memory of them, may I take to you the reply where they're set out.

15 They're confidential, which is why it might be helpful to open that up. It's in bundle A
16 at page 219.

17 This is the striking concentration of the class. You see at 11(a), the 25 developers
18 that are the subject of our original application account for a very large proportion of
19 the claim, and very large damages sought. Just the top five developers, those listed
20 there, still account for a significant majority of the claim as set out at 11(b). Looking
21 at 13, you see that just the top developer accounts for a huge portion of the claim.

22 THE CHAIR: Can you just help me, in (b) over the page, it says the "mean average
23 individual claim value is between..." Mean average. Do you just mean the mean, or
24 the average, and by average you mean the mean?

25 MR TAYLOR: I think it's to distinguish it from a median average. I suspect it means
26 the average calculated on a mean basis by summing them and dividing by the

1 number of developers. And the low value is Professor Fletcher's low scenario, and
2 the high value is the high scenario.

3 THE CHAIR: Yes. And the reason why you have a range is because it's
4 being -- you're accounting for the fact that there are different calculation
5 methodologies?

6 MR HOLMES: Exactly, that's right. There are just different assumptions. You will
7 have seen Professor Fletcher has various assumptions for the purposes of quantum,
8 and they represent those at either end of the spectrum, the low value and the high
9 value, so they give a sense of the range.

10 So a very concentrated class, with class members with large claim values, and we
11 say that those class members should now be required to opt-in. Laying aside the
12 small number of very large claims, the remainder of the claim value consists of
13 a very long and thin tail of developers with very much smaller claims. You see that
14 from paragraph 15, further down the page. Claims that are worth between a few 10s
15 and a few 100s of pounds for the great majority. Almost the totality of the class
16 numerically with claims of below 10,000. Our proposal is that those smaller claims
17 would remain certified as at present, on an opt-out basis.

18 THE CHAIR: Is the figure that you've just given confidential or not?

19 MR HOLMES: I was trying to give broad ranges. The £10,000 or less figure is not
20 confidential.

21 THE CHAIR: Right.

22 MR HOLMES: The percentages indicated in the final line of paragraph 15 are.

23 THE CHAIR: Yes, all right.

24 MR HOLMES: We say that this amendment strikes a fair balance. That's partly
25 having regard to the important statements of principle made by the Supreme Court in
26 the Evans case since these proceedings were first certified.

1 In the terms of paragraph 117 of the Supreme Court's judgment, the entities in
2 question form part of large commercial organisations, well able to look after their own
3 interests. The Evans judgment makes clear that these are not the kind of entities
4 that should generally be permitted to benefit from the opt-out regime, on the basis
5 that it is perfectly practicable, given their sophistication and the size of their claims,
6 for them to opt-in.

7 The inclusion of these large claims on their current track, bundled together with
8 a mass of individually much smaller claims, doesn't strike a fair or appropriate
9 balance for two reasons.

10 The first is the reason emphasised by the Supreme Court in Evans. Opt-out
11 proceedings have an obvious and substantial leveraging effect, given their default
12 class-wide scope. That may be justified in the case of small claims which would not
13 attract wide buy-in given their low value, but we say it's not justified in the case of
14 classes consisting overwhelmingly of a few huge individual claims. Those claims
15 should require the positive consent and engagement of at least the large claimants,
16 limiting the potential for lawyers and funders to use the leverage of a class-wide
17 default.

18 That is why the Supreme Court made clear in paragraph 120 of Evans that the
19 tribunal should consider how the class breaks down, and it should consider the
20 feasibility of opt-out for claimants with different sizes of potential claim within the
21 class, and it should then stand back and see what justice requires. That's what
22 we're now asking the Tribunal to do in this case.

23 The second reason is --

24 THE CHAIR: Are you saying that there was some reason why the Tribunal could not
25 have done that at the time of the original claim? Because of course what the
26 Tribunal in Evans is doing is taking a view on the facts of Evans. The facts of the

1 present case are different to those in Evans. Why could you not have advanced
2 those arguments when the original claim was brought and certified?

3 MR HOLMES: We say, madam, that had we done so, that that would have been
4 met with short shrift, given the law as it stood in the Court of Appeal's judgment at
5 the time, which favoured considering the class as a whole, the approach that
6 your Ladyship took in the Spottiswoode case, before the Evans Supreme Court
7 judgment.

8 Since then, we've seen what the Supreme Court says. One doesn't consider the
9 class as an undifferentiated mass when considering practicability. One doesn't take
10 account of the very small claims within the class and view the practicability of those
11 as decisive. One looks across the class, and one asks, for different segments of the
12 class, whether opt-out would be practicable for those different segments.

13 If it would help, I can take you to the passage of evidence that I have in mind,
14 madam. It's that exercise that --

15 THE CHAIR: Yes, why don't you take us to the passage in the Court of Appeal that
16 you rely on to say that if you had come along and said that the class should be split,
17 because of the different features of the class, the Tribunal would have refused to do
18 so.

19 MR HOLMES: Starting, if I may, with the Supreme Court's judgment, you will recall
20 that the -- I don't have the Court of Appeal references --

21 THE CHAIR: What I'm really interested in is not what the Supreme Court says now,
22 but what the Court of Appeal had said, which you say made it unlikely that any such
23 argument would have succeeded in that first instance when this claim was certified.

24 MR HOLMES: Yes. I can do that. I cannot, I'm afraid, do it on my feet, but my
25 submissions will go over lunch, so maybe I can show you that point at the start of the
26 afternoon.

1 The short point is that the Tribunal, you will recall, found that the tail of long
2 claimants who would not opt-in shouldn't wag the dog in the Evans situation, which
3 consisted, in the same way as this class does, but in a less concentrated form, of
4 some large claimants and then a tail of smaller claimants. The Court of Appeal
5 reversed the majority of the Tribunal and found, on the basis of an analysis of the
6 data in that case, that opt-in would not be practicable.

7 THE CHAIR: Yes, but the Court of Appeal said at paragraph 123 of Evans that even
8 for the largest class members, the sums at stake are relatively modest. That's the
9 basis upon which it rests its assessment. That's not what you're saying in this case.
10 The Court of Appeal looks at the different class members in Evans and reaches that
11 view that, even for the largest class members, opt-in would be likely impracticable.
12 You're saying in this case there's a very different assessment to be made for the
13 largest class members, because of the figures that you've shown us as to the size of
14 their claims.

15 MR HOLMES: I apologise, I would like, if I may, to come back -- can I develop my
16 second point, and then come back to this.

17 THE CHAIR: Yes.

18 MR HOLMES: The second point is more particular to this case.

19 THE CHAIR: So you're going to the practicability point?

20 MR HOLMES: I'm not going yet to practicability, I'm still in fairness, but I'm on
21 a second and specific reason in this case why we say that opt-in is the fair course for
22 these very large claims.

23 You've seen that the class consists of developers that are domiciled in the UK and
24 that made sales on Android devices. Although the claim consists overwhelmingly of
25 a few large developers, Professor Rodger's main evidence is silent as to those
26 developers, it doesn't identify them or consider even the largest of them individually,

1 to asses whether they are developers that are domiciled or have suffered loss here.
2 What he does is to rely on data disclosed by Google concerning sales made on UK
3 merchant accounts, although a number of the entities holding such accounts are
4 clearly overseas corporations, and Google has always made clear that the data
5 should not be taken as indicative of class membership or domicile.

6 Even where the large international developers with UK merchant accounts have UK
7 entities within their group, Professor Rodger's evidence does not consider what
8 those UK entities actually do within their wider corporate groups, and whether they
9 can be really be said to have suffered any loss.

10 Google does not know how the international developers in question arrange their
11 affairs. In ordinary litigation, there would be pleadings and evidence as to who is
12 claiming, and there would be disclosure to test what is claimed. Here, instead,
13 Google has had to piece together what information it can from publicly available
14 sources.

15 THE CHAIR: But you could have done that at any point. Presumably you say this is
16 an issue in the case. I understand that you have pleaded to it. So that goes to
17 whether you are entitled to get disclosure on this point, which you say you're going to
18 ask for anyway.

19 MR HOLMES: Yes. That's correct. The point, though, is that the issues require
20 a greater degree of engagement with an individualised assessment of the large
21 developers in question, and while we've done our best with publicly available
22 materials, we do need the targeted disclosure.

23 THE CHAIR: Yes, but why didn't you ask for that a long time ago, if this is a pleaded
24 issue in the case?

25 MR HOLMES: The short point is we have pieced together what we can, but the
26 experts who put in their responsive evidence in April 2026 identified limits to what

1 | could be done with those public materials.

2 | We have written to a number, four, of the five largest developers, asking for the
3 | disclosure that we want. As one would expect for these large and sophisticated
4 | operators, two have responded through city law firms, Macfarlanes and Winston
5 | Taylor, and what they say, we say, shows why opt-in would render this process more
6 | efficient and practicable.

7 | THE CHAIR: So you're not saying it's not possible for us to make an order, you're
8 | saying that we can make an order for them to provide the material you seek, and
9 | you're just saying that it would be easier if it was done under the framework of
10 | opt-in?

11 | MR HOLMES: Exactly, it would be more efficient.

12 | THE CHAIR: Why? Because we would be making the same order either way.

13 | MR HOLMES: That's true.

14 | What the Macfarlanes letter says is that their client isn't familiar with the proceedings.
15 | They refer to the request as a request for disclosure from a non-party, and describe
16 | that as exceptional.

17 | The Winston Taylor says that its client has not previously had any involvement with
18 | the joint proceedings. The Winston Taylor letter suggests that the disclosure request
19 | is premature pending determination of this application.

20 | We say that this correspondence shows the desirability of running an opt-in process
21 | in parallel. The large developer groups whose commerce Professor Rodger is
22 | including in the class shouldn't proceed on the basis that they're, in the words of the
23 | Macfarlanes letter, non-parties. They should consider the claims and decide
24 | whether to participate in view of whether they include UK-based entities that have
25 | suffered loss, on their assessment.

26 | That would have efficiencies. Those that choose not to opt-in among these very

1 large groups will presumably have made their own assessment, they're either not
2 interested in participating, or they assess that their UK entities are not to be
3 considered UK-based developers that have any entitlement to the revenues that
4 have been paid by Google.

5 Insofar as that's the case, there would be no need to seek disclosure from them, and
6 we can proceed straightforwardly with them. There won't be any time wasted on
7 them at trial. We say that's efficient.

8 I appreciate that this application was brought obviously back in February, and our
9 original thinking in February was that this was, we hoped, could be determined
10 sooner, so as to allow an orderly and sequential approach, with opt-in first and
11 disclosure to follow. For good and understandable reasons, it wasn't possible to
12 arrange the hearing ahead of this hearing, but we say that it's still in the
13 circumstances efficient to do this in a way that enables the developers to consider
14 the claim and to take a view about whether they participate or not.

15 They state that they need more information about the claim, they're not familiar with
16 it and they don't understand it. That's the response I think that we'll receive from any
17 other developers in the top category that we approach, based on the experience so
18 far. An obvious way of cutting through that would be for them to decide whether they
19 wish to participate, which would enable them to assess the claim, look at it and take
20 a view, and disclosure could be focussed accordingly.

21 So for that reason we do say that opt-in is a useful stage in a process of resolving
22 this issue, which as you observe, madam, does arise, it arises on the pleadings and
23 it arises in the evidence, but with limitations based on what's publicly available.

24 The disclosure that is obtained in consequence can then be deployed in the form of
25 submission at trial, because it goes to points that we think are legal points. So even
26 if it comes quite soon before trial, we think that that can readily be dealt with without

1 any extension of the trial timetable.

2 On practicability, before turning to a proposed timetable which demonstrates that this
3 works, can I make six short contextual factors which we say demonstrates that this is
4 practicable, both in the sense of being feasible and workable.

5 First, the number of developers in the proposed in opt-in class is small, either the five
6 or the 25 largest developers that account for the lion's share of the claim.

7 Second, those developers are known, identified, and contactable. Professor Rodger
8 and Google both already have their contact details.

9 Third, those developers are large, sophisticated entities, for the reasons we've set
10 out in our evidence and written submissions, and they're well able to look after their
11 own interests. They're well advised and well established.

12 Fourth, their claim values are very large indeed, and they're certainly large enough to
13 make an opt-in worth the candle.

14 Fifth, no-one should be taken unawares. The developers should have at least been
15 notified of the litigation, given Professor Rodger's own notice and administration
16 plan. So this is unlikely to be an entirely cold call, even if the developers hadn't
17 given careful attention to the claim.

18 Sixth, it's relevant to bear in mind when considering the timetable that
19 Professor Rodger, his funder and advisory panel have been on notice of this
20 application since February. There has thus already been time for them to consider
21 the implications for the case, consider what would happen if the tribunal were to
22 grant the application, and to begin planning for that.

23 With those contextual points in mind, that takes me to the suggested timetable which
24 should be evaluated against that backdrop.

25 If we could go please in bundle A to page 277. This is Mr Cran's 14th witness
26 statement. At the bottom of the page there is the start of a proposed timetable. The

1 first item at A is our suggestion to Professor Rodger that it would be prudent to
2 discuss alternative funding arrangements on a contingent basis in case the
3 certification be varied. We don't know if this has been done, there's obviously
4 evidence from the funder, but we say that there should have been some
5 consideration given to this, and Rodger can't pray in aid the need to do so to
6 challenge the practicability of what's proposed.

7 Then over the page, we work forward from today, but we appreciate your indication
8 that the tribunal will hand down its ruling today.

9 THE CHAIR: Or tomorrow, but probably today, where we are now, yes.

10 MR HOLMES: Yes. On that basis, that would allow a process of opt-in to begin
11 almost immediately, with the 25 largest developers being contacted in order to allow
12 them a period, we have generously allocated 60 days, which might take us to a date
13 in early to mid August.

14 In terms of the disclosure that would then be sought, this is, as I say, only very
15 limited, I don't know if it would be helpful to see what we have asked for from the four
16 developers that we have approached to give you a sense of that. They're short
17 questions, basically, by reference to the publicly available materials. So targeted
18 requests. We think it should be possible for that disclosure to be provided quickly for
19 those that have decided to opt-in, and are therefore engaged.

20 We think for those who are being approached now it would be a longer and more
21 tortuous process, because their first reaction, we suspect, will be the same as that of
22 the two developers who have responded through solicitors' correspondence, and
23 who have indicated that they know nothing of the claim and that they require further
24 information.

25 So the materials will raise simple matters of contractual interpretation and legal
26 submission.

1 THE CHAIR: Where do we find an example of that?

2 MR HOLMES: Sorry, let me show you. If we could go, please, in bundle F to
3 page 141. This is the annex to a letter to one of the four developers that we've
4 approached, which is a top five developer. Its identity is obviously confidential.
5 Could I just ask you to cast an eye over the two requests there.

6 THE CHAIR: Transfer pricing?

7 MR HOLMES: Yes.

8 THE CHAIR: Highly confidential.

9 MR HOLMES: It is highly confidential, but of course the tribunal is used to dealing
10 with highly confidential material with appropriate confidentiality arrangements in
11 place. It's worth bearing in mind the scale of the claims that are represented by
12 these developers. In ordinary civil litigation, this disclosure would be obtainable to
13 test, in my submission, the propositions that Google has pleaded and is advancing,
14 and it would be handled through appropriate confidentiality arrangements.

15 THE CHAIR: So you would accept that you would need first to put in place
16 confidentiality arrangements?

17 MR HOLMES: Yes. There is obviously a confidentiality ring in place in the
18 proceedings, which should be I think durable for that purpose. I can't see any reason
19 why it couldn't apply to third party confidential material. It already does of course,
20 because there's a significant volume of third party confidential material in disclosure.

21 THE CHAIR: Yes.

22 MR HOLMES: So we say these are focussed requests, they won't delay matters at
23 trial, there's no threat to the trial timetable from obtaining them, and moreover --

24 THE CHAIR: How long do you think it would take for these to be provided?

25 MR HOLMES: It depends. If the developers were opting in first, the disclosure
26 process could proceed in parallel with that, so that they could assess the claim and

1 | decide whether to opt-in, and then they could also assess the requests. Then they
2 | would be ready, one would hope, to give the disclosure in short order once they
3 | decide to opt-in.

4 | Of course if they decide not to opt-in, having performed their own self assessment,
5 | then none of us would need to worry about their material. Again, that would save
6 | time at trial, and would reduce the scope of the disclosure that was required.

7 | THE CHAIR: What if we didn't grant your application, and you were therefore
8 | effectively asking them cold? How long do you think it would take?

9 | MR HOLMES: We would need to respond to the questions that have been raised by
10 | the developers that we've so far approached. We would need to consider how
11 | feasible it is to expand the request to other developers in the class, and which of
12 | those developers we should approach, and we would need to give a period for them
13 | to understand what was being sought and to assemble it. That might take
14 | I hesitate to give a figure on my feet, I'll just seek instructions if I may.

15 | THE CHAIR: But you say, if this is simple material -- I mean, you've pointed me to
16 | two requests.

17 | MR HOLMES: Yes.

18 | THE CHAIR: It seems to me not very difficult to understand what is being sought.

19 | MR HOLMES: Yes. So perhaps two weeks on that basis, following -- there may
20 | need to be some correspondence prior.

21 | THE CHAIR: Yes. What would the basis for that application be, under the Tribunal
22 | Rules? Do you accept the position that you would effectively be making a third party
23 | request, or is it something else?

24 | MR HOLMES: Well the rules are unclear, but rule ... if I could find the rules for
25 | a moment. That's authorities bundle 1 at tab ... in bundle F, in fact, the
26 | correspondence sets out the provisions that we rely on at page 136. Do you see

1 | there reference is made to two rules. I think, unfortunately, neither has found its way
2 | into the bundle.

3 | THE CHAIR: That's all right.

4 | MR HOLMES: 53(2) and 89(1)(c) 53 is the general power to order disclosure,
5 | including in respect of third parties. That would be a third party disclosure
6 | application, the usual consequences. 89(1)(c) provides the tribunal may order
7 | disclosure to be given by any represented person, that is to say a class member.

8 | THE CHAIR: Yes. 89(1)(c) is the specific provision.

9 | MR HOLMES: Yes. This is, to my knowledge, a novel point, but I think one could
10 | take the point that as class members, and large and sophisticated entities for which
11 | large claims are being pursued, this is really a self-standing power to order
12 | disclosure of a party that is effectively within the claim. On that basis is it would not
13 | be a third party disclosure application at all.

14 | THE CHAIR: This would be disclosure to be given by any represented person to any
15 | other represented person, the class representative or the defendant.

16 | MR HOLMES: So basically a class member can be ordered to give disclosure to
17 | a party on application.

18 | THE CHAIR: Yes. You're the defendant, so this rule seems to be squarely
19 | applicable to this situation, because disclosure can be given by a represented
20 | person, which would be one of the developers, because they were represented in
21 | the class, to the defendant. I find it difficult to see how it could not be applicable to
22 | this.

23 | MR HOLMES: Yes, and that would be the basis upon which disclosure is sought,
24 | not third party disclosure at all.

25 | A final point. The determination of these issues by reference to these materials
26 | would not require any changes to expert methodologies. This is really a mechanical

1 exercise in determining what goes into the quantum calculations. One sees that
2 from Mr Noble's letter to the tribunal, which is in bundle A at page 300. If I could just
3 ask you to review paragraph 42.

4 THE CHAIR: The relevant volume of commerce would be excluded. So you say
5 that the result would be just to exclude some of the volume of commerce.

6 MR HOLMES: Yes.

7 THE CHAIR: So you raise your legal point about territoriality. If you're successful on
8 that, irrespective of whether you've been successful on the opt-in/opt-out variation,
9 you would say, well, on the basis of that legal point, you just slice off the relevant
10 volume of commerce?

11 MR HOLMES: Yes. I mean take the example in one case, in fact the case of the
12 largest developer in the class. The financial statements indicate that the UK entity,
13 that we apprehend Professor Rodger is latching on to to suggest that this commerce
14 is within the class, is expressly stated to act as an agent on behalf of a principal in
15 another jurisdiction, an overseas entity within a large international developer group.
16 Now, if funds are received as an agent, there's no loss. The loss lies with the
17 principal, whose funds are at stake. One would simply shear off that substantial
18 portion of the claim. You saw what proportion of the claim it represented.

19 Similarly with the internal arrangements for allocating revenues, profits and costs
20 within these groups. That also may affect the extent of the loss, or may give rise to
21 avoidance of loss. It appears that Professor Rodger contends that this is a matter of
22 pass-on, and you will have seen that we've pleaded it either way, either as a point
23 going to loss, whether there is a loss, and a point going to whether in any event loss
24 is avoided. But these are points that could be determined at trial, and they would go
25 to the commerce that's fed in. They wouldn't affect the common issues between
26 Rodger, Coll and us on matters such as the overcharge or ordinary pass-on.

1 THE CHAIR: Yes, it doesn't affect the methodology?

2 MR HOLMES: Yes.

3 THE CHAIR: All right.

4 MR HOLMES: So we say it shouldn't affect the trial timetable whatsoever.

5 But in any event, and even if the Tribunal thinks that more time might be required for
6 argument, or for consideration of the documents, the trial window has reduced
7 because of the Epic settlement, and on the basis of the indications that you gave this
8 morning, madam, it's clear that we'll be able to deal with the evidence more crisply,
9 or it seems likely that we'll be able to deal with the evidence more crisply, and
10 therefore there is likely to be some slack for dealing with all of this at trial. But it is
11 an important issue that will need to be addressed, which goes squarely to the heart
12 of the Rodger claim.

13 THE CHAIR: Yes.

14 MR HOLMES: And we see opt-in as a useful means of progressing this issue. It
15 seemed particularly useful in February, when we first applied, because of the
16 efficiency of having people educate themselves on the claim and decide whether to
17 participate, you have that point, but if not, then we will pursue disclosure in any event
18 under the provision that permits, under rule 89.

19 THE CHAIR: Yes. Obviously if you were to do that, you would have to be -- that
20 wouldn't be an application that was made just with Mr O'Donoghue in the room, the
21 relevant developers would have to respond to that.

22 MR HOLMES: Indeed, with a represented person. And I fear that that will,
23 depending on how the Tribunal is able to deal with it, that may take a little Tribunal
24 time.

25 One is hopeful, though, that they will be cooperative, the developers. They, after all,
26 are sitting on very substantial claims. But opt-in would focus their minds.

1 THE CHAIR: There's a lot of work that has to be done in order to just do a bit of
2 mind focussing, Mr Holmes.

3 MR HOLMES: Yes.

4 THE CHAIR: And if that's really the only basis of bringing this application, it's not
5 a very attractive one.

6 MR HOLMES: I hear what you say, madam.
7 I'm conscious of the time.

8 THE CHAIR: All right. We'll break for lunch, thank you.

9 MR HOLMES: I'm very nearly done now, you'll be pleased to hear.

10 THE CHAIR: All right. Thank you very much. I'm grateful for your comments so far,
11 they've been very helpful. We will rise until just a few minutes after 2 o'clock.

12 (1.05 pm)

13 (The short adjournment)

14 (2.05 pm)

15 MR HOLMES: My Lady, may I briefly return to the Evans judgment of the Court of
16 Appeal?

17 THE CHAIR: Yes.

18 MR HOLMES: I apologise again that I was not able to address this on my feet.

19 THE CHAIR: Not at all, I sprang the question on you.

20 MR HOLMES: You drew my attention to paragraph 123 of Lord Justice Green's
21 judgment in Evans, and you noted the sentence in the middle of the paragraph
22 where he states that in the present case, even for the largest class members, the
23 sums at stake are relatively modest.

24 You put it to me on the basis of that sentence, that it would have been open to us to
25 try to distinguish ourselves from the position in Evans on the basis of this comment
26 of Lord Justice Green's.

1 THE CHAIR: I think the more general point is that what was going on in Evans was
2 an assessment about the facts of that case. Which are different. And I just
3 illustrated it by that. I am not saying that that was the only difference, but that was
4 just one of the points that was made.

5 MR HOLMES: That's understood. That's a helpful clarification.

6 It is true, of course, that the case does say that, but Lord Justice Green also makes
7 other points in the course of discussing practicability, which if I may I will briefly draw
8 your attention to. I am sure you are familiar with them, but just to make the
9 submission. This is in bundle G1, volume 2 -- I think it is probably a single volume
10 for you. Page 1481.

11 And you see the sentence in the middle of the paragraph, but Lord Justice Green
12 continues and at the end of the paragraph he observes that:

13 "At all events, the evidence shows that a large portion of the class would be SMEs."
14 So he's looking, are we say, at the class overall, as a whole.

15 Turning on to page 1482, paragraph 127, at H, Lord Justice Green coming to his
16 conclusion, observes that the scale of the claims set out in the table, assuming them
17 therefore to be towards the upper end of recoverability, can reliably serve as
18 a benchmark of practicability. The table indicates relative to costs that the scale of
19 typical claims is modest and the size of typical claimants is not large.

20 So the focus is on typical claimants. Similarly, in paragraph 127 of the judgment, the
21 CAT sets out that the average claim across the class is between 50 and 60,000.

22 Again looking at the average position, the CAT says of this, it is clear that these are
23 on average not insignificant individual claims --

24 THE CHAIR: Sorry, paragraph?

25 MR HOLMES: Page 1482, paragraph 127, at H. You see the references to typical
26 claims being modest, size of typical claims not large, in the judgment the CAT sets

1 out that the average claim across the class is between 50 and 60,000.

2 Then, at the end of the paragraph, it is the claim of the individual that determines
3 whether the individual is willing to become embroiled in litigation, and he respectfully
4 disagreed with the inferences the CAT drew from the table.

5 So his focus there, while it is not absolutely transparent, it does appear to be on the
6 average, the average claim in assessing practicability and preparedness to opt-in.

7 That, we say, considering the class as a whole on average, is in contrast with the
8 clarification provided or the statement of principle contained in the Supreme Court's
9 judgment in Evans.

10 Now I know that you will be well familiar with this, but if we could briefly turn it up --

11 THE CHAIR: Are you saying that there is anything in Evans which says that you are
12 not able to look at the different groups within the class? What you have shown us is
13 that he notes that on average the scale of claims is modest. But are you saying that
14 having seen this judgment, you could not sensibly have advanced an argument that
15 says: here are very distinct groups of claimants in the class; you have a long tail of
16 modest claims, but we have this concentration of claims with the large app
17 developers which make quite an overwhelming majority -- depending on how you
18 slice it up -- or at least a substantial percentage of the claims. And they don't have
19 claims that are modest at all.

20 I mean, if there is something in there, then I would like to see it.

21 MR HOLMES: So perhaps approaching it another way, it would be interesting to
22 show you how this was approached and applied before our certification hearing, in
23 another certification hearing in the Ennis case. As we say, that does shed light on
24 how the Court of Appeal's judgment in Evans was understood, in a way which was
25 then clearly modified by the Supreme Court's judgment.

26 So that is in hearing bundle G2, starting at page 210. You see the date, October

1 2024, between Ennis in the Court of Appeal and Ennis in the Supreme Court.

2 Mr Frazer will be very familiar with this, having sat on the panel which certified the

3 case in Ennis.

4 THE CHAIR: Remind me, when was the certification hearing in this case?

5 MR HOLMES: 5 March 2025.

6 THE CHAIR: So this judgment came a few months before your certification hearing?

7 MR HOLMES: Indeed, indeed.

8 THE CHAIR: All right.

9 MR HOLMES: And it was the analogous developer claim to the Rodger claim in

10 these proceedings.

11 If you turn within that judgment to page 231, paragraph 49 --

12 THE CHAIR: Yes.

13 MR HOLMES: -- you see that reference is made in the legal principles section to the

14 FX judgment, O'Higgins, represented class estimates. Class was described by the

15 Tribunal as made up of only fairly large and inferentially sophisticated institutions.

16 A book building exercise had been started and some 321 firms had been contacted

17 but it had not proved possible to assemble a large enough group to make a group

18 action economically feasible. The Tribunal inferred that the class members were

19 large and sophisticated --

20 THE CHAIR: I have read to the end of the page. Over the page there is "relative to

21 costs" --

22 MR HOLMES: Over the page you see that the Court of Appeal disagreed:

23 "Relative to costs, the scale of typical claim was modest. The size of the typical

24 claimant was not large."

25 THE CHAIR: That was the point we were debating before lunch.

26 MR HOLMES: This is exactly a reference, in my submission, to the paragraph I just

1 showed to you, paragraph 127 of Lord Justice Green's judgment, which focuses on
2 the typical rather than segmenting the claim and looking at the feasibility of opt-in for
3 different sub-classes within the claim.

4 You then see how that cashed out at paragraph 56 on page 233, if I could ask you
5 just to review that.

6 THE CHAIR: Paragraph?

7 MR HOLMES: 56 on page 233.

8 So in reliance on Evans, what the Competition Appeal Tribunal is there doing is
9 looking at the class as a whole. The class is similarly concentrated in Apple. There
10 is a tail, a long tail, and a very concentrated dog. And it was the tail that swung it in
11 Ennis, on my reading of that paragraph.

12 We say that it's in stark contrast with the approach, understandably, given the
13 paragraph I showed to you in the Court of Appeal's judgment reversing the Tribunal's
14 approach. It's in stark contrast to that. But the approach set out in the
15 Supreme Court's judgment, which says that you have to segment the class, you look
16 at different sections of the class where there are different and discrete groups, as we
17 say there are here, by claim value, and looking at those individual groups you
18 make -- you see whether opt-in is feasible for each of them. That's 122, I think, of
19 Evans in the Supreme Court. I know your Ladyship is familiar with what.

20 THE CHAIR: Yes.

21 MR HOLMES: And you then stand back and take a view as to what's appropriate in
22 the interests of justice overall. But you don't conclude that because of the feasibility
23 for the typical claims, looking at the typical claim value across the class, that opt-out
24 is automatically to be preferred in circumstances where there are some enormous
25 claim values, where it would clearly be feasible, clearly be practicable to opt-in.

26 THE CHAIR: Yes.

1 MR HOLMES: So that's my submission on what changed and why we say it was
2 understandable that we did not advance a submission akin to that of Apple, which
3 was rejected, and why we say the position has changed in law since the judgment of
4 the Supreme Court, in relation to how one approaches the question of practicability.
5 I think, Madam, that you have my position on practicability. I am not sure that I need
6 to address you on strength of the claim or on homogeneity of the class, but I am
7 happy to do so, if that would be helpful.

8 THE CHAIR: Well, you did say you wanted to -- wait a minute. You wanted to make
9 some comments about homogeneity arising out of Professor Fletcher's evidence. If
10 you still want to --

11 MR HOLMES: Yes.

12 THE CHAIR: -- we won't dissuade you from doing so.

13 MR HOLMES: It will only take a moment.

14 THE CHAIR: Yes.

15 MR HOLMES: So you have seen that one of Professor Rodger's points is to
16 challenge the contention that the class does divide up into distinct groups of large
17 and small developers. So he says the class is homogeneous because they are all
18 developers, they are all in the same business. That wasn't the case -- that's in
19 contrast to Evans where you had hedge funds, you had banks, you had some high
20 net worth individuals trading, lots of people trading in FX. We say with respect that
21 that's a misdirected point. Google has focused on the size and sophistication of
22 class members because those are the matters that are obviously relevant to
23 practicability. So Rule 79(3)(b) itself specifically refers to the estimated amount of
24 damages that individual class members may recover when assessing practicability.
25 I don't know whether it would help, I suspect you know these rules by heart by now,
26 but there is a specific reference to class, claim value size.

1 THE CHAIR: Yes.

2 MR HOLMES: That's not surprising. Simply put, the larger the claims the more
3 likely that opt-in will be practicable. The focus of the Supreme Court in Evans, in my
4 submission, was all about claim value and sophistication. It is clear that there are
5 enormous differences within the class in this case. The 25 international developers
6 that comprise the large majority of the claim are vastly different to the small
7 developers, whose claims are at most -- I mean, you saw the figures, they are tens
8 or hundreds of pounds.

9 I mean these, one assumes, are people involved in a side hustle or they are
10 hobbyists. They were not international developers, in multinational corporations,
11 with claims of 100 million or more. So this is a differentiated class in just the same
12 way as in Evans, only with a more extreme skew between big and small.

13 We say, on the Supreme Court's guidance, the different groups across the class
14 should be separately evaluated precisely because the practicability of opt-in will
15 differ very substantially between them.

16 Now Professor Rodger seeks to buttress his argument on homogeneity by reference
17 to the evidence of Professor Fletcher in her letter, which points out that there is some
18 variation across each year of the claim period in terms of who forms part of the top
19 developers in that given year. So apps come in and out of fashion; developers move
20 up and down the rankings, and there are a few transitions. Some move out of the
21 top. She has assessed the top 25, which is actually a different analysis from the one
22 that Mr Noble undertook. He focused on the top 20 for each of the high and the low
23 claim. But in any event, her point is just that there is some fluctuation, some
24 amendment to the competition of the top 25 from year to year.

25 Now we say, with respect, that that's not a relevant matter. We say that we have
26 a class here, a money claim for a defined period, and what matters is the aggregate

1 position: who has the largest alleged claims in total across that period of the claim?
2 As the Supreme Court held, when the claims are large or in the hands of large
3 commercial organisations for that period, then opt-in is likely to be practicable. The
4 fact that there is some flux from year to year at the margins in the composition of the
5 top developers doesn't affect that analysis at all.

6 What matters is that the class isn't homogeneous. Applying an evaluative judgment,
7 it's pretty easy to draw a line between these large and sophisticated entities. The top
8 25, we say, is a reasonable place to draw it. Indeed, the top five would also be on
9 the basis that the top five is in a different class again from the 25. With the top five
10 you move up from international developers to multinational developers of
11 considerable scale and sophistication. In any event, the table shows substantial
12 homogeneity from year to year, particularly in relation to the largest five developers.
13 So we say it doesn't undermine the homogeneity -- our points on the heterogeneity
14 of the class or the exercise which the Supreme Court encouraged in relation to
15 assessing suitability for opt-in.

16 That was all I wanted to say about homogeneity. I don't think I need to address you
17 on retaliation. You have our points about that. There are no concrete instances of
18 retaliation cited. Just as in ordinary civil litigation, you wouldn't say that, you know,
19 large commercial parties could be permitted to sue their counterparties anonymously
20 or behind a veil. That's not appropriate here. There is no evidence to suggest that
21 Google has ever retaliated against a party for litigating. Reference is made to the
22 Epic situation, a party which did litigate against Google, but the point about Epic is
23 that Epic went against the agreed contractual arrangements between Google and
24 Epic. So a court giving rise to a contractual dispute and Google drew the contractual
25 consequences. That's not retaliation, that's simply a contractual dispute between
26 two very large parties. So we say there is really nothing to that point.

1 Then on the strength of the claim, we say that, first of all, Kent can't be
2 straightforwardly transposed to this case. Even if it were admissible, although
3 Google wasn't a party to that litigation, the evaluative conclusions in that case will not
4 read straightforwardly across. There are differences on the facts, which we say are
5 important and distinctive. So we don't think that the strength of the claim can be
6 presumed on the basis of the outcome in Kent. We have a much more open
7 ecosystem on our case.

8 Also, the points about the agency arrangements, the intragroup arrangements and
9 the territorial scope of the claim are all points that did not arise in the Kent case.
10 They are specific to this case. We say they have an important impact on the
11 strength of the claims for the top developers in the claim, in the class.

12 The fact that it goes to quantum doesn't mean that it's not relevant to the strength of
13 the claim. This is a claim for damages. There is no claim for an injunction here. So
14 we say that strength should be a neutral factor.

15 On that basis, we say that for the reasons of fairness and efficiency, which I have
16 sought to outline, it would be appropriate to take the largest developers out of the
17 existing certification and to require them to opt-in if they wish to pursue their claim.
18 Whether that application is successful or not -- and we have heard what you said,
19 Madam, before the short adjournment -- we will be pursuing applications for
20 disclosure against the largest developers, because they have a narrow tranche of
21 highly relevant material. But we think that that process will be considerably more
22 orderly and straightforward if combined with a limited opt-in for the largest
23 developers.

24 Unless I can assist you further, those are my submissions.

25 THE CHAIR: Yes, thank you very much.

26 Mr O'Donoghue, could you address us on several specific points. In fact, the points

1 on which Mr Holmes has concentrated his submissions this afternoon.

2 So whether the position has changed since Evans and in particular whether there is
3 a point of distinction with Evans, which, Mr Holmes' position, as we understand it, is
4 that actually in a way the Tribunal when certifying was driven by the approach
5 adopted by the Court of Appeal, which has now changed.

6 The point about homogeneity, and a distinct difference in the class as between large
7 and smaller developers, which Mr Holmes says would justify picking off the larger
8 developers; and also the point that we were discussing before the lunch adjournment
9 regarding the ability to make an application under the Tribunal rules for disclosure in
10 any event. It would be useful to have your submission on that. Mr Holmes has said
11 that even if his application fails he would be intending to make an application under
12 Rule 89(1)(c) for disclosure.

13 I think those would be useful points because I think those haven't been fully
14 ventilated in the written submissions.

15 Reply by MR O'DONOGHUE Re Mr Holmes' submissions.

16 MR O'DONOGHUE: As it happens, they were on my shopping list anyway.

17 Madam, I will obviously address those, but I can be brief in general in view of the
18 helpful indication. As usual, your Ladyship has done a phenomenal amount of
19 pre-reading and is on top of everything.

20 Can I start with a question you put to Mr Holmes and with respect he didn't have an
21 answer to: the basis of this application is essentially two-fold. One, the Google
22 transaction data, that's where he gets his large developer claims from; secondly,
23 public data on intragroup transfers.

24 You put to Mr Holmes, Madam, well, you had this data long before February of this
25 year and chose not to deploy them. With respect, that is absolutely right.

26 Mr Holmes, with respect, didn't have a good answer to it.

1 In the context of certification, Google did not even attend the certification hearing.

2 THE CHAIR: We don't need to be told that. We know that. Could you please focus
3 on the questions that I have asked you to address?

4 MR O'DONOGHUE: Yes.

5 THE CHAIR: We don't need the background.

6 MR O'DONOGHUE: Yes. Then on Evans, several points.

7 First of all, there is nothing in Mr Justice Morris' certification judgment which relies in
8 any shape or form on what the Court of Appeal said in Evans. It is a straightforward
9 multifactorial application of Rule 79. That indeed is a contrast with the Evans
10 certification ruling Mr Holmes took you to, being because that does expressly rely on
11 Evans in the Court of Appeal whereas Mr Justice Morris did not.

12 Secondly, Mr Holmes said before the lunch break that the present case is -- and
13 I quote -- even more extreme than Evans. Now, if that is correct then all the more
14 reason for Mr Holmes not to pull his punches and to put forward his full case at the
15 stage of certification.

16 Finally, Madam, the ultimate answer to all of this is the one you put to Mr Holmes
17 more than once: all of these certification assessments are multi-factorial. Evans, of
18 course, was an unusual case where the Court of Appeal overturned this Tribunal's
19 refusal of opt-out certification, and at that stage it was perfectly open to Google to go
20 to the Court of Appeal and say "the multi-factorial assessment in this case is different
21 and the CAT got it wrong."

22 So I actually rely on Evans in the Court of Appeal. It opens the door even more to
23 Google coming along and saying "Well, that is the wrong multifactorial approach to
24 certification, this case is different." So my answer to Evans is that Evans is about the
25 facts of Evans and not only does it not preclude other assessments in other cases,
26 the mere fact that Evans overturned the refusal of opt-out in Evans by the Tribunal,

1 | was all the more reason why Google should have gone all guns blazing.

2 | Then, Madam, on your disclosure point --

3 | THE CHAIR: I think you didn't address the homogeneity point.

4 | MR O'DONOGHUE: Yes, I will come on to homogeneity, forgive me.

5 | THE CHAIR: All right.

6 | MR O'DONOGHUE: In my respectful submission, the only point that Mr Holmes can

7 | validly put forward today is that there is an informational issue, or a potential gap.

8 | The answer to that problem, if it is a problem, is that they make an application, it is

9 | unclear to us why that application still hasn't been made. It wasn't made a very long

10 | time ago --

11 | THE CHAIR: So you accept that that's an application that can be made --

12 | MR O'DONOGHUE: Yes, yes.

13 | THE CHAIR: -- at any time, under Rule 89?

14 | MR O'DONOGHUE: Yes, yes.

15 | THE CHAIR: Yes.

16 | MR O'DONOGHUE: And in a sense, therefore, Madam -- of course the application

17 | hasn't yet been made, but it has been ventilated in the context of opt-out

18 | proceedings. Rule 89 is agnostic as between opt-out and opt-in. It is perfectly open

19 | to Mr Holmes to make an application for disclosure, in the context of opt-out

20 | proceedings. He doesn't need to shift to opt-in, even in hybrid form, to bring that

21 | application. I am bound to say it is rather like medicine for a disease that doesn't

22 | actually exist.

23 | As you said, Madam, if he gets that disclosure, that may well lead to adjustments to

24 | the volume of commerce at trial and it may be that the final trial expert reports to

25 | come in July can also reflect different combinations or permutations of value of

26 | commerce.

1 So Mr Holmes is not at this stage being shut out in any shape or form. If there is an
2 informational gap it is within his gift to seek to bring that application and to ventilate
3 it.

4 But it does bear emphasis that no application has been issued. All they have done
5 today is write to four out of 25 developers. It is leaving a lot, in my submission, quite
6 late. I don't understand why this wasn't done a long time ago. We had a discussion
7 of third party disclosure before Mr Malek in September of last year, and at that stage
8 Google were left in no doubt whatsoever that an application would need to be a third
9 party application. For reasons that are entirely unclear to us, nothing has been done
10 even now.

11 Be that as it may, if there is an informational gap, it is open to Mr Holmes to plug the
12 gap.

13 Then, Madam, on homogeneity, that I can quickly wrap up a handful of points. First
14 of all, within the top 25, it is not correct to say that these are a contiguous group of
15 large and sophisticated developers. We put in evidence from Mr Ojukwu, his third
16 statement is at A5/189. Many of these entities are actually SMEs. Some of them do
17 not even have to file statutory accounts. They certainly will not have a general
18 counsel or the resources to conduct large scale litigation of this kind.

19 So as a starting point, even within his 25 they are not contiguous or uniform or
20 homogeneous. That is the first point.

21 The second point is the point, Madam, that we have set out in our skeleton at
22 paragraph 51, which I am sure you have read. Just quickly to refresh our memories.

23 THE CHAIR: Your skeleton paragraph?

24 MR O'DONOGHUE: 51, Madam. There we identify three Tribunal precedents, both
25 pre and post evidence, including, Madam, a judgment from you in Spottiswoode.

26 What they say in unison is that you can't simply approach the question of opt-out

1 certification by segmenting the class members into tall poppies and smaller poppies.
2 We give you the citations from cases there. Madam, you remember this, in
3 Spottiswoode two of the class members, customers, were 75 per cent of the total
4 spend. So in fact a much more extreme case than the present case.
5 Then, Madam, the post Evans case, Stasi, it is over the page at 52(3). We make the
6 point, Madam, in 52(1), what the Supreme Court says is:
7 "Stand back and make an overall assessment of the balance of judgment."
8 That's the guidance. Then Stasi, 52(3), that guidance did not involve fragmenting
9 the intended class. The Tribunal then certified on an opt-out basis, even though the
10 vast majority of those claim value was concentrating on customers who had spent
11 over \$100,000 per year with the defendant. That's the second point on homogeneity.
12 Then, finally, Madam, on homogeneity, going back to Professor Fletcher's letter
13 which Mr Holmes took you to, if we can quickly look at that again, please. The
14 supplemental bundle 1, tab 8. It starts, Madam, at 618.
15 THE CHAIR: Yes.
16 MR O'DONOGHUE: You see 2(b), the conclusion. She looked at the developer
17 composition across the seven years. She says:
18 "The exercise reveals the top 25 varied across the years. Some developers appear
19 in individual year lists that are not present on Mr Noble's list."
20 THE CHAIR: Which paragraph am I looking at?
21 MR O'DONOGHUE: The conclusion at 2(b), page 618. Then she unpacks the
22 analysis then at 12-215. Madam, as you will see at 14 and 15 she has essentially
23 done two things. One, she has analysed the top 25 by year, and there is variability.
24 Then secondly, she has analysed the top 25 according to her damages scenario.
25 She has a low claim scenario and a high claim scenario.
26 What she is saying is that when one just for those two parameters there is quite

1 significant variability on who is the top 25 at any moment in time. So that is why we
2 make the point that it is actually quite arbitrary to determine at any moment in time
3 who is or is not within the top 25. Had that question been asked at certification,
4 there would have been one answer; if it is being asked today, there is a different
5 answer. And I suspect by the time of trial it will be a different answer again. So we
6 do not accept there is a non-arbitrary way of breaking up the opt-out class.

7 THE CHAIR: Your point is that the identification of a top 25 claims by -- sorry, the
8 top 25 developers by claim size varies from year to year?

9 MR O'DONOGHUE: Yes, and from damages scenario to damages scenario.
10 You can see the arbitrariness, because it may well be that had this been raised at
11 certification, someone is inside or outside the top 20. Then if it is asked today,
12 people fall in or out again. That, in my submission, is arbitrary and would be deeply
13 unfair to the person who was in or out at any point in time.

14 Finally, Madam, two quick points if I may. Mr Holmes has, in my submission, entirely
15 glossed over the question of the funding implications. Madam, I am sure you have
16 read the evidence from Mr Chopin on this, but can I just quickly just remind you of
17 the essential points?

18 It is at A8/197.

19 THE CHAIR: Okay.

20 MR O'DONOGHUE: I can take this very quickly. Then, Madam, I have only one
21 more point.

22 THE CHAIR: I don't think we need to hear you on the funding points. I mean we
23 have read the evidence of Mr Chopin. Your point is that it is going to be very difficult,
24 if not impossible, to get funding at this point in time.

25 MR O'DONOGHUE: Yes, my Lady. He says several things. He says, first of all, as
26 a matter of contract it would be a material adverse change and therefore the funding

1 as a matter of contract would lapse. He also says that had this been approached as
2 a hybrid, he would not have funded it, and as far as he can tell no one else in the
3 market would have either. He then says, if there has to be a book build across the
4 25, there is no funding for that. He doubts there would be funding available for it,
5 and if and to the extent funding were available, it would be entirely contingent on
6 uptake.

7 That is the answer to Mr Holmes' rather ambitious timing point.

8 THE CHAIR: I don't think we need to be addressed on that.

9 MR O'DONOGHUE: Yes. Madam, on timing the suggestion that this could be done
10 by August, or indeed by September/October, is for the birds.

11 That's why we say in substance this is an attempt to get off the entire claim from
12 Professor Rodger by lopping off the tall poppies.

13 Madam, unless I can assist you further, those are my submissions.

14 THE CHAIR: Thank you.

15 Mr Holmes, do you have any reply points just on the points that Mr O'Donoghue
16 addressed us on?

17 Reply by MR HOLMES Re Mr O'Donoghue's submissions.

18 MR HOLMES: Yes, terribly brief ones. First of all, reference was made to Mr Justice
19 Morris' certification judgment in this case. The focus is on the position of the small
20 claimants, the typical claims. He was looking at the position overall and not
21 segmenting within the class.

22 Indeed, that was the position that was urged upon him by reference to Evans in the
23 Court of Appeal. I can show you, if it is helpful, the skeleton argument of my learned
24 friend in advance of the certification hearing. A quotation was set out there from
25 Evans in the Court of Appeal which said that the question of practicability
26 encompasses the size of the claim and whether it would be proportionate or

1 practicable for the class members, whatever their size or degree of sophistication, to
2 commence proceedings to recover that loss. That was a point made by reference to
3 paragraph 123 of Evans in the Court of Appeal. That was the approach and we say
4 that that approach has been superseded by the Supreme Court's judgment in Evans.
5 The second point on disclosure, we are grateful for the indication from my learned
6 friend that an application can be made at any time, and that if there is an
7 informational issue or a potential gap, that can be addressed and we will pursue that,
8 whatever the outcome of this application.

9 As regards homogeneity, just to state an obvious point, the top 25 would always be
10 the same across a relevant period, whatever the relevant period, and that provides
11 the claim value that would determine the practicability of opt-in. So those, unless the
12 Tribunal has any question, are my only points -- excuse me.

13 Oh, yes, the only other point concerns Evans' funding. You will have seen the
14 comments in the Supreme Court's judgment about the need to not take in terrorem
15 submissions from funders as decisive, as a trump card. We say that that is
16 illustrated by the history of Evans. The funder in Evans was the same funder as in
17 this case, Bench Walk. Mr Chopin gave evidence in those proceedings in which he
18 stated his concerns that funding would not be available on an opt-in basis. There is
19 now, I understand on instructions, a funded opt-in now in course before the Tribunal,
20 which we say does confirm the need for some caution about taking these statements
21 at face value. Thank you.

22 THE CHAIR: Thank you very much.

23 I will just give the Tribunal's ruling.

24 RULING(extracted)

25 MR O'DONOGHUE: We would also seek our costs.

26 THE CHAIR: All right.

1 MR HOLMES: If it assists, we don't resist that in principle, but we have not seen any
2 schedule of costs and we would wish to see that in order to make submissions on
3 the quantum.

4 THE CHAIR: Right. So should I then make an order for costs to be paid on the
5 standard basis to be assessed if not agreed?

6 MR O'DONOGHUE: Yes, thank you.

7 MR HOLMES: Thank you, Madam.

8 THE CHAIR: Now, in light of the discussion -- the very helpful discussion -- that we
9 have had on disclosure, I think it would be appropriate, before we move on to the
10 pleading amendment, to set directions for any disclosure application to be made. It
11 is going to need to be soon.

12 MR HOLMES: Yes. We heard what you say and we see the force of that. A date
13 for hearing may depend on the availability of represented persons.

14 THE CHAIR: What I was going to propose is that you make your application and we
15 set a date for that.

16 MR HOLMES: Yes.

17 THE CHAIR: And that we will then expect that application to be responded to in
18 pretty short order by the relevant developers.

19 MR HOLMES: Yes.

20 THE CHAIR: Some of whom have already, obviously, been put on notice by the fact
21 that you have engaged with them.

22 MR HOLMES: Yes.

23 THE CHAIR: We are minded to determine that on the papers --

24 MR HOLMES: Yes.

25 THE CHAIR: -- unless there is a very compelling reason for there to be a hearing.

26 MR HOLMES: Yes.

1 THE CHAIR: So I think that we will say that we will set a date for your application
2 and that there should then be a response from the developers.
3 Without them being here, I am reluctant to put in this order a date by which they
4 should respond, but I think what we can say is that the Tribunal is minded to
5 determine the application on the papers unless a compelling reason for a hearing is
6 given.
7 But we will have to make that assessment when we get any response from the
8 developers, so I think that probably once your application has been made --
9 MR HOLMES: Yes.
10 THE CHAIR: -- and any initial response provided by the developers, we will then set
11 a timetable for their responses. Unless anyone has better ideas? Because I am
12 concerned about making an order that would bite on the developers if none of them
13 are here.
14 MR HOLMES: I understand. Unless of course it were with liberty to apply?
15 THE CHAIR: Mr O'Donoghue, do you have any suggestions to make?
16 MR O'DONOGHUE: Well, Madam, it does seem to me entirely fair, given that none
17 of these developers are represented, that they shouldn't be saddled with a date
18 today. We think a short order application then with the expectation this could be
19 dealt with on papers, and then we will have to see how they react. We think punting
20 this off with liberty to apply isn't very helpful.
21 The only other point is Professor Rodger, with the Tribunal's permission, would
22 obviously like to put in submissions as well.
23 THE CHAIR: I think we can say such application to be decided on the papers unless
24 a compelling justification for a hearing is given by one or other party.
25 MR HOLMES: Yes.
26 MR O'DONOGHUE: Yes.

1 THE CHAIR: I think we can say that at least. Yes.

2 MR HOLMES: Thank you.

3 THE CHAIR: All right. Date then?

4 MR HOLMES: Yes.

5 THE CHAIR: You have already essentially made your request.

6 MR HOLMES: We have. For the four developers. What we need to do is to reach

7 a final landing on whether to widen that to others within the 25 largest developers.

8 Our proposal would be Wednesday 17 June for the applications.

9 THE CHAIR: Can you not do it before then? All you have to do -- you have

10 essentially, the request that is there already. You have taken me to what you are

11 going to ask for. Is there any reason why you couldn't --

12 MR HOLMES: 12 June?

13 THE CHAIR: Yes, 12th.

14 MR HOLMES: I am grateful.

15 Madam, would it be possible to give an indication that they should have two weeks to

16 respond? Again subject to any -- I am just conscious that this will need to be kept on

17 a tight rein to avoid matters --

18 MR O'DONOGHUE: Madam, 21 of them know nothing about this. It is not quite that

19 simple.

20 THE CHAIR: How can they know nothing about it at all?

21 MR O'DONOGHUE: They have not been asked for disclosure to date, only four

22 have.

23 THE CHAIR: They obviously know about the claim.

24 MR O'DONOGHUE: Yes, of course.

25 THE CHAIR: If there is some way in which -- I don't mind giving a provisional

26 timetable.

1 MR HOLMES: Yes.

2 THE CHAIR: Subject to further comments for the developers, provisional timetable
3 of two weeks for a response.

4 MR HOLMES: I am grateful. That would work well.

5 THE CHAIR: Because at least that embodies in an order something that is at least
6 provisional, and then they can come back and say if they need more time.

7 MR HOLMES: Yes. If a hearing were required as a result of any application made,
8 that would allow it to be accommodated this side of the summer.

9 THE CHAIR: Yes, all right. That's helpful, thank you.

10 Good, perhaps we could then just rise for five minutes and we will come back to,
11 then, the tail end of the applications before us. I am pleased to say that we will finish
12 today. The pleading amendment application and the CPO costs question. All right,
13 thank you very much.

14 (3.16 pm)

15 (A short break)

16 (3.24 pm)

17 THE CHAIR: We need to get through this by the end of the day, so you can be quite
18 brief, Mr O'Donoghue.

19

20 Discussion Re Amendment

21 MR O'DONOGHUE: I can be extremely brief on the amendment, in view of the
22 judgment and order we have just seen.

23 I really have only three points. One, it is not said the amendment is not arguable.
24 Then on discretion, we say there is no prejudice to Google in the amendment being
25 allowed for two reasons.

26 First of all, until February/March of this year, Google has defended the case entirely

1 on the basis of the amendment as we have put forward. If I can quickly, Madam, just
2 give you a reference to the basis for that submission. It is in our reply at A18.

3 THE CHAIR: Yes. I think I have seen that, but anyway you can just take us to it.

4 MR O'DONOGHUE: Yes. A18, it starts at 517. But the part that's of interest to the
5 amendment starts at paragraph 21 at 521.

6 Madam, the point being made there is that at each and every juncture of the case,
7 starting with service out --

8 THE CHAIR: Oh yes, I have read it.

9 MR O'DONOGHUE: -- and subsequently, the parties have been proceeding on
10 a shared premise that our case is overcharge, pass-on and volume effect. Up to and
11 including April of this year, with Noble 3, that is the basis on which Google has
12 defended the case in response to Fletcher 2 and Fletcher 3. So we say that has
13 been a shared common premise and is the predicate of our amendment.

14 Now, Google wishes to argue as of March of this year the intragroup point and so on.
15 We also say there is no prejudice on that front, because they have put in their
16 evidence from Professor Easton in relation to the public account information. There
17 is a regime in place for the Tribunal to consider a further disclosure application, that
18 eliminates, we say, any possibility of prejudice. They will be free, therefore, to make
19 arguments on value of commerce or analogous issues at trial. They are not being
20 shut out, therefore there is no prejudice even on the basis of the case they say they
21 wish to run.

22 So we say that on conventional amendment principles, arguable, no prejudice, the
23 amendment should be permitted.

24 THE CHAIR: Yes, Mr Holmes?

25 MR HOLMES: So, Madam, we rely primarily on what we have already said in the
26 skeleton. Very briefly, the amendment is presented as clarificatory, but it does

1 change the basis on which the case is pleaded from a plea of loss of profits to a plea
2 of overcharge, lower fees.

3 That is a substantive shift, a pivot in the case. Google's amended defence
4 specifically put Professor Rodger on strict proof of the loss of profits claim. Instead
5 of pleading in response to Google's defence that the claim was in fact for overcharge
6 loss and not loss of profits, Professor Rodger elected not to respond. So on the
7 pleadings the case has always been framed as one based on loss of profits and the
8 amendment application fails properly to explain why a late application to amend is
9 being made shortly before Google filed its responsive evidence.

10 If the purpose is to avoid the agency intragroup issues that Google has raised in
11 relation to the 25 developers, we say that's misconceived. Those issues arise
12 regardless. Google's position is that it makes no difference because on a loss of
13 profit claim, no overcharge was suffered at all by the relevant entities, given their
14 agency and intragroup arrangements. On an overcharge claim, there may be no
15 losses incurred by the relevant UK entity, because any loss falls to be reduced on
16 account of intragroup arrangements that cause the loss to be avoided and passed
17 on.

18 THE CHAIR: Mr O'Donoghue has accepted that you can make the argument in
19 either case.

20 MR HOLMES: Yes. But insofar as there is an attempt to engineer a reversal of the
21 legal burden of proof, we say that wouldn't be appropriate at this stage of the
22 proceedings as a result of changing how the case is put.

23 The third and final point is that whether or not the evidence adduced by
24 Professor Rodger meets a pleaded claim based on loss of profits, it doesn't justify
25 a belated attempt to amend the basis of the claim. A party's evidence is required to
26 meet its pleaded case and not the other way round. So for those reasons we do

1 resist the application at this stage.

2 THE CHAIR: No need to respond, Mr O'Donoghue. We will give permission to
3 amend. The amendment seems to us to be clarificatory and designed to ensure that
4 the pleaded case aligns with the basis on which the case has been dealt with in the
5 evidence of the experts.

6 Google has not identified any prejudice to its position if the amendment is permitted
7 and it is common ground -- and indeed Mr O'Donoghue has expressly
8 accepted -- that Google's arguments based on intragroup loss and agency
9 agreements can be made, even if the amendment proceeds, and indeed will now be
10 the subject of a further disclosure application as we have just ordered.

11 Right. So then, I think the only other issue is -- well, is there any specific application
12 for costs in relation to that or is this going to just be costs in the case or what?

13 MR HOLMES: I am so sorry, I missed -- costs in the case?

14 THE CHAIR: Is that common ground?

15 MR HOLMES: It is, yes.

16 THE CHAIR: All right. All right.

17 Then we just have the question of Professor Rodger's CPO costs. I am not sure
18 where everyone has landed. I think that Google says that those should just be costs
19 in the case?

20 MR HOLMES: Yes.

21 THE CHAIR: Yes.

22 Mr O'Donoghue, is that resisted? Because Google didn't show up and didn't oppose
23 it?

24 MR CARALL-GREEN: Mr Carall-Green.

25 THE CHAIR: I am sorry, Mr Carall-Green.

26 MR CARALL-GREEN: Madam, that is resisted, essentially on the basis that Google

1 | didn't show up to the hearing, but it did put in a letter together with an exhibit which
2 | effectively is equivalent to a set of submissions, and a bundle.

3 | So it still threw brickbats at the application and caused him to incur additional costs.

4 | So we say that from a policy perspective it would be undesirable if respondents were
5 | able to do that ie to substantively oppose funding arrangements but then shield
6 | themselves from the ordinary costs exposure.

7 | THE CHAIR: You are saying that the points made by Google were entirely ignored
8 | by the Tribunal, and dismissed as being hopeless points? Or did the Tribunal
9 | consider them and take them into --

10 | MR CARALL-GREEN: The Tribunal had to address a variety of them.

11 | THE CHAIR: All right.

12 | MR CARALL-GREEN: And much of the -- not all, but much of the skeleton argument
13 | and the oral submissions were concerned with going through the shopping list of the
14 | six objections that Google had raised. I had to address Mr Justice Morris on those
15 | objections and explain why the funding arrangements were suitable.

16 | Google in fact raised the possibility that the funding arrangements called into
17 | question the PCR's suitability to act for the same reasons as were given in the Riefa
18 | case. So for Google to say it was not generating any costs, what it in fact was doing
19 | was invoking the spectre of this Tribunal saying that Professor Rodger was not
20 | a suitable person to carry on this case. In my submission it is perfectly justifiable
21 | and entirely reasonable for Professor Rodger to respond to that with some
22 | seriousness and incur non-negligible costs in making sure that those arguments
23 | were properly answered.

24 | Essentially, Madam, our submission is that a rose by any other name smells as
25 | sweet, and objections by any other name run up costs just as much.

26 | THE CHAIR: Yes, do you have any submissions as to the extent to which the points

1 raised by Google generated additional costs over and above what you would have
2 had to incur in any event to satisfy the Tribunal that the conditions for certification
3 were met?

4 MR CARALL-GREEN: Madam, what we have suggested is that the balance should
5 be 65/25/10. So in our submissions, we have said that the 65 is the percentage of
6 costs to be awarded in Professor Rodger's favour. The 25 per cent is costs in the
7 case, and the 10 per cent is to be borne by Professor Rodger in any event. So
8 effectively it works out to asking Google to bear two-thirds of the costs.

9 THE CHAIR: The 65 per cent is costs paid by Google. 25 per cent costs -- and we
10 are only talking about the costs of the -- the costs following the application, the
11 certification application?

12 MR CARALL-GREEN: Well, strictly following Google's first --

13 THE CHAIR: Yes. Following Google's letter.

14 MR CARALL-GREEN: The first moment at which it raises its objections, which is on
15 19 December 2024. That's when we start the clock. So we have accepted that
16 anything done before then, getting the application together and what have you, that's
17 all costs in the case. But then once Google objects we start the window.

18 THE CHAIR: Yes. 65 per cent costs paid by Google, 25 per cent costs in the case.
19 10 per cent you bear the costs in any event? Is that right?

20 MR CARALL-GREEN: Yes, that's right. We say that because there was that small
21 amendment that we made to the LFA at the hearing. So we make that proposal in
22 order to appropriately recognise the fact that the costs associated with that small
23 point on which we made a concession, we don't wish to visit on Google.

24 THE CHAIR: Yes. All right. Ms Smith?

25 MS SMITH: Thank you, Madam. You will be aware of the relevant case law on
26 costs of a successful CPO application as set out among other cases in *Stellantis* in

1 the Trucks judgment. It's not just that class rep's costs which would have been
2 incurred without any opposition should be costs in the case, but also insofar as
3 a class rep is awarded costs against proposed defendants incurred as a result of
4 meeting their opposition to the CPO, those costs should be discounted to reflect
5 significant or material issues on which the proposed defendants succeeded. So
6 there are two elements to the approach, we submit, that the tribunal should take.
7 As my learned friend says, Google did write to the Tribunal on 31 January 2025,
8 which was the deadline for filing a CPO response. In that letter Google expressly
9 stated that it was not opposing the CPO application, but bringing to the Tribunal's
10 attention certain points as to funding and insurance which the Tribunal might want to
11 consider in its gatekeeper role.

12 I submit that those were not objections, and as you have already indicated, you are
13 aware, Madam, we did not appear at the CPO hearing and we did not oppose the
14 application. But in any event, of the seven issues that we raised in that letter of 31
15 January, Google was successful on five of those. To make that point good, I would
16 ask you to go back to Google's costs submissions which were put into the Tribunal
17 on 12 September 2025, and which are at core bundle A, page 592. I am not going to
18 take you through them, but the position is set out at page 592.

19 THE CHAIR: Is that starting at paragraph 13?

20 MS SMITH: Yes. That's paragraph 13 through to 22. I won't read it out, but you can
21 read it to yourselves.

22 THE CHAIR: All right. Let's just read those to make sure we have your points.

23 MS SMITH: Thank you.

24 (Pause)

25 We therefore say that Google was the successful party on the majority of the issues
26 and that therefore costs in the case is still appropriate even if Google's position after

1 31 January is regarded as one of opposition. In any event, and I would ask you to
2 look at paragraph 23 of those costs submissions at page 595, any additional work
3 that the class rep had to undertake after 31 January should have been minimal, and
4 I will ask you to read that to yourself, but you see the point there, that there were
5 only two letters to be addressed and the issues raised by Google were addressed in
6 the class rep's skeleton argument and my learned friend said that they took up only
7 seven pages out of 22.

8 So costs in the case is our primary position. As set out in our reply submissions, our
9 alternative position is that if you are not persuaded that the order is costs in the case,
10 we say that from the start date of 31 January -- and I will come back to what my
11 learned friend said about 19 December and why that is wrong -- we say that all costs
12 prior to the 31 January start date, 2025, and 40 per cent of the costs thereafter
13 should be in the case. And therefore -- and then to reflect the level of success that
14 Google achieved on those points, Google should pay no more than 20 per cent of
15 the post 31 January costs to Professor Rodger in any event.

16 THE CHAIR: 20 per cent?

17 MS SMITH: Yes. Which is 20 per cent of the costs after 31 January with
18 Professor Rodger bearing the balance of the post 31 January costs, at least
19 40 per cent in any event.

20 As to the start date of 31 January 2025, Professor Rodger initially accepted that the
21 31 January 2025 was an appropriate -- which is the date upon which Google put in
22 its letter to the Tribunal -- was the appropriate date. If I could ask you to turn to
23 core bundle A, page 625. This is a letter from Rodger's solicitor, Geradin Partners to
24 the Registrar to the CAT on 24 September 2025. If you have that, Madam.

25 You will see in paragraph 3:

26 "Professor Rodger has agreed to adopt 31 January as the start date for calculating

1 incurred costs. His costs relating to the 19 December CMC and other costs incurred
2 prior to 31 January no longer form part of the costs claimed."

3 He then sought to resile from that letter, but we say that the 31 January is the
4 appropriate start date.

5 There was correspondence prior to 31 January, but that correspondence was
6 between Google's solicitors and Rodger's solicitors, and simply comprised Google
7 seeking clarification from Professor Rodger of his case in order to enable Google to
8 determine whether or not it should oppose the CPO application, not opposition to the
9 CPO application. There is no basis for an earlier start date.

10 While I am on my feet, Madam, if I could also address you on the question of
11 quantum? We say any costs awarded should be subject to detailed assessment,
12 and no payment on account should be made.

13 As we understand it, the three cost schedules were put in -- or one cost schedule
14 and two subsequent revisions -- were put in by Professor Rodger, but the latest cost
15 schedule as we understand it is found in bundle A, starting on page 643. This was
16 sent to the Tribunal, I think, on 25 September 2025 by Professor Rodger. You will
17 see my first point to be made on this schedule is that it is impossible to identify from
18 that schedule whether the work was done prior to 31 January or subsequently. So it
19 can't form the basis of any summary assessment, let alone any payment on account.

20 Secondly, the costs claimed in that schedule are on any view excessive and defy
21 explanation. The total costs amount to more than £800,000. You have seen the
22 work that had to be done in response to our letter of 31 January. There were only
23 five weeks between 31 January and the CPO hearing on 5 March. During that
24 period Google wrote two letters to the Tribunal on 31 January and 28 February.

25 Professor Rodger's only response in correspondence was a letter of 19 February.

26 As I have said, points raised by Google accounted for fewer than seven pages of

1 Professor Rodger's skeleton for the hearing and the hearing itself was concluded in
2 less than one day, with a total sitting time of about two and a half hours. The rest of
3 the time was adjournment.

4 In those circumstances, you will see on page 647, total solicitor costs of 608 hours.
5 That is inexplicable. The rates at which those solicitor hours are charged are also, in
6 our submission, excessive. Page 644 you see the rates. The rates are, it is an
7 understatement to say, significantly above London guideline rates.

8 There are counsel fees claimed on page 648 of over 183,000 before VAT. Again,
9 inexplicable and excessive. Also it's entirely unclear to us how Google's objections
10 could have led to any costs being incurred by Rodger's experts, Fideres Partners, let
11 alone the £36,755 excluding VAT, which is set out on page 647.

12 You have seen the nature of Google's costs. All of it is inexplicable and, in my
13 submission, grossly excessive.

14 THE CHAIR: Are you saying that your own solicitor fees are charged at guideline
15 hourly rates?

16 MS SMITH: That's the basis upon which, for example, the costs that we agreed this
17 morning with Coll were assessed, my Lady, yes.

18 THE CHAIR: All right.

19 MS SMITH: My Lady, unless I can assist you any further.

20 There is the point of 19 December. I would make the point that this is not the
21 relevant start date for the reasons I have given. But even if it is, the work done post
22 19 December does not justify the hours, or hours and costs then claimed. That's
23 paragraph 13 of our reply submissions at bundle A, page 617 for your note.

24

25

RULING

26 THE CHAIR: We are going to say costs in the case. Google did put in

1 a submission. It was taken into account, and seriously, by the Tribunal; it was
2 reflected in the submissions of Professor Rodger.

3 Having said that, it is apparent that it is not the fact that Google was unsuccessful, as
4 set out in the material to which Ms Smith has taken me. Google's submissions were
5 largely successful, if not entirely successful, and addressed by the Tribunal on that
6 basis.

7 We therefore consider that Professor Rodger cannot be said to be the overall winner
8 of the certification hearing in that regard, in respect of the issues that Google had
9 raised in its submissions. We therefore make an order for costs in the case and we
10 therefore don't need to get into the questions of apportionment or the cost schedules.

11

12 THE CHAIR: That deals with the last item on the agenda. Have I dealt with all of the
13 costs issues that arise for today?

14 MR O'DONOGHUE: Madam, yes, and indeed all other issues.

15 THE CHAIR: Very good. Thank you very much.

16 So where we stand: we have given various dates; we are going to be expecting
17 further documents to be filed on the dates indicated earlier today. What we need just
18 to make sure is that we get an order from the parties as quickly as possible.

19 Given where we are now, is it too optimistic to ask for a draft order to be sent to us
20 by midday tomorrow?

21 MR HOLMES: Would it be possible to say end of day?

22 THE CHAIR: All right.

23 MR HOLMES: If that works for everyone?

24 THE CHAIR: All right, just let me make a note of that.

25 All right, I will say 4 pm tomorrow. In the usual way, if there is anything that's not
26 agreed, please just mark it up with the different positions of the parties and comment

1 boxes so that we can see what you both say about it, and then we will take
2 a decision on that.

3 All right, thank you very much, everybody.

4 (3.52 pm)

5 (The hearing concluded)

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