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IN THE COMPETITION
APPEAL TRIBUNAL

CaseNo: 1673/7/7/24, 1408/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

9th July 2026

Before:

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

BETWEEN:

Professor Barry Rodger

Class Representative / Interested Party

&

Elizabeth Coll

Class Representative

- V -

Alphabet Inc., Google LLC and Others

Defendants / Applicants

A P P E A R A N C E S

Robert O'Donoghue KC & Bethanie Chambers (instructed by Geradin Partners) on behalf of
Professor Barry Rodger

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

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(10.30 am)

(Proceedings delayed)

(10.43 am)

THE CHAIR: Some of you are joining us via live stream on our website, so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced. It is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court. There will be a transcript of this hearing available on the CAT website, as well as a copy of any ruling that arises from this hearing.

Mr Holmes.

MR HOLMES: Good morning, sir. I appear with Ms Kassie Smith for Google. My learned friends Mr Robert O'Donoghue KC and Ms Bethanie Chambers appear for the class representative, Professor Rodger.

The respondent represented person isn't separately represented. In case they regard their identity as confidential, I'd propose to refer to them today as Company X, if you're content with that.

THE CHAIR: Mr Holmes, if I could just start off with what I see as the key issues in determining an application under rule 89. In determining this application, I'm going to primarily refer to four main matters. If I've missed anything, you can tell me what I've missed and so can Mr O'Donoghue and Kassie Smith.

One is relevance: are the documents relevant to any issues on the pleadings? Secondly, specificity and the scope of the disclosure sought. Because of course, as with any non-party disclosure, it's got to be specific. I think you accept that and you've endeavoured to, let's say, narrow down the categories to comply with that requirement.

1 Three, this stage at which these proceedings have reached; we are now in the middle
2 of July for the PTR at the end of July, and the trial on 28 September. And fourthly, is
3 disclosure reasonably necessary and proportionate? In that, there are a number of
4 subfactors: (a) the burden of providing the disclosure to by Company X; (b) the burden
5 on Professor Rodger in having to review and deal with that disclosure; (c) the timing
6 of the application, and that will include what's going to be the impact of this disclosure
7 in terms of further witness evidence, expert evidence and on the trial; (d) the conduct
8 of the parties, and Mr O'Donoghue has gone heavily into that in his skeleton argument;
9 but (e) the ability of both sides to pursue their cases at trial with or without the
10 disclosure.

11 If I can say roughly where I am at the moment, subject to what everyone has got to
12 say, it does seem to me that the documents you seek, at least on a prima facie basis,
13 are relevant to the pleadings in the sense I've looked at the amended defence.
14 Mr Holmes, am I right that the -- it's not quite clear on the copy I've got, but the
15 paragraphs that you're relying on, which is 149, 159 and 154 I think, those ones, is it
16 all relevant by virtue of the amendment that you made on 13 March 2026?

17 MR HOLMES: That's correct, sir.

18 THE CHAIR: I will also look at ...

19 Okay, so what I've -- and then there's the ability of both sides to pursue their cases at
20 trial with or without the disclosure. What I think that, looking at these things -- let's go
21 through the others.

22 So, one, relevance, I've dealt with. Two, specificity. I can see that my provisional view
23 is that the original request did not necessarily comply with that. As is common in many
24 of these things, you refine it by the time you get to the hearing, you listen to what
25 people are going to say and you've come up with something that, in my provisional
26 view, is sufficiently specific. The stage which these proceedings have reached: this is

1 a very late stage, I've got to be honest. You know, when I had that massive hearing
2 with all those schedules and stuff last time in September, I thought that was going to
3 be the last major disclosure exercise. You'll remember that there was one category of
4 documents being sought by Professor Rodger which I refused, primarily on grounds
5 that it was late. It was too close to trial to have that category, and I excluded it. But
6 here we are, very late, and I'm concerned that it's not simply a question of what you
7 want to do, which is, you say, "I'll get the documents, put it in the trial bundle, we'll just
8 make submissions on it and that the tribunal will come up with an answer". I think
9 when I read the skeleton of O'Donoghue, he's saying, "Well, no, it's not as simple as
10 that. I'm going to have to put it to my expert. I may well want to put expert reports. If
11 Holmes doesn't want to, that's up to him, but I may want to have an expert on it."
12 But I think it may well go even further than even what O'Donoghue is saying. Because
13 my experience in these cases is quite often you get documents either on the other
14 side of a non-party, and you actually need to sort of dig deeper. The answer is not
15 actually necessarily on the surface, or the surface might be misleading, in which case
16 you need to research it, speak to the relevant people who produce the documents and
17 provide an explanatory statement or even a further witness statement. And so I can't
18 exclude at this stage that if this material is admitted, there won't be the need for an
19 explanatory statement or possibly even a witness statement, because if it comes to
20 trial, this is an issue. It may be O'Donoghue will say, "Well, I will probably want to at
21 least have the opportunity of speaking to each of the 17 and that we may decide that
22 we want to put in witness statements", in which case they'll have witness statements.
23 And so it's not as simple as it looks.
24 Then is it reasonably necessary and proportionate? Now, it may well be that it's going
25 to be difficult for you to pursue the amended defence, the particular paragraphs that
26 you refer to, in the absence of this disclosure. But sometimes, well, that's the

1 consequence of having a late application. You don't have an absolute right for all
2 issues on the pleadings to be tried, or at least with all the evidence that you want. You
3 know, there may be evidential reasons or procedural reasons or trial management
4 reasons why evidence which ideally you would want to have is not before the trial
5 court.

6 But where I find it the most difficult to get my head around, and this is the area that I'm
7 really unclear about, is how is it going to work out with the trial currently? Because
8 I think at the moment, I can't say now that if I allow this material in, this is going to be
9 ready by 28 September. I've got to be honest. You know, Company X is saying it's
10 going to take two months. It won't take two months because you've narrowed it down.
11 But let's say it takes them four weeks, because they probably want to get an English
12 solicitor to look at it; they probably want to get some advice on what they're producing;
13 they may well want to give an explanatory statement; they may want to actually have
14 someone to do a proper review of the previous years, because under request 2, you're
15 saying the tribunal should assume that the pattern to previous years is the same as
16 the three years are asking for. That takes time.

17 And so what may happen is there's a PTR at the end of the month, and that there will
18 have to be submissions at the PTR if I allow the disclosure as to where you go.
19 Because it's not going to be for me to say, how is this going to be done? There's
20 a number of logical ways of doing it. I very much doubt that any chairman on this case
21 is likely to adjourn the trial date of a trial that's been set down for so long. Indeed, your
22 side were very keen on the last occasion to keep the trial date and emphasise this is
23 a trial that starts in September, I think it's 28 September.

24 On the other hand, there's all sorts of other possibilities of which you might be able to
25 persuade the chairman of the trial tribunal, that actually, you know, we can try and do
26 this either at the end of the trial period where you have a discrete few days dealing

1 with this, or even after trial window, whereby before the tribunal gives its final
2 judgment, you have a hearing to deal with this aspect, or you may even say, well, you
3 can have a sort of -- it's not split trial, maybe the wrong term -- but you may want to
4 say, well, this issue is going to be dealt with after judgment, the judgment's going to
5 be subject to this point, and then it's going to be done there.

6 There's a whole host of permutations as to how you can have your pleading argued,
7 but not necessarily within this trial window, because I find it really difficult at the
8 moment to see what what's going to happen. But I also realise that if I refuse
9 disclosure, then you don't even have the ability to try and seek, let's say, further
10 directions from the chairman as to where you go at the PTR. Because I don't think it's
11 my role here to say, well, look, I'm going to start interfering with the trial and saying
12 how the chairman of the trial tribunal is going to handle this type of evidence if it's
13 going to be admitted. And I'd be very reluctant, Mr Holmes, at this stage to make
14 a ruling that determines whether or not this evidence, if you do get it, is going to be
15 deployed at trial. But I'm also conscious that if I don't make an order, you won't even
16 have the opportunity of making that submission.

17 So that's where I am at the moment, which is that everything's up for grabs really,
18 because I don't know what the answer is at the moment. Quite often in these cases,
19 the answer's relatively clear, subject to what the parties have got to say. On this one,
20 it's a lot more difficult. It's going to be a real balance at the end of the day as to how
21 you deal with the points I've just made and is there an outcome that allows you to have
22 this disclosure, but without having any prejudice to the trial? There's all sorts of
23 permutations as to how that can be done or might not be able to be done. But quite
24 frankly, you haven't really helped me on that issue so far in your submissions.

25 Mr Holmes, I'll let you present this as you will, but I thought it was helpful that I indicate
26 how I see things, having read the material and taken into account what you've said in

1 | your skeleton argument. So I'll just sit here and listen.

2 | Submissions by MR HOLMES

3 | MR HOLMES: So, sir, firstly, I was going to begin my submissions today by saying
4 | I'm in your hands because, as usual, you are on top of the materials. That set of
5 | provisional views was extremely helpful and I'll try to orient my submissions by
6 | reference to them. I won't labour points where you've clearly already considered
7 | matters and you have a clear provisional view on the papers.

8 | THE CHAIR: If that view changes, having heard O'Donoghue, then obviously you're
9 | going to have to come --

10 | MR HOLMES: Yes.

11 | THE CHAIR: -- but, you know, this is a straightforward application. I'm also conscious,
12 | which is a point being made by O'Donoghue, is look, Malek, this is only one of 17. So
13 | the chaotic effect if this goes on, and if it is going to be chaotic -- or the burden is going
14 | to be much greater than just simply looking at this. That's why I distinguish between
15 | the burden on the class member -- and I can assess what that burden is -- but the
16 | burden on Professor Rodger could be many times more significant than that because
17 | he's got 17 lots of documents which you say should be coming in, and he may have
18 | to speak to relevant people, et cetera, 17 different class members, and that you've got
19 | the expert, the impact on the trial.

20 | You know, I don't see, Mr Holmes, that you're necessarily right that it's simply
21 | a question of "I get the documents, put them in the trial bundle and let the judge give
22 | a result based on the submissions and the documents themselves". I may be wrong,
23 | but my experience in this tribunal is that quite often what seems to be a simple
24 | outcome isn't because the parties will say, "Well, we need evidence on this".

25 | MR HOLMES: Yes. So, that's well understood, sir.

26 | As a starting point, in my submission, you are correct in your provisional view that the

1 materials are relevant and they are specific. You are also correct in your conclusion
2 that without these materials it would not be possible for Google to be confident of being
3 able to make good its case at trial in relation to the pleaded matters that we've referred
4 you to, the intragroup arrangements pleadings.

5 So, you are faced with a question about whether to potentially shut us out from arguing
6 those points now, despite appreciating the relevance, specificity and potential need
7 for the materials. In circumstances where there is uncertainty as to what will be
8 required, the materials may be straightforward. The agreements may very well explain
9 the revenue share for the purposes of this person in a way that is transparent and that
10 could be readily applied.

11 Now, I take your point that we can't bank on that for sure at this stage and that
12 Professor Rodger will have his own views about how to develop his case at trial and
13 what materials are needed. (Pause)

14 MR HOLMES: The point I was about to make is that there is another staging post at
15 which the fairness of adducing the evidence can be considered by the president, who
16 will be sitting as chair in the proceedings, depending on the material that comes back.
17 Wider questions of case management can be canvassed then, insofar as they arise.
18 We have focused, it's fair to say, very much on the application before you and on the
19 use that we see this material as being capable of being put to at trial. But we hear
20 what you say and we certainly would not regard your decision on disclosure today as
21 conclusive as to the question of whether the material can be fairly relied on at trial and
22 how it can be dealt with at trial. Those are matters that would need to be considered
23 subsequently. But you are right, sir, in my submission, that this is a fork in the road.
24 We take your point about the closeness of trial. This is the last possible opportunity
25 at which to obtain what are now specific and confined requests with a material impact,
26 potentially on the quantum of the claim. The --

1 THE CHAIR: Can I pick you up on a couple of points --

2 MR HOLMES: Yes, of course.

3 THE CHAIR: -- before you go on. The original application would certainly have been

4 refused as worded, right?

5 MR HOLMES: Yes.

6 THE CHAIR: But what you've done is that you've amended it into a form where I think

7 it is a lot easier to justify, subject to that assumption point you put in your letter about

8 saying, "We're going to get those three years but there's going to be an assumption in

9 the absence of an explanatory statement that if that flows from 2018 to 2021 under

10 request 2 that we can put that to one side".

11 MR HOLMES: Yes, but --

12 THE CHAIR: (Inaudible) you done exactly the same exercise for the other 16, because

13 I haven't looked at the other 16. But if they look anything like the one that I've seen

14 on this one, the original one, there's going to be a problem because if I'm going to

15 decide the others -- I presume I probably will end up having to do that at some stage,

16 or at least you'll follow this ruling and try and get consent orders or whatever with the

17 others -- the others have to really be pruned back as well.

18 MR HOLMES: Yes, that's well understood. So on that, sir, we've been cautious about

19 putting in a further deluge of written submissions to the trial, so we haven't responded

20 yet. What we have done is write to the tribunal to note we would wish to make very

21 short points on the other applications in the light of what the represented persons in

22 question have said, including by narrowing requests in the light of the feedback we've

23 received from individual developers and across the applications. We would propose

24 to do that in short order after today's hearing. If, sir, you consider that that is an

25 appropriate course, it's subject of course to your direction.

26 THE CHAIR: How long do you think this process is going to take? Because you

1 haven't got orders against anyone at the moment. We are at 9 July but the PTR; is it
2 31 July? You know, how's it all going to be ready in time?

3 MR HOLMES: Yes. We're acutely conscious of that and that is one of the factors that
4 will make us apply a scalpel to the requests and to cut them back to the minimum
5 possible -- to give them the specificity, as you put it -- that is required, particularly in
6 the circumstances of these applications, we will really sharpen our pencil to achieve
7 that. We would hope in the light of that that the disclosure could be given rapidly. If
8 we can focus the request sufficiently to specific and identified documents or classes
9 of documents that have been referenced that, we hope, will help with the speed with
10 which they might be provided. I'm sorry, sir --

11 THE CHAIR: (Inaudible) not want to give a ruling on any of the others?

12 MR HOLMES: No, of course.

13 THE CHAIR: A proper draft order that reflects whatever we said here is really specific.
14 So I can say, "Well, that's sufficiently narrow or --

15 MR HOLMES: Yes.

16 THE CHAIR: But the other thing that you've done is that -- I think I asked two
17 questions, or one question which was rolled up with two things.

18 MR HOLMES: Yes.

19 THE CHAIR: Are you going to pay the costs of the respondents --

20 MR HOLMES: Yes.

21 THE CHAIR: -- of the application and you'll pay the reasonable costs of complying
22 with any order, which isn't necessarily the same thing, which says, you know, one is
23 the costs of and occasioned by the application, and I would have thought that the class
24 members would be entitled to get legal advice, spend some money at least, in going
25 through the request.

26 If this was a non-party disclosure application the general practice is that even if it's

1 | been opposed on a reasonable basis they will get the costs of the application as well
2 | as the costs of compliance.

3 | MR HOLMES: Yes. Sir, I have instructions to give a clear and unequivocal assurance
4 | that the costs are incurred, obviously subject to some reasonableness constraint, but
5 | not measuring this, you know, in fine terms, will be met by Google in respect of the
6 | developers against whom these applications have been brought.

7 | The relevance of the material to the claim value you'll have seen is potentially very
8 | material. That's why Google is pursuing these applications even at this late stage, and
9 | it will meet the costs and is happy to accede to an order in the terms that you think
10 | appropriate to give appropriate cost protection and recovery to the relevant
11 | represented persons.

12 | THE CHAIR: Presumably you accept that each represented person would be entitled
13 | to take legal advice from an English solicitor or whatever to --

14 | MR HOLMES: Absolutely. Yes. You have seen that many of them have. They've
15 | instructed, you know, very prominent international law firms and London law firms, and
16 | those costs we recognise are within the scope of what would reasonably be incurred
17 | in considering and responding to Google's application.

18 | THE CHAIR: It may be that if you have an English solicitor, the English solicitor may
19 | advise on not simply the production of what documents you produce --

20 | MR HOLMES: Yes.

21 | THE CHAIR: -- (inaudible) explanatory statement that they may wish to put with those
22 | documents.

23 | MR HOLMES: Yes.

24 | THE CHAIR: As you know, a lot of the cases you've done before me we've had
25 | explanatory statements with aspects of disclosure, and explanatory statements may
26 | be more important in the context of a case where you're getting it from third parties, or

1 at least non-parties (overspeaking) the opportunity. So I think if there is going to be
2 an order that they should have liberty to file, at your cost, any explanatory statement
3 that they wish to provide.

4 MR HOLMES: Yes. First, we fully recognise that. We're mindful of the approach that
5 you have taken, which has been extremely helpful in previous cases of -- I'm thinking
6 right back to the pricing statement in Trucks, sir. It's, we think, a helpful adjunct. We
7 didn't apply in those terms because we don't see that as a substitute for relevant
8 disclosure.

9 Equally, there was genuinely an effort on our side to make this not burdensome. We
10 thought a request for explanatory statements might be viewed as intrusive. But of
11 course if they wish to provide one that could be very helpful indeed. We would hope
12 that there will be some explanatory materials in the local file, as it's called, the tax
13 compliance document which many international companies of this kind produce as
14 part of their regular tax compliance strategy. So, that may well contain narrative
15 material already.

16 You've seen the published accounts, of course, for this particular person also contain
17 some explanation. But if, having taken advice, developers think it helpful and
18 appropriate to provide an explanatory statement with the disclosure, provided that
19 does not result in delay which we are obviously, you know, in a tight place in terms of
20 timing and we accept that, then we would be very open to that. I don't know, sir,
21 whether you were considering that as part of the order or simply as a clarification on
22 the transcript which could be provided to the developers in question or their solicitors.

23 THE CHAIR: What I will say is that, if I'm going to make an order on this one, they
24 would be at liberty to file an explanatory statement in relation to the documents to be
25 disclosed --

26 MR HOLMES: Yes.

1 THE CHAIR: -- and their significance, because I think that sometimes you need them
2 to explain, you know, exactly how it works and what is the significance of what you're
3 looking at. But I don't think I'm going to say they have to, but if they do wish to do it
4 I think it's going to have to be at your cost.

5 MR HOLMES: Yes. That's well understood. We hear that loud and clear, sir.

6 THE CHAIR: Yes. I'm just trying to figure out what the practicalities and what's going
7 to happen. But I can see that the burden on the class members is going to be
8 ameliorated by the fact you're going to cover the costs. You've cut back on what you're
9 asking for.

10 MR HOLMES: Yes.

11 THE CHAIR: (Inaudible) deal with the point Mr O'Donoghue is going to have to deal
12 with is what's the burden on Professor Rodger? Because that's a different point and
13 only he can really help me on that, because I can see that it can impose quite a burden
14 if they've got to go through 17 class members' material on all of this and get
15 instructions on it, go to an expert, perhaps go back to some of them to get
16 explanations. Yes, you know, I can see that it's going to be potentially a much greater
17 burden, on Professor Rodger, than each individual class member who should be able
18 to get this material, if the others are going to be trimmed back like this one, at a cost
19 which you're going to bear.

20 MR HOLMES: Yes. Sir, it may be that it's possible to take this in stages. You have
21 before you this particular application. I appreciate you need to view it in the wider
22 context; I'm not suggesting otherwise. But in its own terms -- and Professor Rodger
23 suggested that it should be determined on its own terms -- it's unlikely, in my
24 submission, to provide that significant a burden.

25 As regards the other applications, it may be that the burden is best assessed in the
26 light of our trimming exercise, which we've indicated that we will do. I'm also mindful

1 that several of the developers have indicated that they were unaware of the
2 proceedings prior. I'm not saying this as a sort of cheap jury point to criticise
3 Professor Rodger. You know, communicating with class members is tricky. We
4 recognise that.

5 The point is simply that having learned of the application, several of them have said
6 that they don't want to participate in the proceedings, irrespective of the disclosure.
7 So it's not a point that is bound up with disclosure. Depending on how those
8 applications to opt out are dealt with by the tribunal, the number of disclosure
9 applications will be materially reduced in any event. So it will be a matter of a smaller
10 number than the 17. And it may be that you will be better placed, sir, to assess the
11 impact on Professor Rodger in the light of our trimmed application.

12 THE CHAIR: Because I think when we deal with, or O'Donoghue deals with, the
13 impact on Professor Rodger, as I understand it, he says, "Well, you look at what
14 happened in the last decision, which was to effectively try and convert these
15 proceedings into opt in proceedings".

16 MR HOLMES: Yes.

17 THE CHAIR: He says, "That's disruptive enough in itself". And the argument was
18 made that, if you did that, it could pull the legs from this claim because, you know,
19 you're going to lose many of the big players. I have no clue how this case is being
20 funded, but if these applications have the result, because of the applications, that
21 people opt themselves out, obviously with the tribunal's permission, then the result
22 would be that these proceedings could be adversely affected, because you will find
23 that large parts of the claim are just taken out. It may affect the viability of the
24 proceedings themselves. All of that.

25 (Overspeaking) the mere fact you're seeking disclosure is not leading to anyone
26 wanting to be opt out? Or are you saying, "Well, that may be a factor, amongst other

1 things, why people want to be opt out? What's your case on that?

2 MR HOLMES: Well, there are various responses that have been received. Most of
3 the developers, it's fair to say, have instructed solicitors, and they have sent responses
4 resisting the disclosure. So it's not the case that they have been put off by the
5 application.

6 A few have applied to do so and they vary. I can show you, if it would be helpful, what
7 some of them have said. Some of them have made the point that this is news to them,
8 this process, and they don't want any part in it, not referring to disclosure as a factor.
9 Some have expressly said that they would wish to opt out regardless of disclosure.
10 So to that extent, it can't be concluded that the disclosure applications are causative.
11 In any event, they are large and well-resourced entities. They are taking legal advice.
12 They have substantial potential claim values, and they are well able, in the language
13 of the Supreme Court in *Evans*, to look after their own interests. The tribunal will form
14 its own view in relation to the opt-out applications. But we say that the disclosure
15 applications can and should be considered separately. It can't be the case that the
16 risk of particular large and sophisticated developers choosing not to participate in the
17 proceedings can act as a veto on relevant and proportionate disclosure for the
18 determination of the quantum of the claim. That, in my submission, would be the tail
19 wagging the dog.

20 I would also say, sir, that it's true that Professor Rodger resisted our shift to opt in on
21 the basis of the risk of disruption to funding. It was said, though, at that hearing -- and
22 I should perhaps show you that -- that the solution was to bring these applications.

23 Sir, I appreciate you're all over the papers. Would it help if I just showed you that in
24 the transcript from the 4 June hearing of our application, or --

25 THE CHAIR: I doubt it.

26 MR HOLMES: Very good. I won't take you there now.

1 THE CHAIR: It's in your skeleton.

2 MR HOLMES: Yes. So, in summary then, you have the point that this is necessary
3 and potentially conclusive of the arguments that Google has pleaded and would wish
4 to run. I understand and accept that that is not the end of the story. The tribunal needs
5 to consider orderly case management and what can fairly be done at trial.

6 A decision today would be conclusive on the basis of a worst possible scenario, which
7 is that these materials cannot be straightforwardly dealt with, that they will require
8 further explanation, that they cannot be addressed at trial. You've seen our hope and
9 expectation is that that is not the case, that this will affect volume of commerce
10 calculations, which can be mechanically applied. That is the evidence of our economic
11 expert, Mr Noble, which there is no contrary evidence before you about.

12 So, in my submission, the correct approach, the fair approach, would be to accede to
13 these requests, at Google's cost, and to take stock subsequently on what comes back,
14 and to see what can and cannot fairly be dealt with at trial. The tribunal will be better
15 placed to do that in the light of the materials, once received.

16 I appreciate that this is late but, in my submission, if we are correct that these
17 agreements may be straightforward on their face, and can be readily applied to the
18 quantum calculation in circumstances where everyone accepts there will need to be
19 a reckoning up, if liability is established at a final stage before damages are awarded,
20 in the light of what is decided at trial, then the material can fairly be deployed. If I'm
21 wrong about that, and Professor Rodger presents substantial reasons why that cannot
22 be fairly dealt with at trial, well, the tribunal has the case management powers to
23 ensure that the proceedings are conducted fairly and will draw the consequences.

24 THE CHAIR: Yes. What I'm not going to decide today is whether or not, if this material
25 is ordered, you are able to deploy it at trial, and if so how.

26 You know, this would (inaudible) so easy. If I was the trial chairman, I could deal with

1 everything all in one go. I could decide how the trial's going to be. I don't know exactly
2 how this trial is going to be. You've got an estimate. I think it was originally at
3 12 weeks and starting from 28 September, if you remember from last time. You know,
4 there's a number of ways of how you can deal with it. It may be that, if I was the trial
5 tribunal, I'd be able to come to a view, but I'm not.

6 MR HOLMES: Yes.

7 THE CHAIR: And I'm very conscious that if I make a decision refusing this disclosure,
8 you don't really even have the ability to come up with proposals as to how it's going to
9 be dealt with. Because, you know, as I said, there's a number of options, aren't there?
10 It may depend on what evidence is needed, actually, in order to fairly consider this
11 material. Do you need witness statements? Do you need expert input? Do they need
12 more time? Can you really do it within this trial window? Can you accommodate it by
13 having a separate hearing or a discrete hearing, or a discrete bid at the end of the trial
14 or a bit after the trial? Or do you get the judgment on liability and then say, "Well, it's
15 all subject to this further issue, which can be trialled later". There's a whole number
16 of different ways that you can deal with this, which would have been open to me if
17 I was a trial tribunal. But, Mr Holmes, I'm not.

18 MR HOLMES: Yes. I agree that's a ticklish aspect of this application for you, sir. In
19 my submission, it cuts in favour of allowing the material to be obtained, at Google's
20 cost, from these large developers, having taken such legal advice as they think
21 appropriate, again, at Google's cost, so that the materials can be obtained, and the
22 trial tribunal chair, the president, can take a view. In my submission, that is the fair
23 course.

24 THE CHAIR: Can you explain to me why the application was only made on 12 June?

25 MR HOLMES: Yes.

26 THE CHAIR: Because, even if you say, "Well, I wasn't fully aware of the issue, so

1 I haven't pleaded it. But now I've got my pleading in on 13 March 2026", there is
2 a significant amount of time between 13 March 2026 and 12 June, let alone between
3 then and 9 July. In the scheme (inaudible) you said, "Well, it doesn't really matter".
4 Well, it does matter, because we've got the trial date on 28 September. So that is
5 a significant period of time. Can you just explain that?

6 MR HOLMES: Yes. So you're right, sir, that when the defence was originally pleaded
7 we were not alive to this issue. We don't know the internal arrangements of large class
8 members. We weren't -- while we knew the class was concentrated, what we didn't
9 know was how likely to be concentrated. We did not know which specific developers
10 would be thrown up by the damages calculations that were performed by
11 Professor Rodger's expert.

12 We flagged the issue promptly when it came to our attention that there were these
13 intragroup arrangements that could have an effect on quantum. We pleaded it on
14 13 March. We by then had an application pending before the tribunal for a switch for
15 the large developers to opt in for the 25, which encompasses the 17 which are the
16 subject of the applications.

17 We thought, rightly or wrongly, that the appropriate course was for that to be
18 determined before -- it was on the basis that disclosure would and could be sought
19 against those that opted in, and that that would be more efficient, because some might
20 assess their own position and conclude that their UK entity has not suffered loss.

21 The application was brought in late February. It was, unfortunately, not possible for
22 the tribunal to accommodate it until June. It was heard in June. At that hearing, the
23 tribunal determined it against us. But a material factor that weighed, both in
24 submission and in the ruling, was that Google could then pursue applications for
25 disclosure. As Professor Rodger's counsel said, that might well lead to an adjustment
26 of the volume of commerce at trial.

1 So that was how it was resolved then. Directions were given then, by the president,
2 for these applications to be brought. In recognition of the timescale, it was indicated
3 that they should be brought in short order, and so they were. The hearing was on
4 4 June, and the applications were brought on 12 June. So, in my submission, that is
5 the background to why we find ourselves in the present situation. It's not a point that
6 we've held back, if I can put it like that.

7 THE CHAIR: What paragraph of that ruling says what you've just said? You said that
8 one of the grounds --

9 MR HOLMES: She took account of the fact that the disclosure applications were -- I'm
10 afraid, sir, that I will need a moment to find that. I don't have it at my finger tips. Yes.
11 Can I come back to you in just a moment, when it's found?

12 THE CHAIR: The written ruling --

13 MR HOLMES: Yes.

14 THE CHAIR: -- on the application, effectively to get them to have an opt-out basis for
15 this 25, where's that? You've got it in the authorities bundle, haven't you?

16 MR HOLMES: Yes, it's in the hearing bundle, sir, I think your first volume.
17 Unfortunately our tabs are differently arranged, but it's at tab 69.

18 THE CHAIR: Yes. Let me find it, yes. I just want to see what's the relevant paragraph
19 that deals with this.

20 MR HOLMES: Yes. So it's on page -- the relevant passage that we would draw your
21 attention to is on page 698. Do you have that, sir?

22 THE CHAIR: Yes.

23 MR HOLMES: If I could invite you, sir, to review paragraphs 37 and 38. (Pause)

24 THE CHAIR: Yes. But she makes the point that you could have made it before.

25 MR HOLMES: Yes. It was certainly open, as a legal matter, to bring the application
26 earlier. Yes.

1 THE CHAIR: Yes. Okay. All right. So I've got that. Yes. Okay.

2 MR HOLMES: So, sir, I hope that addresses, in broad outline, the concerns that
3 you've raised. If there are other points I can address now, I'll of course happily do so.
4 Otherwise, I will hear what Professor Rodger says, and address points in reply.

5 THE CHAIR: Thank you very much.

6 Mr O'Donoghue, we'll have our break in about 15 minutes, if that's okay.

7 MR O'DONOGHUE: Yes, of course, sir.

8 THE CHAIR: Thanks very much.

9 Submissions by MR O'DONOGHUE

10 MR O'DONOGHUE: Thank you. Sir, can you hear me loud and clear?

11 THE CHAIR: I can hear you loud and clear. I've read your skeleton. There's some
12 pretty fundamental points that we need to go through. And you've heard that what I'm
13 particularly concerned about is what is the impact of this evidence if it comes in? Is it
14 a simple exercise which Mr Holmes is suggesting in his skeleton argument, what's the
15 burden on your client, and what is the right thing to do at the end of the day, applying
16 the necessity and fairness test? I'm still unclear as to what my decision is going to be,
17 so I think what you say is going to be very helpful.

18 MR O'DONOGHUE: That's very helpful, sir. Can I just tee up where I'm coming from
19 and then I'll develop the points as quickly as I can. The overarching submission is the
20 one made in the skeleton, which is that this is an extraordinarily and unjustifiably late
21 application and it cannot fairly be accommodated in the current trial timetable with the
22 pre-trial review in three weeks' time.

23 Now, just to unpack why I say that: first of all, sir, we will have to have the disclosure
24 from the 17 developers. We're dealing with one application today; there are
25 a substantial number of other applications, and that will all take time. So let's assume
26 a certain order is made in the near future. I would suggest conservatively that we're

1 looking at something between four to eight weeks to reach a terminus on when the
2 disclosure can be physically produced. That's the first milestone.

3 THE CHAIR: Mr O'Donoghue, can you just help me? When we saw the original email
4 from, I think, 3 July 2026, they were talking about a cost of up to approximately
5 £30,000 and two months. Do you have any feel for how long it will take them?
6 Because I don't really have much of a feel as to how long the narrower ones will take.
7 What's your impression?

8 MR O'DONOGHUE: Well, sir, first of all, the developer's name is confidential, so I will
9 stick to Company X like Mr Holmes.

10 So the two months, in my submission, we should take at face value. In my submission,
11 the apparent narrowing of the request is not real on analysis because what Google
12 gives with one hand they take with the other. So fine request 1 has gone, but within
13 request 2, they're now saying that if the developer wants to suggest that the early
14 three years are not representative, they need a witness statement with a statement of
15 truth from a director to a company, the response. So that is something new and quite
16 substantial and in some ways quite insidious.

17 The other point, sir, is on request 3. In substance, it hasn't changed. And sir, this is
18 very, very important. The reason we put in the contents page from the OECD
19 guidelines on transfer pricing to the tribunal this morning, which I hope, sir, you've
20 received. Do you have that, sir?

21 THE CHAIR: I need to look at it. Let me have a look at that. Where is it? Is it loose
22 leaf? Was it loose somewhere?

23 MR O'DONOGHUE: It was sent this morning. It's got a blue cover.

24 THE CHAIR: I remember, I've seen the blue cover. It's two pages, isn't it?

25 MR O'DONOGHUE: Well, sir, it's 648 pages. We spared you that pleasure. But the
26 reason I wanted the tribunal to look at the contents page is what it really shows is:

1 I mean, transfer pricing, which is request 3, is one of the most fiendishly complicated
2 issues of accounting, taxation and law because it concerns international
3 multi-jurisdictional profit and loss and taxation. It is a very, very complex and
4 sophisticated topic.

5 The reason, sir, for putting forward the guidelines was to give you a basic sense that
6 it is delusional to suggest that one can simply hand over the master file or the local file
7 and we can eyeball that at trial. This is a very, very complicated issue that will require
8 accounting treatment; it may require legal submissions on domestic and foreign
9 taxation laws; it may raise other quantum issues. This is a very, very involved issue.

10 As you may be aware, sir, transfer price has given rise to a number of state aid
11 decisions. This is one of the most complex topics in commercial and competition
12 practice. And it will therefore require, we say, first an explanation from the developer
13 concerned. Second, we strongly apprehend further witness statements from the
14 developers concerned. And crucially, significant expert evidence, perhaps spanning
15 two or more different expertises. Because you may have picked up from a footnote in
16 our skeleton, Mr Harman, who is, I think, uniquely an expert in accounting,
17 computational economics and quantum, he does not feel personally qualified to opine
18 on transfer pricing matters because of their specificity and complexity.

19 So there would need to be a significant new round of expert evidence, conceivably
20 from more than one domain.

21 So to tee this up in terms of chronology, in my submission, we should take what
22 Company X says on the two months at face value, particularly if a witness statement
23 is also required. That may be a longer period in the case of the other 16 applications.

24 So we will not physically get the material for at least, in my submission, eight weeks.

25 We would then wish to consult as a factual matter with the developers. Again, in the
26 ordinary course of events, we would suggest something like eight weeks would be

1 appropriate for witness evidence. And then, all that being done, you would expect
2 a process of expert engagement which, again, I do not see how realistically and fairly
3 could be done in less than two months and in fact, in my submission, it is likely to be
4 longer because of the multidisciplinary issue.

5 So from a standing start today, we're looking at months and months to reach
6 a terminus on any of this. It is delusional to suggest, (a) that any of this could be done
7 by the time of trial, and (b) that we can simply rock up at trial, eyeball or spitball, look
8 at the master file or local file and that's it. That is a complete distortion of the
9 complexity underlying these issues as the contents page to the OECD guidelines. If
10 one looks, for example, at the chapters in the contents page, there is a threshold
11 question. What does arm's length pricing mean in principle? Then chapter 2, there
12 are a wide range of different transfer pricing methods. You see parts one, two, and
13 three. Then you've got the comparability analysis; you've got in chapter 4 OECD
14 model tax conventions. Chapter 5 documentation. Chapter 6 may be important here,
15 especially consideration for intangibles. Chapter 7, equally very important, intragroup
16 services. Chapter 8 cost contribution arrangements. And then over the page, there
17 may be restructuring issues given we're dealing with quite a lengthy period.

18 So this is a very, very involved exercise indeed, which is why I think, in fairness,
19 Mr Holmes has now effectively conceded, that there is no realistic hope of this being
20 done by the time of trial and why he has therefore pivoted following, sir, your
21 suggestion today saying, well, we could deal with this at the end of trial or perhaps on
22 some sort of split-trial basis.

23 Now, two remarks on that. First of all -- sir, forgive me.

24 THE CHAIR: We'll come to that in a second, because I just want to explore where we
25 are on your transfer pricing point.

26 MR O'DONOGHUE: Yes.

1 THE CHAIR: The reason why I said what I said before was that I do not consider it
2 likely that it would be satisfactory, simply putting these documents before the tribunal
3 and the tribunal making what they will of it.

4 MR O'DONOGHUE: Yes.

5 THE CHAIR: I well see that there will be an arguable need for a witness statement
6 from the developer, but I can't compel that to be given. That's why I said that they may
7 want to put an information statement. But then they say, look, Mr Malek, what we want
8 to do is that once we've got this stuff, we want to go back to the individual developers
9 and see what statements we can take.

10 MR O'DONOGHUE: Yes.

11 THE CHAIR: I fully accept what you say about the potential need for expert evidence.
12 I think you're -- I can see that.

13 What I don't have a clear picture in my mind is where they say in their letter, their
14 amendment letter of 3 July: well, it's only going to be one or two documents, or maybe
15 several documents at paragraph 11. What do you envisage the local file will entail?
16 Because I don't see it likely to be like a 10-page document; I think it's going to be
17 something quite substantial. Do you have a feel -- I know it may be a bit unfair asking
18 you because, you know, it's not your client, but do you have any feel for what that UK
19 local file would need to be?

20 MR O'DONOGHUE: Yes. Well, sir, it certainly is not one document or a handful of
21 documents sitting there pretty in a file. It is likely to be a complex suite of materials
22 and information that essentially go to multinational taxation and accounting. Sir, we
23 do actually have -- let me just get you the reference in a second -- because one of the
24 points one of the developers has pushed back on is they say, well, this is not some
25 oven-ready category of documentation; it is a suite of information and materials that
26 will need to be assembled. So, I'll get you that reference, sir, in a second.

1 THE CHAIR: It makes sense. You know, I don't find it particularly credible, just like
2 it's a small document, you take off the shelf and you just hand it over.

3 MR O'DONOGHUE: It's for the birds, if you think of this one second. In a multinational
4 jurisdiction, company engaged in transfer of pricing across different jurisdictions for
5 taxation reasons, there's going to be an enormous amount of material underpinning
6 that multi-jurisdictional taxation issue, both in terms of costs, profits, interactions with
7 the local taxation authorities. It is overwhelmingly likely to be vast.

8 Now, sir, the other point, of course, is that in some ways, that is the tip of the iceberg.
9 Because the question isn't simply, well, as a mechanical matter, when we reach
10 a terminus on physically locating these documents, how big will that be and how much
11 will it cost? That is only the start of the fun and games. Because what is crucial and
12 what will take a lot of time and a lot of money and a lot of effort is that the experts in
13 the way that they have done already for each of the 17 developers -- I'll show you that
14 in a minute -- they will need to go developer by developer, material by material, and
15 triangulate all of that into an expert report. And so you'll have seen from Easton 2, for
16 Google, just by looking at the public information, we have 50 pages across the 17
17 developers. You've a response, something in kind, from Mr Harman. And, sir, you
18 may pick this up from the CMC order, but the president is so concerned about the
19 volume of expert evidence in this case already that she has limited the final trial reports
20 for accounting to 40 pages.

21 Now, based on Easton 2 and Harman 2, just looking at the public materials, we're
22 already at double the size of the total estimate for the expert evidence as a whole. Sir,
23 this is a very, very involved exercise indeed and, in my submission, one needs to be
24 very, very careful about a party who turns up on the cusp of the pre-trial review and
25 says, well, there's a couple of documents -- I mean, this isn't evidence, this is
26 assertion -- there's a couple of documents, we can eyeball them, spitball them at trial.

1 Now, sir, on the reference I promised to give you, it's at tab 63, of the core bundle.

2 THE CHAIR: Yes.

3 MR O'DONOGHUE: And it's at page 535. So this is a response from a different
4 developer who I shall call Developer B.

5 THE CHAIR: Tab 63?

6 MR O'DONOGHUE: Tab 63, page 535. Yes. So it's under 9.2.2.2.

7 THE CHAIR: 9.2.2.2. Let me just have a look at that. Yes.

8 MR O'DONOGHUE: So it says:

9 "[It] also does not have a transfer pricing local file for any of the requested ... Rather,
10 [they] maintain all relevant underlying information and materials ..."

11 So that's the phrase they use. So as I understand it, sir, they're saying there isn't some
12 file sitting there pretty that we can pluck off the shelf. It is a suite of information and
13 materials, a corpus that, taken together, could be colloquially referred to as the local
14 file or the master file. Again, sir, in my submission, it's blindingly obvious that complex
15 international double taxation cannot simply be asked and answered based on a single
16 file. That, in my submission, is for the birds.

17 And so in substance, if one takes a step back, what Mr Holmes is suggesting on the
18 door of the pretrial review is that we should, in effect, have 17 quantum reports in
19 relation to 17 developers and expert evidence on each of those developers. And if
20 someone turned up on the cusp of trial saying, "Well, I would rather like to have a new
21 flank on the case comprising 17 distinct issues to do with quantum across these
22 developers", they would be rightly laughed out of court with that submission. But that
23 is in substance what is being suggested, sir. It is obviously an enormous undertaking.
24 Sir, I'll come back to burden, but one point I would make immediately is this is the
25 second late application Professor Rodger has based in these proceedings. We dealt
26 with the CPO variation in June. We've now been dealing with 17 disclosure

1 applications for the last several weeks. And speaking for myself and for the bulk of
2 the team, the bulk of our resources have been diverted for the last several weeks
3 dealing with these two late applications.

4 The bulk of our resources in the lead up to trial would be equally diverted in dealing
5 with these 17 quantum reports, all at a time when we are supposed to be preparing
6 for a long and heavy trial where we have a solemn responsibility to represent the class
7 members to the best of our ability.

8 Sir, you'll have seen the fallout from the oppressive nature of these late applications:
9 one person has opted out, four people have applied to opt out, more than one other
10 person has suggested if they have to disclose they may well opt out.

11 This is trying to achieve, as we've said in the skeleton, by the back door what they fail
12 to do by the front door; it really is quite insidious. It is an attempt to cut the legs from
13 underneath this claim for reasons not to do with the merits, to divert Professor Rodger
14 from effective preparations for trial. So we say it is delusional to suggest this could be
15 done by the time of trial.

16 Now, sir, you did say to Mr Holmes, and of course he jumped on that bandwagon, he
17 calls this rolling -- well, we could deal with this at a later stage separately, some form
18 of split or at the end of trial, some version of that.

19 Now on their two points. First of all, in the CPO variation ruling Mr Holmes essentially
20 made the same submission to the president, and it received a pretty short shrift. If we
21 go to the core bundle, tab 69, 697, paragraph 34. It starts "Even in the extremely
22 unlikely case"; you see that, sir?

23 THE CHAIR: I'm just reading that now, yes.

24 MR O'DONOGHUE: So it's really the second sentence. But of course, sir, the first
25 sentence is interesting because the point made there applies in spades to this
26 application. In the same way as you could not accommodate an opt in in the lead up

1 to trial, you certainly cannot accommodate 17 disclosure applications, witness
2 evidence and expert reports in the lead up to trial either. So I do rely on that.

3 The second point -- that's the critical one -- so Mr Holmes was saying then as now,
4 "Well, we can sort of hive all this off to next year or the back end of trial" and you see
5 that received a pretty short shrift.

6 As you said at the outset this is a heavy trial. It is being heard together with Ms Coll's
7 claim for reasons of efficiency. It is taking up a lot of tribunal resources. The idea,
8 because of Mr Holmes's late application, the tribunal and everyone else should dance
9 to his tune, incur substantial further costs, and have a further hearing or something
10 split in 2027, is for the birds. That's a submission he made before, and it was rejected
11 in very, very clear terms.

12 Sir, I see the time. There's a few other points I wish to make; would that be
13 a convenient moment?

14 THE CHAIR: Look, what you're saying is all very helpful and many of the points that
15 you're making resonate with me. I'm always quite open with you, Mr O'Donoghue,
16 you've known me for years; I always say where I am and what the problems are.

17 The problem I personally have is that I'm not the trial tribunal. If I was the trial tribunal
18 I could make whatever decision and that would have the implication for the trial I'm
19 doing. I am highly sceptical that all of this can be resolved adequately by
20 28 September. I understand the points you're making; I understand the complexity.

21 You know, quite often people may say it's all very simple, and sometimes it is, but this
22 one isn't. The disclosure exercises -- each individual one may not be that difficult, it
23 just takes time and money to do it. When you're talking about across 17, what's the
24 impact of that? What are you going to do with the material? And what's a class
25 member wanting to do, because they should be perfectly entitled if they want to put in
26 explanatory statements or whatever at the same time.

1 You've got this PTR coming up in July. All these things are sort of factoring in, in my
2 own mind, but I can see that there are real issues as to whether or not, if this disclosure
3 is ordered, all this could be sorted out for trial.

4 Now, as you know, there will probably have to be representations to the trial chairman
5 as to what's the impact, you know: expert evidence, further factual evidence, are we
6 going to have a trial or not, and that the president could take the view that it's all too
7 late, it's not going to be accommodated in this trial; that's the end of it.

8 Or the president could take the view that, "Well, I've looked at all of this. It may be
9 possible accommodating the trial, but even if it isn't it could be a further trial down the
10 line or a split trial" or something. And you say, "Well, it's unlikely she's going to go
11 down that route because of what happened last time", but she may well do. Because
12 what I don't necessarily want to do is to make a decision that is conclusive at the end
13 of the day.

14 So where I am at the moment -- where I'm toying at the moment -- is that I may make
15 some order. If I do make an order it's definitely not going to say that they can use this
16 material. It's not going to make any decision on further factual evidence or further
17 expert evidence, and that you argue it out with the president on 31 July 2026, at the
18 PTR.

19 If she takes the view that, "Actually, I think Malek is right, it's going to be very difficult
20 to accommodate all of this in time to get it all ready for 28 September", it is going to
21 be potentially sudden death at that stage because either she's going to say, "No, I think
22 fair enough, it's an important issue. I don't want you to be overcompensated as class
23 representative. If these aren't proper class members then they shouldn't be in the first
24 place"; I can see all those arguments coming in from Holmes and that he'll say that,
25 and she's going to have to take a view.

26 So what we may end up having at the end of this is potentially an order, but it's all up

1 for grabs as to what happens. Because if I don't make an order it's going to be very
2 difficult for Holmes to even make whatever submissions he has to the trial tribunal,
3 because there's no sign of any material down the way.

4 But if the material is underway being processed and everything, he's at least got the
5 opportunity to say, "Well, look, if you are willing to accommodate this and you think it
6 can be accommodated in the X, Y, and Z, well, the material should be in by a certain
7 date. We'll all have it then". But it is very, very unsatisfactory the situation that we've
8 got.

9 MR O'DONOGHUE: Can I just react quickly to that, sir, before the break -- two points
10 if I may. So first of all I would respectfully submit that it is blindingly obvious today and
11 delusional for Google to suggest that if disclosure is made in the near future even, that
12 any of this could be fairly accommodated at trial.

13 We can see the vista already. The disclosure will take time. There will be the
14 possibility of factual evidence. There will have been an involved expert process, and
15 there is no hope in the real world of any of that being remotely done by 28 September.
16 That is, in my respectful submission, blindingly obvious today. So my submission, we
17 can put that to one side.

18 So all that then leaves is essentially Mr Holmes saying, "Well, the tribunal should in
19 effect reward me for turning up late". My answer to that is it is not merely a late
20 application, it is unjustifiably so. Even taking the most generous possible approach to
21 Google, they had this idea, they raised it for the first time in February of this year,
22 made the amendment in March -- there is no earthly reason, sir, in my submission,
23 why the disclosure applications were not issued in February or at the very latest in
24 March. There has been no explanation, Mr Holmes, as to why he waited several more
25 months to make the application that the blame lies entirely at Google's door.

26 Sir, we're not dealing with the poor grandmother or mother litigant in person, this is

1 one of the richest companies in the world with a vast team, and they shouldn't be
2 rewarded for this ineptitude and unprofessionalism.

3 But sir, I do actually go further. As you will have seen from Professor Easton's
4 statement, the intragroup point comes from public information. That public information
5 was available to Google at any stage in these proceedings.

6 I go further still. The developers are Google's customers. They know exactly who
7 they are. They know exactly which entities are paid and where, in what amounts.
8 They knew exactly from the outset who were the big boys in the claim and who were
9 not. They could and should have grappled with all of this a very, very long time ago.

10 In my suggestion, the guillotine in terms of cut off point, sir, was when they pursued
11 mitigation disclosure last summer, which you dealt with in September at the CMC.

12 This disclosure, which also goes to mitigation, could and should have been pursued
13 at that stage, at the latest. At that stage, sir, you said, and I quote:

14 "It is comparatively late in the process to be seeking disclosure."

15 That is in September 2025. To turn up in June of 2026 just before the PTR with
16 17 applications is beyond adjectival deployment.

17 Sir, the final point I would make is --

18 THE CHAIR: Can we look at the expert report you just referred to on that? Give me
19 the relevant passage.

20 MR O'DONOGHUE: It was Easton 2.

21 THE CHAIR: All from the public, financial statements.

22 MR O'DONOGHUE: Yes, yes. So it's in tab 78. (Pause)

23 It's at page 955, 956, sir. As you can see, sir, at 166 -- so he says he was instructed
24 to consider intragroup. So the idea didn't come from Easton; the idea came from
25 Google, and that idea could and should have been ventilated much, much earlier. So
26 this is not an invention of Professor Easton.

1 Then, sir, over the page at 167:

2 "His analysis is based on publicly available information." [as read]

3 Now, they have known since Fletcher 1, served with our claim form in August of 2024,
4 two years ago, that the bulk of the claim was accounted for by a relatively small
5 number of developers. There was notice of that fact from the very outset. So why
6 they waited two years to agitate on these issues when they rely on public information
7 and have a wealth of private information in addition; it is indefensible.

8 The final nail in Mr Holmes's coffin, with respect, sir, is the point you made at the
9 outset, which is: the application as issued was plainly disproportionate. An hour before
10 our skeleton was due Mr Holmes suddenly narrows his request. The request could
11 and should have been narrowed at the very outset.

12 The fact that Google started with its death by a thousand cuts approach with
13 a manifestly disproportionate request, and then at the 11th hour seeks to refine it
14 further, that is another point on delay and oppressiveness that counts against Google.
15 So, sir, I understand the Solomonic instinct of saying, "Well, we should let this for the
16 trial judge of the PTR to decide". But in my respectful submission the nettle can and
17 should be grasped today, the Gordian knot should be cut. There is no justification for
18 this lateness. It is obviously unworkable for trial and that, with respect, should be the
19 end of the matter.

20 THE CHAIR: Is that your submission then?

21 MR O'DONOGHUE: There's one or two points I might want to check over the break,
22 but I think I've made the bulk of the points I wish to make. I may have a couple of
23 short points when I come back.

24 THE CHAIR: No, that's fine. We'll have a break. We'll come back at, let's say,
25 12.15pm and then Holmes will have a maximum of 15 minutes to come back.

26 Ms Smith, are you going to be saying anything or you don't need to? Okay, you've left

1 it all to Mr Holmes. That's fine. And then I'm just going to have to give a ruling,
2 because I think we fixed this for half a day so we should be able to get this resolved
3 within the half-day estimate.

4 Thank you very much, we'll come back at 12.15pm.

5 MR HOLMES: Thank you, sir.

6 (12.04 pm)

7 (A short break)

8 (12.16 pm)

9 MR O'DONOGHUE: Thank you, sir. Just very briefly, three points. The first was, just
10 to push back on what Mr Holmes said, it is clear already that these oppressive
11 disclosure requests and the way in which they've been approached by Google are
12 a causative factor in terms of opt-out. If I can ask you, sir, quickly to have a look at
13 what one of the developers said, it's in tab 98 of the bundle.

14 THE CHAIR: Just get my head where I am now.

15 MR O'DONOGHUE: Second volume, tab 98.

16 THE CHAIR: Well, let me just note down something before I forget.

17 MR O'DONOGHUE: So do you have tab 98?

18 THE CHAIR: Yes.

19 MR O'DONOGHUE: Page 1275. So this is a different developer called Developer Y.
20 And you can see paragraph 5 --

21 THE CHAIR: I'm just trying to get to the page, actually.

22 MR O'DONOGHUE: 1275.

23 THE CHAIR: Yes.

24 MR O'DONOGHUE: So they know -- "extremely broad in scope", "burdensome" on
25 paragraph 13, 1278. If we go to 1278, they say:

26 "The prospect of complying with such an order would impose significant cost, use of

1 management time and business risk on [the developer], effectively forcing it to become
2 an active participant in the Proceedings ... precisely the kind of burden on class
3 members that the collective action regime is designed to avoid."

4 So there you have it. The making of these burdensome and sensitive disclosure
5 requests is itself causative in terms of prompting developers to opt out of the
6 proceedings.

7 I'll just give you a couple of further references, sir, and then two further quick points.

8 THE CHAIR: Yes.

9 MR O'DONOGHUE: Two other developers.

10 THE CHAIR: Yes.

11 MR O'DONOGHUE: It's in the supplemental bundle, tab 7, page 26, paragraph 12.

12 THE CHAIR: Yes.

13 MR O'DONOGHUE: Tab 7, different developer: Developer Z. They say:

14 "Disclosure [is] very substantial and commercially sensitive."

15 THE CHAIR: Which paragraph are we now?

16 MR O'DONOGHUE: 12. Then at 7, they say:

17 "... unable to disclose information of this scope commercial significance on a voluntary
18 basis."

19 So that's that developer.

20 Then, sir, in the CMC bundle, tab 63, again, a different developer, Developer G. Page
21 530, sir. Paragraph 6, they say:

22 "Google's requests pertain to highly commercially sensitive and complex matters.

23 "... transfer pricing arrangements comprise highly commercially sensitive, complex,
24 and voluminous information".

25 And then at paragraph 11, on page 535, they say, well, it doesn't comfort us that this
26 would be in a confidentiality ring given the nature of the material.

1 So, sir, what we've seen already is, as I said, with the disclosure request having been
2 made, one has opted out, four more have applied to opt out. And I think it is more
3 than tolerably clear, sir, that if an order is made today, there will be further opt-outs.
4 We are very, very concerned that the mere making of these requests, or even
5 a provisional order that some disclosure is provided to, as it were, hold the ring, will
6 itself gut this claim of substantial value and threaten its viability.
7 I'll come back, sir, to what I say, respectfully, the tribunal should do.
8 Two final points. The second point is, in addition to the developers being in limbo for
9 the next several weeks, the burden will continue on Professor Rodger throughout the
10 rest of July, dealing with the remainder of these applications. Again, I emphasise the
11 point that a large proportion of our bandwidth has been taken up dealing with these
12 two late applications for the last three months. That simply cannot continue as we
13 move into the most intensive phase of trial preparations.
14 Then finally, sir, before I make submissions on what we say should be done today, it
15 is obvious what Google could and should have done because it's what they've done
16 in the Ad Tech case. The way one approaches these things is you raise disclosure at
17 an early stage, before factual evidence, before expert evidence. You then have an
18 elongated process where there is collaboration and refinement and an orderly process.
19 What you don't do is turn up on the eve of the pretrial review and issue 17 applications
20 in an aggressive manner and try and scare off the largest class members.
21 So it is obvious what Google should have done. It's what they did in another case,
22 and they're entitled to no sympathy whatsoever today for the dilatory fashion in which
23 they have proceeded.
24 Now, sir, in terms of what should be done today, of course, my primary position is that
25 the application should be refused and indeed all the other applications. If, sir, you're
26 not minded to do that, we would suggest two things: first, that no order is made today

1 and that this application is relisted in front of the president on an emergency basis as
2 soon as reasonably possible. Because I go back to where I started: if any order is
3 made today and a parallel order, in the case of the other applications, and this trundles
4 on for the next several weeks, the damage will have been done in a significant way to
5 the class before the time the president is able to reach a decision.

6 That is my concern and that is the reason, sir, why we brought forward the application
7 today as effectively a test application. We want to try and nip this in the bud. You
8 would have seen, sir, the conduct of Google was so oppressive it forced the president
9 to issue a series of expectations as to how communications with the class members
10 should be conducted. The approach taken by Google, unfortunately, has already
11 borne fruit. We are very, very concerned that any order today granting any disclosure
12 will lead to a significant worsening of opt-outs even before the president is able to
13 grapple with this.

14 So we'd say the application should be dismissed or at the very least, an emergency
15 application listed before the president as soon as reasonably possible. There should
16 be no order today.

17 THE CHAIR: I think that -- Mr O'Donoghue, that's very helpful, but on the practicality,
18 the reason why Malek has been given the task of dealing with this is (a) because I dealt
19 with the September hearing, but (b) because the president isn't available. You know,
20 there's a huge amount of, let's say, work on the plate of the president on other matters,
21 and that I'd be really surprised if she would have the time to deal with an application
22 like this. I will deal with the application and I will make a ruling, and at least the
23 president will have the benefit of my analysis on all the requirements. Then it may be
24 a much easier task because I suspect that, if I'm going to go down the route that I'm
25 inclined to go down at the moment, it's really going to be a question of whether or not
26 she is prepared to accommodate whatever the suggestions are as to how this can be

1 | dealt with in the light of the fact that I think that there's a real risk that all the steps that
2 | need to be done -- and they will have to actually specify that, both sides will have to
3 | specify what they envisage the steps are going to be -- can be done on time for at
4 | least September. But I can see it taking -- it could end up -- one scenario is either
5 | Mr Holmes gets some sort of order that there'll be a split trial; or the president may
6 | say, "You know, I think we've got the trial in September and this isn't going to be ready.
7 | I'm not going to allow you to go down this route." But she may say, "No, I'm going to
8 | let you go down because it's such a large amount of money for all sorts of things". But
9 | I think it's a pretty difficult position I'm in at the moment. And if this was my case,
10 | I would know how I would deal with it, but it's not my case.

11 | MR O'DONOGHUE: Sir, you have my submission that there is a third scenario which
12 | is, by the time we get to the PTR, there is no worthwhile claim left. And I would suggest
13 | that, ultimately, that is Google's objective here.

14 | THE CHAIR: Yes.

15 | Reply submissions by MR HOLMES

16 | THE CHAIR: Okay, Mr Holmes, so you know where I am at the moment.

17 | MR HOLMES: Yes. Sir --

18 | THE CHAIR: I will make an order with whatever provisions I have. There will
19 | obviously be cost provisions. I'm not going to say what use you can make of this
20 | material at trial. I'm not going to make directions as to further factual and expert
21 | evidence. And it will be for you at the next occasion, the PTR, to persuade the
22 | president how this may be accommodated, either in this trial or you may persuade her
23 | to hive off things. But that's where I am at the moment.

24 | MR HOLMES: Sir, I don't attempt to dissuade you from those qualifications. I accept
25 | and appreciate that you are in a difficult position. You should determine, in my
26 | submission, having heard this application, you've been called in not only because of

1 the September 2025 application but because of your acknowledged expertise in
2 matters of disclosure. In my submission, you are well placed to set out your views
3 which will be of assistance to the president when she comes to consider matters at
4 the PTR.

5 Doing the best you can, in my submission, the fair course is the one that you have
6 plotted out. You cannot, with complete confidence, conclude now whether the material
7 can fairly be relied on at trial. That's my submission. The chair was shown one of the
8 developers' requests at the hearing, and her reaction was not to say that this was all
9 too late. On the contrary, she gave directions for these applications to be brought,
10 Mr O'Donoghue having accepted that they could be brought at any time and that if we
11 get disclosure, they may well lead to adjustments to the volume of commerce at trial.
12 So the material is highly significant, and could have profound consequences for
13 quantum. It cannot be concluded for certain that it won't be capable of being relied
14 upon, and the president should determine that, but steps should be taken now so that
15 the material can be obtained. The developers are protected by the costs orders that
16 you will put in place.

17 This is not -- sir, just for the avoidance of any doubt -- an issue about transfer pricing
18 or tax. This is an issue about how intragroup agreements are calculated, it being clear
19 already that they affect the revenues that are enjoyed by this developer. That may be
20 capable of being dealt with straightforwardly, as we hope. Professor Rodger may
21 conclude otherwise and may wish to contend for a different course. You will not have
22 predetermined that issue. If you decide not to give us the disclosure today, you will
23 have predetermined it and we say that that should be avoided.

24 I don't, sir, unless you think it would be helpful, propose to address you on other points
25 regarding Google's conduct, only to say that they are not accepted for the transcript.
26 I can do so if it would be helpful, but I'm conscious that we are now at 12.30. You

1 need to give an ex tempore ruling and you may have heard enough.

2 THE CHAIR: Yes. This is fixed for half a day. I always keep to my estimates,
3 Mr Holmes, so I'm going to have to give a ruling now. It may be a bit rough and ready,
4 but in the normal way, I'll set out what the relevant law is and the background in the
5 written ruling. I'll just give you my analysis now. Then you'll get a written ruling as
6 soon as I can finalise it, once I've got the transcript back from the transcribers.

7 MR HOLMES: Grateful.

8 (12.30 pm)

9
10 Ruling (submitted to the tribunal for approval)

11 (12.59 pm)

12 On costs, I have already made the order on costs in relation to Company X. I would
13 like to hear Mr O'Donoghue on the position of his costs of this application, in the light
14 of the matters I have already raised.

15 Submissions on costs by MR O'DONOGHUE

16 MR O'DONOGHUE: Thank you, sir. Now costs; three points. First of all,
17 Professor Rodger is an interested party for the purpose of this application, so it is
18 a different status to the respondent of the application; that is not a trivial point.

19 Secondly, the reason Professor Rodger was ordered on the 4 June CMC to be an
20 interested party was because his presence is necessary and helpful for the fair and
21 efficient conduct of the proceedings, including the extent to which represented persons
22 should be required to participate directly in disclosure exercises on the doorstep of
23 trial. So we said it was entirely reasonable regardless of, sir, your order, and
24 necessary for Professor Rodger to assist the tribunal on those issues.

25 Finally, sir, you did advert from the outset and in your ruling that the application we
26 faced until an hour before skeleton was disproportionate, and therefore I would be

1 entitled to seek our costs of having to deal with everything until then. But we would
2 suggest the fair course is either no order as to costs or costs in the case.

3 MR HOLMES: Sir, we'd be content with costs in the case if that assists.

4 THE CHAIR: Mr O'Donoghue, I think you may need to consider another alternative
5 which is you apply for your costs, so can you start again?

6 MR O'DONOGHUE: Yes. Well, it is a point I made to you which is: until an hour
7 before our skeleton was due that we faced a disproportionate application and all of our
8 costs, apart from today, were already incurred by that stage. You'll recall, sir, you
9 extended the deadline for skeletons helpfully by two days. It is clear for Mr Holmes's
10 skeleton that it was prepared at all material times on the basis of the revised request,
11 and we should not have had to spend a lot of time and money dealing with
12 a disproportionate request until an hour before the skeletons were due.

13 But we do say, sir, that in substance we have achieved an important measure of
14 success today. This material -- there'll be a limited disclosure in the case of Company
15 X that is entirely without prejudice to what will take place in the PTR. There is therefore
16 every prospect that this material is not deployed at trial. We say therefore, measured
17 in terms of success, we have achieved something important.

18 We do rely again on the way in which this application was conducted pressingly, not
19 giving the developers time to respond. We think that is relevant in terms of cost today.
20 So we do on a primary basis seek our costs of the application, or as an alternative
21 cost in the case.

22 THE CHAIR: Mr Holmes, the way I'm looking at it is the minimum order should be
23 Professor Rodger's costs in the case. I think that does reflect fairly the result of this
24 hearing and the real need for him to be here to resolve the application. Mr Holmes,
25 would you like to sort of argue against that?

26 MR HOLMES: No, sir. We see why you have proposed that.

1 (1.03 pm)

2 Ruling (submitted to the tribunal for approval)

3 (1.04 pm)

4 Housekeeping

5 THE CHAIR: Mr Holmes, should we now deal with where we are with the other
6 16 applications, because my view is that what you need to do now is take account of
7 what's happened today and look at what are you really seeking from the developers?
8 I'm not going to make an order, but I think that's what needs to be done. Then it's
9 a question of when and how do you want them to be resolved.

10 MR HOLMES: Sir, I appreciate it imposes some burden on you, but our proposal
11 would be on the papers you've set out the principles in responding to this application,
12 we will in very short order provide a revised set of applications. We will aim to do so
13 by next Monday if that is acceptable to the tribunal. Then they could be determined,
14 subject to your availability, sir, in short order thereafter.

15 THE CHAIR: What I want by the time I have the applications done is to obviously have
16 the same schedule that you have in annex A for each one.

17 MR HOLMES: Yes.

18 THE CHAIR: But also I'd like to know from each developer their estimate of the cost
19 as well as, if they can, how long it's going to take, because it may be that it may not
20 be the same answer for each developer.

21 MR HOLMES: Yes. That's understood, sir. Would it be possible to make a direction
22 for the timing of their responses?

23 THE CHAIR: I direct that they need to respond within three days of receiving the
24 revised annex so they know exactly what you're seeking in the light of this decision.
25 Once they've done that then you can put it before me to determine.

26 (Inaudible) consider how long do we give Company X to give (inaudible).

1 Mr O'Donoghue has already said that he thinks it should be two months. The estimate
2 we got of two months was obviously on the basis of the, let's say, wider request.

3 Mr Holmes, what do you say should be the timing, bearing in mind that they should
4 have the opportunity to --

5 MR HOLMES: Take advice as you've indicated, yes. Sir, one approach, if it was
6 attractive to the tribunal, would be to say for the agreements themselves in the
7 three weeks, which we hope would be a very contained category two weeks from the
8 date of the order and then for the other materials, four weeks, including any
9 explanatory statement that they're minded to give.

10 MR O'DONOGHUE: Sir, on that, if I may. I mean, the developer has indicated
11 two months and that that is entitled credibility. You said "Well, I think it could be done
12 in one month". I would suggest that the fairest course is we split the difference
13 because the problem with Mr Holmes's submission is that the question of the
14 agreement and the advice, they do go hand in glove. And there have been questions
15 of, for example, I think, privilege raised by some of the developers in this context; it is
16 a composite point. So we would suggest that it should be six weeks for both.

17 We would also suggest that we should err on the side of caution. Of course, Company
18 X isn't present at this hearing, and if they've said two months to end up with two weeks
19 is quite a quantum leap. So we'd suggest that splitting the difference is a fair course.

20 MR HOLMES: We're just worried it might be a fait accompli, sir, if the timing is too
21 long. We do hope the agreements might be locatable quickly.

22 THE CHAIR: Yes. The agreement should be easy to do that. So the agreement is
23 two weeks. I'm happy with that.

24 The rest will be five weeks and the explanatory statement can cover both aspects of
25 disclosure, (inaudible) something on the agreements as well. They can say that in the
26 true statement.

1 | Then what I suggest you do, Mr Holmes, you will prepare the draft of the order anyway.

2 | MR HOLMES: Yes.

3 | THE CHAIR: If I can have the draft order -- of course, you'll have shown it to

4 | Mr O'Donoghue --

5 | MR HOLMES: Of course, yes.

6 | THE CHAIR: -- back at some stage tomorrow.

7 | MR HOLMES: Of course.

8 | THE CHAIR: Because I'm not around, I don't think, early next week. So if I can, I want

9 | to finalise the ruling, if it comes back quick enough, in the course of tomorrow, along

10 | with the relevant order.

11 | MR HOLMES: We'll get it to you as early as possible during the course of tomorrow.

12 | I'll of course liaise with Mr O'Donoghue.

13 | MR O'DONOGHUE: Sir, on the other developments, if I may, first of all, I would

14 | suggest that three days is remarkably short, given they haven't even received the

15 | revised requests yet. Secondly, there will need to be a provision for Professor Rodger

16 | to respond to their responses.

17 | THE CHAIR: Well, that's simply to get to stage 1, which is to have the application

18 | before me, of course. But what I'm trying to make sure is, by the time I get it, I'm going

19 | to have the information on timing and cost. That's quite important stuff. I'm still inclined

20 | to leave it for three days. If they need more time, they can write back and say they

21 | need more time. But of course, within all of this, there's got to be some opportunity for

22 | you to file something in response. And so, Mr Holmes, you're going to have to, if you

23 | can, agree time with Mr O'Donoghue as to all the sort of stages that we need to have

24 | before determination. So I don't have it (inaudible) because, you know, we've had our

25 | half day, but you should try and do it. And put alternatives in the draft order so I can

26 | provide it. If you can't agree, you can't agree, but I know both of you are highly

1 experienced and able to try and resolve this. You know what the format is; you send
2 it to me with an order, different colours for different positions. I'll just make the decision
3 I need to, and I will determine the other applications on paper.

4 But this does leave you in an odd situation. You've got the hearing on 31 July. The
5 president will have my ruling by then. The process will have started for getting
6 documents, and then the president can make a decision on, let's say, the fundamental
7 issue hanging out there of how can this be accommodated within the trial, by which
8 stage you'll both be able to put in, no doubt, submissions for the PTR as to exactly
9 what evidence you will want to deal with this material and how long it's going to take.

10 MR HOLMES: Yes.

11 THE CHAIR: I accept what O'Donoghue has said that there is a reasonable case that
12 it is not a simple exercise and that he may well need factual and expert evidence. The
13 question is, how does that feed in? By the time you get to the PTR, he would have
14 formulated, perhaps in a lot more detail, the nature of the expert evidence, the
15 expertise and why it's necessary, whereas you at the same time can formulate your
16 position as to what you say is necessary and then the president can make a decision
17 whichever way it is. That's the decision.

18 I'm quite happy to deal with any other issues of disclosure, but I appreciate that the
19 president has got other matters that she has to deal with between now and the PTR.

20 MR HOLMES: I think we're both grateful for that, sir. We know you have other
21 commitments as well, so thank you.

22 THE CHAIR: Yes. Well, if I can thank counsel today, the submissions were really
23 helpful. It was a pretty difficult decision as to which way to go on this. Effectively, I'm
24 giving Google another chance to persuade the president as to how -- that this can be
25 dealt with at trial and how and, if it can't be dealt with within the trial window, to see
26 whether the president is willing to say, "Okay, I'll hive this off and deal with it at

1 | a separate occasion".
2 | That's where we are. Thank you very much, all of you.
3 | MR O'DONOGHUE: Thank you.
4 | MR HOLMES: Thank you, sir.
5 | (1.14 pm)
6 | (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?