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IN THE COMPETITION
APPEAL TRIBUNAL

CaseNo: 1601/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 27th July 2026

Before:

James Wolffe KC
Tim Frazer
Professor Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr Sean Ennis

Class Representative

v

Apple Inc and Others.

Defendants

A P P E A R A N C E S

Daniel Hubbard on behalf of Dr Sean Ennis (Instructed by Scott + Scott UK LLP)

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

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Monday, 27 July 2026

(10.28 am)

THE CHAIR: Before we start, I'd better read the usual warning. Some of you are joining us via the livestream on our website. So, I'm going to start, therefore, with the customary warning. An official recording is being made and an authorised transcript will be provided, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

Housekeeping

MR HUBBARD: Sir, I appear for the class representative alongside my learned friends Mr Piccinin and Ms Simonsen for the defendants. Subject to the view of the Tribunal, I intend to speak for no more than two hours, with the aim of leaving myself 30 minutes for a reply.

Sir, I'm going to approach the topics in the reverse order to that in which I approached them in my skeleton argument. I'm going to leave abuse until the end. There's really nothing in this point at all. It's a weak argument from the defendants and I don't wish to waste too much time on it. I'm going to focus my submissions on two orders, but before --

THE CHAIR: Can I just confirm, Mr Hubbard, that the timetabling has been agreed, has it?

MR HUBBARD: It hasn't been agreed, but I hope that was uncontroversial.

THE CHAIR: Okay.

MR HUBBARD: Put it this way, sir. There's certainly enough time today.

THE CHAIR: There should be. Yes, indeed.

1
2 Submissions by MR HUBBARD

3 MR HUBBARD: So, sir, before turning to the orders, I intend to develop some of the
4 points made in my skeleton argument about how these orders fit with the applicable
5 case management regime.

6 Now, a few introductory comments. These are obviously opt-out collective
7 proceedings brought by Mr Ennis on behalf of a class. The class members are not
8 parties to the proceedings, but the case law does establish that care should be
9 exercised in relation to any attempt to involve the class members in proceedings,
10 particularly where that involvement means imposing burdens on the class members.

11 The underlying concern behind that case law is that class members are not
12 encouraged to opt out of the proceedings for the wrong reasons. I've referred in my
13 skeleton argument to the decision of the Supreme Court in Merricks and the discussion
14 there, which said that the essential purpose of opt-out proceedings is to make it easier
15 to obtain redress for breaches of competition law by bringing large collective actions
16 in a cost-efficient way.

17 The concern that's actuated this application has been discussed in some of the
18 authorities referred to in my skeleton. I'd like to take you to one of those. I'm going to
19 be referring to this authority quite a lot in the course of my submissions, because it's
20 an important one, and there are strong parallels between this and the questions we
21 have to decide today. And that's Rodger v Alphabet, which you'll find at page 1566 of
22 the authority bundle.

23 The first passage I'd like to take you to is paragraph 15 at page 1573. And if we pick
24 it up, please, five lines down, you'll see at the end of the fifth line.

25 "Class members are not parties to the proceeding and non-party disclosure or
26 rule 89(1)(c) disclosure should be carefully circumscribed ..."

1 THE CHAIR: Sorry, Mr Hubbard.

2 MR HUBBARD: Yes.

3 THE CHAIR: Just which paragraph are we in?

4 MR HUBBARD: I beg your pardon. It's 15. I'd like you to pick it up five lines from the
5 top of that paragraph. Sentence beginning with the word class at the end of line five.

6 THE CHAIR: Thank you.

7 MR HUBBARD: "Class members are not party to the proceedings and non-party
8 disclosure or rule 89(1)(c) disclosure should be carefully circumscribed [that's the key
9 point] so as not to impose too high a burden on class members."

10 What the case law recognises, including this case, is that the way to address that
11 underlying concern that the class members aren't pressured or intimidated into opting
12 out of the class, is for the class representative to have input into the communications
13 between the defendants and class members, and that those communications will
14 ultimately be regulated by the Tribunal. Again, these points emerge from Rodger. So,
15 if we go now, please, to the next page.

16 THE CHAIR: This point in Rodger, we're dealing with a disclosure application to the
17 Tribunal, where, necessarily, the Tribunal will be regulating matters. I think the
18 interesting question that we're having to grapple with is that we don't, in fact, have an
19 application for disclosure before us.

20 MR HUBBARD: Yes. But it's been indicated that there is such an application coming
21 down the track. It's point number 1. The sort of concerns that were articulated in
22 Rodger, which I'm taking you through now, apply equally to communications to the
23 class, short of an application, as they do to an application. The other point is the earlier
24 that this Tribunal can have an input and can set out a structure, the less likely it is that
25 these sorts of problems will arise down the track. I mean, Rodger was a bit of a mess
26 because what happened there is that Google launched an application for disclosure

1 quite precipitously, and their behaviour was criticised by the Tribunal.

2 THE CHAIR: It was very close to trial, I think.

3 MR HUBBARD: Yes, exactly. So really what we're trying to do, without jumping too
4 far ahead, is to ensure that the kind of problems that emerged in Rodger don't emerge
5 in this case, and that a reasoned, structured process is involved at an early stage.
6 I say "early stage". We do criticise the defendants for the time at which they brought
7 this application and raised this issue but then, having raised it, what we're concerned
8 to do is to make sure that a structured regime or process is put in place to make sure
9 that the process of obtaining documents from the class proceeds fairly to everyone
10 involved, doesn't give rise to the sort of problems that occurred in Rodger, and, most
11 importantly, doesn't put unfair pressure on the class and ultimately lead to some of
12 them opting out of the proceedings for the wrong reasons.

13 With that in mind, if I could just trot through some of the other important passages in
14 Rodger, which I do submit have equal relevance to this application. So, starting with
15 paragraph 18 on page 1574. Five lines down again from the top, picking it up in the
16 middle of the sentence, "disclosure from".

17 "... disclosure from non-parties needs to be properly handled, generally after liaising
18 with the class representative, and in a way that does not encourage class members to
19 opt out of proceedings to avoid the burden and consequences of disclosure."

20 That's a warning with general application. That's obviously not limited to the situation
21 that the Tribunal faced in that case, which was an actual application before it.

22 Paragraph 19, over the page, starting from the top:

23 "As with non-party disclosure applications, in the ordinary case (absent unreasonable
24 conduct or unreasonable opposition to an application), the applicant should be
25 prepared to bear the costs of the application and to pay the respondent's reasonable
26 costs in responding to any application ..."

1 | Next sentence:

2 | "The class representative should be notified of any intended application and be able

3 | to comment on the process and the documents sought."

4 | That's important because that, in a nutshell, is what we're asking for today.

5 | "In most cases, the class representative can play a constructive role in dealing with

6 | the class members from whom disclosure is sought ..."

7 | That is precisely the constructive role that we have tried to play in communications

8 | with the defendants. We've been rebuffed, and we're therefore asking for the

9 | Tribunal's assistance to ensure that we can play that kind of constructive role.

10 | The final part of Rodger I want to take you to, for the time being, is paragraph 80 at

11 | page 1597. It's a short quote, second sentence, starting on the first line:

12 | "The Application has been made without any consultation with Professor Rodger

13 | [class representative] who would be the best person to help at least manage this

14 | process ..."

15 | What all of that comes down to is a pretty clear precedent for the class representative

16 | playing a role, and it's pretty clear in that case the Tribunal thought that that was very

17 | important.

18 | There's precedent, sir, for directions to the effect that I'm speaking about. We find that

19 | again in Rodger. Directions of Kelyn Bacon at page 1549 of this bundle.

20 | Now, this is the skeleton argument of Professor Rodger in response to an application

21 | for third-party disclosure. We don't have the directions, which were set out in a letter,

22 | but we do have a description of what those directions were. You see that from the first

23 | five lines of this. Can I ask you, please, to read down to (iii) but not including (iii).

24 | THE CHAIR: Sorry, which paragraph are we in?

25 | MR HUBBARD: I beg your pardon; it's 10; lines one to five.

26 | THE CHAIR: I think the problem we're having, Mr Hubbard, is that the page

1 | numbering is, at least in the electronic system, is not aligning with the page that you
2 | want us to look at.

3 | MR HUBBARD: That that's a good point. I'm looking at the PDF page numbers. At
4 | least with the bundle I've got, you're right, they don't quite align.

5 | THE CHAIR: Yes. So you want us to look at 1548, which is the page number, the
6 | PDF, which is not --

7 | MR HUBBARD: Well, that's confused me a little bit more because, in my PDF, the
8 | page I want you to look at with paragraph 10 is page 1549. The internal pagination is
9 | page 1546, paragraph 10.

10 | THE CHAIR: Okay.

11 | MR HUBBARD: I ought to ask you, would it make it easier for you if I referred to the
12 | internal pagination or the PDF number?

13 | THE CHAIR: I think if you can give us the page number that appears at the bottom
14 | right hand of the pages, because that seems to be corresponding, at least on my
15 | system, with the electronic number.

16 | MR HUBBARD: Maybe it's something to do with my laptop, in that case. I shall do
17 | that. Forgive me if I slip.

18 | THE CHAIR: Yes. It's a reflection of Sedley's law applied to electronic documents,
19 | that there will always be a discrepancy of some sort.

20 | MR HUBBARD: Yes. So, it's paragraph 10, the first five lines. (Pause)

21 | THE CHAIR: Are you able to say whether the issue of privilege was debated at all in
22 | the context of that case?

23 | MR HUBBARD: It doesn't seem to have been, no, not in that case. I will, of course,
24 | come on and deal with privilege, but just sort of setting the scene and explaining what
25 | the structure looks like and the sort of concerns that have emerged from the cases.
26 | Now, these directions we're looking at echo what was directed in Spottiswoode, which

1 | was mentioned at the CMC in this case in May. If we briefly remind ourselves of what
2 | those directions say. So, page 1431, paragraph 6 and 7 on page 1433. I think it is
3 | fair to say, as was observed at the CMC, that this proposal emanated from the
4 | defendants in that case. But nevertheless, it is another example of the type of
5 | directions that we're seeking, having been ordered by the Tribunal in a previous case.
6 | In other words, there is a precedent for imposing control over the defendant's
7 | communications with the class. And, sir, Mr Chairman, your instincts, you'll recall, at
8 | the CMC in this case were on all fours with that approach. I can take you to the
9 | relevant part of the transcript.

10 | THE CHAIR: I remember it well, although one is very conscious that one's instincts
11 | may require to be tempered by considering the arguments that are presented.

12 | MR HUBBARD: Yes. But I will go on to submit -- not tempered by much, if at all, in
13 | this case -- the reasons that I will explain. Because, subject to the litigation privilege
14 | point, you do, sir, have the powers that you were instinctively grasping for or speaking
15 | about at the CMC. I'll go on and develop that submission.

16 | THE CHAIR: Yes. And to be fair to Mr Piccinin, he accepted that the Tribunal has
17 | wide case management powers.

18 | MR HUBBARD: Yes.

19 | THE CHAIR: But he said, and I agreed with him, that they're constrained by litigation
20 | privilege. And I think the real debate today is: where is the line, and the extent to which
21 | the orders that you're inviting us to make do or do not trespass on privilege? And, if
22 | they don't, whether we should be making those orders that strikes me as the real
23 | boundary?

24 | MR HUBBARD: Yes. That is the battleground. I would agree with that.

25 | THE CHAIR: Perhaps suggesting that my instincts may require to be tempered
26 | somewhat.

1 | MR HUBBARD: Only a little, in that, when you get to order 3, some parts of it, you
2 | would have anticipated. Our position is that they do violate.

3 | THE CHAIR: Absolutely.

4 | MR HUBBARD: Other parts, we say, are unnecessary, either because they're
5 | inappropriate or because they're things that we would do anyway. And there's no
6 | need.

7 | THE CHAIR: No. No. That's understood from the skeletons. No, that's really helpful.
8 | My own sense -- but I don't want to divert parties -- is that there are a series of
9 | proposed orders in relation to things which should be actively said to class members
10 | and correspondence in order that they be treated fairly and given a proper information
11 | upon which to proceed.

12 | MR HUBBARD: Yes.

13 | THE CHAIR: And my untutored-by-counsel's-submissions instinct is that that doesn't
14 | trespass on privilege. But Mr Piccinin, obviously, if you have a submission to the
15 | contrary, I'll hear that.

16 | And then there's the first part of the proposed order, which is inviting us to impose an
17 | order of the sort you've just shown to us, where there's an obligation of disclosure to
18 | the class representative, and ultimately the Tribunal adjudicating on what can and can't
19 | be asked for. And my sense is that that's the area where Mr Piccinin may focus his
20 | submission, but you will tell me in due course.

21 | MR HUBBARD: Yes. But the way that you just articulated the battleground, I don't
22 | think anything that Mr Piccinin said was inconsistent with that. Certainly, the way that
23 | we see the battle unfolding is exactly around the point that you described. It's that
24 | you've got incredibly broad case-management powers, and you're able to exercise
25 | those case-management powers in order to control the process by which the
26 | defendants communicate with class members, subject only to this point, which

1 emerges from McLaren Court of Appeal, that you're unable to trespass on litigation
2 privilege when you do that.

3 So, there will be a debate about exactly what trespassing on litigation privilege means,
4 and how wide that concept goes, and what actually litigation privilege is. I think we'll
5 need to get into that.

6 THE CHAIR: We will need to get into that. And I also wondered whether the starting
7 point is the statement of paragraph 74, that, at least in the law of England and Wales,
8 there's no general constraint on a defendant communicating with a represented party
9 in any litigation.

10 MR HUBBARD: Yes.

11 THE CHAIR: And that, I think, is not the position in other jurisdictions where an issue
12 like this wouldn't arise, because there are constraints on lawyers communicating with
13 parties who are represented. I'm thinking about the United States. I think it's the
14 position in some parts of Canada.

15 MR HUBBARD: Yes. Australia.

16 THE CHAIR: Maybe the position in Australia. For what it's worth, Scottish solicitors,
17 I happen to be aware, are not free, ethically, as a general rule, to communicate with
18 represented parties. But that doesn't seem to be the position in England and Wales.

19 MR HUBBARD: We say that Lord Justice Popplewell slightly misspoke or went a little
20 bit far in paragraph 74, and we've assembled some authority in a supplemental
21 bundle, which I hope has made its way to you. It has, good. Good. Okay. At least,
22 some of you. Do you have it?

23 THE CHAIR: I haven't seen it yet.

24 MR HUBBARD: An electronic copy. It was filed on Friday.

25 THE CHAIR: Oh, sorry. Yes, it's on the system. Yes. I don't want to take you out of
26 order, but I'm interested in -- because in other jurisdictions, the ethical overlay of what

1 | lawyers may properly do in relation to represented parties seems to be a significant
2 | part of the picture, which reading paragraph 74 --

3 | MR HUBBARD: It was downplaying.

4 | THE CHAIR: Looks different in England and Wales. Of course, we're bound by the
5 | Court of Appeal, but I'll hear what you have to say about it.

6 | MR HUBBARD: Look, I'll get on to this. But it was pretty obviously open to what was
7 | being discussed there by the Court of Appeal in that paragraph.

8 | We were grateful for the letter on Thursday. We do say that it crystallises an important
9 | question you raised, it crystallises an important topic in connection with this
10 | application. And we say that where the discussion comes out is very helpful for us. It
11 | helps to explain the rationale of what we're inviting you to do. And we say that
12 | essentially similar rules operate in this jurisdiction that operate in the jurisdictions that
13 | you referred to. But I'll come on and make those submissions good.

14 | But before I get there, I did want to say one or two words about the breadth of your
15 | case-management powers. And of course, you know the breadth of those powers
16 | better than anyone. You've alluded to them. So, I'll take them very quickly. But I do
17 | just want to highlight one or two points that are particularly relevant in the context of
18 | this application, if I may. There's a summary of them in paras 13 to 14 of my skeleton.

19 | But, first, sirs, if we go to the authorities bundle, page 34. So, it's the very bottom of
20 | 34. It's the section headed "case management". Page 31. Sorry, I've fallen into the
21 | trap again. Page 31. Thank you.

22 | So, it's really just the obvious point. Second line:
23 | "The Tribunal may ... give such directions as are provided for in paragraph (2) or such
24 | other directions as it thinks fit to secure that the proceedings are dealt with justly and
25 | at proportionate cost."

26 | Since we're on this page, I just draw your attention to subparagraph 2(L). That

1 expressly includes for the disclosure and the production by a party or third party of
2 documents or classes of documents. That's the first point.

3 The second point is the duty to co-operate, on page 7. This is articulated in rule 4. If
4 we look at sub para 5 of rule 4, active case management includes encouraging the
5 parties to co-operate with each other in the conduct of the proceedings. And a little
6 way down the page at sub para 7:

7 "The parties (together with their representatives and any experts) are required to
8 co-operate with the Tribunal to give effect to the principles in this rule."

9 The final authority I'll refer you to is on page 77 of this bundle. We're looking now at
10 the CAT guide, and it's paragraph 5.87. It starts on page 77. The relevant part is
11 really over the page on 78.

12 Picking it up at the end of that first line on page 78:

13 "The Tribunal will determine what disclosure should be provided having regard to the
14 governing principles set out in rule 4 [which we've just looked at. I do want to
15 emphasise what comes next]. This is an area in which the Tribunal will expect the
16 parties to play close attention to the requirements of co-operation in rule 4(7), and to
17 the need to devise a sensible and practical approach to the conduct of the
18 proceedings. The purpose of disclosure is to obtain documentary material that assists
19 in determination of the issues raised by the pleadings, and is not to be used as
20 a weapon in a war of attrition." [as read]

21 So, just drawing those threads together, what it comes down to is that, as I said before,
22 you have very broad powers. The parties must co-operate. And that applies
23 particularly in relation to disclosure, which must not be used for tactical purposes.

24 Now, on that last point, and it's necessary to draw this out, we do say, sirs, that the
25 defendants' underlying motivation in seeking these documents is to exert pressure on
26 class members.

1 And I want to unpack that submission a little bit because it's an important contextual
2 point. And it goes to the point, which we've touched on already, that disclosure is not
3 to be used as a weapon. And the Tribunal is particularly interested in controlling its
4 processes in order to prevent undue pressure or undue burdens from being placed on
5 members of the class. And I don't shy away from saying that that is what's going on
6 here with the defendants' requests, and I'll make that submission good by reference
7 to five points, if I may.

8 The first, sirs, is the question of timing. Now, there was a CMC on disclosure which
9 took place in this case over a year ago. The defendants have known since then that
10 any further disclosure applications were supposed to be made at the CMC in May this
11 year. It wasn't until 17 April, so just before that CMC, that the defendants wrote to us
12 saying that they intended to seek disclosure from class members and setting out
13 19 categories of disclosure which they intended to seek.

14 Now, that letter coincided with the decertification hearing. It was written shortly before
15 that hearing. And we say what these steps show -- so, in other words, the application
16 for the decertification and now this letter seeking wide disclosure from the class
17 members -- is that the defendants are trying to stifle these proceedings by both the
18 front and the back door. The decertification application having failed, the defendants
19 are now pushing hard at the back door, and they're requesting vast categories of
20 documents from the class and the threat of an application.

21 Now, the second point, which leads closely from that first, is that the defendants have
22 consistently refused to explain their position, to explain why they say that these
23 documents are necessary and how they link to the issues which arise from the
24 pleadings. Now, that, sirs, we say, ought immediately to alert the Tribunal's
25 suspicions. We've touched on the duty to co-operate, and that obviously
26 encompasses ensuring that the documents before the Tribunal consist of only the

1 relevant documents.

2 Now, just by way of background, contrary to what my learned friends say in
3 paragraph 13 of their skeleton argument, we didn't belatedly engage with this request
4 for documents from the class. As I said, the defendants wrote to us on 17 April, setting
5 out their intentions this year, and on 24 April -- so just a week later -- we wrote a very
6 full response to that letter, which I'd like to take you to. It's in the core bundle, page 28.
7 And it's really paragraphs 4.1 and 4.3 on page 31.

8 So, you see at the top there the heading 4: "Response to Apple's intended disclosure
9 application". And in paragraph 4.1, third line:

10 "Apple again does not answer the threshold questions of how the proposed disclosure
11 would address the pleaded issues and why class members are thought to hold
12 relevant documents." [as read]

13 And then a little further down the page at 4.3, it's said that Apple has set out
14 19 intended requests but has provided no explanation of what pleaded issues the
15 requests go to, how the documents sought would help to resolve those issues, and it
16 goes on in that vein. So, what we're essentially saying here is, "Look, help us. You
17 told us that you want these 19 categories of disclosure. Explain to us why you say
18 these are relevant. And if you explain that, perhaps we can have a joint approach".

19 So, we don't say that expressly. But that's the thrust of this letter. If you explain what's
20 going on here and you help us, then perhaps we can do this constructively. And, as
21 I say, this was 24 April. There were repeated attempts on our side to engage the
22 defendants on these questions, starting with a letter we wrote on 18 June, which you'll
23 find at page 189 of this bundle, and it's paragraph 1.5.

24 At the foot of 189, we say:

25 "In light of Apple's stated desire for a collaborative approach with Dr Ennis about its
26 proposal to seek disclosure from class members, the class representative invites

1 | Apple to properly engage with the points raised in our letter of the 24 April, so that he
2 | may consider whether a joint approach is feasible." [as read]

3 | There we are expressly saying a joint approach is sensible, and in order that we can
4 | decide whether it's feasible, please tell us how these requests relate to the pleaded
5 | issues, like we asked you to do in our letter of 24 April.

6 | Then we go on: if the joint approach isn't feasible, what directions it may be appropriate
7 | to seek from the Tribunal? Such engagement should include, at a minimum, providing
8 | explanations in relation to the matters identified at paragraph 4.3 of our 24 April letter,
9 | which is the one that we looked at a minute ago.

10 | The next step in the process, and it's a short process, but it's at page 480 of this
11 | bundle, and I'll show you in due course the responses to these letters, but just
12 | unpacking our attempts to engage. This was the next one, about a month after the
13 | letter we've just looked at. If we look at paragraph 2.1, first of all:

14 | "The CR finds it difficult to understand why Apple will not engage cooperatively with
15 | him in relation to Apple's desire to seek disclosure from class members. If the genuine
16 | purpose of those requests is to obtain what Apple considers to be proportionate,
17 | representative and useful disclosure from class members, it is unclear why Apple
18 | would wish to hide behind litigation privilege to avoid discussing this issue with the
19 | class representative in advance." [as read]

20 | They were all completely fair points, constructive points.

21 | Before leaving this, if we glance at paragraph 2.3, start of that paragraph, again,
22 | there's confirmation that the class representative wishes to co-operate:

23 | "Nonetheless, the CR remains prepared to co-operate with Apple on this issue, as
24 | indicated in our letter of the 18 June. His position is that the most efficient and effective
25 | form of co-operation will be for Apple to take the steps outlined in paragraph 1 of draft
26 | order 2 accompanying the application, with a view to seeking to agree the terms of

1 | any communications with class members and exploring whether they might be sent
2 | on a joint basis." [as read]

3 | Finally, paragraph 3.1 at the foot of that page:

4 | "Please confirm Apple's position on the points raised in this letter by 21 July. If Apple
5 | remains unwilling to co-operate with the CR on this issue, please explain why that is
6 | the case. [Then we say] we reserve the right to invite you to draw inferences from
7 | Apple's refusal to co-operate." [as read]

8 | That's our position, and I say, sirs, that what that represents is precisely the attempt
9 | to co-operate in relation to these issues that the rules and the case law envisage, and
10 | indeed mandate.

11 | Each of these attempts was rebuffed by the defendants, and we see that first in
12 | Gibson Dunn's letter of 25 June, at page 192 of this bundle. It's paragraph 4, which is
13 | a very short letter, and this is sent in response to our letter of 18 June. You see in
14 | paragraph 4, it says:

15 | "If the class representative had put forward a positive proposal for seeking disclosure
16 | from class members, Apple would of course have considered it in a collaborative
17 | manner. However, that has not been the case. Apple will therefore proceed with
18 | gathering evidence, as litigants do, in the ordinary course of proceedings, including
19 | through communications with class members where appropriate." [as read]

20 | Just pausing there, that was a surprising response, where Apple had started this
21 | conversation by saying, "Here are 19 categories of disclosure that we say we need to
22 | get from class members", and we have said, "Hang on a moment. Let's try to have
23 | a joint approach. Let's discuss this in the way that the rules mandate us to, and the
24 | first step in that has to be you explaining to us why you say these categories are
25 | relevant to the pleaded issues." It's a surprising response to that to come back and
26 | say, "Look, why haven't you put forward your own proposal for disclosure? The fact

1 | that you've not done that means that we're just going to go off and not explain why our
2 | documents -- documents we say we want -- are relevant to the pleaded issues. We're
3 | just going to run off and ask the class members directly without involving you".

4 | You get that same stance in the next letter from Gibson Dunn, which is at page 482 of
5 | this same bundle. This is a response to our letter of 16 July. In paragraph 2, third line
6 | down, the class representative has repeatedly made clear that he sees no value in
7 | seeking disclosure from class members, and that he considers that materials held by
8 | Apple will be sufficient. In paragraph 3, they say, "Against this background, there is
9 | no sensible basis on which we could engage with you".

10 | In light of the paragraphs of our letters I have taken you to, I would submit that is
11 | obviously an unfair characterisation of the stance that we have taken. We're not
12 | saying we're not going to engage. On the contrary, we're asking for an explanation of
13 | the relevance of these documents so that we can engage, and that's not being
14 | provided.

15 | Sirs, if we ask ourselves why the defendants have refused to explain their position,
16 | why have they not answered our questions about the relevance of these documents
17 | so as to have facilitated a meaningful engagement? If this was a genuine attempt to
18 | obtain documents which are genuinely relevant to the pleaded issues, why not explain
19 | why; in other words, explain how their categories of documents are said to link to the
20 | issues with a view to a joint approach? Instead, sirs, what Apple want to do is to hide,
21 | not tell us anything about that, and then hide their communications behind the veil of
22 | privilege. Putting things at their lowest, we say that raises a concern about the true
23 | intention behind these proposed communications.

24 | The third contextual point, and the third problem with the way that the defendants have
25 | gone about this, is the breadth of the categories of disclosure sought. I hope I don't
26 | have to do too much to persuade you that these requests cast the net far too wide.

1 | Let's just remind ourselves, sirs, of what those categories of disclosure look like.
2 | You'll find them at page 25 of the core bundle. This is the annex to the defendant's
3 | letter of 17 April. What you find here is 19 wide-ranging categories of disclosure.
4 | The Tribunal will have looked at these and will have formed its own impression. But
5 | we say it's pretty obvious that these go too far. They touch on almost every aspect of
6 | the developers' businesses, the class members' businesses, over a period of almost
7 | ten years.
8 | If we contrast these categories of disclosure with what the CAT guide says; this is at
9 | page 78 of the authorities bundle. It's rule 5.90, and, picking things up four lines from
10 | the top:
11 | "As with pre-action disclosure, the Tribunal is only likely to order disclosure of clearly
12 | defined documents or a very limited category of documents, and it will have regard to
13 | the fact that the person from whom disclosure is sought is not involved in the
14 | proceedings."
15 | There is no way, sirs, that it could be argued that the defendants' annex, the
16 | defendants' 19 categories, meet that description in the CAT guide paragraph 5.90.
17 | Just as a high-level point, sirs: if we take a step back and ask what this case is about,
18 | it's about whether the defendants charged unfair and excessive prices to the
19 | developers. The answer to that question depends on the defendants' revenues and
20 | profits. Yet these categories of disclosure are aimed at the developers' businesses,
21 | the developers' costs, revenues and profits.
22 | What the defendants say is that these categories are aimed at gathering evidence they
23 | reasonably require to defend the claim; but, sirs, they don't. They quite clearly go
24 | much wider than that; and to make that submission good by reference to an example,
25 | if we look at category B, "Pricing", and just glance at the types of documents
26 | encompassed by this category, so 3, 4 and 5. What these documents are relevant to,

1 | if anything, would be an allegation of pass-on. But there is no such pleaded case of
2 | pass-on.

3 | THE CHAIR: Does that mean that the defendants are not entitled to investigate the
4 | question of pass-on with a view to considering whether or not they have a basis for
5 | seeking to amend their pleadings?

6 | MR HUBBARD: Well, if that's what they would like to do, then this is precisely why we
7 | have asked these questions in the letters that I took you to: what are you trying to do
8 | here? If they had come back and said, "That's what the aim of this approach is", we
9 | could have had a conversation about that. They could have given a commitment to
10 | plead a case on pass-on, and we might then have been able to have a joint approach
11 | to the class members, at least in respect of that particular part of the case. But that's
12 | not what they've done, so we're just at a loss at the moment. This is me trying to piece
13 | together, trying to join the dots and understand what all of this is about. But as things
14 | stand, this request goes beyond the pleaded issues.

15 | A similar point in relation to category C. I won't spend too much longer on this, but
16 | a couple more points. If we glance, sirs, at request 7, 8, 11, 12, you see that these
17 | requests encompass not only the underlying documents, but documents recording the
18 | reasons for decisions and the strategy of the class. We say that this category, and
19 | category D, is aimed at particularly confidential information, which is likely to be very
20 | sensitive to the developers and to cause them alarm when they get a very broad
21 | request for these types of documents.

22 | A good example of that is request 18 on page 27, under the heading, "Financial
23 | information". If you just glance, sirs, at that, request 18. (Pause)

24 | This is essentially a request for documents showing the entire cost base of the
25 | developers. Yet as I mentioned before, this is a case about the defendants' prices and
26 | therefore, if anything, about their costs.

1 | Sirs, it's instructive to compare the breadth of these requests with what was going on
2 | in Rodger. We can see that through looking at page 1572 of the authorities bundle,
3 | and it's paragraph 20 of Rodger.

4 | If we just look at paragraph 20 and the subparagraph to it, we see a description of the
5 | categories of information which were being sought in that case. If I can invite you
6 | quickly to read paragraph 20(1) through to (3), please.

7 | You can immediately see that what was being requested there is narrower than what's
8 | being requested in our case, and yet the Tribunal said in Rodger that it wouldn't have
9 | granted disclosure. It wouldn't have granted an application for disclosure of those
10 | documents, and we get that from paragraph 65 at page 1589.

11 | You see the first sentence of paragraph 65, "The Tribunal considers the application as
12 | filed on 12 June was far too wide, and it would have been unduly burdensome to
13 | comply with".

14 | We're obviously not here today, sirs, to decide whether the defendants are entitled to
15 | the disclosure which they intend to request. The point for present purposes is what
16 | the breadth of these categories suggest about the defendant's true purpose, which
17 | goes to the imperative of the need for the Tribunal to supervise the process pursuant
18 | to which the defendants seek these documents from the class, in order to restrain
19 | abuse and to control the risk of developers dropping out for the wrong reasons.

20 | The fourth reason for the five concerns that we have as to this application being
21 | misused, or this process being misused by the defendants, is the reluctance of the
22 | defendants to agree to provide the class members with full information when they
23 | make an approach. I'm going to develop these submissions when I address you on
24 | order 3. But just jumping ahead to make good this submission, sirs: if we have
25 | a preview of order 3, and we go to page 262 of the core bundle, which is where we'll
26 | find order 3. It's paragraph 3 subparagraph (8) that I'm interested in, on page 264.

1 | What we find here at paragraph 3 is a list of the information which we say ought to
2 | accompany any request for information which the defendant sent to the class.
3 | Subparagraph (8) we thought was a pretty uncontroversial request.

4 | It just says:

5 | "A statement that defendants will agree to pay the class members' reasonable costs
6 | associated with its disclosure requests, and the defendants will be ordered to pay the
7 | class members' costs if it is unsuccessful in making an application for disclosure." [as
8 | read]

9 | The defendants have refused to include this information. In fact, they've indicated that
10 | that they will ask the class members to bear their own costs of this process. That just
11 | is so against the default position. But again, it raises a serious concern about the true
12 | intention of the defendants in sending this communication. I'll make good that
13 | submission, again by reference to Rodger, in the authorities bundle at page 1572.

14 | We've looked at this briefly already, but it's the opening part of that paragraph where
15 | the Tribunal said:

16 | "As with non-party disclosure applications, in the ordinary case (absent unreasonable
17 | conduct or unreasonable opposition to an application), the applicant should be
18 | prepared to bear the costs of the application and to pay the respondent's reasonable
19 | costs in responding to any application and in complying with any order, including legal
20 | costs."

21 | So, all that we're asking in paragraph 3, subparagraph 8 of our draft order 3, is that
22 | the defendant tells the class members what the legal position is, as articulated in
23 | Rodger, obviously for the purpose of giving them comfort and not making them think,
24 | "Look, we're suddenly going to have to put our hands in our pockets and search
25 | documents going back ten years. That's going to be incredibly onerous to comply
26 | with. We're going to think about dropping out of this."

1 | If there was some information in that communication to this effect, it would obviously
2 | meet and ameliorate those concerns. The fact that defendants are refusing to put
3 | information to that effect in does cause us to be suspicious, and we say it ought to
4 | cause the Tribunal to be suspicious.

5 | Sir, the fifth and final reason for our concern is the suggestion that the focus of these
6 | requests will be on the larger app developers. The reason we say that is the way the
7 | request was articulated in paragraph 3 of the defendants' letter of April 17, which, if
8 | we go back to the core bundle, we'll find at page 21. This is paragraph 3, and it really
9 | draws the focus to the larger developers.

10 | "Many members of the class have very substantial enterprises and stand to benefit
11 | significantly if the proceedings are successful." [as read]

12 | Skipping ahead, the third line from the bottom:

13 | "The vast majority of the commerce at issue in these proceedings resides in a very
14 | small number of businesses with very substantial revenues. So that suggests that it's
15 | going to be those businesses which will be the focus of these requests. But if we
16 | remind ourselves of what this Tribunal said in the decertification application, it
17 | observed that the funding of these proceedings depends on those larger developers
18 | staying in the proceedings. I won't take you to that for reasons of time, but it's
19 | paragraph 86 of the decertification judgment in authorities bundle page 1539. So just
20 | drawing these threads together, what these concepts -- sorry, sir.

21 | THE CHAIR: I suppose you've taken us to Rodger.

22 | MR HUBBARD: Yes.

23 | THE CHAIR: And we're thinking about disclosure requests to larger class members.

24 | MR HUBBARD: Yes.

25 | THE CHAIR: I suppose we should look at paragraph 18 where the Tribunal says.

26 | "There may be proceedings such as the Rodger proceedings, where certain class

1 | members represent a significant percentage of the substantial aggregate damages
2 | claimed. In such circumstances, these sophisticated parties may well have documents
3 | which shed important light on issues such as class membership [overspeaking ..."]

4 | MR HUBBARD: Yes.

5 | THE CHAIR: So, there's a distinction being drawn in Rodger between a request
6 | directed to the larger class members, which may be easier to justify --

7 | MR HUBBARD: Yes.

8 | THE CHAIR: -- than a request such as that referred to in paragraph 17, where class
9 | members have smaller claims. So, it may --

10 | MR HUBBARD: If I can just retort. The Tribunal does say that in Rodger, but it's
11 | crucial to read what Tribunal says next. "Even in such cases". So, what the Tribunal
12 | is drawing a distinction to that extent, I agree. But then it caveats that by saying that
13 | even where you've got these large class members, they still need to be properly
14 | handled, requests for documents from those class members, in order to (a) make sure
15 | that an unfair burden isn't imposed, and (b) this is the point I keep coming back to:
16 | making sure that they don't opt out. Because even if you're talking about a big
17 | concern, if you're saying to that big concern, "Look, you have to go back ten years and
18 | give us all of these documents which are going to be highly confidential and sensitive",
19 | it's not then going to be such a matter of cost for the big concern.

20 | It's going to be other issues. It's going to be confidentiality and management time. So
21 | that's why the Tribunal did make that caveat --

22 | MR PICCININ: I hesitate to interrupt, but my learned friend has just paraphrased
23 | what's said in that paragraph inaccurately. What it says in that sentence is that even
24 | in such cases, applications for disclosure from non-parties needs to be properly
25 | handled. It doesn't say "requests for documents".

26 | MR HUBBARD: Look, it's all much of a muchness. If my learned friend is going to try

1 | and draw a kind of bright line between requests for disclosure and applications, he's
2 | not going to get very far with that. It's all part of the same process, and these concerns
3 | which the Tribunal articulated in Rodger apply with the same force, or with force, to
4 | requests for disclosure, particularly if those requests aren't going to be accompanied
5 | by the kind of contextual points which we say they should be accompanied by in, for
6 | example, draft order 3.

7 | THE CHAIR: So, I suppose there's a point about the extent to which we can, and if
8 | we can, should order any sort of cooperative process. But, you know, does your
9 | objection really fall away if: the class members are given, you know, the kind of
10 | information, including, for example, information such as described at 19 about the
11 | costs of any application; they don't have to respond to a request voluntarily; they're
12 | not obliged to disclose anything without a Tribunal order? If the class member is fairly
13 | faced with accurate information about the process, does that part of the objection fall
14 | away?

15 | MR HUBBARD: No. I mean, that information helps. But there are prior and more
16 | fundamental concerns like, for example, why are these documents relevant at all? If
17 | these documents aren't relevant, then it's a total waste of time and costs, and class
18 | members are alarmed for no reason, if these requests are made.

19 | There's another point about -- and I'm going to develop these points but just giving you
20 | a sneak preview -- there's another point about the identity of the class members. The
21 | people who are approached have got to be representative, or at least not
22 | unrepresentative. The class has got the number of people who are approached, and
23 | the identities of the people who are approached are important in order to make sure
24 | that the documents that they provide, assuming they do, are going to be helpful and
25 | not unhelpful to the Tribunal when we get to trial.

26 | So, it's for those kind of considerations which, like I say, I'm going to develop, that the

1 | order needs to go further than simply including that information in para 3 of draft
2 | order 3, although that is the absolute minimum that we say any request ought to
3 | contain. But it ought to go further than that, for reasons I will come on to.

4 | The short answer to your question, sir, is that it helps, but it doesn't answer our
5 | concerns, that information.

6 | THE CHAIR: So, you, in effect, would want the Tribunal to bring forward to this stage
7 | what would otherwise be the discussion we would have in response to this application
8 | under, say, rule 89, seeking disclosure from the represented parties.

9 | MR HUBBARD: It's not entirely the same question, but it would make complete sense
10 | too for this discussion to be informed by the kind of questions that would arise at an
11 | application. Because if when we get to an application, say, just for argument's sake,
12 | there's one category of their 19, which is just so obviously relevant that it is never going
13 | to be ordered. And we can see that in advance at this stage. It makes no sense to
14 | burden the class members with even a request for that set of documents, short of an
15 | application, for all the reasons that I've explained; the principal one being the
16 | intimidation of the class member and the fear that it might persuade that class member
17 | to opt out, even short of an application.

18 | Obviously, that fear is intensified if the class member is facing an application. But
19 | even at this stage, there's a real danger of that happening, which is one of the factors
20 | which has actuated this application.

21 | I suppose the more general point is that it -- and it goes back to Rodger being
22 | something of a mess because of the way that Google approached that. It makes
23 | sense, and this is what the cases say, for the parties to engage, pursuant to
24 | a collaborative process, very early on in the process to make sure that if we do reach
25 | the stage of an application, number one, no class members have been persuaded to
26 | drop out before then, and number two, that application is contained within sensible

1 | bounds, and that's all we're really trying to achieve with this application today.

2 | Let us have an input into these requests. Let the Tribunal control the process so that
3 | that request, which is step one in the process of getting documents from the class
4 | members, is sensibly managed and results in relevant documents only, being applied
5 | for ultimately, if that's the way it goes.

6 | PROFESSOR NEUBERGER: I'm still confused about the difference between the two
7 | stages. I mean, if you have the stage where you have the discussion between the
8 | parties about the contents of a voluntary disclosure supervised by the Tribunal, and
9 | then you go to a formal stage of applications, what's the difference in terms of
10 | discussions about the scope of documents which should be discovered?

11 | MR HUBBARD: Well, there will be great similarities because the content of stage one,
12 | so the discussion about the categories will be informed by exactly the same
13 | considerations that will arise at stage two, if we get to an application. But the benefit
14 | of having stage one is that number one it makes sure that that's a -- it's meant to
15 | ensure that the request that is sent to the class members only contains a request for
16 | relevant documents, and documents which would help the Tribunal, which might
17 | ultimately be disclosable by the class at stage two.

18 | So, the ultimate aim would mean that if you have a proper stage one, you don't ever
19 | really get to stage two, or stage two should be a lot simpler, because the documents
20 | you've requested are only the documents which would be disclosable on an
21 | application, rather than the situation we've got now, where you've got 19 categories of
22 | documents, and we don't know what issues they relate to, if any.

23 | So, if they were applied for -- if what happened is that Apple writes to the class with
24 | these 19 requests and the class says no, essentially that's the bulk reaction, then
25 | Apple goes, as it's threatened to do, and makes an application for these nine
26 | categories, it's a complete mess. It would be a huge application, a costly application,

1 | and probably would have resulted in at least some of the class members dropping out
2 | before you get to that application, because they're so intimidated by what they're asked
3 | to do at stage one. So that's why it's important to have a stage one and not allow
4 | Apple to jump straight to stage two.

5 | This sort of ties in with, I think it's almost the last paragraph in Rodger I'm intending to
6 | take you to before I exhaust your patience with that case. But it does tie in to the
7 | exchange we've just had. It's in the authorities bundle, page 1595. So, this is
8 | paragraph 82 of Rodger. So, it's six lines down from the top of paragraph 82, sentence
9 | beginning "It":

10 | "It [meaning the application for disclosure] was brought only on 12 June 2026, without
11 | proper consultation with Professor Rodger, the 16 App developers were given very
12 | little notice, and the app developers were by and large not content to give the
13 | disclosure sought, were concerned about the burden of disclosure and maintaining
14 | confidentiality in very sensitive commercial information. Indeed, it has led to some
15 | considering to opt out of the proceedings altogether."

16 | And then just might as well read four lines from the bottom of that paragraph:

17 | "Had the Tribunal determined that the Application and the other Disclosure
18 | Applications had been brought to the collateral purpose of inducing App developers to
19 | opt out ... then on that ground the Tribunal would have refused the Application."

20 | So that first passage which I've just read out, it really goes to the exchange that we've
21 | just had. It's the way that this process was approached in that case led to all of these
22 | problems. And it's those problems -- so in other words, there wasn't a preliminary
23 | stage. There was just an application completely without input from Professor Rodger.
24 | And it's that that led to these problems that the Tribunal are articulating in that
25 | passage, and which our application is designed to avoid.

26 | And since we're on the topic, can I make a final point about the fear of class members

1 dropping out of these proceedings? And that arises from the fact that class members
2 are likely to interpret any request for disclosure through the prism of this market
3 perception -- at least among some participants -- that Apple is likely to respond badly
4 or unfavourably to developers who challenge it and refuse to do what it wants.

5 Now, this arises from an observation made in the decertification judgment, which it is
6 worth going to, at page 1537 of the authorities bundle. And it's at Paragraph 83. So,
7 it's five lines from the top sentence, beginning, "There is before the Tribunal":

8 "There is before the Tribunal substantial evidence of concerns being expressed in the
9 public domain about retaliation, or the risk of retaliation, by the Defendants against
10 developers who challenge them. We make no finding as to whether those concerns
11 are or are not well-founded. We also recognise that some developers have raised
12 proceedings against Apple and that some of the class members are sufficiently
13 substantial organisations that concerns about retaliation by Apple might not be
14 a deterrent for them. But the very fact that such concerns have been expressed in the
15 public domain, and the apparent prevalence of such concerns, is a feature of the
16 environment (in our view, an objective feature of the environment) which is capable of
17 affecting the behaviour of reasonable developers, whether large or small ..."

18 Now, we say that objective feature of the environment which the Tribunal noted in the
19 decertification hearing is equally an objective feature of the environment in this
20 application.

21 So, it's against that background, that this fear I keep going back to, it's an important
22 fear, of developers dropping out of the picture, is to be judged against that objective
23 feature.

24 So, I'm not far off now from getting into the orders, but before I do that, I think it's worth,
25 sir, spending a just a brief amount of time on McLaren Court of Appeal, just to sort of
26 clear the ground before I make my submissions on the orders. And in discussing

1 McLaren Court of Appeal, I'm going to segue into an answer to the Tribunal's letter of
2 Thursday.

3 So, a high-level point to make about McLaren Court of Appeal is that my learned
4 friends tried to get too much from that decision. What McLaren decided is that the
5 rules, the Tribunal rules, don't contain a rule. They don't contain a rule that precludes
6 communications between the defendants and a class member. There was
7 a prohibition to that effect, which was imposed by the CAT. And you see that. I won't
8 take you to it, but it's paragraphs 6 and 7.

9 It is worth looking at the ratio of the decision in McLaren. Now that we will find on
10 page 946 of the authorities bundle. It's paragraph 124. So, this is the ratio of McLaren,
11 in para 124:

12 "... I have concluded that the Rules do not contain the Restriction [which I just referred
13 to] determined by the Ruling. In summary, those reasons are the following."

14 Then he sets out the reasons for the Court of Appeal's decision.

15 Now, in paragraph 26 of my learned friend's skeleton argument, he really misstates
16 what's going on in paragraph 24. He says, start of paragraph 26 on page 8 of his
17 skeleton, that the Court of Appeal expressly confirmed that defendants may
18 correspond with class members in collective proceedings under cover of litigation
19 privilege in McLaren CA at 124.

20 Now, we've seen that's not what the Court of Appeal is saying there. What he says
21 they're saying goes further than what they actually said, but all they actually said is we
22 can see in black and white there is that the rules don't contain what Lord Justice
23 Popplewell called an a priori prohibition on communications.

24 Now, the appellants in McLaren Court of Appeal accepted that the Tribunal does have
25 a power even to apply a blanket prohibition on communications between the
26 defendants and class members. And we see that, sirs, at page 938 of the authorities

1 bundle. It's paragraph 99 of the judgment. They all seem to be five lines from the top.

2 These quotes, these five lines from the top of paragraph 99:

3 "... the appellants recognise that if there is no a priori restriction, the CAT can
4 nevertheless impose a restriction by way of its case management powers in
5 appropriate circumstances in individual cases. The dispute would therefore appear to
6 be about what the default rules should be, rather than about whether a particular
7 communication should be permitted in a particular case."

8 THE CHAIR: Does that not have to be read in a context where there may be all sorts
9 of communications?

10 MR HUBBARD: Yes.

11 THE CHAIR: And what struck me, looking at the Del Giudice case, for example is that
12 in some of the cases in this area, we're not looking at communications directed to
13 recovering evidence or investigating the case. We're looking at communications,
14 which are much more overtly and directly directed to warning off a class member. And
15 where -- I'll be corrected if I'm wrong --one might think litigation privilege doesn't apply
16 at all. And, therefore, there's scope, as the Court of Appeal says, in appropriate
17 circumstances to impose restrictions, indeed, prohibitions on certain types of
18 communication if the facts justify it. But that, at least, can be given content by referring
19 to communications which have nothing to do with the investigation of the case and
20 don't, therefore, engage any issue of privilege.

21 MR HUBBARD: Well, the Court of Appeal wasn't drawing a distinction in this
22 paragraph, and in other paragraphs I'll take you to, between communications which
23 are seeking evidence and communications which aren't. What the Tribunal is
24 accepting and what the appellants in that case acknowledged is that the Tribunal has
25 a power. Its powers are broad enough to prevent any type of communication between
26 a defendant and a class member, and that would include a communication for the

1 | purpose of seeking evidence.

2 | Now, the only caveat to that is that what the Tribunal can't do is make an order which
3 | interferes with litigation privilege. Now, an order which says to a defendant, "You can't
4 | send a letter to a particular class member or to any class member seeking evidence"
5 | would not be an order which interferes with litigation privilege, because no litigation
6 | privilege would have arisen in those circumstances. The Tribunal would just be
7 | saying, "You can't send the communication, which if you did send it, would attract
8 | litigation privilege". That's all it's saying in those circumstances.

9 | And the Court of Appeal's judgment in McLaren was certainly permissive of that type
10 | of restriction in a particular case. That was the whole thrust of
11 | Lord Justice Popplewell's decision. It's that the Tribunal has got such wide powers,
12 | those powers enable it to make any order it thinks fit in the particular circumstances of
13 | a particular case. And that's why we don't need to have an a priori restriction -- we
14 | don't need to imply an a priori restriction into the rules, because if the Tribunal thinks,
15 | in a particular case, it wants to apply a restriction to that effect, it's got the power to do
16 | so, subject to it not being able to interfere or trespass on a right to litigation privilege.
17 | If no such right has arisen, then an order from the Tribunal restricting the
18 | communication can't trespass on it.

19 | THE CHAIR: Is that precisely the kind of order that they had before them? It was an
20 | order from the Tribunal prohibiting (inaudible) class members.

21 | MR HUBBARD: Let's unpack that. I am going to address that. It's a very fair question.
22 | In some ways, it's sort of crucial question about McLaren. I just want to take it in
23 | stages. So, we sort of build up to that payoff.

24 | So, let's have a look at a few passages in McLaren. Not many. But if we look at these,
25 | then it will become clear what they were saying and what they weren't saying. So,
26 | paragraph 114, first of all, at page 944. So, this is talking about the Del Giudice case.

1 | Lord Justice Popplewell says:

2 | "The decision and these comments, again suggest it's not regarded as necessary in
3 | practice in Canada to have some a priori prohibition on communications between
4 | defendants and class members; and that restrictions on communications can be
5 | addressed on a case-by-case basis with the co-operation of the parties."

6 | So, in other words, he's contemplating that there can be a restriction on
7 | communications between the defendants and class members. He's not limiting that
8 | observation to communications which aren't seeking evidence. This is an observation
9 | of general application. Then he makes the point that that co-operation is required
10 | under the rules. So that is point number 1.

11 | Paragraph 122 at page 946. So, this is five lines from the bottom, this time, of that
12 | paragraph:

13 | "The question is whether a blanket prohibition, subject to permission from the Tribunal,
14 | is necessary to achieve the aim of a fair resolution of collective proceedings; or
15 | whether that aim can be achieved by the alternative means, namely restriction by an
16 | order from the CAT based on individual cases."

17 | So, when he says that aim can be achieved, he's referring back to the potential for
18 | a blanket prohibition. Or at least he's not ruling out that the response of the CAT in
19 | a particular case can include a blanket prohibition. What he's saying is the fact that
20 | the Tribunal have got that power to impose this restriction means that there's no need
21 | to imply a rule to that effect in order to achieve the aim of a fair resolution. That aim
22 | can be achieved by the alternative means, namely, restriction by an order from the
23 | CAT based on individual cases. And, again, there's no limit to the breadth of the order
24 | the CAT is able to impose.

25 | Just to make good that point, sirs, a little bit further down on this page, paragraph 124,
26 | which we've looked at briefly. So, when the Court of Appeal is listing its reasons for

1 | saying that the rules don't contain the restriction as an a priori matter, if we look at
2 | rule 6 -- actually start on rule 5 over the page. One of the reasons which points against
3 | the implication of an a priori rule is the practical consequences which might flow from
4 | implying such a rule.

5 | Then he says in (6), and this is the important bit:

6 | "So too does the flexibility of the CAT's active case management powers."

7 | So, it's the same point: that the CAT does have a power to restrict any communication
8 | if it so wishes. And that is one of the reasons why it isn't necessary to imply an a priori
9 | rule into the rules to that effect.

10 | And then just finishing this off, the submission on this part of the judgment at the
11 | bottom of the page 948, the court says, second line from the foot of that page.

12 | "It remains open to MMRC to invite the CAT to make an order on a case management
13 | basis in the light of our decision on the interpretation of the Rules."

14 | So, in other words, what the court's saying there is that McLaren can make any
15 | application it wants, including an application for the relief that was granted by the CAT
16 | earlier on in the sequence, if it so wishes. In other words, it's confirming that the CAT
17 | has that power.

18 | Now, turning to litigation privilege. And this is moving on to the chairman's point. So
19 | there was a ruling in McLaren that this restriction exists in the rules as an a priori
20 | matter. After that ruling had been handed down, there was a CMC in that case. At
21 | that CMC, the Tribunal gave the defendants permission to contact the class members
22 | subject to the Tribunal's permission, if that contact was going to threaten an
23 | application.

24 | It's helpful to look at that order at the CMC on page 918 of the authorities bundle. You
25 | see in paragraph 20, it says, "Meanwhile, there was a case management conference
26 | on 15 March 2023". Then the order made at that hearing is there in paragraph 5. You

1 | see there are two parts to it. If I could ask you, please, sirs, just to read that to
2 | yourselves.

3 | PROFESSOR NEUBERGER: Which page are we on?

4 | MR HUBBARD: I beg your pardon. This is page 918 of the authorities bundle, and
5 | it's paragraph 20. It's the quotation which begins 5 beneath paragraph 20.

6 | Just précising that quotation, what the order of the CMC did was to give the defendants
7 | permission to contact the members of the class, subject to a need to obtain the
8 | Tribunal's permission if the communication threatened an application. What that
9 | caveat meant, that second part of the order meant, is that the defendants had to
10 | disclose the detail of their intended communication with the class members to the
11 | Tribunal; because if that approach asks for -- or rather threatens -- an application, the
12 | second limb of this order said, "Look, you have to get the Tribunal's permission for
13 | that". That necessarily means that if the defendants intend to threaten an application,
14 | they have to show the Tribunal, and therefore the other side, the intended
15 | communication with the class members.

16 | This is the important point to grasp: it's that order which amounted to an invasion of
17 | litigation privilege. In other words, this requirement in limb 2 of the order at the
18 | CMC -- that if the defendant threatens an application, he has to get the permission of
19 | the Tribunal and therefore has to show the Tribunal the intended communication -- it's
20 | that that represents the invasion of litigation privilege in that case.

21 | If we go to what Lord Justice Popplewell said on this topic, the important paragraphs
22 | are 102 and 103 at page 939 of the bundle. Paragraph 102:

23 | "At the forefront of her argument that the Restriction brings unacceptable and unfair
24 | consequences was the submission that it interfered with litigation privilege."

25 | This is important, the next sentence:

26 | "In this case, the shipping companies had to disclose the detail of their approach to

1 | class members in seeking disclosure of relevant evidence". [as read]
2 | That was pursuant to the second limb of the order of the CMC, at paragraph 20 of this
3 | judgment that I just took you to.
4 | Then he goes on:
5 | "There is considerable force in this argument [this is 103]. The Tribunal's scrutiny of
6 | such an approach is an invasion of litigation privilege. It forces the defendants to
7 | disclose to their opponent details of their pursuit of evidence for the purposes of
8 | defending the claim." [as read]
9 | Then four lines from the foot of that paragraph:
10 | "The ruling has resulted in that principle being breached in this case, and would
11 | potentially do so in many other collective proceedings before the CAT." [as read]
12 | The reason he says the ruling has resulted in litigation privilege being breached is that
13 | the ruling said that there's a prohibition on communications. Then at the CMC, that
14 | topic was discussed, and the Tribunal said, "Look, you can communicate in this
15 | instance, but only subject to this condition". It was that condition, in the way that I've
16 | explained, that led to litigation privilege being breached in that particular case.
17 | This, I think, directly answers your point, sir. What the Court of Appeal aren't saying
18 | in that case is that the Tribunal can never prevent a defendant from communicating
19 | with a member of the class in relation to the question of asking for documents or
20 | gathering evidence. They are absolutely not saying that. They are saying the risk that
21 | such an outcome might flow from a prohibition, as it did flow on the facts of McLaren,
22 | militates against the implication of a rule in the CAT's rules, imposing a blanket
23 | prohibition on communications with members of the class.
24 | THE CHAIR: I think, Mr Hubbard, we had better take our morning break. We have
25 | gone a little further on, but I'm conscious of the transcriber.
26 | MR HUBBARD: Yes.

1 THE CHAIR: Perhaps we could rise now and come back at 12.10. (Pause)

2 Thank you.

3 (11.53 am)

4 (A short break)

5 (12.07 am)

6 MR HUBBARD: Wrapping up the discussion of McLaren in the Court of Appeal: in the
7 course of making the points about litigation privilege, and the reasons why in this
8 particular case that privilege was invaded, the Court of Appeal,
9 Lord Justice Popplewell, did say that litigation privilege, where it exists, is inviolate.
10 That was reflected in this Tribunal's order at the CMC, paragraph 37, which I won't
11 take you to, but where this Tribunal said it's not open to the Tribunal to make an order
12 which would be incompatible with the defendants' litigation privilege. Of course, we
13 don't quarrel with that proposition. But, subject to that proposition, this Tribunal can
14 make an order which restricts or even prevents communications between a defendant
15 and a member of the class.

16 THE CHAIR: I suppose what is curious about 103, and classically, one thinks of
17 privilege as residing in documents, and it prevents documents being disclosed or
18 orders for disclosure. But in 103, Lord Justice Popplewell certainly treats litigation
19 privilege as a rather broader concept:

20 "The vice in litigation privilege being invaded in respect of the conduct of a party's case
21 in preparations for trial is that it may involve a party having to reveal to its opponent
22 aspects of its litigation strategy ..."

23 That seems to be the mischief that the order that had been made in that case created.

24 MR HUBBARD: Without picking a fight with Lord Justice Popplewell, litigation
25 privilege is a negative right to prevent disclosure of certain confidential documents
26 from being ordered. That is just a very basic proposition that's contained in all of the

1 cases on privilege that one looks at. It certainly isn't directed at protecting litigation
2 strategy or preventing a party from having to disclose documents that talk about
3 litigation strategy. It's a concept which prevents disclosure of legal advice; or, where
4 litigation is in contemplation, communications with clients or third parties for the
5 purpose of gathering evidence.

6 I mean, that's the core concept to which privilege attaches. I would take issue if there's
7 a suggestion that Lord Justice Popplewell was going further than that in what he was
8 saying here. The mischief that he was concerned with in this case is that the second
9 part of that CMC order required the defendant to show the Tribunal and to show the
10 other side a copy of the letter they intended to send to the class. If one was going to
11 be really strict about it, one might say that even that wasn't an invasion of litigation
12 privilege, because the communication hadn't been sent to the member of the class.
13 I'm not arguing that. I mean, it's pretty obvious in that case, and generally, that if you
14 are required to show a draft of the communication which you intend to send, then that
15 would be an invasion of litigation privilege in the same way that if you were asked to
16 show the actual communication which you would send. But that's as far as courts of
17 appeal were going in McLaren.

18 PROFESSOR NEUBERGER: Are you saying that the McLaren wouldn't
19 preclude -- the Court of Appeal judgment wouldn't preclude the CAT from saying, "You
20 just can't send that sort of letter at all"?

21 MR HUBBARD: I am saying that, yes. McLaren would not preclude that. What it
22 would preclude is that if the CAT said, "Show us what you're proposing to send; then
23 we'll make a decision about whether you can send it or not", which is what happened
24 in McLaren, that would be an invasion of litigation privilege. But simply saying "you
25 can't even send the communication to which litigation privilege would apply if you sent
26 it," would not be an invasion of litigation privilege.

1 THE CHAIR: But how does what you're asking us to do in the first part of order 3,
2 I think it is --

3 MR HUBBARD: Right.

4 THE CHAIR: -- not do exactly what you've said we can't do? Because you're, in effect,
5 asking us to order the defendants to disclose to you the rationale for what they're
6 proposing to do, and to give you a chance to respond, and then you're inviting us to
7 make an order that would, in effect, involve us then regulating precisely what they
8 would send. Leaving aside the issue of waiver -- which I know you will come to, and
9 on which the parties are at odds -- why would that not do exactly what you were saying
10 we can't do?

11 MR HUBBARD: The answer to that is I can't leave aside -- I'm not going to describe
12 it as waiver, but waiver loss of confidence -- I can't leave that aside. For my argument
13 on the first part of order 2 to succeed, I need to rely on waiver/loss of confidence. If
14 I don't get home on that, then I entirely agree with you; what I'm asking the Tribunal to
15 do would be an invasion of privilege.

16 THE CHAIR: So you accept that that part, I think the order in Spottiswoode --

17 MR HUBBARD: Yes.

18 THE CHAIR: -- and was it also in Rodger, that part of the order, if it hadn't been asked
19 for by the defendant, and therefore in effect waiving any privilege, would have been
20 a breach of privilege?

21 MR HUBBARD: On the authority of McLaren (inaudible).

22 THE CHAIR: Okay.

23 MR HUBBARD: I think I have to accept that. Yes.

24 THE CHAIR: Okay. Yes. That's helpful.

25 MR HUBBARD: Thank you.

26 Subject to that caveat, you can make any order which you believe it's just to make.

1 | The discussion of McLaren leads, I think, quite nicely on to the question that you raised
2 | in Thursday, which --

3 | THE CHAIR: Before you go there, the question that occurred to the Tribunal. You've
4 | made a significant part of your submission that the concern here -- let's put it that
5 | way -- is that class members may opt out.

6 | MR HUBBARD: Yes.

7 | THE CHAIR: Am I right that at this point, a class member who wished to opt out would
8 | require the permission of the Tribunal to do so?

9 | MR HUBBARD: That is correct, yes.

10 | THE CHAIR: Yes.

11 | MR HUBBARD: Yes.

12 | THE CHAIR: You also talked about opting out "for the wrong reasons". I don't know
13 | whether you want to unpack what you mean by that.

14 | MR HUBBARD: Well, a wrong reason would be -- and there's a serious danger of this
15 | in this case -- if the defendants write to the class and say, "We want you to disclose
16 | these 19 categories of disclosure going back for ten years. If you don't do that, we're
17 | going to make an application", and just as the Tribunal observed in Rodger, that this
18 | is actually what happened in that case, there must be at least a danger -- putting things
19 | at their lowest -- that a member of the class, faced with that kind of letter from a person
20 | like Apple, with whom we say the class members are constrained to do business, takes
21 | the view that this just is not worth the candle. "I don't want to disclose these
22 | documents. I don't want to get into a fight with Apple. I don't want to be on the
23 | opposite end of an application for a disclosure order in due course. I'm just going to
24 | wash my hands of this and opt out." That would be opting out for the wrong reason.
25 | The reason --

26 | THE CHAIR: To be very precise, to apply to opt out because the opt-out period has

1 | expired.

2 | MR HUBBARD: Exactly, yes.

3 | THE CHAIR: At which point the Tribunal would have to consider all the issues that
4 | would be relevant to that application.

5 | MR HUBBARD: Yes. I mean, that is true. Of course, I don't want to say anything that
6 | prejudices what might happen there.

7 | THE CHAIR: No, and you shouldn't read any --

8 | MR HUBBARD: No.

9 | THE CHAIR: It's just that we understand the structure within which we're deciding the
10 | issue before us.

11 | MR HUBBARD: Yes.

12 | THE CHAIR: And what we make of the submission that you've, you've laid before us
13 | in relation to the mischief that you apprehend.

14 | MR HUBBARD: Yes, yes. And I do. You're quite right, sir, to identify that. I do put
15 | that high in my list of arguments. It's not the danger of opting out or forcing opt-outs
16 | or encouraging opt-outs. It's not the only danger. There are also the points about
17 | waste of money and waste of costs. If the Tribunal allows Apple to engage in this
18 | evidence-gathering process which we say is either misdirected or directed too widely.

19 | PROFESSOR NEUBERGER: Can I just follow up on the opting out for the wrong
20 | reasons?

21 | MR HUBBARD: Yes.

22 | PROFESSOR NEUBERGER: If the class member makes a correct assessment of
23 | the risk of being asked to disclose, has realistic appreciation of it, and decides it would
24 | rather be out of the action; is that opting out for the wrong reason?

25 | MR HUBBARD: No. That wouldn't. If the class member gets this letter and thinks,
26 | "Look, I don't agree with this; I think this is a misdirected request, but I'm still going to

1 | I'm still going to opt out", it would depend on its reasons for opting out. I mean, in that
2 | sort of scenario, I'd suggest that, if the class member has taken advice, or reached its
3 | own view that it would actually win an application if Apple pursued this request to an
4 | application, but still decided to drop out, one could infer from that, it decided to drop
5 | out because it doesn't want the hassle of going through that process, even though it
6 | thinks it will win. It doesn't want (a) to fall out with Apple and (b) to have a big battle
7 | on the way to winning. So it would drop it, and yes, that would be the wrong reason.
8 | In those circumstances, it would be dropping out for the wrong reason. It would be
9 | dropping out, not because it doesn't think it has a case, talking about the underlying
10 | merits, but dropping out because of the pressure which is being applied on it before
11 | the Tribunal has had a chance to decide those merits. So it's a long way of saying
12 | yes. The short answer is that it would be for the wrong reasons in that scenario. These
13 | are all the things that we're trying to guard against.

14 | Okay, I will move on to the point raised in the Tribunal's letter of Thursday. Just before
15 | we do that, let's have a look at paragraph 74 of McLaren.

16 | It's page 932 of the authorities bundle. It's really the first five lines.

17 | "There's no general rule in civil litigation which prevents a defendant or its legal
18 | representative from communicating directly with a claimant about the case. Nor is
19 | there any rule of professional conduct for solicitors which imposes a blanket ban on
20 | communications from a defendant solicitor to a claimant directly where the claimant is
21 | legally represented."

22 | Now, in that case, the Court of Appeal didn't have the benefit of a decision of
23 | Mr Justice Kekewich. I think it was 1879. If one goes to the supplemental bundle,
24 | mindful of the chairman's observation this morning about being bound by the court of
25 | Appeal, I'm not going to push this point too hard, but it is worth looking at this. It's
26 | page 54 of the supplemental bundle. 1897 actually, so slightly more recent!

1 THE CHAIR: Sorry, am I in the right?

2 MR HUBBARD: So this is the supplemental bundle which I'm not you have.

3 THE CHAIR: Supplemental bundle?

4 MR HUBBARD: Sorry, supplemental authorities bundle.

5 THE CHAIR: And the page number, sorry?

6 MR HUBBARD: It's page 54.

7 PROFESSOR NEUBERGER: There are two supplementals.

8 MR HUBBARD: That's a good point, yes. Sorry. The defendants also lodged

9 a supplemental bundle on Friday, which I really hope we don't have to get into. That's

10 to do with a completely different procedural point. My supplemental bundle is

11 a supplemental bundle of authorities.

12 THE CHAIR: Yes. I've got it now, thank you.

13 MR HUBBARD: Great. Thank you. So it's page 54 of that.

14 THE CHAIR: Yes, so it's 56 of the electronic bundle that we have. I'm afraid we're

15 back to Lord Justice Sedley's laws.

16 MR HUBBARD: Okay. It's the internal pagination 54, and the PDF is 56. So at least

17 we're now tracking. My bundle is the same as that. So this is the case. The relevant

18 part of the case is at page 60 of the electronic bundle, the decision of

19 Mr Justice Kekewich. It's interesting to read what he says. If I could ask you please

20 to read from the very top of that paragraph, "It is a professional rule" just down to the

21 word "footing", on the next page, please.

22 MR PICCININ: Page 58.

23 MR HUBBARD: It's internal page 58. It's page 60 of the PDF. (Pause)

24 THE CHAIR: I may be wrong, and I'm sure one or other of you will correct me if I am

25 wrong, but I have the impression that the professional rules on solicitors in England

26 and Wales may well have been liberalised or modified in the sort of post-Clemente

1 | period, to move rules which previously would have been hard edged and imposed,
2 | you know, it might be said a more proportionate approach, where it all depends on the
3 | circumstances.

4 | MR HUBBARD: Yes.

5 | THE CHAIR: Whereas professions in other jurisdictions may well have retained a kind
6 | of thinking that you see here. I'm making no judgment one way or the other on, you
7 | know, the position, because different systems operate differently. But we're in England
8 | and Wales case, in which case I wonder how helpful it is to look at historic case law.

9 | MR HUBBARD: Well, look, the point that you made earlier, sir, about what
10 | Lord Justice Popplewell said in the McLaren appeal is pretty unequivocal.

11 | All I would say is that, I mean, you're right as well that the current iteration of the
12 | solicitors conduct rules don't contain a rule reflecting this. It may be an argument
13 | about -- I mean this case, it's never been overruled, as far as I can see. It's also fair
14 | to say, it's not been really applied. I just couldn't find anything since this decision which
15 | echoes this. But maybe a point about the interaction between a decision of a chancery
16 | judge and the solicitors rules, and which prevails. I would, of course, say the chancery
17 | judge, subject to the point about McLaren Court of Appeal.

18 | Perhaps the most I can say about this is that it reflects, or reflected, a sensible
19 | approach, which one finds curiously still reflects in the Bar Standards Board rules.
20 | One can see those at page 50; 48 internally of this bundle. It's towards the top there
21 | at rule gC24. So that really does reflect the Kekewich decision, though curiously just
22 | for barristers and not --

23 | THE CHAIR: Yes.

24 | MR HUBBARD: As I say, it does reflect a rule which is still extant in Australia and
25 | Canada. I'm not unpacking all of this to get credit for my researches, particularly as
26 | it's my solicitors that uncovered this stuff, or just for academic interest. But there is

1 | a point here which I'm going to come on to, in terms of rationale.

2 | THE CHAIR: Yes. I mean, there's an interesting -- you mentioned Canada, and I can
3 | have the reference there, give you the case that I found from Canada, which really
4 | made the point that -- albeit it was a Quebec case -- that post-certification, basically,
5 | it's the solicitors' ethical rule that is at least one of the things which constrains
6 | communications.

7 | MR HUBBARD: Yes.

8 | THE CHAIR: And the issue in a sense that we're grappling with simply doesn't arise
9 | because of those ethical restrictions.

10 | It did make me wonder whether McLaren had had a full account of the Canadian
11 | position, because the cases that were looked at in McLaren, I think, are
12 | pre-certification cases.

13 | MR HUBBARD: Right. But, you know, that's you know -- McLaren is a Court of Appeal
14 | decision, and, you know, it says what it says.

15 | THE CHAIR: Yes.

16 | MR HUBBARD: There's certainly no discussion at this point in McLaren, Court of
17 | Appeal, of -- I mean, the position without going to the rules, for reasons of time, the
18 | rules in Canada and the Australian conduct rules, the Law Council of Australia, they
19 | both do contain essentially the same prohibition that we looked at in the Bar Standards
20 | Board rules, that where a party's represented, the other party's solicitors can't
21 | communicate directly with that person. They have to communicate through solicitors.

22 | THE CHAIR: Interestingly, for our purposes, that's the general rule in Scotland under
23 | the Law Society of Scotland rules.

24 | MR HUBBARD: Yes.

25 | THE CHAIR: There are some qualifications to it.

26 | MR HUBBARD: Exactly. So just for your reference, it's page 55 of the supplemental

1 bundle you'll find the Canadian rules.

2 THE CHAIR: Do you happen to know what's the position in Northern Ireland?

3 MR HUBBARD: I don't know that, I'm afraid, no.

4 THE CHAIR: I wonder if those behind you could find out whether the Law Society of
5 Northern Ireland has rules that are relevant to this.

6 MR HUBBARD: Yes.

7 THE CHAIR: Because the Tribunal may require to at least reserve its position in
8 relation to whether the issue would be looked at in the same way in different parts of
9 the UK.

10 MR HUBBARD: Yes. That is a very helpful point. Thank you. We will look at that.
11 For Australia -- just over the weekend I sent copies of this to my learned friends -- it's
12 the latest iteration of the Australian Solicitors' Conduct Rules. It helpfully came out
13 1 July this year, so very fresh. I've got copies of those to hand up to the members of
14 the Tribunal. Just for your information, it's rule 33. It's only an extract, this. It's rule 33:
15 communications with another solicitor's client. It just embodies the rule that we've
16 been discussing.

17 THE CHAIR: I suppose there are two separate issues. One is the ethical rule and
18 then a rule that treats class members as represented by the solicitor for the class.

19 MR HUBBARD: Exactly.

20 THE CHAIR: That may be a difference with our system, because class members are
21 treated as -- I think I'm right in saying -- it has not been (inaudible). So I think, you
22 know, in the other parts of the UK, there might at least be a question to be addressed
23 as to whether the rule bites in relation to communications with class members.

24 MR HUBBARD: Yes. You've pre-empted the submission I was going to make about
25 the status. It's helpful to have that to trail the submission in that way. It leads quite
26 nicely on to just a couple of Australian authorities I want to look at, in terms of the

1 | rationale. Because we would say it goes slightly wider than just the ethical
2 | consideration. There's another point.

3 | If we look please at a decision called Legal Services Commissioner v Poole which is
4 | in the supplemental authorities bundle at page 114, internal page 112.

5 | MR PICCININ: I really do hesitate to interrupt, but I'm just looking at the time. My
6 | friend said, I think that he was going to take two hours, haven't even got on to waiver.
7 | I am a little bit worried.

8 | MR HUBBARD: Look, I'm going to have to cut my cloth. I'm going to have a shorter
9 | reply. But we'll move quickly on to this.

10 | THE CHAIR: Yes. Of course you're alive, Mr Hubbard -- it's very helpful and
11 | interesting to see the comparative material. As I say, this Tribunal may have to reserve
12 | its position in relation to other parts of the UK. But in an England and Wales case, we
13 | basically have McLaren, don't we?

14 | MR HUBBARD: Yes, we do; we do. But the rationale for the rule, which I'm about to
15 | very briefly take you to, is something which ought at least to inform the Tribunal's view
16 | of placing restrictions. It's helpful to see that. So page 122. This is internal page 120.
17 | It's actually 128, internal page 126. See paragraph 82, third line from the top.
18 | Rule 33.1 embodies the so-called "no contact" rule, the chief rationale of which is to
19 | prevent a lawyer from circumventing the protection that legal representation provides
20 | to a client. So that's of significance. That rationale was developed in another
21 | Australian case called Wharf(?), at page 77 internal of this supplemental bundle.

22 | THE CHAIR: Sorry, what was the page number?

23 | MR HUBBARD: Just one moment. Page 77 internal of the supplemental.
24 | It's really paragraph 12, at the bottom of that:

25 | "The rationale for this principle includes protecting the opposing party against the
26 | solicitation of information by the opposing legal practitioner, contrary to that party's

1 | interests, as well as preventing the undermining of the other party's trust and
2 | confidence in his own legal practitioners." [as read]

3 | Really, the first part of that rationale -- because that's exactly what we say there's
4 | a danger of going on here -- the defendants approaching the class members directly
5 | gives rise to a danger that the class members will provide information contrary to their
6 | own interests, which they wouldn't be obliged to provide if this went to an application,
7 | because, as I've said already, the request goes further than what the defendants are
8 | strictly entitled to under the rules. So that rationale for the rule is in play in terms of
9 | exercising the Tribunal's discretion, if I can put it like that.

10 | To the Chairman's point about the status of the class members that was discussed in
11 | a case called Ad Tech, which is in the bundle. And, again, for reasons of time, I won't
12 | take you to it. But the way that the class was described was as occupying a middle
13 | ground. It's page 1492 of the main bundle of authorities, paragraph 91. I won't take
14 | you there. But that's how the class was described: a middle ground. Because, you
15 | know, they're not parties, you're quite right, but neither are they disinterested persons,
16 | because the action is being brought for their benefit. And the class representative has
17 | a fiduciary duty to act in their best interest, which is another reason why he ought to
18 | be consulted about all of this.

19 | So with that, primary relief is order 2. And let's go to that. It's page 259 of the --

20 | THE CHAIR: Just before --

21 | MR HUBBARD: I beg your pardon.

22 | THE CHAIR: I'm mindful of the point Mr Piccinin has fairly made about time. One of
23 | the reasons why I was interested in what the ethical position is -- partly it's got -- even
24 | within the UK (several inaudible words) that there are maybe different approaches.
25 | But also, I think it would be interesting to understand the point Mr Piccinin made at the
26 | CMC, that any communication is obviously undertaken by those instructing him within

1 | the ethical framework as applied. And it would be interesting to know what parties
2 | say, I'd be interested to see what Mr Piccinin has to say, about what restrictions that
3 | or -- in a sense, what that demands of them in the way that they present the material
4 | to the class members.

5 | And, of course, it won't be lost on either of you, that that can cut in two ways. It could
6 | be said, well, the Tribunal doesn't need to regulate what is regulated by the solicitors
7 | ethical rules. Equally, it might be said, well, if the ethical rules would require certain
8 | things to be done. You know, the Tribunal can clearly, in effect, replicate those in
9 | a direction.

10 | That was the principal reason why the Tribunal's interested to understand just what
11 | the framework is.

12 | MR HUBBARD: Yes. Well, just putting things slightly the other way around, there's
13 | certainly nothing in the solicitor conduct rules that would prevent the Tribunal from
14 | imposing the restrictions that we've suggested. At the very minimum, they ought to
15 | comprise the information in order 3, but we say you can and should go much further
16 | than that.

17 | So order 2 at page 259 of the core bundle. Now, this is the primary relief we ask for.
18 | Our basic concern is that the class representative in the Tribunal should have as much
19 | input as the Tribunal considers appropriate into the process of gathering evidence from
20 | the class, subject to the point about litigation privilege. And if what that means is
21 | mixing and matching a little bit from provisions contained in the two draft orders, we
22 | would be perfectly happy with that.

23 | But I'm going to address you, starting with order 2, and focus first of all on paragraph 1.
24 | Now, what this is aimed at doing is putting in place a collaborative approach consistent
25 | with the rules. As I've already acknowledged, sir, as paragraphs 1 sub 3 and sub 4
26 | would interfere with the defendant's privilege if that privilege exists. And I'll come on

1 | and address you about that. Paragraphs one -- sorry --

2 | THE CHAIR: Could you repeat the paragraph?

3 | MR HUBBARD: Yes. I beg your pardon. So paragraph 1, subparagraph 3 and
4 | subparagraph 4 are the ones that I concede, on the basis of McLaren's CA, would
5 | interfere with the defendant's privilege if it exists, which we'll come on to.

6 | Now, paragraphs 1, sub 1 and sub 2 would not interfere with the defendant's privilege
7 | if it existed. Privilege, as we've discussed, is a negative right not to disclose certain
8 | documents. It's concerned with the content of those documents or communications.
9 | Now, obliging the defendants to provide the identities of the persons with whom they
10 | intend to correspond, which is the concern of paragraph 1 sub 1 and sub 2, before any
11 | document has been created and therefore before privilege is attached to any such
12 | document, does not amount to an interference with that privilege.

13 | And, sirs, as we say, that essentially follows from a concession that was made by my
14 | learned friend at the CMC, and I will take you to that. It's in the core bundle page 128.
15 | So we're looking here at the transcript. And if we pick it up at line 15, you see my
16 | learned friend says:

17 | "What you can't do is ask to see our correspondence with developers, where we're
18 | seeking to gather evidence from them. The other thing you can't do is order us not to
19 | send letters to developers asking them to provide documents. Those are the two
20 | things you can't do ... Beyond that, we fully support the Tribunal's jurisdiction to
21 | regulate its procedure and to deal with whatever comes after that. That's what the
22 | Court of Appeal said."

23 | Now, what we're asking for in order 1, sub paras 1 and 2 falls outside of what my
24 | learned friend said that you were constrained by at the CMC. And for the reasons I've
25 | explained, it would not interfere with privilege. There's a difference between asking to
26 | see drafts of documents, and asking for the identities of the persons to whom it's

1 | intended to send those communications.

2 | Now, the reasons why it's important we have input into that process of deciding to
3 | whom communications are going to be sent, are set out in our letter of 24 April in the
4 | core bundle, page 32. And I invite you to read what we say there in that letter for
5 | reasons of time, but just to try to summarise things very briefly: it's important that the
6 | defendants don't adopt a self-serving approach in relation to the people to whom
7 | they're going to send these communications. In other words, it's important they don't
8 | select an unrepresentative sample of developers. The ones, in other words, which
9 | defendants think are going to hold documents helpful to their case.

10 | But that goes for all of the issues in the categories they've indicated. Any request for
11 | documents has got to be targeted at a representative spread of developers, and only
12 | those developers likely to have relevant documents. By relevant, I mean relevant to
13 | the issues the Tribunal has to decide, not just helpful to one party's case.

14 | And in paragraph 1 sub 1 and sub 2 of our draft order 2, what we're trying to do is to
15 | make sure that the selection of developers to whom these requests are addressed is
16 | underpinned by a rationale, and also trying to make sure it's not just targeted at the
17 | larger developers on whom funding of our claim depends.

18 | So that is paragraph 1 sub 1 and sub 2. Turning to paragraphs 1 sub 3 and sub 4,
19 | and just so we can navigate back to that it's page 260 of the core bundle.

20 | Now we accept, as I say, that these would interfere with privilege if it could be claimed.
21 | However, the defendants couldn't claim privilege in a disclosure communication of the
22 | type being contemplated in those subparagraphs. Now, it's common ground that
23 | confidentiality is an essential precondition of a claim to privilege, and what the
24 | submission quite simply says is that, in this case, confidentiality in the proposed
25 | communication is lacking. The defendants have already lost any confidence which
26 | existed. And the reason I say that is that we know what the communication is going

1 to say, because the defendants have told us what it's going to say.

2 There isn't time to take you to this, but, for your reference, there's a quote from
3 Mohammed v MOD, which is in the authorities bundle at page 447, paragraph 14(iv),
4 which is helpful for the point that it's an essential prerequisite of a claim to privilege.
5 That confidence exists. Now, a classic way of losing confidentiality is if the relevant
6 information enters the public domain, and the classic way of putting information into
7 the public domain is by reading it in open court. Mohammed stands for that. There
8 are other references in my skeleton. And reading a document in open court includes
9 pre-reading by the court and also putting a reference to the document in one skeleton
10 argument. The authority for that is SmithKline Beecham, referred to in my skeleton.
11 And both of those things happened in this case. And that isn't controversial. That's
12 accepted.

13 But the contents of the 17 April letter were put before the court at the CMC. Now, the
14 defendants don't dispute that the information in the April letter is no longer confidential.
15 They can't dispute that. But what they say is they can't have lost confidence in
16 a disclosure communication containing that information, because no such disclosure
17 communication has yet been created. But, sirs, that can't make any difference. Just
18 reading from the speech of Lord Leggatt in the Mohammed case, I referred to,
19 paragraph 14(iv):

20 "... privilege only protects information which is confidential, if the information
21 concerned ceases to be confidential, privilege cannot be claimed."

22 Now, it doesn't matter, sirs, if confidence is lost before or after the communication has
23 been created. And let me illustrate that by taking a simple example.

24 Imagine a situation where a litigant writes to a third party for the purpose of collecting
25 evidence in ongoing litigation. There's no doubt that communication would be
26 privileged. Then assume that that that litigant tells everyone in open court what that

1 | letter said. There can equally be no dispute that that letter would then lose privilege,
2 | because the information the privilege is designed to protect would no longer be
3 | confidential.

4 | Now, that works, sirs, just as well the other way round. A litigant says in open court
5 | he's going to write to a third party for the purpose of collecting evidence. And he tells
6 | the court what that letter is going to say. Now, because he's told the court what the
7 | letter is going to say, that information can no longer be confidential. It's been shared
8 | with everyone in open court. And therefore, sirs, any document which embodies that
9 | information in the future is incapable of attracting privilege because that information is
10 | no longer confidential. It's been shared with the courts. It's common ground that
11 | a pre-condition of claiming privilege is that the information over which privilege is
12 | claimed is confidential, and if it's been shared with the court, whether that happens
13 | after the letter has been written or before the letter is written, in either case, the quality
14 | of confidence is lost, and that's fatal to any claim for privilege.

15 | Now, the way that my learned friends try to answer this is to say, "Well, actually, we've
16 | not told you what these communications are going to contain. We've only told you in
17 | general terms what they're going to contain". That, sirs, is not a sustainable
18 | submission. I'm not going to take you to it, I know you've already read this in advance
19 | of the hearing, but I would invite you again to read carefully their letter of 17 April, in
20 | which they set out, number 1, very specifically, 19 categories of disclosure, which they
21 | say they're going to seek from class members. They also set out the nature of the
22 | searches they're going to ask the class members to undertake.

23 | So it's just not right for the other side to say they've only told us in general terms what
24 | they're going to ask for. They've told us in very specific terms what they're going to
25 | write to the other side about. And it's notable -- there's never been a suggestion from
26 | them since we took these points that they're not going to write in those terms; that

1 | actually they're going to abandon those categories of disclosure and those searches
2 | and ask the class members to do something else.

3 | Sirs, the example the defendants take in paragraph 37 of their skeleton, where they
4 | say -- this is at the foot of paragraph 37, three lines from the bottom:

5 | "For example, a person negotiating the contract might tell their counterparty that they
6 | intend to seek legal advice on the drafting, but they do not thereby lose privilege in
7 | that subsequent advice." [as read]

8 | Well, of course we would agree with that. That's an uncontroversial proposition, but
9 | that's not what's going on in our case. If you change the facts of their example a little
10 | bit -- so rather than someone saying, "Look, I'm going to seek legal advice in general
11 | terms", which is their example -- if you change those facts and you imagine a situation
12 | where a litigant tells his opponent that he intends to ask his lawyers for advice on
13 | ten specific questions and writes those questions down and gives them to his
14 | counterparty, which is really our situation, then in that case, that hypothetical example,
15 | the party wouldn't be able to claim privilege in the letter subsequently sent to his
16 | solicitors, because he's told the other party exactly what he intends to do. Ergo, there's
17 | no confidence. Ergo, one can't claim privilege.

18 | It's also significant, when asking whether confidence has been lost, to look at what
19 | Apple said about this topic at the CMC in May. The relevant parts are at page 109 of
20 | the core bundle. It's towards the foot of page 109, lines 23 to 26, where my learned
21 | friend said, "We could have just gone off and written to developers and made our
22 | request to them and asked them to produce what they would like to. We could have
23 | done all of that under the cover of litigation privilege."

24 | What we say that amounts to is an acknowledgment that Apple had a choice. They
25 | could either have proceeded in a different way to the way they did proceed in, and
26 | gone off and written communications without telling us in advance what they would

1 say; then they could have enjoyed litigation privilege; or they could have taken the
2 route they actually took, which involved sharing what they're going to say to developers
3 in advance of writing those letters. But by taking that route, they've lost any potential
4 to claim privilege, because they've told us the information which that letter is going to
5 contain and thereby lost the confidence which would be a necessary part of any claim
6 to privilege. We say that what my learned friend said in that passage is really an
7 acknowledgment of that.

8 THE CHAIR: Is it your position, then, that any defendant who behaves in the
9 co-operative way that the guide envisages in relation to disclosure, by doing so waives
10 privilege and loses the potential to rely on litigation privilege? I mean, I've no doubt it
11 would all depend on --

12 MR HUBBARD: Yes.

13 THE CHAIR: -- precisely what happened in any given case. But is that where your
14 submission goes?

15 MR HUBBARD: No, it doesn't go that far. Everyone knows that privilege is
16 a treacherous path to try to navigate, and if one does something which basically
17 involves telling your counterparty or saying in open court, either what you've done,
18 what you've told a witness, or what you intend to tell a witness, you give up confidence
19 in that information.

20 The example that, sir, you posited: if the defendants had turned up to court and said
21 in very general terms that, "We'd like to make an approach and we'd like to discuss
22 that approach with the Tribunal and with the claimants", they would have been fine.
23 They didn't do that. They went a lot further, and they stepped over the line by saying,
24 "Here are the specific categories of information which we intend to ask the class
25 members to provide, and here are the searches we intend to ask them to undertake".
26 So, in other words, they went a lot further than that very general approach, and by

1 | going as far as they did, they disabled themselves from being able to claim confidence
2 | in that information in the future, because they told us about it. Once you've lost
3 | confidence, you've given up the claim to privilege, because confidence is a necessary
4 | element of any claim to privilege.

5 | In other words, I don't say that in every case where a party broaches the topic with the
6 | Tribunal, they automatically lose privilege. It depends how far they've gone, and it's
7 | difficult to imagine circumstances in which a party could have gone further than the
8 | defendant did. That's really been acknowledged by my learned friend, we say, in what
9 | he said at the CMC. We had a choice, and we took route B. Now they're trying to
10 | resile and take route A, but it's too late. They've lost confidence in the information.
11 | When you've lost confidence, you've lost the claim to privilege. It's really as simple as
12 | that.

13 | Quickly rattling through the other provisions of order number 2, it's page 260 of the
14 | core bundle. Paragraph 2 and 3 are really quite straightforward. They're just setting
15 | down a process for the kind of collaborative approach that I've outlined.

16 | Paragraph 2 envisages that the class representative has been provided with the
17 | information contemplated in paragraph 1. It then sets out a process for the class
18 | representative either agreeing to or providing comments on the proposed
19 | communication. Paragraph 3 just sets out a process for the Tribunal to resolve any
20 | differences.

21 | THE CHAIR: Do you accept that 2, 3 and 4 would breach litigation privilege, assuming
22 | it's not been waived?

23 | MR HUBBARD: Yes.

24 | THE CHAIR: I mean, do those paragraphs depend on your argument about whether
25 | it's really the question?

26 | MR HUBBARD: Yes, they do, because these paragraphs depend on the class

1 | representative having seen the disclosure communications. Perhaps a more accurate
2 | way of putting it is to say that, at least in relation to subparagraph (1) and (2) of
3 | paragraph 1, these provisions in 2, 3 and 4 wouldn't arise in relation to that part of the
4 | relief, because, if you're not with me on loss of confidence and therefore inability to
5 | claim privilege, then there's no basis on which we could ask to see those
6 | communications, so 2, 3 and 4 just wouldn't arise in relation to them, although they
7 | would in relation to paragraph 1, subparagraphs (3) and (4).

8 | Paragraph 4 is just aimed at holding the ring while the Tribunal resolves any difference
9 | under paragraph 3. Paragraph 5 is uncontroversial. It's just asking us for notice of
10 | any application, and the defendants have conceded that they would give us that
11 | notification.

12 | Let's move on, sir, to draft order 3, quickly at page 262 of the core bundle.
13 | Paragraph 1, subparagraph (1).

14 | This isn't asking to see disclosure communications at all. It's simply asking for the
15 | defendants to confirm -- I'm reading from subparagraph (1)(a):

16 | "...confirm how each category of proposed disclosure requests relates to each of the
17 | pleaded issues in these proceedings, and

18 | "(b) the criteria that the defendant will use to select the intended recipients of the
19 | disclosure communication". [as read]

20 | That's what we're asking for. We're not asking to see an actual disclosure
21 | communication. We're just asking really to see the basis of the disclosure requests
22 | which the defendants have shared with us, and the criteria they're going to use to
23 | select the intended recipients.

24 | THE CHAIR: Does that depend on your argument about waiver being (overspeaking)?

25 | MR HUBBARD: No. Absolutely not, no. Nothing I say about order 3 depends on
26 | establishing that there's been a loss of confidence and inability to claim privilege.

1 | There's no question of privilege arising in relation to the information we seek at order 3,
2 | paragraph 1, subparagraph (1).

3 | You understand what the mischief is, sir, hat two limbs of paragraph 1, subparagraph
4 | (1) go to. I've explained what they are. We're concerned that requests aren't made
5 | for documents which don't go to pleaded issues, or which are unnecessarily broad or
6 | are targeted at an unrepresentative sample of developers. In other words, these
7 | requests are aimed at ensuring that disclosure is reasonable and proportionate in
8 | accordance with the rules.

9 | Now, the defendants don't say much about order 3 at all. What they essentially say,
10 | they take one point. This is sort of the point you just foreshadowed, sir. They say that
11 | order 3 can't be squared with the defendants' litigation privilege, because it provides
12 | for the parties to agree the nature and the recipients of communications. That's just
13 | wrong. This isn't talking about communications, paragraph 1, subparagraph (1) of
14 | order 3. It's talking about how the disclosure requests relate to the issues in the
15 | proceedings. We're not asking to see a communication. They've already shared with
16 | us their disclosure requests. We're asking them to explain, before they're able to send
17 | a communication to the class, how those requests relate to the issues in the
18 | proceedings, which they must; and (b) the criteria they're going to use to select the
19 | recipients.

20 | So, this idea that paragraph 1, subparagraph (1) is trespassing on legal privilege really
21 | betrays a misunderstanding of the nature of that concept. I've explained it's a negative
22 | right not to have to disclose certain documents. What it doesn't do is give you an
23 | absolute right to communicate with class members or anyone else in the first place,
24 | and any such absolute right would be inconsistent with what the Court of Appeal
25 | decided in McLaren, because, as I've explained, they contemplated that in an
26 | appropriate case, the Tribunal could apply an order, impose an order which restricted

1 | a defendant's ability to communicate with class members.

2 | That's the crucial part of this draft order 3, 1 subparagraph (2) and subparagraph (3)

3 | just echo the process in draft order 2 for the class representative to give input into the

4 | draft order and for the Tribunal to resolve any differences arising from that input.

5 | Paragraph 2 is just a provision to hold the ring. Paragraph 3 is the information which

6 | we say that any communication ought to contain. The defendants have agreed it can

7 | contain the information at subparagraph (1), (3), (5), (6).

8 | We've spoken about subparagraph (8).

9 | THE CHAIR: Sorry. Which ones do you say are agreed?

10 | MR HUBBARD: I beg your pardon. It's in my skeleton, but I --

11 | THE CHAIR: I'm sure I will have picked it up, but if you could just for my notes remind

12 | me.

13 | MR HUBBARD: Of course.

14 | The ones that are agreed are paragraph 3, subparagraph (1).

15 | THE CHAIR: Yes.

16 | MR HUBBARD: Subparagraph (3), subparagraph (5), subparagraph (6), and that's it.

17 | THE CHAIR: Okay.

18 | MR HUBBARD: Subparagraph 8 is the point about costs, which we've spoken of.

19 | That should of course be in there.

20 | Subparagraph (2): this provides for a class member to be able to contact the class

21 | representatives' legal representatives. It is natural, of course, that the first thing -- or

22 | possibly the first thing -- a class member would want to do is to discuss this request

23 | with the class representative and/or his legal representatives. The member of the

24 | class may well ask the class representative to represent him in any contested

25 | application. My learned friend has acknowledged this in their skeleton for the CMC at

26 | page 213 of the core bundle, paragraph 57.

1 | In those circumstances, sirs, there would be an identity of interest between the class
2 | representative and the member against whom disclosure is being sought, because in
3 | this hypothesis, the class member would have said to the class representative, "Look,
4 | I've received this document. I want you to represent me in this contested application
5 | that's coming down the track". In those circumstances, sirs, the member must be able
6 | to discuss the prior communications before the application takes place. That's really
7 | what paragraph 3, subparagraph (2) is directed at.

8 | Paragraph 3, subparagraph (4). This has been objected to for reasons I can't really
9 | understand. All of this does is to record the legal position. It says that disclosure
10 | requests must be necessary for the fair resolution of the proceedings and reasonable
11 | in scope. That's just the law. So informing the class member of the law is obviously
12 | helpful in enabling that class member to form a decision. It's not enough for my
13 | learned friend to say, well, it can go and get legal advice. The name of the game here
14 | is to try to lessen the burdens on class members, not force it to go and instruct its own
15 | lawyers. So this really is unobjectionable in 4.

16 | 7 is a pretty straightforward point. We say that if a class member receives
17 | a communication out of the blue from Apple asking for all of this extensive information,
18 | it's at least going to fear, or may fear, that it's been accused of having done something
19 | wrong. Telling it that the request doesn't imply that will simply put its mind at rest in
20 | that respect.

21 | Paragraph 3 sub 9: helpful that a class member would receive a copy of the order
22 | pursuant to which the requests of information from it have been restricted.

23 | Moving off paragraph 3; paragraph 4, all this said is that if before this order the
24 | defendants have already communicated with the class member, then they ought to
25 | send the information above to them. It was confirmed as at 10 July that Apple hasn't
26 | communicated with anyone yet. If that's still the case, this provision doesn't arise, or

1 | at least only arises up to the point when the Tribunal makes its order in this case.

2 | Paragraph 5 says -- this is a very sensible suggestion, just limiting the circumstances
3 | in which the defendants can communicate with a class member to the hours of 9.00
4 | to 5.00 in the time zone in which they're located. Apple says this is an unnecessary
5 | intrusion into its communications with the class member. That's concerning. In reality,
6 | all of this is a modest restriction to protect the class members against untoward
7 | approaches out of office hours, which are likely to unnerve them.

8 | THE CHAIR: The real point -- I mean, I picked this up as being connected to the
9 | circumstances we saw in the Rodger and Google case where that seems to have
10 | happened, but it was coupled then with a very, very short time limit for response.

11 | MR HUBBARD: Yes.

12 | THE CHAIR: Now, in this case, as Apple itself has submitted, we do have a long time
13 | until trial. So is the way to deal with this not simply to say -- and in fact, it's in your
14 | next paragraph -- that, you know, there should be a, you know, if we were minded to
15 | require Apple to include information along these lines, that your paragraph 6, which
16 | makes clear that there's no requirement to respond immediately, really means that
17 | paragraph 5 becomes an unnecessary one?

18 | MR HUBBARD: Well, I'm not going to die on paragraph 5. But let me put it like this.
19 | It's sensible to try insofar as they can to -- the only point they really make about this is
20 | that, "Look, if we post a letter, we don't know what time it's going to arrive". Fine.
21 | Carve out postage. Otherwise you've seen what we've said, and they've agreed
22 | paragraph 6.

23 | THE CHAIR: Well any communication is almost bound to be by letter rather than
24 | phone call, or someone, we would say in Scotland, chapping on the door. But you
25 | know --

26 | MR HUBBARD: I hope it won't come to that.

1 THE CHAIR: And if we were, you know, making directions of this sort, and obviously
2 I'll hear Mr Piccinin on them, we could say any communication shall be in writing if,
3 you know, one really wanted to avoid any risk of the sort that you're apprehending.

4 MR HUBBARD: Yes, exactly.

5 THE CHAIR: If the Tribunal felt it needed to do.

6 MR HUBBARD: So it's really just a harassment concern. I mean, like I say, the way
7 they've behaved makes us very suspicious. So we're just trying to lay down as many
8 obstacles in their path to ensure that class members aren't harassed, and this seemed
9 like a reasonable requirement. But I do hear what you say, sir.

10 Paragraph 6, 7 and 8 are uncontroversial. Happily, 8 just reflects paragraph 5 of the
11 second order.

12 I think the final thing I'll say is that order 3 is a form of -- it's the secondary relief we
13 ask you to order. I know you have that point. Order 2 is the primary form of relief.

14 When I mentioned the potential for adopting elements of one order and incorporating
15 them into the other, what I really had in mind there is that if you were against us on
16 para 1, subparas 3 and 4 of order number 2, so they're the ones that I say we can only
17 get home on, exactly. But if you were with us on subparas 1(1) and 1(2) of order 2,
18 you could import those provisions of order 2 into order 3 in substitution for
19 paragraph 1, subparagraph 1(a) and (b) of order 3. I appreciate that there's too much
20 jumping around there, but hopefully on the transcript you'll see exactly what I mean by
21 that.

22 THE CHAIR: Yes.

23 MR HUBBARD: Apologies for going over.

24 THE CHAIR: I hadn't realised we had gone past 1.00. Are you home, or all but home?

25 MR HUBBARD: I am home. I've not dealt with abuse but, like I say, I'm not
26 proposing --

1 THE CHAIR: What I suggest there is that I hear what Mr Piccinin has to say on abuse.
2 MR HUBBARD: Exactly.
3 THE CHAIR: And if you if there's anything you need to reply to, you will have time to
4 reply.
5 MR HUBBARD: Thank you very much. And you've obviously got my submissions on
6 that.
7 THE CHAIR: Yes. Is that?
8 MR HUBBARD: That is that, yes.
9 THE CHAIR: Well, thank you very much, Mr Hubbard. We'll rise now. We will come
10 back 2.00. Would that be satisfactory?
11 MR PICCININ: Yes, sir.
12 THE CHAIR: Yes. Thank you very much.
13 (1.08 pm)
14 (The short adjournment)
15 (2.02 pm)
16
17 Submissions by MR PICCININ
18 MR PICCININ: Yes. I would like to start, if I may, with some observations about what
19 this hearing is and isn't about. Because for the fourth time now, by my account,
20 Dr Ennis has turned up with an application alleging that Apple is attempting to oppress
21 or harass class members with a view to stifling this claim. That is utter nonsense, as
22 I'll go on to explain.
23 My clients have had enough of turning up to this Tribunal and being abused in this way
24 by Dr Ennis making the same baseless allegations that concern events and alleged
25 conduct that has nothing at all to do with the application that the Tribunal is actually
26 considering. Things like Sherlocking, for example.

1 | Indeed, two years ago, in June 2024, Dr Ennis made an application for an order
2 | restricting communications between Apple and class members by reference to these
3 | same stale and false allegations. That argument was rejected by this Tribunal, and
4 | rightly so, although unfortunately the Tribunal never produced a written ruling, or any
5 | kind of ruling on it. It just said what the answer was with reasons to follow. And they
6 | didn't follow.

7 | But it is wrong for Dr Ennis now to come and make substantially the same arguments,
8 | based on the same material, to attempt to stifle our defence once more, because that
9 | is what this application is actually about. It's not about Apple stifling anything. It's
10 | about Dr Ennis quite expressly attempting to stifle our defence.

11 | All Apple is doing here is what any normal defendant does in normal, grown up
12 | commercial litigation up and down the country. It is instructing its external solicitors to
13 | seek to gather evidence on a voluntary basis from people who have relevant evidence
14 | to give, in order to defend what Apple considers to be a baseless claim. So, it's
15 | a voluntary dialogue that we're talking about here. It's not an application -- at this
16 | stage anyway -- for disclosure, and it may never be.

17 | THE CHAIR: And for those claims that could have been pursued as standalone
18 | claims, were they being pursued as standalone claims, there would be positive
19 | obligations of disclosure on the claimant.

20 | MR PICCININ: Yes. To support --

21 | THE CHAIR: So, I mean, it's one of the interesting features of collective litigation, that
22 | disclosure is managed by the Tribunal.

23 | MR PICCININ: Yes.

24 | THE CHAIR: From class members under rule 89 and the third-party disclosure rules.
25 | So, I suppose that's part of the context? You know, is that you would say that's part
26 | of the context that we should have in mind?

1 | MR PICCININ: It is, and I'll come on to that. That's a point we're going to discuss
2 | shortly in relation to opting out in that concern.

3 | Now, my learned friends take issue with the particular disclosure, or the particular
4 | requests for information and documents that we've expressed an intention to make. It
5 | is not our obligation; it's never a defendant's obligation to explain or justify the
6 | exploratory steps that they want to take to obtain information that may or may not turn
7 | out to be useful in their defence. That's not something anyone is ever required to do
8 | in civil litigation.

9 | But actually, my learned friend is wrong to say that we've ignored their complaints
10 | about that, and he's wrong to say that we have not explained ourselves. Because we
11 | did it last time when these same complaints were made, and now they've just been
12 | reheated in the microwave and dished out again today.

13 | So if we go to the core bundle at page 212, you'll see our skeleton argument from not
14 | very long ago -- it was the last CMC. In fairness to Mr Hubbard, he wasn't there. But
15 | it is in the bundle and his solicitors were there. So, on this page we set out in broad
16 | terms why it is that the material that we're seeking, then presently intending to seek,
17 | is relevant.

18 | The short point is that my learned friend is wrong to say that this case is all about the
19 | profits that Apple earns; the revenues and the costs that Apple earns and incurs. It
20 | may be that Dr Ennis wishes to run a highly simplistic case of that kind, but there's
21 | actually an awful lot more to it.

22 | Just talking it through -- it's all explained there, but just talking it through -- in relation
23 | to market definition, one very important point that we have that Mr Frazer will
24 | remember from Kent is that developers of many kinds are actually able to transact with
25 | iOS end users for digital content that that they are then able to use on an iOS device
26 | in their game, for example. That transaction can take place on the developer's own

1 | website. And then Apple's technology has been used, the transaction has happened,
2 | and the consumer is actually able to use that digital content on the iPhone without
3 | anyone paying any commission to Apple. That's something that Apple allows under
4 | its rules.

5 | It's part of our case that that imposes important competitive constraints on Apple and
6 | makes it difficult, will make it impossible for Apple to charge supracompetitive prices.

7 | So that is part of our case on market definition and dominance.

8 | Now, developers are obviously in a position to help us with information on the extent
9 | to which they make use of that right, and the reasons why they do or don't. Do they
10 | charge different prices on their website and on their iOS apps, or not? As we explain
11 | in paragraph 53, I think it is, that is one of the reasons why we're asking for some of
12 | the material in sections (b) and (c).

13 | In addition, if the case ever moves beyond market definition and dominance and you
14 | get on to analysing abuse, my learned friend is wrong to say that unfair pricing is all
15 | about the profitability of the defendant. It's about the economic value that is provided
16 | to the developers. That's certainly our case. Our case is that developers receive
17 | extraordinary economic value. That is our technology that enables them to create this
18 | digital content which they then earn vast revenues on around the world. And that all
19 | we're taking is a reasonable share of those vast revenues that they earn from the use
20 | of our technology. There's nothing unfair about that. So that's our case.

21 | Again, developers are going to have documents and information that sheds light on
22 | the way that they use our technology and the way that they use our services in order
23 | to earn the money that they do.

24 | In addition, another important topic is applicable law. It's been a while now, but I hope
25 | that Mr Frazer and Professor Neuberger will remember some of the arguments we had
26 | about that.

1 But what's going on in this case, and it may be, sir, that you have been doing some
2 pre-reading as well, I don't know, but one thing that's going on in this case is that
3 Dr Ennis is attempting to apply an exorbitant reach of UK competition law to regulate
4 the price that Apple charges for the services that it offers all around the world, of
5 distributing, as he analyses it, developers' apps and digital content to consumers all
6 the way around the world on storefronts that are targeted at those consumers. And
7 he says that the applicable law and the grounding of the territorial scope of UK
8 competition law attaches to something as fragile and economically meaningless as the
9 domicile of the particular legal entity in a massive multinational developer group that
10 happens to transact with Apple, that happens to have contracted with Apple through
11 the DPLA. That's his case.

12 Our case, you'll remember, is all set out in the Tribunal's judgment on the jurisdiction
13 challenge. Our case is that domicile is, for these purposes in this context, essentially,
14 commercially, economically, legally, not significant. And one of the points that we ran
15 in the jurisdiction challenge, you may remember, is that some of these class members
16 are actually UK domiciled legal entities in much larger groups that are not even
17 headquartered in the UK. They're headquartered elsewhere, and some of them have
18 also, at various points in time, made decisions to shift the particular legal entity that
19 contracts with Apple from one jurisdiction to another.

20 So that's something you've had submissions about before. I won't go into any of the
21 details. And so again, that's why the request 19 is there. That's section E, dealt with
22 in paragraph 54 of our skeleton argument last time.

23 We want to know why it is that particular developer groups have chosen, at different
24 points in time, to direct their global commerce through a UK legal entity, if that's what
25 they've done. Because that our case is that the answer to that has got nothing to do
26 with the location of the services that are being provided and actually has everything -- it

1 | has nothing to do, therefore, with what the applicable law ought to be.

2 | So it's just wrong to say that we've not provided information about why we're seeking
3 | this kind of material. The question of whether -- we do say that what we're seeking is
4 | appropriate and necessary and proportionate and all of that. It doesn't have to be.
5 | And today's not the day to decide whether it is, but it's wrong to suggest that we're just
6 | engaged in some harassment exercise, asking for things that have got nothing to do
7 | with the case. And Dr Ennis knows that, because we told him last time that he
8 | shouldn't be turning up and making submissions in this Tribunal that give the incorrect
9 | impression about that.

10 | So, in trying to carry out this perfectly normal activity of trying to explore the facts of
11 | the case and try to gather evidence that we might use in our defence, what we're
12 | finding is again and again and again, four times now, we are met with distracting
13 | roadblock applications from Dr Ennis that expressly seek to limit regulate our efforts
14 | to gather evidence. And he is succeeding in that task, even though his applications
15 | have never had any legal merit, and has not succeeded on any of them up to this point,
16 | at least, he has succeeded in delaying our efforts to gather evidence.

17 | Now, rather than waste time going through the details of his baseless allegations about
18 | Apple's conduct over the years, which we entirely reject, I want to put them in context
19 | by reminding us all, in a little bit more detail, what it is that we're doing here and what
20 | the real concern is that is being thrown back at us.

21 | The proposal that we made at the last CMC is that Apple's external solicitors, regulated
22 | by the SRA in this country, should send correspondence to sophisticated commercial
23 | undertakings to ask them whether they would agree to provide information and
24 | documents to assist Apple's defence in these proceedings. And, depending on the
25 | response that we receive, we may or may not then need to make an application to the
26 | Tribunal against some of those sophisticated commercial undertakings for an order

1 | compelling them to provide documents.

2 | If we do that, Dr Ennis will self-evidently know all about that, and obviously the Tribunal

3 | will, too. Nobody is going to be compelled to provide anything that they're not willing

4 | to provide without being given a fair hearing by this Tribunal first. That's just axiomatic.

5 | My learned friend's main concern seems to be that at some point in this process that

6 | I've just outlined, these sophisticated commercial entities will decide that they want to

7 | opt out of these proceedings. And I don't dispute that some of them might choose to

8 | do that. And there is nothing wrong in principle with them making that decision, and

9 | then making an appropriate application to the Tribunal for permission to do so.

10 | For all I know, some or all of these undertakings may be completely unaware that

11 | Dr Ennis is running these claims in their name for the commercial benefit of his funders

12 | and lawyers, and, indeed, himself. They may well be appalled to discover that, for all

13 | any of us know.

14 | After all, many of these developers are very large global businesses who, like Apple,

15 | are innovators, who earn substantial returns on their intellectual property. They may

16 | well think that there is nothing wrong with a company like Apple earning what may

17 | seem to them like a reasonable share of the proceeds of what they have managed to

18 | earn using our technology. And they may well not like the idea of companies in that

19 | sort of position -- they're in the same boat -- being targeted in this way by profit seeking

20 | troublemakers, as they may perceive them to be.

21 | They may well decide that they want to opt out and provide us with documents or

22 | information to support our defence. All of that is possible. We won't know until we

23 | ask.

24 | It's also possible that they might not care about the claim one way or the other, but if

25 | faced with an order for disclosure, they might not think that the claim is really worth

26 | the candle. And, again, for all we know, they might not think that it's worth anything

1 | like what Dr Ennis says it is. They may well take a different view from Dr Ennis about
2 | the merits of the case, because, of course, they are the only ones who know what their
3 | documents and data say about the extraordinary economic value that they have
4 | received from Apple. They're the only ones who know what their documents and data
5 | say about the strong alternative options that they have for dealing with consumers
6 | without paying any commission to Apple.

7 | Dr Ennis is terrified, rightly terrified, that you might see that evidence at trial. He wants
8 | to keep it out, but the developers know what it says. They know, and they may well
9 | think that the litigation is not likely to succeed, and therefore to be worth anything if
10 | their evidence that they're sitting on ever sees the light of day.

11 | Now, we say there'd be nothing wrong with either of those outcomes. Those are both
12 | perfectly reasonable outcomes. They're not bad reasons. Whether you think that's
13 | right or not, as the Tribunal, or whether you think that's problematic doesn't actually
14 | matter for today. The key point is the one that you made, sir, which is that all of this
15 | is happening now, unlike in McLaren. All of this is happening now well after the end
16 | of the opt-out period. And so that means that everything that matters is entirely within
17 | your control. If faced with a class member who makes an application to opt out, if
18 | disclosure is ordered, at least in principle, you have three options open to you under
19 | the Tribunal's rules.

20 | You can decide not to order disclosure. We would say that's the wrong decision. It's
21 | probably unlawful in the circumstances, but, in principle, it is, of course, up to you to
22 | order what disclosure you want to order. That's one option.

23 | Another option is you can say, "Tough. You had your chance to opt out and you didn't
24 | take that chance. I'm ordering disclosure and refusing permission to opt out". That's
25 | another thing you could do.

26 | Or you could say, "Okay, well, I think disclosure is justified if you stay in, and I'm going

1 | to let you opt out because, frankly, the claim should not be pursued in your name if
2 | your considered view is that it's not worth pursuing if the price of that is to provide
3 | exactly the kind of evidence", and this is your point, sir, "that you would be ordered to
4 | provide in the ordinary course of civil litigation brought in your name, and you're big
5 | enough to be able to handle that".

6 | So, today is not the day for the debate about which of those three options would be
7 | the right answer in law, or as a matter of discretion, if any such application ever arises,
8 | which it may or it may not. The critical point for today's application is that there is zero
9 | risk of anything that we do in our correspondence with developers, leading to someone
10 | opting out in circumstances where the Tribunal does not consider it to be right that
11 | they should be permitted to opt out, because that's something that is in the Tribunal's
12 | control.

13 | Beyond that, my learned friends also seem to be worried more generally that we will
14 | bully or harass these developers in some way. That's the word that my learned friend
15 | chose to use just before the lunch break. We say it is absurd to think that Apple would
16 | want to do that to its developer customers, they are Apple's customers. Indeed,
17 | Dr Ennis's own case is that Apple relies on developers to make the App Store more
18 | attractive than it would otherwise be, and that this contributes to the sale of iPhones.
19 | Just for your reference, it's core bundle, tab 20, page 469. It's their reply 53.3.4.1 and
20 | 53.3.4.2.

21 | And to that extent, we agree. It's actually a big point against Dr Ennis on the
22 | substance of the case, for reasons we'll get on to at trial if we ever get there. But all
23 | that matters for today is that we all agree that having developers choose to invest in
24 | making great apps for the iOS platform is something that Apple wants to encourage.
25 | Harassing them in litigation would be a strange way for a business to go about that.

26 | It's even more absurd and, frankly, insulting, to suggest that Apple's in-house lawyers,

1 | who are professionals regulated by various regulators around the world, would agree
2 | to harass anyone in the course of litigation, or at all. And, frankly, it is beyond the pale
3 | to suggest that Apple's external solicitors, regulated by the SRA, would do so. That
4 | really is an outrageous submission, and I cannot fathom how those on the other side
5 | of this courtroom felt able to make it today, or on any of the previous occasions it's
6 | been made. So we really do want to draw a line under this now. It's wrong.

7 | Before I get on to the issues of waiver and the problems with the order that's sought
8 | by Dr Ennis, this is also a convenient moment for me to address briefly the issue of
9 | the solicitors' professional conduct rules. I've just mentioned a couple of times that
10 | we're SRA-regulated.

11 | THE CHAIR: I should say that I asked the référendaire to pass a Canadian case and
12 | some American work to parties, not because I'm inviting submissions on
13 | a wide-ranging comparative material, but just since we had some of that material
14 | before us already, I thought you should both see material that I had looked at and
15 | found interesting. So that if there is anything anyone wants to raise, they can do so.

16 | MR PICCININ: I'm grateful. I've not had a chance to consider it.

17 | THE CHAIR: I wouldn't have expected you to but --

18 | MR PICCININ: So the position is now -- I think we more or less arrived at this
19 | destination through your questions in my learned friend's submission. But, to be clear,
20 | the only rules that currently exist in this jurisdiction that bear on the issue we're talking
21 | about at all are very general and flexible.

22 | And it's slightly odd that my friend didn't take you to the actual rules that apply, but if
23 | we could turn up his bundle, the supplementary authorities bundle. And go to page 12,
24 | using the internal red numbers.

25 | These are the current SRA rules, and it's rule 1.2 and 1.4 that are most obviously
26 | applicable:

1 "You do not abuse your position by taking unfair advantage of clients or others."
2 So it's the "or others" bit that would catch communications with class members in these
3 proceedings. And then 1.4 is also relevant:
4 "You do not mislead or attempt to mislead your clients, the court or others, either by
5 your own acts or omissions ... [et cetera]"
6 Then you may also want to look at page 2, also using the internal numbering, and it's
7 principle 2:
8 "[Solicitors should always] act in a way that upholds public trust and confidence in the
9 solicitors' profession and in legal services provided by authorised persons."
10 The reason I keep mentioning the SRA regulation is that these are actually points in
11 our favour, because they are reasons why you, the Tribunal, should feel confident that
12 in the absence of some evidence of misconduct by those who represent Apple, you
13 can just leave us to behave like grownups, just like every court in this country does,
14 and allow us to get on with our evidence-gathering efforts, just like everyone else does
15 in courtrooms up and down the country.
16 One of the things I want to show you from McLaren in due course, in paragraphs 74
17 to 78, -- which are ratio; they're not obiter -- is that there was a bit of a theme of
18 Lord Justice Popplewell's reasoning, which is that actually competition law isn't that
19 special, that collective actions in this Tribunal are different in some ways, but there is
20 group litigation in the High Court as well, including opt-out group litigation, and has
21 been for a very long time, and applications like this kind would not even be entertained
22 in that kind of litigation.
23 If there were some reason in a particular case to do so, of course the court would, just
24 as this Tribunal would and should. But in the absence of some reason to get involved
25 in this kind of micromanaging of the kind that my learned friends are inviting you to do
26 today, we should just be allowed to get on and prosecute our defence in the way that

1 | seems best to us in line with all of our professional obligations.

2 | THE CHAIR: Do you have any submission -- we could do it under reference to the
3 | draft order that Mr Hubbard has provided -- as to whether there are any or all of the
4 | information which he suggests should be provided is something that as a matter of
5 | good practice, a solicitor contacting a class member in a case such as this ought to
6 | provide.

7 | If your position is, well, it's all down to those very high-level principles, so be it. But
8 | I think it would be interesting to know what you say those high-level principles would
9 | require of a solicitor in a situation such as this, as a matter of treating class members
10 | fairly.

11 | MR PICCININ: Yes. It's quite a difficult thing to do. One of the submissions that
12 | I made in McLaren, in the Tribunal, when we were having this sort of debate, is that
13 | trying to legislate for every possible situation, even within a species like this, where
14 | you've got collective actions and you're trying to gather evidence, is difficult, because
15 | the type of class members you're dealing with are going to be different. The
16 | correspondence will go back and forth.

17 | I mean, sir, at one point you said before we could direct that it should all be in writing,
18 | but what if the class member is being cooperative and proactive and helpful and wants
19 | to have a Zoom to discuss some of the details of it? I mean, why shouldn't we have
20 | a Zoom with them, just like we would with anyone else?

21 | So I would caution the Tribunal against trying to legislate and do the job that the SRA
22 | hasn't done, because the SRA -- you're right, sir, to think that the rules used to be
23 | different. Certainly when I started practice as a solicitor, more than 20 years ago, or
24 | about 20 years ago, the rules were more prescriptive. They were much like the
25 | Australian ones, the ones that I studied at university back home, and they were
26 | abolished. They were abolished and replaced with the more general principles that

1 | you see now. It would be unhelpful in my submission to try and undo the good work
2 | of the regulators in this country by trying to say, "Well, those are the general principles,
3 | and here's now a textbook on all of the minutiae about, you know, the time of day that
4 | you send correspondence, or how many days someone has to respond to your letter",
5 | and to say that that all flows from the professional conduct rules. That seems unhelpful
6 | to me, but --

7 | THE CHAIR: It may be that it doesn't flow from the professional conduct rules, but
8 | I suppose the thing I'm interested in here is taking on your point that: where is the
9 | mischief of a well-informed class member who decides they would rather opt out and
10 | come to the Tribunal and asks for permission to do so? The starting point for that is
11 | a class member which has been given, you know, a fair and accurate statement of
12 | what the legal position is in response to a wide-ranging request for disclosure.

13 | Certainly, in the kind of reading around I've done, it does strike me that the Tribunal
14 | may have an interest in the things that ought to be said to a class member in a situation
15 | such as this, and it may flow from the solicitors' rules anyway, or it may not. I'm
16 | interested in thinking about what as a matter of fairness one might say should -- if
17 | there are approaches of this sort in collective proceedings of this kind, as a matter of
18 | fairness, here's a list of things that should be done, because I'm very conscious that
19 | other defendants may choose to simply approach class members without coming to
20 | the Tribunal in the transparent way that you did.

21 | MR PICCININ: I apologise if this is impertinent of me, but perhaps I could make
22 | a practical suggestion, which is that when we come and go through the order, you'll
23 | see that there are a number of items that we've never contested that we're very happy
24 | to do. In the ruling that you give following today's hearing, you could record that fact,
25 | and then you could say -- if you were minded to do so -- that you think those are things
26 | that, at least in circumstances like these, people should do. It may be that more is

1 required in other cases, if you're dealing with a different kind of class member. I don't
2 want to overstate it.

3 But then there are some of them, sir -- and this may be where you are going -- where
4 what is being asked of us is effectively to advise the class member on their rights, to
5 advise them on the test that the Tribunal is likely to apply or to advise them on what
6 costs order the Tribunal is likely to make. In my submission -- we are going to come
7 on to that; I'll develop this -- but it's actually not appropriate to ask Apple to advise the
8 class members about those things. But there is a practical way forward again, which
9 is that if you have views on those things, you can write them in your judgment, and
10 then we are very happy to provide that judgment to direct them to it. That's much
11 better, because it means that the class members get it from you rather than from us.

12 THE CHAIR: Well, that was very much in my mind, I should say, and bearing in mind
13 that we already have a number of paragraphs in Rodger, which help set out what the
14 basic rules are. It may well be entirely possible to craft a reasoned order, and if we
15 felt that we were able to do so, direct that that reasoned order be provided.

16 MR PICCININ: This is a small point, sir, but I do ask you not to direct us to do any of
17 this. If they are things that we were going to do anyway, it is a normal incident of
18 commercial litigation that the parties are trusted to behave in accordance with their
19 professional obligations and to treat people fairly. Once you've made that clear, and
20 I've said we will provide a copy of your judgment, we'll provide a link to your judgment
21 in our correspondence with the class members so that they can read it for themselves.
22 You don't need to order us to do something that we're going to do. That's not the way
23 litigation is generally conducted. What it's conducive to is wasted costs of this kind of
24 occasion where we end up spending a day talking about something where there was
25 never any problem to begin with.

26 I will also make submissions on the particular point about costs, because of course

1 | what was said in Rodger was in the circumstances where I think Google had conceded
2 | that point, and we would have something to say about it. It is important that whatever
3 | you say about it doesn't mislead the class members as to what the position may
4 | actually be when they get to the hearing. But I'll come on to all of that.

5 | My learned friend did at one point seem to suggest that the professional conduct rules
6 | in England are different from what the SRA says they are, by reference to a first
7 | instance judgment from, not last century, but the century before. That is a bad
8 | submission. It's wrong. I don't really want to waste time looking at it, but there are two
9 | points to make about them, just in case.

10 | One is that the learned judge, in those opening couple of sentences of the judgment,
11 | was describing the professional conduct rules that applied to gentlemen, as he put it,
12 | as they were at the time in the 19th century. He wasn't purporting to tell anyone what
13 | the professional conduct rules were going to be in 2026.

14 | The second point is that it actually wasn't a case about that. That was obiter. If you
15 | read on and see what the case was about, it was about what followed afterwards,
16 | because he said that even though at that time you couldn't have dealings between the
17 | solicitor and the lay client of the other solicitor without consent, et cetera, if you did,
18 | the deal would be binding. That's there when the case went on.

19 | Obviously the Australian cases are very interesting as far as they go, but they don't go
20 | very far, because this is not Australia.

21 | In any event, though, I do just want to round out this --

22 | THE CHAIR: Yes. You heard my exchange with Mr Hubbard about Scotland and
23 | Northern Ireland, which are matters for this Tribunal.

24 | MR PICCININ: But not in this case.

25 | THE CHAIR: But not in this case (overspeaking) position.

26 | MR PICCININ: As a general submission, I do caution the Tribunal against trying to

1 | decide other cases.

2 | THE CHAIR: Well, indeed.

3 | MR PICCININ: You should probably hear submissions from someone for whom they
4 | matter.

5 | THE CHAIR: It may be that we simply have to note that and reserve our position.

6 | MR PICCININ: Yes. But I do have three points to make with this argument more
7 | generally. Even if this case were taking place in Australia under the Australian
8 | professional conduct rules, or the old 2011 SRA rules, there are three problems with
9 | the submission that Dr Ennis is making.

10 | The first is that those rules only apply to communications with persons who have
11 | instructed lawyers to deal with the case. That is not the situation here. Dr Ennis is not
12 | acting as a legal representative for class members. He is a natural person bringing
13 | a claim in his own name without instructions from any of those class members.
14 | Scott + Scott are authorised legal representatives, but they are not acting for the class
15 | members. They're instructed by Dr Ennis, whose interests may or may not align with
16 | class members, depending on what the issue is in the case.

17 | So even the old English rule would simply not apply to Apple's lawyers writing directly
18 | to class members, because they are not people who have instructed solicitors to deal
19 | with the issues on which Apple would be corresponding.

20 | The second point --

21 | THE CHAIR: So if we look at these comparative jurisdictions, there's a separate rule
22 | or a separate feature of the system that we should be alive to that they're treating class
23 | members as represented by class counsel, and that may be to do with particular
24 | features of the way their regime is (inaudible).

25 | MR PICCININ: Of those regimes. Yes. It may be, or it may not be, or it may be wrong,
26 | or -- this isn't Canada.

1 The second point is that even if the old rule did apply, so even if you were to
2 characterise class members as being represented by -- I don't know at this point
3 whether you're calling Dr Ennis their solicitor; I think he is an economist rather than
4 a lawyer, or whether you're calling Mr Mansfield their solicitor, I don't know -- but its
5 effect would only be that Apple needs to send the letters directly, rather than via its
6 external SRA-regulated solicitors, because, even back in the day, the rule never
7 prevented principal to principal communications in commercial litigation. It's always
8 been a part of commercial litigation where the clients can talk to the client without
9 talking to either of their solicitors. That's how many cases are settled.

10 The third point is that if the suggestion were that this rule has the effect of preventing
11 Apple from communicating with class members directly without Dr Ennis's consent,
12 that is inconsistent with McLaren, both with paragraph 74 and with the actual outcome
13 of McLaren, and the ratio, and it is a ratio that that Lord Justice Popplewell found that
14 there was a violation of litigation privilege involved in preventing in a rule that prevents
15 defendants from corresponding with class members.

16 So, the only relevance of the professional conduct rules is the point in my favour, which
17 is that you can take comfort from the fact, and you should take comfort from the fact,
18 that Apple's external solicitors will be under obligations to treat the recipients of their
19 letters fairly and not to mislead them.

20 But, ultimately, if I'm right about privilege, which is the point I'm coming on to, and
21 waiver, none of that matters, at least in relation to order 2, and actually some important
22 parts of order 3, because privilege is inviolable and is in play here, for reasons I'll come
23 on to.

24 I should say as well, I will come back to abuse of process at the end. I'm dealing with
25 the substance first because we're all here now. Actually, the substance is even easier
26 than the abuse argument. So, I'm dealing with that because I detect that that's what

1 | matters to you. But I do want to come back to abuse briefly because, as I said, we are
2 | sick of this, and it has to stop.

3 | The key here, in the waiver analysis, in the privilege analysis, is to be clear about the
4 | communications to which our privilege attaches. One thing I think we agree on is that
5 | privilege attaches to confidential communications, either from Apple or its solicitors,
6 | that are made for the dominant purpose of litigation.

7 | The particular communications that Dr Ennis is trying to regulate here are
8 | communications in which Apple solicitors, as I've said, will attempt to obtain the
9 | voluntary provision of evidence, both existing documents and also potentially
10 | information- so, newly created documents containing words that haven't been written
11 | before, from class members.

12 | Spelling that out in slightly more possibly painful detail: first, we will write to whichever
13 | class member we have selected to ask for the documents and information that we
14 | would like them to give us. There may then follow, we don't know, it's up to them and
15 | us, a period of dialogue where we and they go back and forth, them offering to provide
16 | some of what we're seeking and not other parts, and possibly either them or us offering
17 | differently formulated packages of information and documents in light of whatever it is
18 | that they've got to say.

19 | In doing so, both in that dialogue and in the output of that dialogue, they may well
20 | provide us with information about their businesses that we didn't know before. Where
21 | they provide us with information rather than documents, it is up to us whether we
22 | deploy that in the litigation or not. The pre-existing documents, they're likely to be
23 | disclosable, although even there, there can be circumstances where privilege attaches
24 | to those too. But, other than for the pre-existing documents, if there's no privilege
25 | there, the whole of that exchange will be confidential and privileged.

26 | If class members choose to engage in this voluntary and confidential dialogue with us,

1 | and there are lots of good reasons why they would do that, then the whole of that
2 | dialogue is privileged. The Court of Appeal explained why that that is in paragraph 103
3 | of McLaren, which you've already looked at. But I want to go back to it because my
4 | learned friend said some things about it that weren't right. So it's page 939 in the
5 | authorities bundle, using the red numbers.

6 | My learned friend already showed you 102, which is where Ms Demetriou made the
7 | argument that she did about interference with litigation privilege.

8 | Lord Justice Popplewell says:

9 | "There's considerable force in this argument. Tribunal scrutiny of such an approach
10 | is an invasion of litigation privilege because it forces the defendants to disclose to their
11 | opponents details of their pursuit of evidence for the purposes of defending the claim.
12 | That is a class of communications which attracts litigation privilege because the
13 | communications are for the dominant purpose of the litigation."

14 | Just pausing there, Lord Justice Popplewell's analysis of what privilege attaches to is
15 | entirely orthodox. It attaches to the communications, communications for the
16 | dominant purpose of litigation.

17 | In the next sentence, what he goes on to deal with is a different point, which is the
18 | rationale for the litigation privilege rule. He says:

19 | "The vice [the problem, the bad thing that happens] in litigation privilege being invaded
20 | in respect of the conduct of a party's case in preparations for trial is that it may involve
21 | a party having to reveal to its opponent aspects of its litigation strategy, or its unused
22 | material. ..."

23 | I don't know if everyone knows what is meant by "unused material". It's a term that's
24 | most often used in the criminal context. What it refers to is material that you have that
25 | you have not used, surprisingly enough, that you're not deploying in litigation. So that's
26 | why I referred before to the possibility that class members might give us information

1 | and then we don't deploy it. That would be unused material.

2 | It goes on:

3 | "But the right to maintain privilege does not depend on whether it does so in
4 | a particular case. ..."

5 | As in it doesn't matter whether the violation of the privilege would involve revealing
6 | any of those things. Whether it does or doesn't, it's a violation. That's because the
7 | privilege attaches to a class of communications. Moreover, where legal professional
8 | privilege exists, it is inviolate. There is no balancing exercise between the interest in
9 | maintaining privilege and competing public interests. It doesn't matter what they are.
10 | There's no balancing exercise.

11 | The penultimate sentence:

12 | "The Ruling has resulted in that principle being breached in that case, and would
13 | potentially do so in many other collective proceedings before the CAT. ..."

14 | Then the last sentence my learned friend skipped:

15 | "That poses an unfair dilemma for defendants between forgoing their privilege or
16 | forgoing their legitimate pursuit of evidence."

17 | That is really important. Because that at certain points in my learned friend's
18 | submission, he seemed to say, "Well, there would be no violation of privilege if you
19 | just stop us from gathering evidence altogether", to direct Apple to do this litigation
20 | with its hands tied behind his back. That is not right.

21 | Whether you want to characterise that as a violation of privilege or a violation of the
22 | common law right to a fair trial, or a violation of the article 6 right to a fair trial, I don't
23 | mind. But what is crystal clear is that Lord Justice Popplewell is telling you that is
24 | a thing you cannot do, and it should be obvious. I can't believe I'm having to make
25 | this submission in an English courtroom. We have a right to defend ourselves and to
26 | gather evidence in order to do so. That is not subject to any kind of scrutiny or

1 | regulation whatsoever.

2 | So that's the starting point, which is that that whole exchange is confidential and
3 | privileged. So if you have a question about that, that's fine. I was about to come on
4 | to deal with waiver.

5 | THE CHAIR: Yes. It was just your very absolute proposition that the process of
6 | gathering evidence (inaudible) subject to any scrutiny or regulation whatsoever.

7 | MR PICCININ: Yes.

8 | THE CHAIR: I wonder whether that's such an absolute proposition after the event,
9 | depending perhaps on what you use it for or depending on how it emerges into the
10 | public domain.

11 | MR PICCININ: So you've pulled me up. It was probably a slightly careless rhetorical
12 | flourish. It's true that in the course of doing something we have a right to do, which is
13 | gathering evidence, it's possible that you could do things you don't have a right to do,
14 | like misleading people. That's something a person could do. It is not my submission
15 | that we have a right to go and mislead people. That is not my submission. I said that
16 | earlier. We are -- like everyone involved - regulated. They have obligations.

17 | THE CHAIR: And indeed, as matters unfold, if you either deploy evidence at trial or
18 | you need to come to the Tribunal for an application, with an application, you may well
19 | be required to disclose --

20 | MR PICCININ: Yes.

21 | THE CHAIR: -- the process of how it came to be, how it got there.

22 | MR PICCININ: Exactly.

23 | THE CHAIR: And there may be a variety of issues that could arise after the event.

24 | MR PICCININ: Yes. But what I meant, sir, was that it is not the case that in your
25 | efforts to go out and gather evidence to defend yourself in commercial litigation, that
26 | you need to run through some sort of exercise where the other side scrutinizes what

1 | evidence you're going to seek and see whether it's appropriate.

2 | THE CHAIR: And you're deploying that in answer to Mr Hubbard's submission, that if
3 | we were to simply direct you not to write to class members, that would be an invasion
4 | of privilege.

5 | MR PICCININ: Yes.

6 | THE CHAIR: He may or may not be right on that, but you would say, if we were to do
7 | that, that would be an interference of a different sort?

8 | MR PICCININ: It's either of the same sort or a different sort, it doesn't matter .What it
9 | is, is not okay.

10 | THE CHAIR: Yes.

11 | MR PICCININ: Not something you can do. That's what matters.

12 | THE CHAIR: Unless we were, and again, perhaps absolute -- so let's be careful about
13 | absolute propositions. If it could be said in some way that, in some way, a particular
14 | type of communication was an invasion of someone's rights.

15 | MR PICCININ: Yes, but --

16 | THE CHAIR: A court could intervene to prevent it. But if what you're doing is,
17 | paragraph 74, and what's said in paragraph 103, just simply making enquiries of
18 | people to obtain evidence, which you say are relevant enquiries, that's not invading
19 | anyone's rights.

20 | MR PICCININ: Yes. So, the making of an enquiry is contacting a third party or a class
21 | member, and asking them voluntarily to provide information that you think might be
22 | helpful for your defence, is not an invasion of anyone's rights. Because they can
23 | always write back and say no. If they do that, that will have consequences. You know,
24 | it may be that then an application is made. Maybe the fact that they didn't co-operate
25 | then has various consequences, practical consequences, for where you end up in the
26 | application. So, there are lots of good reasons to co-operate with a good-faith request

1 | like that. But that they can say no. And so that their rights are not being interfered
2 | with in any way.

3 | But my learned friend says that we've waived that privilege that exists because we
4 | have identified for Dr Ennis the initial categories that we had an intention to ask for at
5 | the date that we sent the letter that we did before the last CMC.

6 | So, his logic runs something like this. It is now not confidential that we will be asking
7 | for information and documents on these categories from someone. Therefore, so the
8 | argument goes, the particular requests that we make for these categories addressed
9 | to anyone are also not confidential. Therefore, the whole exchange from start to finish
10 | is not confidential. And, therefore, actually the Tribunal can regulate the whole thing
11 | and stop us from writing at all without there being any invasion of privilege or our rights
12 | of defence.

13 | That argument is flawed. Because we have not told them whom we are going to ask
14 | for information or documents. We have not provided a draft of our communications.
15 | That means they don't know the substance of what we're going to say in the
16 | communication, to invite the recipients to provide us with information. Nor have we
17 | committed to requesting only the categories that we've identified previously, or to
18 | requesting them in exactly that form, rather than reflecting on them and changing
19 | them. I'm not saying we are or aren't. I'm very careful now about saying anything
20 | because my learned friends jump on everything we say cynically, to assert waiver of
21 | privilege.

22 | Nor do they know anything at all about the dialogue that will follow. If we end up
23 | making trade-offs to obtain more information about one category than another, or
24 | information in one form rather than another, they won't know what those trade-offs
25 | were or why they were made. Several implications follow from that.

26 | If we turn up at trial without evidence from any particular developer, they won't know

1 | whether we never asked them at all, or, if something in the later correspondence led
2 | us not to pursue an application against that developer, for example, that they just don't
3 | have any documents.

4 | If we turn up with evidence on some categories, but not others, again, they won't know
5 | why. That might be because the developer didn't have anything or that we made
6 | a trade off of some kind for some reason.

7 | And if the communications produce any unused material, in the sense that we've seen
8 | Lord Justice Popplewell refer to it, then they won't know that either. They won't know
9 | that we ever had it. And that is the way it should be, as the Court of Appeal explained,
10 | in the passage from McLaren that we've just looked at. And that is why the mere fact
11 | that you tell your opponent that you intend to engage in privileged communications on
12 | a particular topic, it doesn't matter how specific it is, or, indeed, at the other end, if you
13 | tell someone that your opponent and you have engaged in privileged communications,
14 | again on a particular topic, that does not amount to a waiver of confidentiality or
15 | privilege at all.

16 | In a contractual negotiation, one party may well say that they intend to go and get legal
17 | advice on the effect of a very particular clause. That is obviously not a waiver of
18 | privilege or confidentiality in their communications with their solicitors asking for that
19 | advice. Similarly, at the other end, it is very common in litigation about a contract for
20 | it to be revealed that one party or another has obtained legal advice about an issue in
21 | the case. It's very common to say that in response to a letter before action, for
22 | example, or in an interlocutory witness statement in support of an application.

23 | And, to give you an example from the evidence gathering context, there are also many
24 | situations where a party might need to reveal their plans to gather evidence. For
25 | example, in timetabling debates at a CMC setting directions to trial, you might say that
26 | more time is needed because you need to investigate what evidence third parties

1 | might have. And if you're asking for a long period of time, the judge will probably ask,
2 | if it's not obvious, what evidence you're talking about, and you'll need to say something
3 | about it in order to persuade the judge to give you the timetable. That's not a waiver
4 | of privilege in the proof of evidence that you then take from those potential witnesses.

5 | THE CHAIR: I suppose one has to look at each situation in its very particular
6 | circumstances, and here I think Mr Hubbard's skeleton makes the point that you -- and
7 | this is not a critical comment at all -- you came to the Tribunal with a list of items, and
8 | you invited the Tribunal to comment on scope, among other things. The class
9 | representative might say -- Mr Hubbard might say on his behalf -- that what he's
10 | looking for in part of his order, the part which is inviting us to direct that he be given an
11 | opportunity to respond and then that comes to the Tribunal for (inaudible); he would
12 | say: that's simply us giving effect, in a sense, to your invitation to the Tribunal to
13 | consider the scope of the order or the request that you were minded to make, to which
14 | you might say -- but I'd be interested in your submission -- that you were (inaudible) if
15 | I remember correctly, but you (inaudible) ultimate position is, you had said (inaudible)
16 | so that you could take into account the Tribunal's views. I think that it struck me that
17 | that might be where the waiver point bites at its sharpest. I'd be interested in what you
18 | have to say on that.

19 | MR PICCININ: I'm going to show you a bit of law on that in a moment, because the
20 | remarkable thing is that so much of this application hinges on the law of waiver. And
21 | my learned friend didn't show you any law on it at all. So I'm going to show that to
22 | you.

23 | But the short point is that we did not deploy that information in order to achieve any
24 | kind of advantage in the case. We were transparent and came forward and provided
25 | information about what we were interested in for two reasons. One was because if it
26 | happened that Dr Ennis was one of those class representatives who was interested in

1 | the facts of the case and wants to learn something about the people he is purporting
2 | to represent and get some evidence from them so that the Tribunal can consider it at
3 | a trial, if he had something that he was looking for, in other words, we were open to
4 | cooperating with them and adding their list to our list. So instead of 19, it might be
5 | 25 categories, if there was something else that we hadn't covered that they wanted.
6 | In addition, we wanted to be frank and clear with the Tribunal and --

7 | THE CHAIR: My comment didn't intend to suggest you were seeking any particular
8 | advantage. But, of course, parties do things in the course of litigation which, on
9 | analysis, have legal consequences, which may not be what they intend.

10 | MR PICCININ: But the reason I'm saying that is that that is actually what the law of
11 | waiver requires. So we'll see that shortly.

12 | But the point is that's not what was going on. What we were doing was being
13 | transparent with the Tribunal in circumstances where -- I want to be delicate about
14 | this, like I say -- but sometimes in this Tribunal, surprising decisions are made about
15 | what the Tribunal can control or what is prohibited. That happened in McLaren. It's
16 | very unpleasant when it happens. And so, we wanted to be open and transparent with
17 | the Tribunal and as it happened, as it unfolded. So you'll remember your view was
18 | that you did have the power to regulate it and you wanted to regulate it, and then it
19 | transpired that that you couldn't. And it was only by -- and I don't mean that as
20 | a criticism. It's the opposite of a criticism. It's praiseworthy, sir.

21 | THE CHAIR: It's the nature of the process.

22 | MR PICCININ: It is the nature of the process.

23 | THE CHAIR: And your position, as I recall it, was that was in fact to acknowledge that
24 | the Tribunal has wide powers of direction.

25 | MR PICCININ: Yes.

26 | THE CHAIR: But provided we don't interfere with privilege.

1 | MR PICCININ: Exactly. That's right, sir.

2 | THE CHAIR: (Inaudible) the two particular points that Mr Hubbard drew my attention
3 | to.

4 | MR PICCININ: Yes. Those aren't to be read like a statute, sir. It's true, I didn't include
5 | in that list every possible thing you might do that might throw a side wind, invade our
6 | privilege. That wasn't the intention of my submission. Certainly, what is being
7 | proposed in this case would be a violation for reasons I'll come on to when we look at
8 | the order.

9 | But the point was just that it would be very unfortunate if a party, being frank and open
10 | with the Tribunal, actually then suffers the litigation disadvantage, from having rightly
11 | perceived that the Tribunal might have been, at least at first, upset if we'd gone off and
12 | done what was in fact our right. It would be very unfortunate if the message that other
13 | defendants hear from today's hearing is that they should not tell the Tribunal what it is
14 | they want to do, because it will be held against them in the Tribunal. And it's not my
15 | submission that is conducive to any of the Tribunal's rule 4 objectives.

16 | Some law. Authorities bundle; we can take this from Hollander, because he canters
17 | through the cases. 1621, there's a heading that says: "What sort of reference
18 | constitutes a waiver?" The focus is on legal advice, but actually my submission is
19 | going to be that you can apply the same sort of analysis to litigation privilege. It doesn't
20 | matter.

21 | The first sentence:
22 | "There is a distinction between a reference to the fact of legal advice and reliance on
23 | its contents." [as read]

24 | Reliance on its contents. Not providing information about the subject matter that is
25 | going to be covered; not providing specific information about the questions that are
26 | going to be addressed in the legal advice. Reliance on its contents. And some

1 | illustrations that he gives below show how extreme it needs to be, at least sometimes.
2 | It is a fact-sensitive exercise. And the learned author provides some commentary on
3 | where he thinks some of these cases might have gone wrong or right, but at the bottom
4 | of the page, you can see the Tate and Lyle case, where there was a statement by
5 | a deponent that the information in the affidavit was derived from Iranian lawyers. So
6 | he had a whole lot of information, like the contents of it. And he was saying, "I got this
7 | from Iranian lawyers", and that was held not to be a waiver of privilege in respect of
8 | the underlying communications with the Iranian lawyers.
9 | Similarly, in Marubeni, which is discussed over the page, so page 1622, call it six lines
10 | down. It says:
11 | "Even a statement by plaintiffs that they had obtained Japanese legal advice which
12 | stated unequivocally that a defence lacked merit -- particular defence -- that was held
13 | not to be a waiver of privilege in respect of those communications." [as read]
14 | As I said, the learned author goes on to say -- it's a bit hard to reconcile that with some
15 | other cases going slightly the other way, but they show you where the frontiers of the
16 | debate are, and they're nowhere near where we are in this case.
17 | At the bottom, there is a quotation from a judgment of Mr Justice Elias, as he then
18 | was, in the Brennan case, where he says that:
19 | "In our view, the answer to the question whether waiver has occurred or not depends
20 | upon considering both what has been disclosed [that's the point that my learned friend
21 | likes to rely on] and circumstances in which the disclosure has occurred. As to the
22 | latter, the authorities in England strongly support the view that a degree of reliance is
23 | required before waiver arises, but there may be issues as to the extent of the reliance.
24 | Ultimately, there is a single composite question of whether, having regard to these
25 | considerations, fairness requires that the full advice be made available." [as read]
26 | You can say the same for the full correspondence between us and whoever it is that

1 | we choose to write to.

2 | "The court might, for example, find it difficult to say what side of the contents/effect
3 | line a particular disclosure falls, but the answer to whether there has been a waiver
4 | may be easier to discern is if the focus is on the question whether fairness requires
5 | full disclosure." [as read]

6 | And you only need to pose that question, we say, to see what the answer is in this
7 | case.

8 | But in circumstances where we were trying to be frank and transparent with the
9 | Tribunal and test out whether there was going to be some kind of allergic reaction to
10 | what we were doing that might result in criticism or huge wasted costs or anything like
11 | that -- just to say that because we did that, fairness requires that we now lose the right
12 | to go and gather evidence with the protection of legal professional privilege that every
13 | other litigant in the country and Dr Ennis has. Fairness requires that. It doesn't make
14 | any sense at all. And that's why I said we didn't deploy those particular categories
15 | with a view to say, "Aha, because we're asking for item 19. You should do something
16 | in my favour". That's not what we were doing at all. It wasn't the nature of the exercise.
17 | And that's why the waiver argument is just hopeless.

18 | It doesn't really matter. But I do just briefly want to address the mischaracterizations
19 | that my learned friend made about the correspondence between the parties on this
20 | issue. Because, as I said before, one of the reasons why we did write to Dr Ennis
21 | about this, and we did so before the last CMC, was because we wanted to know
22 | whether he wanted anything, whether he positively wanted anything, from class
23 | members as well. It's not to say that he has to want to do that. It's his decision how
24 | he wants to run his litigation. If he wants to do this in a fact-free zone, that's his
25 | prerogative. There'll be consequences, but that's his prerogative.

26 | But the response that we got back was unequivocally that there is nothing that he

1 | positively wants to gather from class members. And that's the letter on -- where is it?
2 | Page 31 of the core bundle at paragraph 4.4.

3 | I think my learned friend showed you that letter, but didn't show you the relevant bit,
4 | which is the opening sentence of 4.4: "it seems doubtful". So not only do they not
5 | have anything in mind, positively, but it actually seems doubtful to them that the
6 | materials sought will be of any utility in their determination of the case. And, indeed,
7 | they haven't resolved that at any point. Although, after you rejected the arguments
8 | that they made at the last CMC, they then wrote to us again, and you've now seen that
9 | correspondence, so that later correspondence came after they had failed in their
10 | attempt to stop us. And then they complained that, at that stage, we weren't being
11 | cooperative and they still wanted to play ball. But at no stage have they said there's
12 | anything they want.

13 | And my learned friend, I don't have the exact quote because I don't have a transcript,
14 | but I think he said something today that they wanted to throw up as many obstacles
15 | as they could to our evidence gathering.

16 | MR HUBBARD: Sorry. I mean, you know, that wasn't the way that I characterised it
17 | at all.

18 | MR PICCININ: I apologise.

19 | THE CHAIR: The transcript will tell us what was said.

20 | MR PICCININ: The transcript will reveal.

21 | I think the point that is clear in common ground is that there is nothing in particular
22 | they do want to gather. In those circumstances, we have nothing to gain from an
23 | exercise of co-operation with them, because all they're trying to do is limit our ability
24 | to learn about the facts of this case. That is not an exercise that you normally conduct
25 | collaboratively. It's very strange to do that with your opponent. We were willing to
26 | entertain it, as I said, if they were after something themselves, because of the huge

1 | efficiencies that might come from that. But, since they're not, we're not interested, and
2 | we don't have to be interested. There's nothing wrong with us not being interested.

3 | That's the position on privilege, and the consequence of that is that order 2 is out.

4 | That takes me to order 3. My learned friend did say that two subparagraphs of order 2
5 | were okay, but they are, I think, replicated in order 3, so I think we can focus on
6 | order 3.

7 | In short, we say that order 3 is also an invasion of privilege -- not all of it, but some of
8 | it -- and, in any event, none of it is necessary or appropriate. You should just trust us
9 | to get on with our jobs. I do at this point want to show you another few
10 | paragraphs -- I know you've read them -- but from McLaren, to (inaudible) with my
11 | theme, which I'm calling slightly facetiously my grown-up commercial litigation theme,
12 | which is that you should just let people get on with it in the same way that the
13 | High Court does.

14 | If we could look at the authorities bundle at page 932. This begins in paragraph 74,
15 | which is the paragraph that the Tribunal asked the parties to look at. The context for
16 | this discussion is the question of whether the CAT rules contained a general rule
17 | prohibiting class communications. I accept my learned friends are right about that.
18 | That's the context.

19 | The point that Lord Justice Popplewell was making in this passage is that there are no
20 | such rules in the High Court. So, he is asking himself whether there is anything
21 | materially different about collective proceedings in this Tribunal from the forms of
22 | litigation that happen in a world without this rule, the High Court. He concludes that
23 | there isn't, and the reason he had to conduct that analysis is because that leads him
24 | down a path where he says, if there's no material difference between Tribunal
25 | collective proceedings and collective proceedings in the High Court, then if someone
26 | is going to say that there is a rule prohibiting this in the Tribunal, it had really better be

1 | written down somewhere, and then he looks and he finds that it's not written down
2 | anywhere. So he concludes that there is no such rule.

3 | That's what he's doing here, and that's why it's on the ratio path. The ratio is not limited
4 | to the final paragraph. It's the reasoning that leads there.

5 | But my submission is that you can say much the same things as what he says in these
6 | passages for the case management issues that you're grappling with today, to the
7 | extent that there are case management issues, the inoffensive parts of order 3. I've
8 | never heard of an order like this being made in the High Court. And if this is not the
9 | approach that we take -- this kind of micromanagement of correspondence is not the
10 | approach that we take that's thought to be consistent with the overriding objective in
11 | the High Court -- then you might wonder why it should be here.

12 | MR FRAZER: Because perhaps the case management powers of the Tribunal are
13 | very extensive, something which Lord Justice Popplewell does refer to, even though
14 | he says there's no rule against in relation to blanket bans. But just coming to your
15 | grown-up litigation strategy, that may be one thing which does separate us from the
16 | High Court and which would make the circumstances and the Tribunal different in
17 | terms of its ability to micromanage, if I can put it like that.

18 | MR PICCININ: Yes. The ability is there in both fora, sir. There are, I'm sure you
19 | know -- I'm sure you all know -- the extensive case management powers post-Woolf
20 | in the High Court as well. I don't think there's any --

21 | MR FRAZER: Not particularly active, as it were, as it's usually described.

22 | MR PICCININ: We'll see what Lord Justice Popplewell says about that in a moment,
23 | because that's not right in relation to those kinds of big-ticket commercial litigation,
24 | and it's certainly not right in relation to group litigation, which are actively managed, as
25 | we'll see.

26 | But I'm just trying to foreshadow what my submission is, and then we'll look at what

1 he says.

2 THE CHAIR: If I could just add the question that I was formulating in my mind as you
3 were making that point, it's whether there's something very particular about the
4 position of class members in collective proceedings in this jurisdiction. Again, in my
5 sort of general reading around, I have the sense that, in collective proceedings
6 regimes generally, courts in various jurisdictions are concerned to manage and
7 control, in a way that is fair to everyone, communications with class members,
8 particularly in the period up to the point where opt-out remains possible.

9 MR PICCININ: Which is of course not the period we are --

10 THE CHAIR: We're not in that period, albeit class members still have the opportunity
11 to apply to opt out. But of course those are regimes where, for the reasons we've
12 discussed before, once the class is certified, by reason of professional rules, matters
13 are much more constrained anyway.

14 MR PICCININ: Other jurisdictions, in other parts of the world.

15 THE CHAIR: Yes. So, I suppose what I'm interested in is that in the collective
16 proceedings world, if I put it that way, broadly, courts and tribunals are interested in
17 the form and content of notices and notifications that go to class members, to make
18 sure that everyone is being treated fairly. By "everyone", I include class members and
19 defendants, and the class representative.

20 MR PICCININ: Yes, sir. That's right as far as it goes. But of course, different
21 jurisdictions around the world take different approaches to case management and
22 micromanagement issues like that. The reason I'm drawing your attention to this is
23 that it very often in this Tribunal, one reaches straight for Canada. But, actually, you
24 can go across the road to the Rolls Building before you go as far as Canada. That's
25 what Lord Justice Popplewell is doing here in these passages, because it's wrong to
26 think that collective proceedings in this jurisdiction are limited to the Tribunal. They

1 | have been across the road as well, and they have for a long time.

2 | In paragraph 74 -- that's the one you've already looked at -- where he says that there

3 | is no general rule in civil litigation preventing this kind of thing, nor is there any rule of

4 | professional conduct to that effect. Then the next sentence is important:

5 | "No doubt the court would be able to impose such a restriction if the circumstances of

6 | an individual case required it, although [Lord Justice Popplewell, in all of his

7 | experience was] unaware of any particular instance of it having done so." [as read]

8 | Then he says that the default position is that there is no prohibition, et cetera:

9 | "Absent fact-specific reasons for an order being made in a particular case, the general

10 | rule and widespread position in practice is that such communications are permitted."

11 | Not contrary to the overriding objective, and the overriding objective is materially

12 | identical to rule 4 in the Tribunal. He says:

13 | "This is equally true in each of the three ways in which civil claims can be advanced

14 | by or on behalf of a group of claimants with a community of interest."

15 | He's talking about High Court litigation here.

16 | THE CHAIR: Yes.

17 | MR PICCININ: The first way is --

18 | THE CHAIR: Sorry to interrupt, but he's talking specifically about a blanket ban.

19 | MR PICCININ: That's right. That's why I said --

20 | THE CHAIR: He's not talking about an order in which a party is directed to include

21 | certain information.

22 | MR PICCININ: That's right, sir.

23 | THE CHAIR: In a communication with a third party.

24 | MR PICCININ: That's right, and my submission to you is not that he's already

25 | considered that issue. My submission is that everything he says here you can turn

26 | around, mutatis mutandis, to the issue that we're dealing with about

1 micromanagement, because that is not the way it's done in the High Court, and
2 Dr Ennis hasn't cited any authority to you to suggest that that is the way it's done in
3 the High Court.

4 Absent some explanation as to why things should be done differently here, I think it's
5 peculiar to the Tribunal, and my submission is that you should do things in the same
6 way that things are done in the High Court.

7 There are differences that are relevant to other aspects of Tribunal proceedings, and
8 that's why there are many other aspects of proceedings about expert evidence and so
9 on that are different in the Tribunal, and that's fine then. But if we just look at his
10 analysis, he says that the first way is by way of representative proceedings:

11 "Under CPR 19.8, where more than one person has the same interest in the claim, the
12 claim can be begun by a single person representing the class. This is a form of
13 proceedings that has existed for several hundred years, having its origin in the
14 procedure of the Court of Chancery. [See Lloyd v Google] It is not a necessary part
15 of the jurisdiction to bringing claims that all members of the class have authorised it,
16 and an authorised representative person may be bound by the result without taking
17 any positive step, and without even being aware of the existence of the claim. In this
18 respect, it shares the opt-out characteristics of the opt-out collective proceedings
19 before the CAT." [as read]

20 In other words, you have opt-out collective proceedings in the High Court, and we have
21 for centuries:

22 "The community of interest between the representative and those represented, which
23 is required by 19.8, is to ensure that the representative does not have any conflicts.
24 This mirrors the rules in the CAT. The court has some supervisory power over who
25 acts as a representative [which again is the same as here]."

26 That's one way. The second way is through a GLO; that's paragraph 76:

1 "GLO claims typically involve a large number of small claims, sometimes many
2 thousands, which enable economies of scale to render the pursuit of the claims [it
3 refers to BHP]. A register of claims within the group is maintained ... Such
4 proceedings are 'opt-in' [so there's an opt-in version as well]. Such cases are actively
5 and intensively case managed." [as read]

6 See that at the end of paragraph 76.

7 "The third way in which a group of claims may be pursued is by claims brought
8 individually but which are case managed together, with all the case management tools
9 available to the court, including preliminary issues and test cases. These have been
10 used to manage litigation of considerable complexity involving very large numbers of
11 parties and issues [see, for example] litigation arising out of the losses at Lloyd's in
12 the ... 1980s and 1990s."

13 It gives one example, and the many related cases. This is old hat, is what
14 Lord Justice Popplewell is telling us.

15 It then asks: what are the essential features of the collective proceedings in
16 competition cases which distinguish them from these other forms of group claims,
17 para 78, he says the two key features that have been identified by the Supreme Court
18 as marking them out from GLO claims, are the availability of opt-out proceedings and
19 the availability of aggregate damages.

20 As to the first, opt-out proceedings enable members to have their claims advanced
21 without their knowledge. This contributes to cost effectiveness. It ensures the
22 inclusion of claims, takes advantage of the inertia of those who are aware of the
23 proceedings, and that avoids the administrative costs of individual claims having to
24 authorise GLOs.

25 As to aggregate damages, that enables the CAT to award damages without need for
26 proof of loss. All very familiar.

1 Paragraph 79:

2 "Neither of these distinguishing features has any bearing on whether there should be
3 a general prohibition on communications between a defendant and represented
4 persons in collective proceedings. The availability of aggregate damages is
5 immaterial. The availability of opt-out proceedings is not, in fact, a feature
6 distinguishing collective proceedings from representative proceedings ..." because, as
7 we've just discussed, opt-out proceedings have existed for a very long time in the
8 High Court as well.

9 This is where I stop reading and I make a submission to you. My submission to you
10 is that just as neither of those distinguishing features has any bearing on whether there
11 should be a general prohibition, so neither of those distinguishing features has any
12 bearing on whether you should micromanage the time of day of which letters are sent,
13 or anything like that either. That's the bit that is submission.

14 MR FRAZER: That submission doesn't rely on McLaren because McLaren didn't
15 advert to that at all.

16 MR PICCININ: I'm relying on the analysis that Lord Justice Popplewell is setting out
17 in these paragraphs about the situation; the aspects of collective proceedings in the
18 CAT that are different, and the aspects of the proceedings in the CAT that are the
19 same insofar as they pertain to communication between defendants and opt-out class
20 members.

21 The context for that, where he was going with it, was to say, therefore, if there's
22 a special rule in the CAT, it must be written down. Where I'm going with it is that if the
23 situation is not materially different, then the case management approach ought to be
24 similar too, unless there's some reason not to. But I haven't heard one from my
25 learned friend as to a reason to take a different approach. But that's all I wanted to
26 say about that.

1 | I have the impression that it's a suggestion we should do things like we do in the High
2 | Court is not very welcome. But I just want to reset the discussion a little bit; that the
3 | idea that we need to produce orders that direct people to do things they were going to
4 | do anyway is actually no part of the way civil litigation is managed in this jurisdiction.
5 | That's my submission.

6 | It doesn't matter, really, because I can come to the detail, and we can look at it and
7 | see. This is a convenient moment.

8 | THE CHAIR: This might be a convenient moment. How are you getting on?

9 | MR PICCININ: Quite well. I don't think it will take long because I'm just going to run
10 | through the order.

11 | THE CHAIR: So if we take 15 minutes now, ten minutes?

12 | MR PICCININ: Maybe ten minutes.

13 | THE CHAIR: Ten minutes. Thank you.

14 | Mr Hubbard will that -- we'll finish reasonably expeditiously if we take ten minutes now
15 | and Mr Piccinin takes --

16 | MR HUBBARD: Fifteen?

17 | THE CHAIR: Yes. Thank you very much.

18 | (3.22 pm)

19 | (A short break)

20 | (3.35 pm)

21 | PROFESSOR NEUBERGER: Before you start, Mr Piccinin, I just wonder if I could
22 | raise one question about something you said much earlier.

23 | MR PICCININ: Mm-hmm.

24 | PROFESSOR NEUBERGER: If I understood you right, you were talking about the
25 | control that the Tribunal has over disclosure.

26 | MR PICCININ: Yes.

1 | PROFESSOR NEUBERGER: And were saying that it's entirely in the Tribunal's
2 | hands, as it were. Faced with an application for disclosure, it could reject it?

3 | MR PICCININ: Yes.

4 | PROFESSOR NEUBERGER: Or if it accepted it and there was an order for disclosure
5 | against a class member, the class member could then apply to opt out, and the
6 | Tribunal then had the power to decide whether to admit opt-out or not. I thought the
7 | implication was that if the class member was successful in opting out, then the
8 | disclosure application would fall. But I wasn't sure whether that was what you were
9 | implying or whether it was the case?

10 | MR PICCININ: Well, all I was trying to say in my submission was that this is all within
11 | your control.

12 | PROFESSOR NEUBERGER: Right.

13 | MR PICCININ: We can have an argument about it later if necessary, when we get
14 | there.

15 | PROFESSOR NEUBERGER: Yes, sure.

16 | MR PICCININ: But I was envisaging, I think, in the scenarios that I went through, what
17 | I was envisaging was a situation where the two applications would be made together
18 | and contingently so that someone might -- I was positing a class member who might
19 | say to you, in response to our application for disclosure, if we make one, they might
20 | say, "If this application is going to be granted, then I want to opt out instead of being
21 | ordered to provide the disclosure". That's something that the Tribunal mentioned in
22 | the McLaren certification judgment as a possible approach the Tribunal could take.

23 | MR FRAZER: I suppose at that point, and you're right, this is foreshadowing things
24 | that may or may not happen. But in terms of the possible outcomes, one possible
25 | outcome might be that the class member opts out. But there's, in effect, a third-party
26 | disclosure order that's relevant evidence. But that -- you know -- who knows?

1 | MR PICCININ: Exactly. So that's possible too.

2 | PROFESSOR NEUBERGER: It was really more to clarify in my own mind the process
3 | on a class member to opt out.

4 | MR PICCININ: Yes, I see. Yes. No, I'm not saying that's what they should do,
5 | obviously.

6 | PROFESSOR NEUBERGER: No, no. But you're not saying that if they do opt out
7 | that automatically the disclosure would fall?

8 | MR PICCININ: No, I'm not saying that.

9 | PROFESSOR NEUBERGER: No, no. Fine. Thank you for the clarification.

10 | MR PICCININ: That's ultimately up to you.

11 | PROFESSOR NEUBERGER: Yes, yes. That was the point. Right.

12 | MR PICCININ: So if we could take a look at draft order 3, please, which is in the core
13 | bundle, page 262.

14 | I want to start by considering paragraphs 1 and 2 together because they really go
15 | together. 1 is pointless without 2.

16 | Paragraph 1 says that:

17 | "Should the defendants intend to send any communication seeking disclosure from
18 | class members", then firstly we have to provide them with information on how each
19 | category relates to the pleaded issues. Then also we need to tell them the criteria that
20 | we will use to select the particular people they're going to seek evidence from in
21 | support of our case. Then they get to provide comments on both of those things.
22 | Then, if we're not able to agree them, we have to make an application for directions.
23 | Read that as meaning "for permission" to send the letters.

24 | Para 2 is what gives it all force, which is that until that process is completed, we're
25 | prohibited from gathering evidence in support of our case. My submission is that that
26 | is an invasion of our litigation privilege. That is essentially the position that existed in

1 McLaren and the Court of Appeal said was wrong. True that there was a blanket rule
2 in McLaren, but the Court of Appeal described this outcome, this situation, where you
3 are prohibited from sending letters asking for evidence until someone has approved
4 what you're proposing to do, as a violation of privilege. And the Court of Appeal was
5 right.

6 THE CHAIR: The Del Giudice postface envisaged that process between the parties,
7 but then, if I recall it correctly, left the defendants then to decide whether or not to take
8 into account things (overspeaking) --

9 MR PICCININ: Just go ahead.

10 THE CHAIR: Or to just go ahead.

11 MR PICCININ: That's true.

12 THE CHAIR: Would you say that to order a process of engagement is an invasion of
13 privilege, even if, as in the Del Giudice postface, the Tribunal then leaves it to the
14 defendant to decide what to do as a result of that process of engagement.

15 MR PICCININ: Yes. If you're ordering us to provide information, more information
16 than we've already provided about the efforts that we want to now make in order to
17 gather evidence to support our case, that very much does engage the vice that you'll
18 recall Lord Justice Popplewell explaining in paragraph 103 of McLaren.

19 Now, of course, the irony here is that we had actually explained what information we
20 wanted, at least at that stage, leave open the possibility that we want different
21 information or more information, reformulated information, it doesn't matter. But we
22 did that, and we also, when they then said, "Well, we can't understand what any of this
23 could be about", we provided the explanation that I showed you earlier and my learned
24 friends ignored it and just turned up and told you that it never happened. I feel like I'm
25 being gaslit.

26 So that's the situation. There's no need to order any of this, and it would be wrong to

1 | order us to tell them how we're going to go about selecting class members who are
2 | the people that -- it would be like ordering us to tell them how we're going to go about
3 | selecting potential witnesses in the case. You can't do that. That's an invasion of the
4 | very process that Lord Justice Popplewell describes, even if you don't have the force
5 | of prohibition on it. It's also pointless, particularly in circumstances where the dialogue
6 | has already happened. So that's paragraphs 1 and 2.

7 | Paragraph 3 is then the list of things that they want us to include in correspondence.
8 | Subparagraph 1, we've said we agree, although I should clarify of course, just looking
9 | at it again, and this is a bit of a warning about the problems of this kind of
10 | micromanagement, is that it does say "a hyperlink". I'm not sure we have the
11 | technology if we're sending a letter to allow the person to get to the website from the
12 | link that appears on the page. So it still illustrates the kind of problems with trying to
13 | legislate in this way, by the way that correspondence is going to happen. But we've
14 | certainly said we're going to give them, and were always going to give them, obviously,
15 | the link to the case page, so that they can understand what it's about.

16 | The second point at 3(2) is that we have to give Scott + Scott's contact details and
17 | state that the class members are free to discuss our confidential communication with
18 | Scott + Scott. That is also an unlawful violation of our privilege. The answer to that
19 | point can be found in paragraph 104 of McLaren which is on page 939 of the
20 | authorities bundle. You remember -- Mr Wolffe will remember, we looked at this last
21 | time, where the McLaren was arguing that litigation privilege can't exist in this situation
22 | because the communication is with an opponent.

23 | They also relied on the doctrine of common interest privilege, common interest, as
24 | between the class member and the class representative. Lord Justice Popplewell said
25 | that that was wrong, that the common interest he invoked was, as I just said, between
26 | the class representative and members of the class. The litigation privilege in issue is

1 | that of the defendant in its communications with a member of the class. Then he goes
2 | on to say that. while the privilege obviously can't exist vis a vis that particular class
3 | member, because the communication has been sent to them, and so it can't be
4 | confidential vis a vis them; it does remain confidential and privileged vis a vis all of the
5 | other members of the class with whom the defendant has no common interest.

6 | THE CHAIR: So do you say that if you write to a potential witness -- let's take it away
7 | from class members?MR PICCININ: Yes.

8 | THE CHAIR: Inviting them to engage with you in the context of litigation and provide
9 | you with documentation, that that person is not free to go and disclose that letter to
10 | third parties?

11 | MR PICCININ: No. If you write to someone, expressly on a confidential basis, you
12 | know, the law of confidentiality is obviously complex. But if you write to someone
13 | expressly on a confidential basis, saying in circumstances where confidentiality would
14 | usually apply, and here that's because we're talking about the gathering of evidence
15 | for the purpose of litigation, then, while the recipient has no obligation to participate in
16 | that confidential dialogue, as I said before, they can just say no, but still the letter is
17 | confidential. You can receive a confidential communication like that which is
18 | expressed to be confidential and is sent in circumstances that are objectively
19 | confidential.

20 | THE CHAIR: What you're envisaging is that the correspondence here would be
21 | explicitly sent on a confidential basis?

22 | MR PICCININ: Yes. I don't really want to say any more words that will appear in the
23 | letter, for reasons you'll appreciate. But, yes, we're talking about doing what
24 | Lord Justice Popplewell is talking about in McLaren, and that is a confidential dialogue
25 | with the class member. Now, of course, it's up to them what they then do about that.
26 | They don't have to engage in confidential correspondence with us. They can respond

1 | to that in any way they please. But what they can't do is run off and show the letter to
2 | our opponent in this litigation, who is Dr Ennis. That that would undo the very privilege
3 | that Lord Justice Popplewell is explaining applies here. And that is what he says in
4 | paragraph 104. And it is therefore ipso facto right.

5 | THE CHAIR: But there couldn't be any objection to a class member getting in touch
6 | with the class representative or the class representative lawyer to talk about the
7 | litigation.

8 | MR PICCININ: I would agree with that.

9 | THE CHAIR: And, indeed, one might have thought that that might be a natural
10 | response of some class members, at least to an approach from you giving them
11 | information about the litigation. And there would be nothing intrinsically objectionable
12 | about that, provided there was no breach.

13 | MR PICCININ: Exactly. That is exactly right, sir. But that's not what they're asking
14 | for. What they're asking for is a direction that we have to tell them that the letter is not
15 | confidential vis a vis Dr Ennis, which is the opposite of what Lord Justice Popplewell
16 | says it is.

17 | Draft order 3. So we're back in core bundle page 264. Paragraph 3 is a statement that
18 | the class member is not obliged to give disclosure and will have an opportunity to resist
19 | any application. Obviously, we're going to make that clear. Again, there's no need for
20 | an order.

21 | Subparagraph 4 is actually inappropriate for the reason that I foreshadowed earlier,
22 | which is that it's not appropriate for us to be in a position where we are advising the
23 | class member about the test that you will apply. And there's also a risk that even
24 | inoffensive, but short, summaries of what the test is will be misleading. Because if you
25 | haven't read all of the accompanying case law, sometimes you can get the wrong
26 | impression from the form of words like this.

1 | So we find ourselves on the horns of a dilemma, where you're torn between saying
2 | something short because you don't want to turn this into a textbook, and saying
3 | something that's misleading in one direction or another. And the best approach is for
4 | us just not to advise them. But, as I said, if you're concerned about what they might
5 | imagine the case law might be, in the ruling that you give today, you could say
6 | whatever it is you want to say about that. And we could then just provide them with
7 | a link to that judgment. That's easily done.

8 | 3(5) is blindingly obvious, but again, we've said that we'll say it.

9 | 3(6) is also something we're obviously going to tell them, because it's in our interests,
10 | after all. Obviously it only applies to anything that we disclose in the proceedings
11 | because, of course, class members are free to tell us information, as I said before,
12 | which is then not disclosed to Dr Ennis, which is another reason why I do caution
13 | against giving orders in these terms, because it is very difficult to do this without
14 | inadvertent --

15 | THE CHAIR: But, again, I suppose we could, in a reasoned order, observe that the
16 | Tribunal is well used to handling confidential information for making arrangements to
17 | make sure that confidential information is not disclosed to those to whom it shouldn't
18 | be disclosed.

19 | MR PICCININ: Sir, we would be very grateful if you did, because, of course, the one
20 | difficulty that we have in saying that if we disclose anything, we'll disclose it into the
21 | confidentiality ring is that ultimately it's not up to us whether it stays in confidentiality
22 | ring. And the Tribunal can always override our request and override the confidentiality
23 | rights. And so we can't promise that it will be kept confidential. You obviously can't
24 | fetter yourselves either, but what you can do is provide --

25 | THE CHAIR: Well, what we can do is, if a class member is anxious about either
26 | engagement voluntarily or indeed about the prospect of a formal application and order,

1 | can make sure that we can say that in the context of any order for disclosure that the
2 | Tribunal might ultimately make, it can also regulate access to the documents.

3 | MR PICCININ: Yes. Exactly.

4 | 3(7) is inappropriate. We're obviously not going to write the letter in a way that gives
5 | the impression that anyone thinks that they've done anything wrong. That would be
6 | a very strange impression to get from a letter that is asking them to help us, voluntarily.
7 | But our concern is actually that if you include a positive statement saying that no one
8 | is saying you've done anything wrong, it's a bit like the teacher who calls you to the
9 | headmaster's office. You only make a statement like that if what you're saying is that
10 | circumstances like these are usually associated with wrongdoing, but not this time. So
11 | we don't think that's actually a good idea at all.

12 | 3(8) we disagree with. Our position on this was made pre-Rodger. But in any event,
13 | as I said before, Rodger doesn't consider any submissions that we might make on
14 | a disclosure application. And we do say that it will depend on the circumstances. Just
15 | by way of example, if there is a class member who is large and well-resourced and
16 | you're obviously satisfied that the disclosure that is being ordered is appropriate, it
17 | meets all the criteria for disclosure, and, indeed, is of the same kind that would be
18 | ordered in a claim that was brought by that class member in their own name. And if
19 | you're of the view that that class member is of the kind that -- thinking about evidence,
20 | now, in the Supreme Court -- ordinarily you would expect to bring the claim in their
21 | own name, just in this case, they happen to be slotting into a wider opt-out exercise.
22 | You can well see why you might say, well, they stand to benefit from this litigation.
23 | They've chosen not to opt out of it. So why shouldn't they bear the costs of disclosure
24 | like any litigant does?

25 | That's to foreshadow a submission that we might make, and if we do, that the Tribunal
26 | will consider it, I'm sure, and then decide what it thinks about it in the circumstances

1 | at the time. But that that is an issue for later. And there's certainly no basis on which
2 | the Tribunal could properly order us, in relation to voluntary communications with class
3 | members, to offer to pay them for the information that they provide to us. That wouldn't
4 | be appropriate.

5 | Whatever discussions we have with the class members about that, the discussions
6 | that we have, but there's no -- it would be wrong, we say, to make an order of the kind
7 | in paragraph 8.

8 | THE CHAIR: So do you say that the first sentence of paragraph 19 of Rodger was
9 | wrong as a matter of ordinary practice?

10 | MR PICCININ: I'm just going back to -- I think the words to the effect of, in general.
11 | In the ordinary case. And so page 1572, "in the ordinary case", and then it says in
12 | brackets, "absent unreasonable conduct or unreasonable opposition".

13 | If that was intended to mean that those are the only circumstances in which the
14 | applicant wouldn't have to bear the costs, then, yes, I do say that would be wrong. I've
15 | just articulated a different circumstance in which it might well be reasonable for the
16 | Tribunal to make no order as to the costs of the person giving disclosure, because
17 | they're a large multinational corporation with billions in revenue, and they are standing
18 | to benefit to a very significant degree if the claim is made out to the extent that it's said
19 | to. Why shouldn't they bear the costs of their disclosure?

20 | Similarly, but, again, I would say if you've got something to say about that in this
21 | judgment today, without fettering your discretion in whatever way seems appropriate
22 | to you, then, of course, we'll provide that to them and they can see what you say. It's
23 | not for us to advise them then on what the Tribunal is likely to do.

24 | The same goes for the costs position of the application. What they've asked for you
25 | to order us to say is misleading because it says that the defendants will be ordered to
26 | pay their costs if we're unsuccessful in making an application for disclosure. That's

1 | one possibility, although, even then, it would normally only end up being a proportion
2 | of their costs. And, of course, there are many other possibilities, including that it could
3 | be cost orders the other way, or an application might succeed in part, but not whole.
4 | Cost orders could be made in all sorts of different ways. And, again, if you want to say
5 | something about that in your ruling, we'll provide it to them. But it would be wrong to
6 | fetter your discretion as to how you respond to the application, or any application that's
7 | ultimately made.

8 | Then, at 9, there's the copy of the reasoned order. Obviously, we object to this order
9 | being made at all. But I've already said, we don't object to providing a copy of, or a link
10 | to, your ruling, which is obviously sensible. So that's paragraph 3.

11 | Paragraph 4 is just inapplicable because we haven't sent any communications.

12 | Paragraph 5 is inappropriate micromanaging, difficult to interpret, and also pointless
13 | in the modern era. And provided that we give people a reasonable time to respond.

14 | That takes us to 6, as you said, sir, in argument. And we're happy with 6, although
15 | I should clarify again, another danger of trying to craft an order. The first letter that we
16 | sent, it's reasonable to say they should have 28 days to think about it and respond,
17 | but it certainly shouldn't be right that that we give them 28 days for every follow up.
18 | Otherwise, very quickly, this is going to become 28 years later, like the film.

19 | Then there's paragraph 7, which we've also said we're happy to do. Obviously
20 | sensible. Also no need for an order.

21 | Paragraph 8 is also obvious, and goes without saying and, actually, has already been
22 | said. We said it at the last CMC, before this application was even made.

23 | Paragraph 9: you will appreciate is very much resisted. So that's what we say about
24 | draft order 3.

25 | And I think we can just read across what I've said to the paragraphs of order 2.

26 | THE CHAIR: Sorry, I didn't pick up what you said about 9.

1 | MR PICCININ: They should pay our costs. The class representative of this
2 | application, which I say should be --

3 | THE CHAIR: Oh, sorry. Oh, sorry. We'll talk about this application, now. Sorry. Yes.

4 | MR PICCININ: Yes. It's very much resisted. The other way around.

5 | So that's the substance. Abuse of process, I don't want to take too long because, as
6 | I said, we're here now. It would have been nice if we didn't have to be here, but we
7 | are here now. And so, we've argued the substance of it. Maybe you don't need to
8 | decide abuse if you decide in my favour.

9 | But I do want to say that this really does have to stop now, because this is attempt
10 | number 4 to interfere with our evidence gathering techniques. And we just cannot
11 | progress with this litigation in this way. And the position is particularly acute in relation
12 | to the waiver of privilege argument, because I stood here, or maybe it was like that,
13 | and had the argument with Mr Carall-Green last time to the effect that the
14 | communications that we were proposing to have said were protected by inviolable
15 | litigation privilege. And he said I was wrong and that the Tribunal did have a power to
16 | stop us from sending those letters.

17 | Now, that was a bad argument and you rejected it, sir, rightly, in my submission. But
18 | if they were going to say that there was another reason why you could stop us from
19 | sending the letters, because through things that we had already said before then,
20 | privilege had been waived, then the time to say that was at that hearing. Otherwise
21 | we just lose months and months if parties are allowed to keep coming back, making
22 | that kind of point, where we had a hearing and nothing at all changed. And that really
23 | is actually just a simple example of a Henderson and Henderson abuse.

24 | But my main reason for making that point is just to draw a line and say, it's got to stop
25 | now. Speaking of stopping now --

26 | THE CHAIR: Thank you. I've been reminded, of course, that I think we've been

1 presented with an application to deal with another case management issue. Shall we
2 complete this? And then if you would like to deal briefly with that.

3
4 Reply submissions by MR HUBBARD

5 MR HUBBARD: I would, sir.

6 THE CHAIR: We can do that.

7 MR HUBBARD: I'm going to resist, sir, even dealing with that.

8 THE CHAIR: Okay.

9 MR HUBBARD: We've set out the position in the letter, but certainly, none of us should
10 feel constrained in dealing with what remains of this application by the perceived need
11 to deal with another application, because --

12 THE CHAIR: No, no. We'll finish this, and then I'll hear what both of you have to say
13 on the other matter.

14 MR HUBBARD: Yes. (Inaudible) is the preview of what I'm going to have to say on
15 the other matter. Apart from (inaudible), you shouldn't consider it.

16 In terms of reply, I'm not going to take things in the same order as my learned friend
17 dealt with them. I'm going to focus on what I perceive to be the most important of the
18 submissions that he made, and then sort of work backwards from there.

19 Really, sirs, you can summarise my learned friend's submissions in one quite
20 remarkable statement that he made to the Tribunal, which is the invitation that you
21 should just follow the High Court, "just trust us to get on with it", I think is a verbatim
22 quote. It's a very surprising submission, that, not least because it bumps up
23 immediately against all of the authorities I took you to this morning, from Rodger, both
24 Hodge Malek and Kelyn Bacon, Spottiswoode, Giudice, McLaren, Court of Appeal
25 and what it said about Giudice, and in particular, the new Canadian case.

26 My learned friend said, "Why look to Canada when we can just nip over the road and

1 | go to the High Court?" The obvious answer to that is that our -- put it in broad
2 | strokes -- our competition law is really based on what's going on in Canada. So the
3 | Competition Appeal Tribunal will always look to the Canadian experience, because
4 | there's a wealth of experience on which to draw. When we're drawing on that
5 | experience, we're drawing on experience from the same or a very similar regime to
6 | that in place governing competition claims in this jurisdiction. So, it obviously makes
7 | sense to look to Canada for guidance, rather than going to the civil procedure rules in
8 | the High Courts.

9 | The reason why two situations aren't the same is really what was identified by the
10 | Chair and Mr Frazer, which is that we're dealing here with class members. There's
11 | the fact of a class membership which exists in these sorts of collective action
12 | proceedings, which is generally absent from proceedings in the High Court, save for
13 | group litigation.

14 | So it is worth, I think, looking at what Ad Tech had to say about the status of class
15 | members. I alluded to this in my submissions this morning, but given the way the
16 | submissions have gone, I think it is worth having a look at what the Tribunal in Ad Tech
17 | said about the status of class members, because it's the best description we've got,
18 | and it's very germane to this exchange that we're having.

19 | It's in the authorities bundle, paragraph 91, page 1492. It's again five lines from the
20 | bottom of paragraph 91. Just for context, this was a discussion about an earlier
21 | decision by Bridget Lucas in the McLaren proceedings. It's not the decision that was
22 | appealed in McLaren Court of Appeal. It's another decision in the same proceedings.

23 | It said here:

24 | "We understand her to mean [so Bridget Lucas] that the fact that class members
25 | occupied a middle ground [in other words, that's between being a party and not being
26 | involved at all; that's the middle ground which they occupy] we understood her to mean

1 | the fact that class members occupied a middle ground meant that it was necessary for
2 | the Tribunal to adopt an exceptional process in scrutinising and supervising the
3 | disclosure process." [as read]

4 | Really, that's the point. It's the fact that class members do occupy this middle ground
5 | somewhere between being a party and being a non-party that justifies the sorts of
6 | orders that were made in Rodger and Spottiswoode, and means that it's not
7 | appropriate, as my learned friend has invited you to do, just to let them get on with it,
8 | effectively ignoring the guidance that was laid down in those cases. The reason for
9 | that is the one I've just described.

10 | Just to answer the point which my friend made in this connection about
11 | Lord Justice Popplewell's speech in McLaren at Paris 74 and onwards. As we all know
12 | by now, he was talking about an a priori rule, and what he was effectively saying there
13 | is that there's nothing in the nature of collective actions that requires an a priori rule.
14 | Part of the reason for that was that it was his acknowledgment that the width of the
15 | Tribunal's powers enables it to impose a restriction in an appropriate case. It doesn't
16 | help my learned friend to rely on those passages of the Court of Appeal's judgment in
17 | McLaren.

18 | Just before leaving this first of the topics I want to reply on, it's instructive to look in the
19 | core bundle at page 166. This is from the reasoned order, your reasoned order,
20 | paragraph 9. (Pause)

21 | This is in relation to survey evidence, and, if you just remind yourself, please, sirs, of
22 | what you ordered there. (Pause)

23 | This is instructive, because the position that's being imposed there is really the same
24 | as we're inviting you to impose in relation to the collection of evidence from class
25 | members. It's really acknowledged here that that is an appropriate way to reflect the
26 | requirement to behave in a collaborative way.

1 | That's the first point, sirs. You really should resist the temptation just to let the other
2 | side get on with it.

3 | Turning to the specific orders, and starting with order 2, if we go to this, please. Core
4 | bundle, page 259.

5 | My learned friend said that so much hinges on waiver in relation to the discussion
6 | around this order, and he's really talking there about paragraph 1 and the
7 | subparagraph to paragraph 1. With respect to him, he's really falling into the same
8 | trap he's often fallen into in discussions of this area, between conflating waiver and
9 | loss of confidence. They're not the same thing. Just to lay the ground for what I'm
10 | about to say in reply, I think it is worth taking you to the decision of mod against
11 | MOD v Mohammed, which I alluded to in my submissions this morning. It's at
12 | page 447 of the main authorities bundle.

13 | This is the decision of Mr Justice Leggatt. What he says in paragraph 14 --

14 | MR PICCININ: I hesitate to interrupt, but this is really not a reply submission. Going
15 | to authorities that nobody has gone to is not a reply submission.

16 | MR HUBBARD: I mean, I did go to this authority.

17 | THE CHAIR: I think Mr Hubbard did take us to the Mohammed --

18 | MR PICCININ: It's certainly not something I said anything about.

19 | MR HUBBARD: Well, he doesn't have to say anything about this. The point is that
20 | I'm replying to a submission that he made, and I'm making my reply submission by
21 | reference to this case, which is in the bundle that everyone has seen, or certainly he
22 | should have seen.

23 | What is said in 14(4) is that because privilege only protects information which is
24 | confidential, if the information concerned ceases to be confidential, privilege cannot
25 | be claimed. Now, that's the principle on which I rely, as I hope I made clear this
26 | morning, and the simple submission is that, because we've been told the content of

1 the intended disclosure communication, that content can no longer be described as
2 confidential, and therefore privilege can't be claimed, because of the point that
3 confidentiality is a necessary prerequisite to a claim of privilege.

4 My learned friend tried to meet that point by using an example of a contractual context.
5 You'll recall he said: in the contractual context, even if you say to your counterparty
6 that you're going to get advice on a specific provision, you don't lose confidence. Well,
7 that's no better than the example he raised in paragraph 37 of his skeleton argument,
8 and it doesn't help him for the same reason that paragraph 37 doesn't help him,
9 because that's not what's going on here. They have not said to us in a general sense,
10 "Look, we're going to go out and get evidence from the class members". They have
11 said, "We're going to write to the class members, and here's what we're going to write
12 to them", and they've given us as detailed an account of that as it would be possible
13 to give, together with details of the searches they want the class members to
14 undertake.

15 So, what they intend to ask the class members to do can't be privileged, because
16 they've told us the content of that communication in advance. It's very different to the
17 two examples that he relies on. It's sort of instructive that he has to rely on examples
18 that are very different to the fact pattern that we're dealing with, which rather suggests
19 that he can't answer the fact pattern that we're dealing with.

20 In terms of what we're asking for, my learned friend said that we say that because
21 confidence in the first communication has been lost -- we can see that -- we can also
22 see everything that follows. I addressed this in my skeleton argument. We certainly
23 say that they can't claim confidence and therefore can't claim privilege in the first
24 communication, for all the reasons I've described.

25 In relation to communications which follow that, as we've said in our skeleton, this
26 does engage the question of fairness. It's the point in the Brennan case, which my

1 | learned friend took you to. Essentially, if you're going to show the other side part of
2 | communications, which either have at one time had privilege or which you say you can
3 | claim privilege in relation to, it's only fair that you show them the whole chain of those
4 | communications. Otherwise, you're cherry-picking and depriving your opponent and
5 | the court of a picture of the whole of those communications. We do say -- my learned
6 | friend is right -- that this order 2 ought to embrace not just the first communication, but
7 | everything which flows from that.

8 | But to be clear, sirs, our focus is very much on that first disclosure communication. If
9 | you were minded to accept my submissions in relation to that, but not in relation to
10 | everything that flows from that, then we would invite you to do that as a fallback
11 | position. But, certainly, you are entitled to see that first disclosure communication,
12 | because my learned friends can't claim confidence in the content of that.

13 | Drilling down a little bit into what my learned friend said about order 2, and looking at
14 | paragraph 1 of that on page 259 over on to 260 of the core bundle. You remember
15 | I drew this distinction between subparagraphs (3) and (4) on the one hand, of
16 | paragraph 1, and subparagraphs (1) and (2) on the other hand. I said that my
17 | argument on (3) and (4) only gets home if you're with me on the loss of confidence
18 | and therefore loss of privilege points. But that doesn't, you'll recall that I said, apply in
19 | relation to subparagraphs (1) and (2). My learned friend didn't deal with that. He said,
20 | "Look, I can ignore that" because that's replicated in order 3".

21 | That's just wrong. Subparas 1 and 2 aren't replicated in order 3. You'll remember that
22 | I said you might want to import subparagraphs 1(1) and 1(2) of order 2 in order 3 in
23 | substitution for paragraph 1, subparagraph (1)(a) and (b) of order 3. You'll remember
24 | that exchange. But the point for present says is that in order 2, paragraph sub(1) and
25 | sub (2) aren't replicated in 3. That's the first point. The second point is that I don't
26 | need to succeed with my privilege argument in order for you to grant the relief sought

1 in paragraph 1(1) and (2) of this order for the reason that the privilege argument has
2 no application to these. It's not an interference with privilege to seek the identities, or
3 rather to ask the defendants to provide the identities of the persons with whom they
4 intend to communicate.

5 There's a difference between the content of the communications which would be
6 privileged, and identities of the persons with whom they intend to communicate, and
7 the privilege argument only applies to the first of that and not the second. It certainly
8 doesn't apply to paragraph 1(2) of order 2, which is talking about an explanation of the
9 basis and methodology upon which the defendant has identified the class members to
10 whom he intends to write.

11 If they were to be ordered to disclose that information, that would not be an
12 interference with their privilege, because privilege, as we've said, is a negative right to
13 withhold communications written to, for example, a third party for the purpose of
14 gathering evidence. That's not what subparagraph 2 is concerned with.

15 Moving on, sir, as to order 3. This is at core bundle, page 263. Now the real battle
16 here is in, or rather over, paragraph 1, subparagraph 1. Remind yourselves of what
17 that says, please, sir. Now, the submission is very similar to the one I've just made in
18 that if you were to make this order, that would not represent an interference with the
19 defendant's litigation privilege.

20 As far as I understood my learned friend's submissions, his argument is just to the
21 contrary of that. He says look at McLaren, Court of Appeal. On that basis, an order
22 to the effect in paragraph 1, sub 1 would transgress their litigation privilege rights.

23 Now, just by way of reminder, sirs, you'll recall that in McLaren after the ruling, there
24 was a CMC and the order at that CMC gave the defendants permission to contact the
25 class members, but subject to the Tribunal's permission, if the application threatened
26 an application, that caveat meant the defendants had to disclose details of their

1 | intended approach to the class members. It was that which amounted to an invasion
2 | of litigation privilege. It's that with which the Court of Appeal was concerned in
3 | paragraphs 102 and 103 of its judgment. That's as far as what they said about
4 | litigation privilege went: that, if the defendant was required to show the Tribunal and
5 | show its opponent the nature of the intended communication, that would be an
6 | invasion of litigation privilege.

7 | If we compare that to what's being sought in paragraph 1(1), the two things are entirely
8 | different. There's no requirement in paragraph 1(1)(a) or (b) for the defendant to show
9 | us their intended communication. It is simply in the case of (a) to confirm how each
10 | category of their disclosure requests, which of course we know, relate to each of the
11 | pleaded issues, and, in (b), the criteria the defendants will use in order to select the
12 | intended recipients of those communications.

13 | So, in other words, contrary to my learned friend's submissions, McLaren, Court of
14 | Appeal, does not provide him with an answer to what is sought from the Tribunal in
15 | para 1(1) of order 3.

16 | The second way my learned friend tried to make his case in this respect to you was
17 | by reference to the final sentence of para 103 of McLaren, Court of Appeal, which we
18 | find at page 939 of the authorities bundle.

19 | As you see it said, four lines from the bottom:

20 | "The Ruling has resulted in that principle being breached in this case."

21 | In other words, the inviolate nature of litigation privilege.

22 | "The Ruling has resulted in that principle being breached in this case, and would
23 | potentially do so in many other collective proceedings before the CAT. That poses an
24 | unfair dilemma for defendants between foregoing their privilege or foregoing their
25 | legitimate pursuit of evidence."

26 | Now, my learned friend tried to latch on to this as helping him. But if we analyse what

1 | this means, all it means is that in circumstances where the defendants are required to
2 | show their intended disclosure communication to the Tribunal and/or to the other side,
3 | that that would result in interference with their litigation privilege and would give them
4 | a choice between either doing that and losing that privilege, or forsaking that privilege
5 | and not doing that, which would interfere with their right to pursue evidence. That's all
6 | that's being said in those final two sentences. What those sentences don't say is that
7 | imposing a restriction on the defendant's ability to write to class members is in itself
8 | an invasion of privilege. Those sentences don't stand for that proposition. They're
9 | talking about a dilemma which arose from the particular order made in this case.

10 | So, sort of moving away a little bit from his argument that if the Tribunal were to prevent
11 | the defendants from writing to class members, that would be an invasion of litigation
12 | privilege, I mean, that can't be an invasion of litigation privilege, because it wouldn't
13 | have arisen yet in that hypothesis. If the Tribunal were to say to the defendants, you
14 | can't write to class members or you can only write having satisfied these conditions,
15 | that could not be an invasion of litigation privilege, because the privilege wouldn't have
16 | arisen yet. The Tribunal would be stopping the defendants from doing something
17 | before that privilege has arisen, before the communication to which the privilege would
18 | otherwise attach has come into being.

19 | So, my learned friend is not right about that for that reason. So, what he then shifts
20 | his argument to is a focus on the very final sentence of para 103, which refers to
21 | defendants having to forego their privilege or forego their legitimate pursuit of
22 | evidence. My learned friend kind of recasts his argument and says, "Look, if you
23 | impose a restriction on our ability to write to class members to request documents or
24 | evidence, that may not be an interference with litigation privilege, but it would be an
25 | interference with our legitimate pursuit of evidence".

26 | The problem he's got there, sirs, is that that right isn't an absolute right. It's subject to

1 exactly the same potential measures of control from this Tribunal as the right to write
2 to class members in order to request documents. So, in other words, it's subject to
3 the very wide powers of control that you have that McLaren, or rather the
4 Court of Appeal referred to, in McLaren.

5 So you recall the Court of Appeal essentially said, "Look, there's no a priori restriction,
6 but your powers are so wide you can impose a restriction in a particular case". The
7 force of that and the existence of that applies just as much to the right of the
8 defendants to pursue evidence, as it does to their right to request documents. In other
9 words, both of those rights are subject to your very wide powers to impose controls
10 and restrictions in an appropriate case. We say this is an appropriate case for all the
11 reasons that I've outlined.

12 Just dealing quickly with some specific parts of order 3, paragraph 3. This starts on
13 page 263 of the core bundle. Very quickly responding to some of what my learned
14 friend said on this, in relation to paragraph (2), my learned friend didn't really address
15 the submission I made about this.

16 You'll recall, sirs, that I posited a situation in which a class member receives a request
17 for documents from the defendants and then goes to us, goes to the class
18 representative and says, "Look, can you fight my corner on this? Can you represent
19 me in this?"

20 In those circumstances, there would be an identity of interest between the particular
21 class member and the class representative, which must entitle the class representative
22 not only to see the application, if it emerges in the future, but must also entitle it to see
23 the communications which preceded that application. Because the class member is
24 asking the class representative to represent it and to fight its corner, that must enable
25 the class representative to see the communications which have been sent to it in those
26 circumstances. That's all we're asking for in paragraph 3(2).

1 | I appreciate it might be drafted a little bit more widely than that, or it might seem like
2 | it's drafted more widely, but that's really what it's aimed at, and it can be tweaked.

3 | THE CHAIR: So do I understand from that that you accept the basic proposition that
4 | was being put that if the letter to a class member were explicitly framed as
5 | a confidential letter, that the class member, while they might be free to contact those
6 | instructing you to discuss the case, it wouldn't be free to disclose the contents of that
7 | letter.

8 | MR HUBBARD: Not unless they went a step further and said, "and we want you to
9 | represent us in dealings in relation to this request".

10 | THE CHAIR: Okay.

11 | MR HUBBARD: Yes.

12 | THE CHAIR: I think your answer to my question is yes.

13 | MR HUBBARD: Yes.

14 | THE CHAIR: You accept the basic proposition?

15 | MR HUBBARD: Yes.

16 | THE CHAIR: But you're postulating a particular circumstance in which you say that
17 | particular, the confidence, would in effect -- I'm not sure "fly off" is quite the right way
18 | of putting it.

19 | MR HUBBARD: Yes, yes. But if there was a situation where we were representing
20 | that person in relation to this application, there wouldn't be a question then of the class
21 | representative not being able to show us the communications. What I've just said is,
22 | of course, subject to litigation privilege existing. But I accept that is the hypothesis of
23 | this discussion, because we're talking about order 3 in relation to which I don't need
24 | to make any litigation privilege-type arguments.

25 | So, very quickly, order 3(4). The point my learned friend says here, "Look, we can't
26 | be expected to give legal advice". I mean, that's not legal advice. That's just an

1 | uncontroversial statement of the law.

2 | THE CHAIR: Well, I think Mr Piccinin very helpfully suggested that one way to address
3 | that might be for the Tribunal itself to say what it feels it can say and its recent order.

4 | MR HUBBARD: Yes.

5 | THE CHAIR: And that would be conveyed to the class members.

6 | MR HUBBARD: I think he also --

7 | THE CHAIR: Which would, I think, deal with his concern about being seen to gloss
8 | what might be a somewhat more complex situation and also being put in a position of
9 | giving advice to a party whose interests are adverse.

10 | MR HUBBARD: Yes, but I think he also said they shouldn't be directed to do anything,
11 | which would include directing them to show the class members a copy of the -- I mean
12 | that as a general statement gives us great concern that he's resisting being directed
13 | to do anything by the Tribunal.

14 | Perhaps that's an appropriate moment. I've almost finished. It's an appropriate
15 | moment to move on to my next point in reply, which is this idea that -- and it really
16 | feeds into the first point I made. This idea that comes from my learned friend that you
17 | can just be comfortable, that you don't have to direct them to do anything, because
18 | the solicitors regulatory rules are there, and you can trust their solicitors to abide by
19 | those rules.

20 | Well, the problem with that is that what those rules do is really stop solicitors -- just
21 | précisising the ones that we looked at -- from misleading people or bullying people or,
22 | or other kind of extreme forms of behaviour. The difficulty we've got with those is that
23 | there's a whole range of behaviour in which the other side might engage, which would
24 | strictly fall short of something which transgresses those regulatory rules. But
25 | nevertheless, it would be undesirable to let them do that for all of the reasons that
26 | I explained before.

1 | I say that asking for an extremely wide category of disclosure or a number of extremely
2 | wide categories of disclosure would be a good example of that kind of behaviour. It
3 | might not be -- or it wouldn't be -- a breach of the code of conduct, but it would
4 | nevertheless be undesirable and would represent the kind of behaviour that this
5 | Tribunal has restrained -- or say ought to be restrained or ought to be spoken about
6 | between the parties pursuant to a collaborative process in all of those previous
7 | decisions that I took you to.

8 | So in other words, it's not really sufficient protection for the class members to say,
9 | "Well, don't worry, because you can trust my solicitors not to transgress the code of
10 | conduct". That doesn't really get us home or answer the point.

11 | I ought to say as well that in moving from the 2011 Code of Conduct for Solicitors,
12 | you'll be aware, sirs, that the SRA shifted these rules from being very prescriptive to
13 | replacing the prescriptive rules with indicative behaviours, in other words, broader
14 | principles.

15 | Now, there is certainly an argument, and if it was the case before that shift happened,
16 | that the rule which applies in other jurisdictions applied in this jurisdiction too,
17 | a solicitor wasn't able to contact a represented party, now, there's a strong argument
18 | saying that when the shift from prescriptive rules to indicative principles happened, it
19 | was assumed that that prohibition carried forward into the indicative rules, even though
20 | it wasn't prescribed.

21 | So that that wouldn't be surprising if that were the case, because we do seem in this
22 | jurisdiction to be an outlier, compared to other Commonwealth jurisdictions, and even
23 | other UK jurisdictions. We've got to the bottom of the Northern Ireland position.
24 | Rule 5.5 just really echoes the same provision in the Australian rules and the Canadian
25 | rules and the Scottish rules. Would it be helpful if I handed these up?

26 | THE CHAIR: Yes. (Handed)

1 Thank you. And one for Mr Piccinin. Yes.

2 MR PICCININ: Thanks.

3 THE CHAIR: Thank you.

4 PROFESSOR NEUBERGER: Thank you.

5 MR HUBBARD: We're very grateful as well to the chair for sending that Canadian
6 case. And I know you didn't invite submissions on that, but I would direct the Tribunal's
7 attention to paragraph 60, and the subparagraph to that. In many ways, that's the
8 most complete and most helpful, albeit from a Canadian authority. But, like I say, it
9 has persuasive authority of the way that communications between defendants and
10 class members are treated in Canada.

11 And just to summarise the sort of gist of this very detailed guidance: communications
12 between a defendant and class members directly are not encouraged, if I can put
13 things at the lowest. I would invite you to read paragraph 6, through the
14 subparagraphs to that, because they do provide important context, instructive context,
15 in relation to the debate that we've had.

16 Just give me two moments, sir. (Pause)

17 Yes. Just three more very quick points in closing. The suggestion from my learned
18 friend that we're trying to stifle the defendant's defence. We're, of course, not doing
19 that. We're just trying to make sure that the process of collecting documents is
20 relevant to the pleaded issues in the case so that we minimise (a) unnecessary cost
21 and expense and (b), the risk of class members being encouraged to opt out for the
22 wrong reasons. And on that point, I just did not understand my learned friend's
23 submission that there's zero risk of opt-out arising from these requests. The risk is the
24 one I outlined this morning. The developers are so spooked by these requests that
25 they apply to the Tribunal for permission to opt out, and the Tribunal grants it in some
26 or all cases.

1 | It's much better to try to avoid that scenario, including for the efficient administration
2 | of the case, and allow the other side to run off in an uncontrolled manner and go about
3 | this exactly as they please.

4 | And I think the final point, sirs: it was suggested that we were wrong to say that the
5 | defendant has never explained the categories of disclosure it's after. We're not wrong
6 | to say that. We're perfectly right. My learned friend picked some low-hanging fruit on
7 | his feet in the same way as he did in his skeleton argument for the CMC, which was
8 | served very shortly before the CMC. What we've never had, and what we've
9 | repeatedly asked for, is a proper explanation of the way that each of the categories of
10 | disclosure which they seek is tied to a pleaded issue, and that causes a great concern
11 | and, as I said this morning, ought to arouse the Tribunal's suspicions about what is
12 | going on here.

13 | If you just give me one moment, sir. (Pause)

14 | You'll be pleased to know that that is the end of my submissions. Thank you.

15 | THE CHAIR: Thank you very much, Mr Hubbard. That's very helpful.

16 | Mr Piccinin, is there anything that you feel you need to come back on?

17 | MR PICCININ: Well, just one point, very briefly, which is on paragraph 3(2) of order
18 | number 3. That's page 263. Because my learned friend made a new application on
19 | his feet, and I didn't entirely understand what it was, but perhaps I could just say what
20 | I think the position is. I think he now accepts that if privilege applies, that means that
21 | we can write a letter on a confidential basis. And it's up to the class member whether
22 | they respond or not, but they can't provide that letter to Dr Ennis or Scott and Scott.

23 | THE CHAIR: I think I understood that. With the qualification, with the qualification --

24 | MR PICCININ: I just wanted to clarify the qualification, because I understood the
25 | qualification to be connected with the class representative representing the class
26 | member on an application for disclosure, which is something that arises later. But

1 | I don't think it's being suggested that, in response to the letter, they can run off to
2 | Dr Ennis and show him the letter. There may never be an application, and if there's
3 | no application, then there's no basis at all for breaking confidence. That was all
4 | I wanted to say about that.

5 | In relation to the timetabling issue, can I just address you?

6 | THE CHAIR: Sorry, there was just one point. Mr Hubbard explicitly asked us to look
7 | at a paragraph in the Canadian case that I referred you to earlier. You earlier made
8 | the fair comment that you hadn't a chance to look at it. If you would like to look at it
9 | immediately after the hearing and there is anything that you would specifically like to
10 | draw to our attention, I'm not necessarily encouraging you to do so, but if there is
11 | anything you feel that, you would like to say about that that hasn't, in effect, already
12 | been said, then obviously, if you could let the Tribunal have that, ideally overnight, if
13 | that's not imposing too much of a barrier.

14 | MR PICCININ: Sir, I'm grateful for that.

15 | THE CHAIR: Yes. Thank you.

16 | MR PICCININ: Just in relation to timetabling, then. This is a brief point, but it's
17 | important and it's urgent, as well. The application that we've made is to move the
18 | deadline.

19 | MR HUBBARD: Sorry, just before this happens, I ought to clarify since my learned
20 | friend asked whether he understood right what I said. What I understood in relation to
21 | order 3, paragraph 3, sub 2 is that if having received a disclosure communication,
22 | a particular class member decides, even before an application has been made, but
23 | just decides having received it, that that member wants Dr Ennis to represent him in
24 | relation to it -- so, in other words, to correspond about it and to deal with any
25 | application which may arise in the future in relation to it, then he's able to do that. The
26 | class member is able to do that. So, if what my learned friend was saying that he's

1 | only able to do that after an application has been issued, then that's not right.

2 | The point of distinction is when the class representative is asked by the class member

3 | to represent him in relation to the request, and, at that point, he's got to be able, talking

4 | about the class member, to show the class representative that communication.

5 | MR PICCININ: That is a problem then, sir, because that would be a breach of

6 | confidence in circumstances where there's no application, what we're engaging in is

7 | a confidential dialogue with a person on a confidential basis. For that person to go

8 | and share that confidential communication with someone we're in litigation with in

9 | relation to the very litigation that we're trying to gather evidence from, that that would

10 | be an obvious breach of privilege and confidentiality.

11 | I mean, I don't really know what is meant by Dr Ennis acting for them. Dr Ennis is,

12 | I think I'm right, an economist, not a lawyer. But, anyway, you if you didn't happen to

13 | instruct the same lawyers they would have to have Chinese walls in place, you know,

14 | information barriers in place, and all sorts of things in order to ensure that our efforts

15 | to gather evidence didn't get shared with the team that was running the litigation

16 | against us.

17 | THE CHAIR: Of course, if this goes to the unusual position of the class member

18 | because it is the class member's claim that's being litigated by the class

19 | representative...

20 | MR PICCININ: But that's the point.

21 | THE CHAIR: In that sense, the class representative clearly represents the class

22 | members in the pursuit of those claims.

23 | MR PICCININ: Only in a loose sense. Not in the sense of acting for them like

24 | a solicitor acts for a client. They're not a client. And this was this is the point that was

25 | run and lost in McLaren in paragraph 104 that I showed you earlier. So, I don't want

26 | to break over it, but that that really would be driving the coach and horses through

1 | what Lord Justice Popplewell says in paragraph 104.

2 | So turning to the timetabling point, as I say --

3 | MR HUBBARD: Sorry to interrupt again. If what my learned friend is going to do is

4 | make an application, we resist him even being able to make that application, for

5 | reasons I can explain. It's 4.40 pm now. I can explain why you shouldn't hear this

6 | application.

7 | MR PICCININ: Can I just explain what I've got to say? Because the application has

8 | been made?

9 | THE CHAIR: Yes.

10 | MR PICCININ: And we asked for it. And if my learned friend persuades you to ignore

11 | what I've just said, then that's fine. But can I just say what I've got to say and you can

12 | consider it?

13 | THE CHAIR: I mean, on one view, it's a very short point. It's whether we should

14 | extend the time and if so, to what date. And we haven't had a chance, I think, to

15 | discuss this amongst ourselves. For my own part, I (inaudible) but it will be for the

16 | Tribunal as a whole. I'm sympathetic to fixing dates which are realistic relative to other

17 | things that are going on in litigation and then, ideally, sticking to them.

18 | MR PICCININ: Yes.

19 | THE CHAIR: Equally, I'm anxious that we don't derail the process, so, you know, if

20 | the point can be focused fairly shortly, as I imagine it can be. And then I can hear

21 | what Mr Hubbard has to say in response and consider where we go.

22 | MR PICCININ: It's really not complicated, what I've got to say.

23 | The application is to move the witness statement deadline from where it is at the

24 | moment, which is 5 October, where we're asking for it to go, which is

25 | 26 February 2027. Dr Ennis has offered as a stop-gap an initial extension from one

26 | month, so to 5 November 2026. The short point is that's not enough time for us, for

1 | reasons I'm going to come on to. And it really would be hugely disruptive and
2 | prejudicial for us if we had to wait until September to have that resolved, because there
3 | just isn't going to be enough time for us between September and November to proof
4 | these witnesses. That would just be impossible.

5 | So because of the urgency of this, we actually wrote to Dr Ennis about this six weeks
6 | ago. And, true to form, he didn't respond for this until 17 July, which was over a month
7 | later. We then wrote to the Tribunal with an application just two business days later,
8 | and they've now responded. In our application, we asked for this to be resolved before
9 | today. Obviously, it hasn't been. So that's why I'm just saying this very briefly.

10 | And the key point is that through -- I don't want to play any kind of blame game about
11 | fault, but it's certainly not our fault -- the situation is that the litigation has progressed
12 | in a way that is very different from the way it was envisaged when the order was made
13 | in 2025, I think it was. In particular, the original plan was for disclosure to be concluded
14 | by 13 March 2026.

15 | Obviously, things didn't pan out that way for very various, different reasons. We didn't
16 | get a disclosure order until June of 2026, and then we've only just now had, on 7 July,
17 | we had the search terms that Doctor Ennis wants us to apply. And in addition to that,
18 | there are nine additional disclosure categories that have been ordered. And, of
19 | course, we've got to work on the search terms as quickly as we can. We've begun
20 | work on the disclosure requests. Some of them we're going to need more time for
21 | anyway, and we'll write separately about that. But once we get to the end of that,
22 | there's then going to be a process of dialogue. We're going to need to review the
23 | documents that are thrown up by the search terms.

24 | There's a CMC in September, at which anything contested will need to be resolved.
25 | Even if nothing is contested, it's just not realistic for disclosure to be concluded until
26 | October at the earliest, failing which, it could easily slip until November. We're

1 | conscious of the need to keep things moving. And so we're not suggesting
2 | a concomitant delay to the witness evidence, because there's enough slack in the
3 | timetable not to need that. But, at the same time, it's important that we get this exercise
4 | of witness statements right, and that we do it only once.

5 | THE CHAIR: You remind me when our expert reports --

6 | MR PICCININ: Expert reports are due in May. And so, our submission is that you can
7 | accommodate that. I've got a copy of the order.

8 | THE CHAIR: Sorry, I should have had the detail of this. But -- (Pause)

9 | PROFESSOR NEUBERGER: Thank you.

10 | MR PICCININ: The expert evidence is the end of May. So that's paragraph 13.

11 | So we say the witness evidence is overwhelmingly, if not exclusively, going to be from
12 | our side. There's not likely to be any reply witness evidence. But in any event, we
13 | say that that May works for the expert evidence as in it won't be prejudiced by having
14 | the witness statements in February.

15 | And even if it did need to move, that wouldn't make any difference to the trial date
16 | either. The trial hasn't actually been listed. The order was for it to be listed for a date
17 | after February 2028, but it hasn't been listed. Even if it was going to be listed in
18 | February 2028, which would be a bad idea for other reasons, February 2027 for
19 | witness statements leaves a whole year to get to trial, so there is enough time to
20 | accommodate it there. It's perfectly normal to have a less than a year gap between
21 | first witness statements and a trial.

22 | I do just want to stress the importance of having the usual order here, where you have
23 | disclosure first, time to consider the disclosure, and then the proofing of the witness
24 | statements. It's important because although it's no longer the practice to use the
25 | witness statements to tell the story of what the documents say, and obviously, the
26 | solicitors need to have read the documents in order to know what questions to ask.

1 And also the witnesses do need to have their memories refreshed by reference to the
2 contemporary documents where that's appropriate.

3 My learned friends seem to think that we're just going to call the same witnesses to
4 give the same evidence that we did in the Kent proceedings. I'm afraid that's wrong.
5 It's just not possible for us to use those same people in every piece of litigation, given
6 the demands of their jobs. That's just impossible. So there are going to have to be
7 new witnesses being proofed and afresh. It's just unavoidable.

8 And if we have a situation where, even if you take the 5 November date, and the
9 disclosure is not complete until October or November, it's just not possible to do
10 everything we need to do to book the time in the diaries of these incredibly busy
11 people, who are out there running the business that is their day jobs, travel to California
12 and take the witness statements in time to produce them in November. And, as I said,
13 we can't wait and see either, because if we don't do anything until we have the CMC
14 in mid-September, and you decide at that hearing to keep the 5 November date, it's
15 just going to be impossible to take the witness statements. So that's why it's essential,
16 that we do it now.

17 I mentioned that the trial hasn't been listed. And that's obviously an important thing
18 too. Like I said at the last CMC, there are good reasons why, when we do come to list
19 the trial, we should revisit the whole of the rest of the timetable too, because it was
20 listed, firstly, in a way that would have resulted in expert reports being given probably
21 before you had a Court of Appeal judgment in Kent.

22 Now, as we've just seen, the expert reports are end of May and the Kent appeal is in
23 May, and it's not a very good idea to have a situation where the economists are
24 producing expensive reports, and then it turns out they were shooting at the wrong
25 legal target. Whatever the outcome in Kent, it's likely that the Court of Appeal will say
26 something that is of some interest to the economists.

1 THE CHAIR: It's been a great -- oh no, it was Ms Demetriou who was at great pains
2 to tell us that the Kent case was irrelevant to our --

3 MR PICCININ: Well, the conclusions in it are, that's true. But the law is obviously not
4 irrelevant. The law is obviously very relevant. And that's what the Court of Appeal will
5 be dealing with.

6 THE CHAIR: Yes. So Kent's due to be heard in May.

7 MR PICCININ: Heard in May. So we may not have a judgment until -- I mean it's
8 invidious to guess. But that's a different issue. The good news is you don't actually
9 need to resolve that today. I anticipate my learned friend doesn't want to deal with
10 that today, doesn't want to deal with any of that.

11 THE CHAIR: That, we will leave till September.

12 MR PICCININ: Exactly. And we can do that because even with February, there's still
13 a whole year before the earliest possible date that you could list it.

14 That's all I wanted to say.

15 MR HUBBARD: So just in terms of what's being applied for, just to be clear, they're
16 applying to defer the deadline for the exchange of witness evidence by almost
17 five months. Now, it's pretty clear to us that that application alone isn't workable. In
18 the context where we've got an available -- where the trial is going to be listed as things
19 stand on the first available date on or after 7 February 2028. They've not made
20 an application to move the trial date, notwithstanding what my learned friend has just
21 said. So we have to work on the basis that that is going to be the time when the trial
22 is listed. In other words, the time it's currently slated to be listed. So that's point
23 number 1.

24 Point number 2, they've not identified --

25 THE CHAIR: A year between the date for witness evidence and trial, why is that not
26 enough?

1 MR HUBBARD: I'll come on to explain the reasons why their proposal was not
2 workable and address that point in doing that. But just in terms of the shape of their
3 application, they've not identified with any specificity what disclosure work remains to
4 be undertaken, what remains to be completed, or why completion of that work requires
5 an extension of time of the length sought. I mean, their basic ingredients that one has
6 to come to court with -- if one's going to ask for an extension, you've got to justify the
7 extension. The starting point is that the timetable has been ordered by the court, and
8 it stands. And you can't just turn up and say, "Well, I'd like longer". You have to
9 explain what you need that time for and what you've been doing. It is necessary to
10 judge this application against the wider context that my learned friend has just made
11 noises now that they wish to delay the date for expert evidence, and, indeed, the listing
12 of the trial. So we are concerned that this is just part and parcel of a general strategy
13 of trying to kick off and delay things.

14 So, as matters stand, this goes to the point that you just made, sir. As matters stand,
15 the deadline for primary expert reports is 28 May 2027. So that would allow for a gap
16 of only one month between the defendant's proposed new deadline for reply witness
17 evidence, which is 26 April 2027, and expert reports, which is plainly insufficient, in
18 our submission.

19 Now, we do accept, sirs, that there's some benefit in deferring the current deadline.
20 And what we've suggested is that a sensible way to approach this is to defer the
21 current deadline for witness evidence by one month. This will allow further time for
22 the parties to identify what, if any, additional time might be needed to allow for witness
23 evidence, in light of any ongoing disclosure issues which ought to have come to the
24 surface during that period.

25 However, at this stage, it's totally unclear what further impact the disclosure exercise
26 may have on the timetable for witness evidence. And in this respect, sirs, I refer to the

1 fact that Scott and Scott wrote on 7 July that this is enclosure for Scott and Scott's
2 response to the application made last Tuesday. The class representative wrote to the
3 defendants on a range of outstanding disclosure issues. Many of those disclosure
4 issues relate to categories of disclosure that defendants had already agreed to provide
5 prior to the case management conference in May. The class representative's
6 assumption is that defendants have, in the intervening two-to-five-month period, been
7 making progress on the agreed disclosure categories. But we just don't know,
8 because we've not had proper engagement with these letters. The application
9 doesn't --

10 THE CHAIR: Do I take from that that you are still expecting significant disclosure from
11 the defendants?

12 MR HUBBARD: Yes. Well, that's right. So, yes. Until we're advised differently. Like
13 I say, this application, for an extension of time, hasn't been properly explained. If they
14 said, "Look, you're not going to get this disclosure you're expecting, we need additional
15 time for these reasons", that would have been one thing. That's not what's happened.
16 It's just a bare request for more time.

17 And we say, in those circumstances, the sensible thing to do, because they've not
18 justified the request for such a long extension, is to grant them a month and revisit the
19 position if needs be, after that.

20 THE CHAIR: Thank you, Mr Hubbard.
21 Mr Piccinin?

22 MR PICCININ: Two very short points.

23 One, in relation to disclosure: just to be clear, we're not late in anything. We've been
24 carrying out the process that you ordered us to carry out that required input from them.

25 THE CHAIR: I obviously have some sense of what was your (several inaudible
26 words).

1 MR PICCININ: Yes. And, obviously, I can't say what the outcome of it's going to be,
2 because it still needs to be discussed. We're now applying the search terms that
3 they've asked us to apply, and then we're going to need to agree on what we do with
4 the fruits of that.

5 But, in any event, it's now the end of July. It's not going to happen before October at
6 the earliest, even if there's no disputes.

7 The other point, just briefly, the key point, really, is that there is no prejudice caused
8 to anyone by having the witness statements in February, even if the trial remains in
9 the following February. And I just note, Mr Frazer might remember, it might bring
10 a smile to his face, that the witness statements in Kent were filed at the end of January
11 in 2024. And the trial was actually earlier than that. It was at the start of term,
12 effectively, in 2025.

13 So, there's no difficulties at all in having a February 2027 witness statement date. The
14 rest of the adjustments, we can work out in September.

15 THE CHAIR: We should maybe go off the bench just for a minute, just to consider
16 what we've heard on this point, and be mindful of the time. We will be back very, very
17 shortly.

18 (4.57 pm)

19 (A short break)

20 (5.00 pm)

21 The Tribunal is grateful to both parties for the submissions on the application to extend
22 time. And, in short, we decided we're going to grant the application as presented.
23 There is an ongoing disclosure process. The Tribunal considers it better to adjust the
24 timetable once in a manner that ought to be realistically achievable and to result in
25 good quality statements being produced. We are doing so on the basis that we've
26 been assured, and given that it's a year out, we accept the assurance that this

1 adjustment of the timetable would not prejudice a trial date in February, should that be
2 what the Tribunal decides should happen. And we'll deal with other issues of
3 timetabling when we see you again in September.

4 So, thank you very much.

5 MR PICCININ: Thank you, sir. I'm grateful to everyone for sitting there.

6 THE CHAIR: No, not at all. On the main issue of the day, we're going to reserve
7 judgment. We're very conscious Mr Piccinin, that we need to make a decision quickly.

8 It may be that what we will do is give a decision in relatively short order, with a detailed
9 judgment to follow, but we're going to go off the bench to consider just logistically how
10 we approach that. And, suffice to say, we will give you a decision as soon as we're
11 able to.

12 MR PICCININ: Very grateful for that as well.

13 MR HUBBARD: Yes.

14 THE CHAIR: Thank you. Thank you all.

15 (5.02 pm)

16 (The hearing concluded)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?