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IN THE COMPETITION
APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

31st July 2026

Before:

The Honourable Mrs Justice Bacon
Tim Frazer

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Professor Barry Rodger

Class Representative

&

Elizabeth Coll

Class Representative

- V -

Alphabet Inc., Google LLC and Others

Proposed Defendants

A P P E A R A N C E S

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

Ronit Kreisberger KC, Antonia Fitzpatrick (instructed by Hausfeld) on behalf of Ms Coll
Josh Holmes KC, Kassie Smith KC & Charlie Coverman (instructed by RPC) on behalf of Google

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(10.30 am)

THE PRESIDENT: Some of you are joining us via live stream on our website, so I'll start with the customary warning. An official recording is being made, and an authorised transcript will be produced. But it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court. Thank you very much. I should also say that I'm feeling the arctic chill in the room, and I have asked for the temperature to be turned up. A little bit ironic in a heat wave.

Housekeeping and Agenda

THE PRESIDENT: All right. Thank you very much, everyone, for your submissions, and thank you for the further authority that we received this morning. For the reasons that we'll discuss when we get to that part of the agenda for today, provisionally, I don't think that we're going to need to go there. But we note the authority is obviously the well-known judgment of the Supreme Court in relation to the reflective loss principle, which I understand is relied on by Professor Rodger. But, as I said, speaking for myself, at this stage I think that's not something we can conceivably give a ruling on today and in the context of a PTR. We'll just discuss how we deal with that when we get to that issue. Now, the order in which I propose to deal with things is as follows.

Firstly, to deal with the trial timetable — and we've got a few questions on that, in addition to the ones that have been raised by the parties.

Secondly, to deal with the trial management issues. My list is page limits; hot tubs. I think the directions are agreed, but someone will tell us if they're not. The directions are for factual witnesses and documents to be put to them, and use of transcripts overnight; then trial bundles and confidentiality. So that deals with big issue number 2,

1 | trial management issues.

2 | Thirdly, to deal with Coll's application to amend.

3 | Fourthly, to deal with Rodger's application to amend.

4 | Fifthly, to deal with the Google trial expert reports and the complaints that have been
5 | made about those by Coll.

6 | Finally, to deal with the question of the use at trial of the disclosure from the app
7 | developers and where we go on that.

8 | In terms of the headlines does that cover everything or have I missed anything? If
9 | anyone thinks that -- yes.

10 | MR O'DONOGHUE: It does.

11 | THE PRESIDENT: It covers everything, all right. If anyone disagrees, please say so
12 | now and I'll add it to my list.

13 | All right. So, there being no disagreement, let's just go into the trial timetable. I should
14 | say, if necessary, if we're not making sufficiently good progress, we could slightly
15 | shorten the lunch adjournment or we could sit slightly late, but I'm anticipating that we
16 | should be able to get through the matters for this PTR comfortably in the time available.
17 | We'll have a short break at about 11.45.

18 |
19 | Trial timetable

20 | Discussions re cross-examination

21 | THE PRESIDENT: All right. Timetable. The first issue on my list in relation to the
22 | timetable is the time for cross-examination of the claimants' witnesses. That is, I think,
23 | Google's issue. Can I just tell you what our proposal is. My understanding is that you
24 | want a little bit more time, Ms Smith, if you're dealing with this, to cross-examine the
25 | claimants' witnesses of fact and you are proposing that you use for that purpose some
26 | of Monday, 12 October. In other words that the cross-examination of Mr Cunningham

1 | shouldn't last an entire day, and you're proposing it should be half a day. I mean,
2 | we've looked at the length of Mr Cunningham's witness evidence, and there seems to
3 | be quite a lot in that. We anticipate that there may need to be -- and we're not saying
4 | now that it definitely does need to be a day, but we wouldn't be surprised if that would
5 | take a day.

6 | So, I am wondering whether we can deal with this in an alternative way, which is by
7 | starting early and finishing late on 14 October. So, we could, for example, start at 9.30
8 | and we could finish at 5.00 on that day. Then we could also start early on 16 October.
9 | That would give Google effectively the further half day that you're asking for. Would
10 | that work?

11 | MS SMITH: We would be very happy with that, yes.

12 | THE PRESIDENT: All right. Does that cause problems with anyone else in the
13 | courtroom?

14 | MS SMITH: Not us, thank you.

15 | THE PRESIDENT: No. All right. Well, let's do that and let's build that into the
16 | timetable. I should say that at the end of this section, we'll just need to discuss how
17 | we are going to produce an updated trial timetable reflecting wherever we get to in this
18 | hearing as well as actually now specifying when all of the witnesses are going to be
19 | called. That may not be immediate, but we'll need to have that in good time before
20 | the trial. So just give some thought to that. So that's the first issue.

21 | The second issue is Google's request to schedule a rather hard provision for
22 | continuation of the cross-examination in the econ 3 issues pass-on and quantum into
23 | 17 November. Provisionally, I'm content with scheduling a definitive continuation into
24 | the morning of 17 November. But I think that we shouldn't just assume that the
25 | afternoon will be available, and I think we should say that unless there's an extremely
26 | good reason, we are going to assume that cross-examination will finish by lunchtime.

1 | So, we're not really attracted to the idea of just having the afternoon as an overspill
2 | day.

3 | The amendment, if there is one, as far as we're concerned should be -- the
4 | cross-examination can continue into the morning. So, it's not just listed as an overspill
5 | provisionally. But that will be it; that we will finish by the morning. Because we're very
6 | aware that the size of the legal teams on each side is variable, and there are some
7 | people who are going to have to be doing a very, very large amount of work in quite
8 | a short amount of time. You might say that it's just a few hours, but I'm sure a few
9 | hours will make a difference to some people in the courtroom.

10 | MS SMITH: Madam, that is acceptable for us. I understand that at least Coll has
11 | indicated prior to the hearing that they would also appreciate a full day and a half. So
12 | we take what you've said about stopping at lunchtime. But if we have a day and a half
13 | for cross-examination on these issues, which I hope, my Lady, you'll appreciate are
14 | important issues live between all three parties.

15 | THE PRESIDENT: Yes.

16 | MS SMITH: We have four experts testifying on these issues. So, we think a day and
17 | a half is necessary, but we're happy with what you say, madam.

18 | THE PRESIDENT: Yes. Just while we're on the subject of cross-examination, can
19 | I just check that it's not intended that any of the witnesses will be cross-examined by
20 | multiple members of the same counsel team.

21 | MS SMITH: My Lady, our plan insofar as it's acceptable to the Tribunal, is that
22 | Mr Holmes and I will be splitting the expert witnesses by topic, so there will only be,
23 | for example, one or other of us cross-examining the class representatives' experts on
24 | market definition, exclusionary abuse and objective justification. So, you will only have
25 | one of us appearing for each session with the experts. We won't be splitting each
26 | session.

1 THE PRESIDENT: All right. But that does mean that you -- if I just look at the way
2 that they've been divided up.

3 MS SMITH: Yes. If you look at week 6, my Lady, on the second page of the Tribunal's
4 draft timetable.

5 THE PRESIDENT: So, there's cross-examination down there. Are you saying that
6 say for each -- we've got three economists' sessions for cross-examination: 1, 2 and
7 3. Are you saying that for each of those we will have no more than one of you
8 cross-examining?

9 MS SMITH: It will either be Mr Holmes or myself.

10 THE PRESIDENT: Right. So, for econ 1.

11 MS SMITH: Yes.

12 THE PRESIDENT: It's not suggested that you are going to divide that by topic so that
13 you --

14 MS SMITH: No.

15 THE PRESIDENT: -- are both cross examining in that session.

16 MS SMITH: No. It's each session. We will take each session.

17 THE PRESIDENT: All right. That was a concern because I think it can be quite hard
18 for witnesses to be cross-examined by two counsel.

19 MS SMITH: Exactly.

20 THE PRESIDENT: I think that would need to be flagged today.

21 MS SMITH: That does mean that I will be cross-examining, for example,
22 Professor Fletcher on certain issues, and Mr Holmes will be cross-examining her on
23 other issues. But it will be for different sessions.

24 THE PRESIDENT: Different sessions.

25 MS SMITH: Yes.

26 THE PRESIDENT: All right. Okay. What's the position for the other counsel teams?

1 | Is that the same?

2 | MS KREISBERGER: Could I start with the factual witnesses, madam, which is I think
3 | where you began the question, will we be having more than one counsel team member
4 | addressing questions to the same factual witness?

5 | THE PRESIDENT: Yes. I was asking about both really.

6 | MS KREISBERGER: Both, yes. So factual, yes. So, the split on our team between
7 | Mr Hoskins and me is, Mr Hoskins will be dealing for the entirety of the trial with market
8 | definition, dominance and the exclusionary abuses. I'll be leading on excessive
9 | pricing, incidence and quantum. Mr Armitage will be dealing with payments and
10 | security. That does, I'm afraid, mean that different counsel team members will be
11 | putting questions to the same factual witnesses, but on these discrete topics. That
12 | was the approach taken in Australia as well with the very same witnesses. So it won't
13 | be, as it were, their first rodeo. They're well used to team members asking different --

14 | THE PRESIDENT: Yes, all right. But that should have been flagged. This is normally
15 | an issue that should be raised at the PTR so that the Tribunal can decide whether
16 | that's appropriate. Because normally you would not have more than one counsel
17 | member cross-examining the same witness. So, I think that we will need a statement
18 | of that. Is it possible for a document to be produced by this afternoon, from you and
19 | indeed anybody who -- I mean is it also the case for your team, Mr O'Donoghue?

20 |
21 | MR O'DONOGHUE: Yes. In addition, of course, we have a number of exclusionary
22 | abuses that Coll are not running, at least directly, such as anti-steering, Project Hug,
23 | so they were supplemental points in any event, but there will be a division of labour
24 | between Ms Blackwood and myself.

25 | THE PRESIDENT: Right. What about the Google team?

26 | MS SMITH: One counsel will be cross-examining one witness. We won't be splitting

1 | the cross-examination. So, this is news to us, as I think it is to the Tribunal.

2 | THE PRESIDENT: Yes.

3 | MS SMITH: The implications of it are that Google's witnesses may be cross-examined
4 | by up to four different counsel, which is not ideal, my Lady. We're not proposing that
5 | approach. It's not ideal. But I hear what you say, my Lady, about ...

6 | THE PRESIDENT: I think maybe if you can both try and produce something for this
7 | afternoon so that we can just look at concretely what that means for the
8 | cross-examination of the witnesses.

9 | It is normal practice, in this jurisdiction, whatever is done in other jurisdictions, for
10 | a single witness to be cross-examined by a single counsel member, and if that's not
11 | going to be the case for that to be raised at the PTR. So that really should have been
12 | raised. We would like to try and deal with this today if possible.

13 | If you can produce, each of you, a document setting out who is intending to
14 | cross-examine which witnesses where there are multiple counsel members
15 | cross-examining a single witness, then that would be helpful and we can consider it.
16 | If not, we'll need to consider it on the paper after the PTR, and maybe very shortly
17 | after the PTR so it can be reflected in the PTR order.

18 | MS KREISBERGER: I'm grateful. So if it can't be done today, then by first thing on
19 | Monday.

20 | THE PRESIDENT: By first thing on Monday, yes.

21 | Can you just clarify, is this only for the factual witnesses or are you in a different
22 | situation than the Google team for the experts?

23 | MS KREISBERGER: I don't think we are because it's split by these very topics across
24 | the hot tubs.

25 | THE PRESIDENT: All right. But I haven't really thought about how your split maps
26 | on to the hot tub and cross-examination topics. If you go away and you can confirm

1 | this afternoon that for each of the different economist topics you've only got one
2 | counsel then that will clarify the position for the experts, and we then just maybe have
3 | to deal with the factual issues.

4 | MS KREISBERGER: Yes. And if it's helpful, just so the Tribunal is aware, this is really
5 | following the *Kent* template where the same splits were broadly adopted by counsel.

6 | THE PRESIDENT: Right. Okay. Well, let's come back to that this afternoon, if you're
7 | able to, to put something in writing. I presume it should be relatively straightforward
8 | to just get a document up which says which of the witnesses this goes to --

9 | MS KREISBERGER: Yes.

10 | THE PRESIDENT: -- and which of the counsel team are proposing to cross-examine
11 | each of those?

12 | All right. Let's move on then.

13 | Discussions re hot tub

14 | THE PRESIDENT: The next question that we've got is the second economist hot tub,
15 | which is excessive pricing. At the moment the provisional timetable has Harman in
16 | that hot tub and that was picked up from the party's timetable. Harman seems to give
17 | very little evidence of relevance to that, and he is an accountancy expert, not an
18 | economist. So our question is whether Harman should really be in that hot tub
19 | because I don't want somebody coming along who's - I mean, I've looked at the
20 | relevant section of his expert report and it's a matter of a page or so where he talks
21 | about ROCE and WACC and so on. I don't really think that it's appropriate for him to
22 | be interposed there when the issues are not going to focus on those points.

23 | So, could I please have a response as to whether Harman should be in or out?

24 | MS SMITH: My Lady, we strongly agree with the indication you've given. We're trying
25 | to keep this trial efficient and focused. The inclusion of Mr Harman in that hot tub we
26 | don't think is either necessary or in line with keeping these proceedings efficient and

1 | focused.

2 | THE PRESIDENT: All right. Mr O'Donoghue, it's probably for you, isn't it?

3 | MR O'DONOGHUE: Yes, it is.

4 | So, madam, you're right that Mr Harman is certainly wearing an accountancy hat, but
5 | he essentially does the same job as Mr Dudney and Mr Holt for Coll, because he's not
6 | simply looking at the pure accounting questions. He's also, for example, looking at
7 | the question of the significance and persistence of the excess for purposes of limb 1,
8 | which I think --

9 | THE PRESIDENT: Mr Dudney is not in that hot tub.

10 | MR O'DONOGHUE: Yes, but my point is that Mr Harman is wearing two hats and
11 | trying to disaggregate them, given that he expresses views in both accounting and
12 | competition economics.

13 | THE PRESIDENT: Looking at his expert report, it's not another hat, it's just a bit of
14 | icing on the hat.

15 | MR O'DONOGHUE: Well, the limb 1 significant persistence is the question of
16 | competition economics only, it's not a question of accounting. He expresses opinions
17 | on both, and Mr Harman, I think, uniquely is both a competition economist and an
18 | expert accountant.

19 | THE PRESIDENT: He's put forward as an accountancy expert, and the relevant bit of
20 | his expert report is a couple of pages. It's really questionable whether to the extent
21 | that he gives any relevant evidence at all that this should really be in that hot tub.

22 | MR O'DONOGHUE: Madam, the conclusion of limb 1 again is a question of
23 | competition economics. In my respectful submission, the way forward is to, frankly,
24 | manage Mr Harman rather than to boot him out completely, and that can be done very
25 | effectively. Mr Harman is very, very experienced. He will not be bobbing up and down
26 | for the sake of it, and he can take his lead from the Tribunal.

1 THE PRESIDENT: Why can't Ms Fletcher deal with any of those issues?

2 MR O'DONOGHUE: Because she relies on what Mr Harman says.

3 THE PRESIDENT: Well, okay. So, she can rely on what he says. Then when he
4 gives his evidence on accountancy, that can be addressed?

5 MR O'DONOGHUE: Yes, but she's not independently expressed a view on anything
6 to do with limb 1, including significance and persistence. That's the difficulty. There
7 is a gap in her evidence.

8 THE PRESIDENT: Well, it doesn't mean that every single issue that is covered in
9 every footnote in the economic reports or the other reports needs to be the subject of
10 the hot tub. What we are going to be eliciting in the hot tub are the main points, and
11 the question is whether somebody is going to have an opportunity to cross-examine
12 Mr Harman on that. You will have an opportunity to cross-examine him in the
13 accounting evidence.

14 MR O'DONOGHUE: Madam, I made my point.

15 THE PRESIDENT: Yes.

16 MR O'DONOGHUE: The limb 1 conclusion is not a footnote. It is a fundamental,
17 separate part of the competition economics case, and it is one on which only
18 Mr Harman (audio distortion) has expressed a view.

19 THE PRESIDENT: Let's look at what part of his evidence is, you say, necessarily
20 going to have to feature in that hot tub. Where in his expert report --I've got open --

21 MR O'DONOGHUE: Bundle E.

22 THE PRESIDENT: It's headed "The forensic accounting and economics of limb 1 of
23 *United Brands* issue 5". So, he deals with the forensic accounting issues. I think the
24 only issue that he addresses which you say is relevant to this part is "My position on
25 the economic issues relating to limb 1", and it starts at page 27 of his report. (Pause)
26 I've got this at PTR bundle E2, page 33.

1 | MR O'DONOGHUE: As I read it, madam, he gives evidence across seven limb 1
2 | issues, including the question of the significance and persistence of the excess. And
3 | the other reason, madam, why that is important is he, uniquely, has put forward --

4 | THE PRESIDENT: So where is that part of his assessment? Because the initial
5 | sections are really accountancy issues. 4.1.4, that section, "Fully allocated cost
6 | approach". That's an accountancy issue. The next point is about whether it's possible
7 | to be reasonably accurate. I mean, that's a couple of paragraphs which again turn on
8 | accounting issues.

9 | MR O'DONOGHUE: Yes.

10 | THE PRESIDENT: The next paragraphs also deal with accounting issues. He does
11 | say in a few places he agrees with Mr Holt or refers to Mr Noble. But I don't think that
12 | it's necessary to have a hot tub on the issues which he addresses there.

13 | Where do we get to that on the points that you say really need to be in that hot tub?
14 | Because as far as I can see, that entire section of his report, although he puts this in
15 | under limb 1, deals with accounting concepts which I assume will be coming out in the
16 | accounting evidence on Wednesday, 4 November.

17 | MR O'DONOGHUE: Yes.

18 | THE PRESIDENT: Or before then.

19 | MR O'DONOGHUE: Yes. But a couple of points on the accounting issues, the ROCE
20 | and WACC, his approach is not identical to that of either Mr Dudney or --

21 | THE PRESIDENT: Well, all right, so it's --

22 | MR O'DONOGHUE: -- Mr Holt. So that's the first point.

23 | Then secondly, madam, because on limb 1 he has, different metrics, for example, he
24 | includes the TIRR or the truncated internal rate of return, he has a separate
25 | significance and persistence assessment for that metric which is not adopted by any
26 | of the other experts.

1 THE PRESIDENT: So where is that?

2 MR O'DONOGHUE: That is in Harman 2 and 3.

3 THE PRESIDENT: I'm looking at the trial expert report of Mr Harman.

4 MR O'DONOGHUE: Yes.

5 THE PRESIDENT: So that's the one report that we're going to be using at trial?

6 MR O'DONOGHUE: Yes.

7 THE PRESIDENT: Is there another one?

8 MR O'DONOGHUE: You see at 4.1.13? It deals with "significance and persistence".

9 It's page 36.

10 And you see, madam, at 4.1.15. That's my reference to his unique TIRR metric where

11 he has different excesses. That is something only covered by Mr Harman. As I said,

12 he's effectively doing the job of Dudney and Holt in a composite report.

13 THE PRESIDENT: But he makes those calculations?

14 MR O'DONOGHUE: Yes.

15 THE PRESIDENT: Is there any suggestion that he won't be able to be cross-examined

16 on those fully to the extent anyone wants to on 3 and 4 November?

17 MR O'DONOGHUE: That may be the way forward, that we see how we go, and maybe

18 that Mr Harman, ultimately, either doesn't need to be in the hot tub, or can be in a very

19 small part of the hot tub. I would suggest that that may be a way forward.

20 THE PRESIDENT: All right.

21 Let me hear Mr Smith on this point.

22 MS SMITH: Very briefly, madam. The analysis that Mr O'Donoghue took you to from

23 paragraph 4.1.13 onwards is really just more of the accounting issues. It's his table of

24 the ROCE, and that, we say, can be dealt with when cross-examination is carried out

25 on the accountancy issues.

26 There's no need for Mr Harman to be in the hot tub, but we do need clarity on that

1 | issue today, with the greatest respect, rather than waiting and seeing.

2 | THE PRESIDENT: Is Mr Harman going to be remaining available for the hearing?

3 | Let's suppose we say now that we think he probably won't be required, for that hot tub.

4 | The hot tub is nothing to do with you because, that's going to be led by the Tribunal.

5 | So that's not going to be a matter for you preparing for that, unless there are going to
6 | be some minor supplemental questions, which would be in the days after.

7 | So is it envisaged that if we say now that Harman is out, he is then going to not make
8 | himself available or would he be available? That's a question for Mr O'Donoghue.

9 | MR O'DONOGHUE: I think he will be available, but with respect, Ms Smith is not
10 | correct that significance of persistence is an accounting question. It is an autonomous
11 | question of competition economics, which comes directly from *United Brands*, that line
12 | of case law. It is not a question of accounting, it's something that Mr Harman has
13 | expressed a view on, and Ms Professor Fletcher has not expressed a view on.

14 | THE PRESIDENT: All right. So, it just means that to the extent that that arises, we
15 | will not be able to ask questions of him in the hot tub if he's not there. But the
16 | assumption will need to be that, on that basis, he will be cross-examined on that during
17 | the accounting period of time?

18 | MR O'DONOGHUE: Yes.

19 | THE PRESIDENT: All right.

20 | MR O'DONOGHUE: You will understand the submissions I'll be making.

21 | THE PRESIDENT: Yes. All right. That needs to be dealt with in the cross-examination
22 | of Mr Harman, and that all needs to be done in the accounting slot rather than having
23 | part of Mr Harman's evidence spliced into the hot tub. We will assume that any
24 | questions that need to be asked of him will be asked during the accounting slot and
25 | that we will not be asking questions of him in the hot tub, nor will there be an extra
26 | cross-examination of him in the econ 2 excessive pricing slot. And I think that that will

1 | streamline the expert evidence. (Pause)

2 | Discussions re CMA

3 | THE PRESIDENT: All right. The next issue I have is how the CMA is going to fit in

4 | the timetable.

5 | At the moment we have a slot for the CMA on 6 October, but there's no specific

6 | provision for that. I'm assuming that the claimants don't want their opening

7 | submissions to be truncated to make space for the CMA. So our proposal is that we

8 | should perhaps have a 9.30 am start on 6 October to accommodate the CMA. Then

9 | you will just need to finish maybe by 3.30 pm with the claimants, so that the CMA can

10 | then speak from 3.30 pm to 4.30 pm. Does that sound acceptable?

11 | MS SMITH: That sounds excellent to us. Thank you, madam.

12 | THE PRESIDENT: Okay. Just while we're talking about timings, is everyone working

13 | to the assumption that we will otherwise run from 10.30 am until 4.30 pm?

14 | MS SMITH: We certainly are. Yes, on the claimants' side.

15 | THE PRESIDENT: Okay. Thank you.

16 | MS SMITH: Madam, well, before we move on from the CMA submissions, I think they

17 | have indicated, or at least the Tribunal has indicated in correspondence that the CMA

18 | will not be making oral closing submissions so they can be taken out of the timetable

19 | for 1 December.

20 | THE PRESIDENT: Now, do we need to deal with anything else regarding the CMA?

21 | Or are the other issues regarding the CMA agreed?

22 | We understand that there's going to be a further written submission coming.

23 | MS SMITH: It was actually received on 27 July.

24 | THE PRESIDENT: I'm sorry. It has been received. Yes. All right.

25 | Is the assumption that, insofar as necessary, you will all deal with that in your written

26 | openings?

1 MS SMITH: Yes, my Lady.

2 THE PRESIDENT: All right.

3 MR O'DONOGHUE: It's from David Bailey KC who, as you'd expect, is admirably
4 clear.

5 THE PRESIDENT: Well, I'm sure it is, but I haven't read it.

6 All right. Is there anything else on the timetable?

7 Discussions re updated timetable submission

8 THE PRESIDENT: So then the question remains as to when you will produce an
9 updated timetable which builds in the timings for the days that we're sitting in early and
10 late and also sets out who is going to be cross-examined when. That's both factual
11 witnesses and experts, so a more detailed version of this. When do you envisage that
12 you will all be in a position to produce that? (Pause)

13 MS KREISBERGER: Well, we were going to propose Monday, but I think, Ms Smith
14 may need to make submissions asking for a later slot. We see no objection to getting
15 that done immediately.

16 THE PRESIDENT: Have you already worked out when you're going to be
17 cross-examining -- when the factual witnesses are going to be called?

18 MS KREISBERGER: Well, we have a clear idea on our side about timing. Certainly.

19 THE PRESIDENT: Okay.

20 MS SMITH: We were thinking that the claimants may require a little more time as they
21 have more factual witnesses -- more of our factual witnesses to decide when they want
22 them to come. But yes, we're happy with Monday. We've got a relatively clear idea
23 at the moment of who we want when by way of the claimants' factual witnesses.

24 THE PRESIDENT: All right. So that would be helpful, so we've got that before we
25 finalise the order.

26 Do you want the timetable to be appended to the order when it's made?

1 MS SMITH: I think that would be useful, madam.

2 THE PRESIDENT: It doesn't have to be. If it's appended, it's going to go on the
3 website. If it's not, it'll be for internal use.

4 MS KREISBERGER: We're in your hands. We don't have a strong view.

5 THE PRESIDENT: All right. But at any rate we should have it for Monday?

6 MS KREISBERGER: Yes.

7 THE PRESIDENT: All right. Then everyone knows who's going to be cross-examined
8 when?

9 MS KREISBERGER: Yes.

10 MS SMITH: Yes, madam. Sorry. I've just been instructed that as a number of Google
11 witnesses will of course be coming over from the States, we might need a little more
12 time to determine when they will be available. But we anticipate working closely with
13 the claimants as far as we can to make sure that they're available for when the
14 claimants want them. But we may need a little more time than one day.

15 MR O'DONOGHUE: Yes, madam. We have three witnesses, factual witnesses. Coll
16 have none. They're not obviously inside our tent, unlike Google. We will need to
17 check with them today and possibly into Monday.

18 THE PRESIDENT: Right.

19 MR O'DONOGHUE: Might I suggest, therefore, that we have the possibility of coming
20 back to the Tribunal on Tuesday?

21 THE PRESIDENT: Well, I was going to say then, in that case, let's not append it to
22 the order. We'll get the order out, but if the parties could produce the more detailed
23 timetable as soon as possible next week, and I'll just leave that with you.

24 MS SMITH: All right. Thank you, my Lady.

25 THE PRESIDENT: All right. If that deals with all of the timetable issues, can we then
26 move on to the trial management issues, starting with page limits?

1
2 Trial management issues
3 Discussions re page limits
4 THE PRESIDENT: Our provisional proposal is that Coll and Rodger should each have
5 100 pages and Google to have 150. Does anyone want to try and persuade me
6 otherwise?
7 By the way, we have looked at the page limits in other cases, and we've considered
8 what issues are in this case.
9 Who's going to jump up first?
10 MS SMITH: I was just going to confirm we'd consent to that. So I'm not seeking to
11 dissuade you from that.
12 THE PRESIDENT: Yes.
13 MR O'DONOGHUE: Likewise.
14 THE PRESIDENT: All right, all right. Good.
15 Discussions re hot tubs
16 THE PRESIDENT: Hot tubs. I don't think there's any dispute. Is there agreement as
17 to the provisions for hot tubs? For example, that the experts get to have hard copy
18 annotations. I think the provision for that just follows the experts practice direction.
19 MS KREISBERGER: That's right. We understand that to be agreed between the
20 parties.
21 THE PRESIDENT: All right.
22 MS SMITH: Yes. That's paragraphs 22 and 23 of the draft order, I think.
23 THE PRESIDENT: All right.
24 Discussions re factual witnesses
25 THE PRESIDENT: Factual witnesses. Our provisional view is that 24 hours' notice
26 should be given of additional documents. That should not extend to Mr Krein who's

1 | been regarded as an expert witness. Does anyone want to persuade us of a different
2 | order?

3 | MS SMITH: Subject only to that should be one working day, rather than notice being
4 | given on Saturday evening or Sunday evening.

5 | THE PRESIDENT: One working day.

6 | MS SMITH: Yes, my Lady.

7 | THE PRESIDENT: All right, that's what was intended.

8 | MS SMITH: Thank you, my Lady.

9 | THE PRESIDENT: One working day? (Pause)

10 | MR O'DONOGHUE: We're content with that.

11 | THE PRESIDENT: All right. One working day's notice of additional documents, not
12 | to include Krein who will be regarded, for these purposes, as an expert.

13 | Now, then the remaining question I have on factual witnesses is whether the witnesses
14 | should have transcripts overnight.

15 | Our provisional view is that we don't see any reason why the same should not apply
16 | to all witnesses, both factual witnesses and experts on the same basis as we provided
17 | in *Qualcomm*, which is that if anyone, having seen the overnight transcript, wants to
18 | come back and make a very brief clarification of their evidence the following day, that
19 | will be permitted.

20 | We do expect that to be extremely brief and of a clarificatory nature. They will not be
21 | permitted to come along with a prepared speech which recounts in total an entire
22 | section of their evidence the previous day on, having thought of it better. Is there any
23 | problem with doing it that way?

24 | MS SMITH: My Lady, we're happy with that, as indicated in our skeleton.

25 | MS KREISBERGER: We're also happy with that.

26 | MR O'DONOGHUE: Likewise.

1 THE PRESIDENT: All right. Is there anything else that arises in relation to the factual
2 witnesses? (Pause)

3 No. All right.

4 Discussions re trial bundles

5 THE PRESIDENT: Trial bundles. A few points that we wanted to emphasise that,
6 insofar as relevant -- and I know we're using Opus bundles -- but the bundles should
7 comply with the provision of the bundles practice direction, which as you should know,
8 applies equally to Opus bundles where that's used. Obviously, there's a difference in
9 the structure of those bundles, but in general, the practice direction should be complied
10 with.

11 In particular -- and this is going to be an issue in this trial -- where there are
12 confidentiality markings, the confidential passages should be clearly marked with
13 appropriate colour coding and a key provided to the Tribunal. The colour coding must
14 allow the text to be read underneath, so dark red is not going to work. It needs to be
15 a sufficiently light colour that we can see what is written underneath. The colour key
16 needs to be provided to the Tribunal. Then the same confidentiality markings need to
17 be applied throughout, for example, in the skeleton arguments, so that we know
18 exactly what's confidential.

19 The current skeleton arguments for today don't mark up what is confidential. So we
20 don't know what we can say in open court or not. We're not going to be able to do the
21 trial on that basis. We're going to need to know what is confidential, so that we can
22 also make an assessment of when we need to go in and out of private session.

23 We also would like there to be as early as possible resolution of any outstanding issues
24 regarding confidentiality designations. It seems to me, from what I've seen so far, that
25 there is a large measure of agreement on what's going to happen, and that Google
26 has agreed to provide category explanations.

1 | Is that now common ground as between the parties? Are there likely to be any
2 | remaining disputes on confidentiality before the hearing?

3 | MS SMITH: My Lady, if I could deal with the points in order that you have raised, on
4 | our skeleton argument for today's hearing, we have actually highlighted confidential
5 | material, for example, page 12 of our skeleton. I do hope you've received the version
6 | of our skeleton with the red confidentiality highlighting.

7 | THE PRESIDENT: No, I don't have that. I've only got a version that doesn't.

8 | MS SMITH: I apologise, you should have received a version.

9 | THE PRESIDENT: It's all right (overspeaking).

10 | MS SMITH: Page 12, for example, internal page 12, does have confidentiality
11 | markings. Essentially they are the --

12 | THE PRESIDENT: Oh, I'm sorry. Okay. Sorry. I was looking at the wrong bit.
13 | Yes, I can see that in yours. I don't see the same in some of the other skeletons.

14 | MS SMITH: My Lady --

15 | THE PRESIDENT: Yes, no, no, you're right. I've got that.

16 | MS SMITH: Those are names which we would ask your Lady not to, to mention in
17 | open court.

18 | THE PRESIDENT: Well, can I just ask about that? Why is that confidential? I noticed
19 | that that was confidential in the hearing before Mr Malek.

20 | MR HOLMES: Yes. We agree, madam. It's not confidential because of any concern
21 | about confidentiality from Google. The concern is that the developers themselves
22 | regard their identity as confidential, as I understand the position.

23 | THE PRESIDENT: So, this is third party.

24 | MR HOLMES: It's third party, exactly.

25 | THE PRESIDENT: Well, as in the *Qualcomm* case, I think it's going to be important
26 | that if there are issues like that, we bottom that out before the start of the trial.

1 | MR HOLMES: That's understood.

2 | THE PRESIDENT: Now, for my part, I cannot understand why the identity of the
3 | developers is confidential.

4 | MR HOLMES: No, I think I can say we share that view. We don't consider the
5 | material, the names of the developers to be confidential.

6 | THE PRESIDENT: All right. I mean, it may be that at no point does anyone have to
7 | refer to this. So it may be that at the trial we don't need to deal with it, but if there is
8 | any possibility of things like this, in relation to which there seems to be a profound
9 | disagreement as to confidentiality, maybe not between these parties, but between you
10 | and third parties. That needs to be resolved, because I don't want to be going
11 | unnecessarily into and out of private session. Is this going to become at all relevant
12 | at the trial?

13 | MR HOLMES: The identities of the individual developers, potentially it will be
14 | necessary, it would be convenient to refer to them. We could refer to them by means
15 | of, you know, company X, as we did in the 9 July hearing. That's not ideal. I mean, it
16 | just adds a layer of complexity.

17 | THE PRESIDENT: Yes. Is that the only issue where there's likely to be a third-party
18 | issue that we should deal with before the trial?

19 | MR HOLMES: No, regrettably not. There's a large volume of disclosure that came
20 | across from the US, from Epic and from other developers, where there are
21 | confidentiality claims by third parties. It may be that some of that material will be
22 | referred to at trial.

23 | THE PRESIDENT: Well, I think that -- yes, Mr O'Donoghue?

24 | MR O'DONOGHUE: I mean, it wasn't simply the developer names. No, it doesn't
25 | matter, in fact. It was Google originally who put forward the designation of names as
26 | confidential. The real issue, of course, is the highly sensitive material such as transfer

1 | pricing, the content of agreements, as we apprehend it. The developers have said
2 | loud and clear, that is unbelievably sensitive.

3 | THE PRESIDENT: Yes.

4 | MR O'DONOGHUE: But we will work as best we can with Mr Holmes and with the
5 | third parties the best we can, to minimise or avoid the scope to go into confidential
6 | session more than we need to.

7 | THE PRESIDENT: All right. Can I ask then that some thought is given to this. We
8 | are, as you know, in the process and actually very close to the end of finalising
9 | a confidentiality practice direction, which will deal with some of these kinds of issues
10 | for the future. But I don't think that that will be out. Well, it may be out in the next
11 | couple of weeks. But one of the points that is raised in that and has been discussed
12 | with the user group, is precisely the question of having a protocol agreed which sets
13 | out how confidentiality is going to be managed.

14 | Now, I don't think that there has been a confidentiality protocol in these proceedings,
15 | at least I haven't seen one. But without wanting to ask you to go away and do
16 | something, you've obviously agreed confidentiality arrangements so far, but I think we
17 | need to understand how confidentiality is going to be managed at the trial and the
18 | extent to which we are likely to have to go in and out of closed session.

19 | Actually, I think some thought needs to be given to the question of, for example, the
20 | identity of the developers, even if not their confidential data; that's a different question.
21 | But whether the identity of the developers is something that can now be unredacted.
22 | For my part, I can't see how that could possibly be confidential: the fact that there are
23 | certain developers against whom disclosure applications have been made and the
24 | identity of those developers. Of course, the content of what they have disclosed I can
25 | readily understand is confidential. But their identity, it seems to be very odd if they are
26 | the developers who are the subject of these applications and about whom there will

1 | be presumably some submission at trial, whatever way we choose to proceed on the
2 | disclosure issue. I think that's going to be very difficult to deal with if we can't say the
3 | developer names. I think it's quite cumbersome for us to have to identify them by code
4 | words or code letters.

5 | So I think it would be preferable for you all to come up with a way of dealing with
6 | confidentiality at trial, and just give us a very short document saying how you propose
7 | to deal with it, but also to try to un-redact as much as possible, including in relation to
8 | third parties, and if necessary bring any disputes on that back to the Tribunal, so
9 | a decision on the papers can be made by somebody whether or not it's me, before the
10 | trial. Because I don't want to have to deal with this at the start, if it seems to be when
11 | we get the skeleton arguments that there are, you know, huge issues, which are going
12 | to be very difficult to discuss in open court.

13 | MR HOLMES: Yes.

14 | THE PRESIDENT: All right.

15 | MR HOLMES: We will do that.

16 | THE PRESIDENT: Yes. Obviously not by Monday. Perhaps you could put something
17 | in the draft order with a proposed timetable for dealing with this, and how to resolve
18 | any remaining disagreements. All right.

19 | MS SMITH: My Lady, we hear what you say.

20 | Just before we leave the topic of confidentiality.

21 | THE PRESIDENT: Yes.

22 | MS SMITH: It's the draft order, paragraphs 9 to 16, which deals with the trial bundles
23 | and confidentiality review process. So this is the process for reviewing documents for
24 | confidentiality before they go into the trial bundle.

25 | THE PRESIDENT: Yes.

26 | MS SMITH: There were some outstanding points highlighted in paragraphs 52 and

1 | 53 of Ms Coll's skeleton argument. We have just received a proposal from Ms Coll to
2 | resolve those outstanding confidentiality issues. We, with respect, suggest if we have
3 | the opportunity to take those away and discuss over lunch, we hope they can be
4 | resolved without having to disturb the Tribunal any further.

5 | THE PRESIDENT: Yes. All right. And nothing that I've said impacts on those,
6 | because my question is really about how we deal with it at trial.

7 | MS SMITH: Those are different issues. This is the process leading to trial.

8 | THE PRESIDENT: Of course. The only other issue that I had on trial bundles was:
9 | authorities bundles. I know that we'll be using the Opus bundles for authorities as well.

10 | But, as you all probably know, I use PDF authorities bundles just because it's easier
11 | for me to mark up on my iPad, and I know that some others in the courtroom might do
12 | the same. So could we just agree that the authorities bundles will be extracted from
13 | Opus at the start of the trial or whenever you provide them. And you will make
14 | available a set of PDFs for the use of those who work in that manner. You will need
15 | to give references in your submissions to both, if the page numbering is different, which
16 | it might be.

17 | If there are, in the course of the trial, any additional authorities, we will do as we did in
18 | *Qualcomm*, which is simply to put them in a separate supplemental bundle on the
19 | Opus system. Then when it comes to the oral closings, then that can be then extracted
20 | into a further PDF bundle.

21 | Any updates can be added to the supplemental bundle on a rolling basis. What is
22 | important is that once the PDFs have been extracted, the original authorities bundles
23 | then can't be changed, for example, by splicing in additional pages or additional
24 | authorities, because that's going to put out the numbering of the PDFs.

25 | All right. That is everything that I had on trial management issues. Is there anything
26 | else before we get to the Coll application to amend? All right.

1
2 Elizabeth Coll's application to amend

3 THE PRESIDENT: The Coll application to amend. Now, I understand that that's
4 agreed by Google, but we do have a question about that. All right. Mr Frazer is going
5 to deal with it.

6 MR FRAZER: So, you refer to the *Kent* ruling in relation to the extension of the
7 damages period.

8 MS KREISBERGER: Yes.

9 MR FRAZER: As you'll recall, that took place following the conclusion of the trial,
10 which is not the case here. In, I think, it was paragraph 23 to 25 of that ruling we talked
11 about what the situation may have been had the matter been brought at an earlier
12 stage so that the parties could propose how evidence was going to be presented in
13 relation to the period after the trial.

14 I haven't seen any such proposals in relation to your application to extend the
15 damages period, beyond that covered by the evidence which has already been
16 submitted and which is now closed. So really what we need to hear is how you believe
17 we should deal with any evidence relating to wrongdoing. That's to say market
18 definition, dominance abuse, damage, quantum, et cetera in relation to the period for
19 which you're now seeking an extension.

20 MS KREISBERGER: Just so it's clear, we're talking here about category 3.

21 MR FRAZER: Category 3.

22 MS KREISBERGER: No class members --

23 MR FRAZER: Correct.

24 MS KREISBERGER: It's for damages.

25 MR FRAZER: Just category 3.

26 MS KREISBERGER: Could I suggest that I take instructions on that point and come

1 | back to you? I could do that now or perhaps come back to you after the short
2 | adjournment.

3 | THE PRESIDENT: Yes. Because we note, unless we've misunderstood it, that
4 | Professor Rodger's application is to extend the period up to the date of the PTR. That
5 | would be entirely consistent with what was said in *Kent*. If your application was to
6 | extend it for that period, I don't think that there'd be any problem with that. The
7 | problem is extending it beyond that. Indeed, if I've got the wording of your proposed
8 | amendment correctly, it's until the date of the Tribunal's "final determination of the
9 | claims or their earlier settlement". So that's potentially even beyond the date of the
10 | final trial judgment.

11 | Of course, as Mr Frazer said, if there's any further evidence relevant to that, we won't
12 | have had that at the time at which that is potentially applicable because the evidence
13 | goes up to now, and there's no application to put in further evidence beyond today's
14 | date, factual evidence, leaving aside the specific issue about the disclosure
15 | applications.

16 | MS KREISBERGER: Understood.

17 | THE PRESIDENT: Yes.

18 | MS SMITH: My Lady, I think our position is clear. But just to emphasise, as set out in
19 | our skeleton argument, paragraph 22(c). We don't oppose the amendment being
20 | made, but we made the very point made by Mr Frazer in our skeleton, that we will
21 | contend at trial, that Ms Coll is not entitled to claim damages for the damages claim
22 | period, as amended, because of the judgment in *Kent v Apple*. But we don't object to
23 | the amendment to the pleading. We'll simply deal with that amendment.

24 | THE PRESIDENT: Well, that seems an unsatisfactory way to proceed. Because, on
25 | the one hand you're then allowing in the amendment and then, on the other we don't
26 | have the factual evidence to deal with any changes that might arise after today.

1 MS SMITH: My Lady, yes. It may very well be that those are the submissions we will
2 be making: that there is no evidence on which Ms Coll can claim damages for that
3 extended period. But we hear what you say.

4 THE PRESIDENT: I see. All right. Well, Ms Kreisberger, if you can take instructions,
5 and we'll come back to it this afternoon.

6 MS SMITH: Yes. I'm grateful.

7
8 Professor Rodger's application to amend

9 THE PRESIDENT: Okay. All right. Professor Rodger's application to amend. That
10 seems to be entirely unopposed. All right. So, we can make that order.

11
12 The Google trial expert reports

13 THE PRESIDENT: Then we have the question of the Google trial reports. We do
14 have some sympathy with the concerns expressed by Ms Coll on this. We've looked
15 at the Noble trial report. I think some of the references given by Ms Coll, I can
16 understand why the relevant section is in the annex, because as soon as I see the
17 equation, my eyes glaze over, and I wouldn't expect that to be -- and that's no
18 disrespect to Mr Noble, of course. I'm sure it's all very learned, but that's not
19 something that we would obviously want in the main section of the report.

20 But there are other sections where I think that Ms Coll is right to say that this is actually
21 substantive opinion.

22 So, the examples that I found, E/1/5, page 312, for example, there's a long section of
23 notes underneath this table which effectively sets out Mr Noble's view as to the
24 reliability of data. This isn't just calculations or supporting mathematics or anything
25 like that. This seems to be substantive opinion.

26 Another example I found was E/1/5/320. Some of the analysis at E/1/5/320 and

1 following is mathematical data, but some of it does seem to be substantive opinion,
2 which explains what his approach is and why that is correct. When one then looks at
3 the main part of his expert report, it appears that in numerous respects, I think
4 including this one, rather than dealing with his calculations and the result of his
5 calculations in the main report, he simply gives that in the annex reference.

6 So, for example, at paragraph 7.26 of his main report, he doesn't actually say what he
7 considers the total damages to be. This is on page 165 in the Opus bundle. He just
8 says tables A 7.3 and A 7.8 set out the resulting total damages. So the main report is
9 then not self-contained. I can't see what his opinion is on a number of these issues.
10 I'm just giving examples here.

11 Another example would be 7.23, tables 87.2 and 87.7 set out the resulting overcharge.
12 I can't see that without looking at the annex.

13 Now, as you'll have appreciated from the discussion at the last CMC, the aim was that
14 the main report should stand as a self-contained report that we wouldn't have to refer
15 to anything else. We wouldn't have to refer back to the original reports and, in
16 particular, the annexes are really simply in order to, among other things, comply with
17 the practice direction that the workings are set out. We understand that experts will
18 need to do that. But I was absolutely not expecting that we were going to have to go
19 to the annexes in order to find out what the conclusions are of an expert on a particular
20 point as in what his calculation is.

21 I do have a degree of sympathy for what is said about Mr Noble's report, and I would
22 like to understand how you propose to address that, because there does seem to be
23 at the moment a disproportionate number of pages of annexes given by Mr Noble. It
24 seems from what Ms Kreisberger has said in her skeleton argument, there are similar
25 concerns with Mr Burg, with him including extensive notes on what he's done, which
26 are his substantive opinion. It's not simply workings and calculations.

1 | I don't - I'm not sure which of you is going to deal with that point? Ms Smith, all right.

2 | MS SMITH: I may need to supplement what I say, if I may, by taking instructions from

3 | the specific examples you've given, madam, but I hope I can perhaps deal with some

4 | of the other more general concerns that you raised at the end of your helpful

5 | indications as regards Mr Burg and the other annexes of Mr Noble's report, apart from

6 | the examples you specifically took me to.

7 | Mr Burg, if I may, the appendices to Mr Burg's report comprise just 9 figures and

8 | 11 tables. All of them are reproduced from his first report, Burg 1. The explanatory

9 | notes that you -- let's have it open, it might be easier to have a look at that. It's PTR-

10 | E4, tab 13.

11 | THE PRESIDENT: And the criticism is made at page 35?

12 | MS SMITH: Page 35. So, yes, my Lady. You'll see that page 35 is the table which

13 | sets out the detailed comparisons of the services, the footnote or the explanatory note

14 | attached to that. Start on page 40. And yes, my Lady, that they do, they do continue

15 | for a number of pages. But my Lady, what you have in those, if you read them through,

16 | as I've had the misfortune of doing last night, is they are simply the sources for the

17 | material that is set out in the table. So, there are references to the web page from

18 | which the material is obtained, or a call that one of Mr Burg's team has made to the

19 | company at issue in order to determine the facts that are made, that are set out in that

20 | table.

21 | THE PRESIDENT: I see.

22 | MS SMITH: So, they're simply sources for the data.

23 | THE PRESIDENT: So, it's your view, is it, that we're not going to have to look at any

24 | of this?

25 | MS SMITH: No, my Lady, no. In fact, the tables and the figures are cross-referred to

26 | in the report and are available for your Ladyship to cross refer if you wish to the tables

1 | and the figures as you are reading through the report, but you will not have to, unless
2 | you wish to, even look at the tables and the figures, unless you want to double check
3 | that the underlying -- but as to the sources, that is simply there, to put it crudely, so
4 | that the other side, the claimants, know where this material comes from. So, if they
5 | want to challenge the figures in his data, his tables and his figures, they have the
6 | sources for that material.

7 | THE PRESIDENT: And is it your view -- is it everyone's understanding in this
8 | courtroom that at trial, first of all, the Tribunal panel will not need to read the annexes
9 | and appendices, we will only read the main reports? Because that certainly was the
10 | intention behind reducing the page numbers of the main reports, because it's
11 | impossible for us to read the volume that was originally put in. So, the idea in reducing
12 | the page limits of the main reports was to get those down to a number of pages that
13 | we can feasibly read during and before and after the trial.

14 | So, is it everyone's understanding that, first of all, we are going to confine our reading
15 | to the main reports without the annexes?

16 | Secondly, that there will be no expectation that we will be going through the annexes
17 | in writing our judgment?

18 | Thirdly, that cross-examination and the hot-tubbing at trial will be done by reference
19 | to the main report, and there will be no expectation on anyone's part that detailed
20 | points relating to the annexes will be put to the witnesses, unless exceptional?

21 | MS SMITH: My Lady, our understanding is from the point of view of the Tribunal, that
22 | we will we only expect the Tribunal to have read the reports. There are
23 | cross-references, of course, in the report to the annexes, and if, as the Tribunal is
24 | reading through the trial expert report, you wish to cross-refer to the material in the
25 | annex, then of course that is available. But we only understand that the Tribunal will
26 | be reading the reports. It's not necessary for the Tribunal to read the annexes before

1 trial.

2 THE PRESIDENT: Or during or after the trial?

3 MS SMITH: As to cross-examination, it may very well be that I wish to put a point that
4 is in the annex to one of the class representatives' reports to that expert, and I would
5 expect to have the freedom to do that, just as I would assume my learned friends
6 would also want to do the same. I would also -- just as I would expect to have the
7 freedom to put to an expert witness a document that they have previously referred to
8 or an article that they have previously written that I say is inconsistent with, for
9 example, the material that they're putting forward in their report. So, I wouldn't,
10 my Lady, wish to be limited to only putting to the experts in cross-examination what
11 appears on the face of their report.

12 I won't speak for them, but I assume my learned friends would wish also to have that
13 freedom when cross-examining an expert.

14 THE PRESIDENT: To what extent do you think that you are going to be raising
15 material that is in the annexes? Because of course we're not suggesting that anyone
16 is precluded from putting a question that's based on the annexes. However, the
17 annexes are supposed to contain supporting technical material. That's absolutely
18 clear from our order. So, our expectation is not that there should be extensive
19 cross-examination on that, but that the focus of the cross-examination should be on
20 the main substantive content, and the substantive content is supposed to be in the
21 main part of the report.

22 MS SMITH: My Lady, I think we are aligned on the fact that the substantive opinion is
23 we expect -- well, certainly from our point of view -- Google's experts, the substantive
24 opinion is contained in their report. I can't prejudge what, at this moment, exactly what
25 we might want to put across in cross-examination to one of the experts, but it may be
26 that we say the material in the annex does not support their substantive opinion as set

1 out in the report. So we want to put that to them, for example. But yes, the substantive
2 opinion we would expect, and from the point of view of the Google experts, it is
3 contained in the report.

4 Would it help if I just very briefly address you on the specific annexes to Mr Noble's
5 report?

6 THE PRESIDENT: Yes.

7 MS SMITH: If you have it open.

8 THE PRESIDENT: Yes, we do.

9 MS SMITH: We don't understand that any objection is taken to appendices
10 annexes A1 to A3, which contain Mr Noble's expert declaration, instructions and CV,
11 nor to appendix 8 which includes the list of public disclosure material relied upon by
12 him. We don't understand that any objection is taken to the length of the reports
13 themselves. All of Google's expert reports, the actual reports, comply with the page
14 limits set out in the order of 4 June.

15 As to the appendix, I've addressed you on Mr Burg's appendices.

16 Mr Noble's appendices, as I've said, we don't understand any objection to be taken to
17 A1 to A3 or A8.

18 A4, which starts on page 205 of the bundle, simply reproduces tables found previously
19 in Noble 2 or Noble 3, and you will see in the note to each of the tables or the figures
20 where that table previously appeared in either Noble 2 or Noble 3. So, we don't again,
21 see that there is anything objectionable to that. The tables simply support
22 a substantive opinion in the report to which refers to the particular table or figure.

23 Appendix 5 sets out the inputs into Mr Noble's profitability and limb 1 assessment in
24 section 4(g) of his report. They don't contain any substantive opinion. Again, you'll
25 see they are simply tables. They are taken from tables and figures produced by
26 Professor Easton, to which we understand no objection is taken. So those are just

1 | underlying figures set out in the annexes.

2 | THE PRESIDENT: Has any thought been given to the extent to which all of the
3 | material in these annexes is actually necessary, because I note that there's some
4 | concern that Google's experts haven't signed up to the declaration that Ms Coll and
5 | Professor Rodger's experts have?

6 | Is there any reason why they couldn't sign up to that?

7 | MS SMITH: Well, my Lady, they were instructed and this was made clear in
8 | correspondence from Google's solicitors of 27 July. Google's experts were instructed
9 | to prepare their reports in line with -- let me get the paragraphs right, I think it's
10 | paragraphs 6 and 7 of the 4 June order, so they were given those clear instructions
11 | and provided with a copy of the order. That was the basis upon which they produced
12 | their reports. So they were producing their reports on the basis that their annexes only
13 | contained what they considered to be necessary to support the substantive opinion
14 | set out in their reports. That, I can confirm, is the case.

15 | THE PRESIDENT: So why didn't they sign up to the declaration then?

16 | MS SMITH: Can I take instructions on that? (Pause)

17 | My Lady, there are -- for the record, there were some issues about the declaration that
18 | our experts were required to sign did not, in our submission or our view, my solicitor's
19 | view, reflect the full ambit of the order which allowed the experts to respond to the new
20 | evidence from Dr Singer and Mr Krein. So there would have been, as I understand it,
21 | a rush to produce these reports. This request to sign the declaration came at the last
22 | minute, and there was some dispute about the wording of the declaration.

23 | Also, it came at a point at which Professor McDaniel, for example, had already signed
24 | his report, and was travelling, so it wasn't possible to sign the declaration in the form
25 | demanded by the claimants at that late stage. But we have made it absolutely clear
26 | in correspondence, then and since, that our experts were clearly instructed to comply

1 with the terms of the order, and they have, in their view.

2 THE PRESIDENT: Yes. I just find it rather surprising that so much supporting material
3 is included with Noble because the aim was not that the annex should be a means to
4 include every single bar chart and graph and other table that was in the original reports.
5 The entire purpose of this was to produce something that was a lot shorter and really
6 focused on what was absolutely necessary and not simply put in there, for the
7 avoidance of doubt. Because, of course, we've gone through the process, if there's
8 ever any suggestion that someone hasn't done something, and the response is, "Well,
9 I did do it. It was set out in one of my earlier reports. I did, you know, go and do the
10 additional work. I've shown my methodology. That's all there", of course, that
11 response can be given, but the idea was not that the annexes should become a means
12 of putting in every single thing that was in the original report.

13 I find it very difficult to understand why Professor Rodger and Ms Coll are able to
14 produce far more concise and succinct reports with far fewer annexes than
15 Professor Noble, who is responding to those.

16 MS SMITH: My Lady, I hear what you say. I can only repeat that it is not expected
17 that the Tribunal read the appendices. The report, as I have already said, contains -- it
18 does comply quite with the --

19 THE PRESIDENT: Well, apart from the fact that some of the conclusions aren't
20 actually stated in the report, and they're just hived off to the annexes.

21 MS SMITH: Well, my Lady, those two examples you've given me on the quantum,
22 those are -- I take the points you say about the cross-references to the tables. If I can
23 take instructions on that and get you a detailed response on that.

24 But appendix, I'd explained our position on appendix A5, and appendix A6 contains
25 a technical appendix for pass-on. That is new evidence that Mr Noble was given
26 permission by the Tribunal to put in in response to Mr Singer. It contains numbers and

1 | equations and explanatory text to the numbers and equations, not substantive opinion.
2 | Insofar as from a point of view purely of volume, the volume of the appendices is really
3 | found in appendix A4. I can reassure the Tribunal that these figures and tables are
4 | simply cross-referred to by Mr Noble. The substantive opinions are contained in his
5 | report. The tables and figures are put in here -- and I apologise if it hasn't had this
6 | effect -- but not to make the Tribunal feel as though it is being flooded with material.

7 | But for the purposes of transparency, because Mr Noble refers to these tables and
8 | figures that are not new to anyone -- they're all reproduced in previous reports. He
9 | refers to them in support of his substantive report and felt properly that, in those
10 | circumstances, he should reproduce them in the appendices. He could simply have
11 | put in a cross-reference to a figure from his previous report. But seeing as the Tribunal
12 | had made it clear that they wanted the trial report to stand as the trial report --

13 | THE PRESIDENT: Yes, yes, I understand.

14 | MS SMITH: -- it is -- and it has had the unfortunate side effect of meaning that there
15 | are 100-odd pages in this appendix, but it was not done through anything other than
16 | a desire to be transparent about the material that he was relying upon from his
17 | previous reports in order to express the substantive opinion in his report.

18 | I can only apologise if it's had the opposite effect, but that is, with respect, the purpose
19 | in which those appendices were put in.

20 | At this stage, the proposal from Ms Coll, I think, was three points that she wanted us
21 | to resubmit these reports and to file what she has said to be -- this is paragraph 19 of
22 | her skeleton.

23 | THE PRESIDENT: Yes, no, we're aware. They want to refile within seven days.

24 | MS SMITH: Yes.

25 | My Lady, we say at this stage of the trial, when we have made our position clear that,
26 | in line with the Tribunal's previous orders, the substantive opinion is contained in the

body of the report, not in the annexes, which contain tables, figures, equations for the purposes of transparency to enable the other side and the Tribunal, if it has the time, to understand the basis on which these substantive opinions are expressed. This would simply be, in my submission, an unnecessary order to make and would just simply involve unnecessary work at this stage, unnecessary wasteful time wasting work at this stage of the proceedings.

THE PRESIDENT: All right. It's 11.45 am. What I propose is that we rise for five minutes. You take instructions on the specific examples that I've given you.

I should say, those are simply illustrative, because I haven't gone through everything, but those were immediately points that jumped out at me as being problems where either the substantive conclusion is not even stated in the main report, or if one turns to the annex, you can see what looks plainly like substantive opinion evidence which should have been in the main report.

Please do not regard those as being exhaustive. In the time available, I've just picked out a few that seem to me problematic. Perhaps you can then put forward, after the short break, a proposal as to how you are going to deal with those and similar concerns, which, no doubt, arise in other parts of the reports as well.

I should say I haven't looked at all of the reports. I've only looked at Noble for those purposes so far. So, there may be similar points in relation to some of the others.

So, we'll return in about five minutes, and then you can let us know what you propose to do and then I'll hear from Ms Kreisberger as to whether she pursues her application for you to refile.

All right, thank you very much.

(11.44 am)

(A short break)

(11.56 am)

1 THE PRESIDENT: Yes, Ms Smith.

2 MS SMITH: My Lady, I've managed to take instructions and have a proposal, which
3 I hope will be agreeable to the Tribunal.

4 If I could take you back to paragraph 19 of Ms Coll's skeleton argument. We are happy
5 to agree to subparagraph (b) to include the additional wording, "the expert
6 declaration". We're happy to agree to (c) that -- I think, probably, the Tribunal should
7 assume, but they're not just Google's, but all parties' "evidential position" at trial is as
8 reflected in the TERs. I assume that must be correct.

9 THE PRESIDENT: Yes.

10 MS SMITH: As to the subparagraph (a), and in light of what the examples that have
11 been given in Coll's skeleton argument and the examples that were given this morning
12 by you, the Tribunal, madam, this is, of course, Mr Noble's report, and at risk of
13 repeating myself, he has included in the report what he thinks is necessary. So we do
14 need to discuss with Mr Noble.

15 But what we propose is that, in light of the indications you have given and the material
16 in the Coll skeleton argument, we will go and discuss with him what adjustments can
17 be made to his report to reduce the length of the appendices and to deal with the
18 issues, the concerns that you have raised and come back with a proposal as to how
19 he will deal with that in any revised or refiled report, if that is what is proposed.

20 We will come back to Ms Coll within seven days with proposals which we hope she
21 will be able to agree. Or if not, we hope that the Tribunal will be able to address this
22 on the papers, because we can't, on our feet, of course, make deletions from the report
23 that is Mr Noble's report.

24 THE PRESIDENT: But coming back with a proposal within seven days is too late,
25 given that we are now -- from next week, we'll be into the August holiday period. We
26 are very close to trial.

1 | I think that you ought to be coming back with proposals as to how to deal with it by no
2 | later than Monday lunchtime. That's your proposal for how to deal with it. I envisage
3 | that the proposal will be something along the lines of a revised report will be refiled.
4 | Taking into account of the concerns expressed by the Tribunal by no later than -- and
5 | I'm looking at my diary now -- something like 10 August.

6 | MS SMITH: I could take instructions on that. (Pause)
7 | I'm not aware of Mr Noble's availability, but if we could have until the end of Monday
8 | to confirm our proposal, then 10 August, as your Ladyship has indicated, for a refiled
9 | report, we can agree to that.

10 | THE PRESIDENT: Well, I think what we'll have to do is you'll have to put your proposal
11 | in the draft order. I think you'll need to confirm it to the other side by noon on Monday.
12 | That gives you an entire working day from now to discuss with Mr Noble. It will go in
13 | the order. If your proposal isn't agreed by Ms Coll's side, then in the usual way, if there
14 | is a disagreement on the order, then you will each file short submissions on that. But
15 | I think that it's very unlikely that we would want any revised report to be filed by later
16 | than 10 August, given the short period now remaining before trial.

17 | MS SMITH: As your Ladyship wishes, we're happy to agree to that in light of what you
18 | said.

19 | THE PRESIDENT: All right.

20 | Yes, Ms Kreisberger.

21 | MS KREISBERGER: Thank you, madam. The only concern on our side is that
22 | 10 August is rather late. The team have already spent a lot of time and effort on this
23 | satellite issue. Really, the preparation of cross-examination is really being impacted
24 | in concrete ways. We would ask for the 7 August at the very latest, which is a Friday.
25 | The second point I would make is that Ms Smith referred to making revisions. Given
26 | our experience so far, we would hope that "revisions" is shorthand for cutting out rather

1 | than adding.

2 | THE PRESIDENT: Yes. I think that should be clear. The revisions will be of the
3 | nature of hitting the "delete" button rather than making any substantive amendment.

4 | MS SMITH: My Lady, yes. We have a page limit. We're not proposing to go --

5 | THE PRESIDENT: Yes.

6 | MS SMITH: Yes. I mean, we obviously are subject to a page limit.

7 | THE PRESIDENT: Yes, so if you are going to move some of the substantive opinion
8 | to the main report, then there will need to be deletions to reflect that.

9 | MS SMITH: Absolutely, my Lady.

10 | THE PRESIDENT: But what Ms Kreisberger is saying is that there should be no new
11 | substantive content added in. Insofar as what you're doing is moving text from the
12 | appendix into the main report, that's not going to be a rewriting of the report.

13 | MS SMITH: My Lady, absolutely.

14 | THE PRESIDENT: Yes. All right. Well, it may be that we can just simply put in the
15 | order that a revised version of Mr Noble's report reflecting the comments of the
16 | Tribunal and the concerns raised by Ms Coll will be refiled by a particular date. That
17 | really avoids the need for a further layer of negotiation between the parties.

18 | MS SMITH: We'd be very grateful for that.

19 | THE PRESIDENT: The only question really is whether there is some insuperable
20 | obstacle because of Mr Noble's availability over the next week. Obviously, this point
21 | was flagged by Ms Coll in her skeleton argument. She's asked for a revised report to
22 | be filed on the part of all of the experts. So, I'm surprised if the Google team don't
23 | know whether their experts would be available to do that over the next seven days.

24 | MS SMITH: My Lady, I was only talking about, in that context, of Mr Noble's
25 | availability on Monday morning.

26 | THE PRESIDENT: All right.

1 MS SMITH: But you suggested 10 August, my Lady, with which we agreed.

2 Ms Kreisberger said we need more time, which I find difficult to understand, given that
3 what we will be doing is taking material out, not putting material in. So she is not going
4 to be -- if she's already been working, as she says, on her cross-examination on the
5 basis of what is currently in the report, we're going to be taking material out. We're
6 not going to be putting anything new in. So, we continue to maintain that your initial
7 indication of 10 August is a reasonable and appropriate date.

8 THE PRESIDENT: Yes. (Pause)

9 Well, I think we'll say, by 10.00 am on 10 August, which is something of a compromise
10 between the proposals. That means that you get a weekend, but in terms of the
11 working days, there's not very much difference between that and close of business on
12 7 August. I very much hope that the entire team is not going to be working weekends
13 throughout August. That might be optimistic ...

14 MS SMITH: My Lady, thank you for putting that on the record.

15 THE PRESIDENT: All right. So Noble to be refiled with appropriate shortening and
16 to ensure that his substantive conclusions are set out in the report by 10.00 am on
17 10 August.

18 All right. We haven't made any order in relation to the other expert reports from
19 Google. It seemed to us that Noble was probably the main one where concerns were
20 expressed.

21 Ms Kreisberger, are you urging on us to make the same order in relation to any of the
22 others?

23 MS KREISBERGER: No, it's really not for us to police Google's compliance with the
24 order.

25 THE PRESIDENT: But Google has confirmed that the declarations will be signed.

26 MS SMITH: Yes.

1
2 App developers' disclosure

3 THE PRESIDENT: All right. That leaves then the use at trial of the disclosure from
4 the app developers. Can I indicate what our position is, provisionally having reviewed
5 the submissions of the parties.

6 It seems to us that we can't decide at this hearing, the issue raised by
7 Professor Rodger as to whether the disclosure is necessary. That's the matters
8 referred to at Mr O'Donoghue's skeleton at paragraph 56 and following. That seems
9 to be clearly a matter for trial, not this PTR. It is not a PTR issue. It's a substantive
10 issue.

11 We note that Professor Rodger has not sought to strike out the relevant sections of
12 Google's Amended Defence, which he could have applied to do. The matter is
13 therefore one which is going to proceed to trial.

14 The 9 July disclosure ruling of Mr Malek finds that the disclosure sought is relevant to
15 those pleaded issues.

16 That being the case, this is not the occasion to pursue what may be regarded as
17 something like a strike-out application through the back door of saying that the
18 disclosure is unnecessary. The pleading stands; it's not been struck out. The issue
19 will then be a triable issue.

20 Having said that, it is also clear to us that if there is going to need to be further factual
21 and/or expert evidence, which does seem reasonably likely, that cannot be done in
22 time for trial. We're not about to give directions for an entire new round of evidence to
23 be filed while everyone is very busy over the summer period preparing for what is, on
24 any view, going to be a heavy trial.

25 So our suggestion is that the sensible course would be to decide at the trial the issue
26 of principle as to whether the material is relevant to the calculation of quantum.

1 | Mr O'Donoghue's argument will then be able to be fully ventilated and decided as
2 | a matter of law on the basis of the initial disclosure that has been given.

3 | If Mr O'Donoghue is right, then the entire issue will fall away and there will be no need
4 | for any further hearing, expert or factual evidence. Because if Mr O'Donoghue is right,
5 | none of this will be relevant for the Tribunal to interrogate. So if he's right, then the
6 | question of further evidence and the Tribunal's determination of that will simply not
7 | arise.

8 | If he is wrong, and the issue is relevant, then it seems to us we will have to then say,
9 | "This is the position as a matter of law and principle. We haven't had full exploration
10 | of the factual and evidential position. We've had disclosure that has been ordered, but
11 | we haven't had any further witness statements and/or expert reports". We will then
12 | need to deal with those at some later stage, not in the trial, because it plainly won't fit
13 | in the trial timetable.

14 | That seems to be the only course which enables ventilation of an issue that has been
15 | pleaded and has not been struck out, in circumstances where, for whatever reason,
16 | we are in a position that we don't have the time available between now and the trial to
17 | explore any further factual and expert evidence on this issue. There is no time for
18 | more evidence to be put in by the parties. It would be entirely unreasonable to expect
19 | Professor Rodger to deal with that or anyone else to deal with that, and the trial
20 | timetable will not accommodate it in any event.

21 | So that is our proposal. I'm not sure who should be speaking first on this point. So,
22 | Mr Holmes, you're standing up. All right.

23 | MR HOLMES: I'm happy to speak first and give Mr O'Donoghue a moment to collect
24 | his thoughts.

25 | THE PRESIDENT: Sure.

26 | MR HOLMES: For our part, we think that that is a sensible suggestion and one that

1 achieves a fair balance in the circumstances. It remains Google's position that it is
2 likely to be possible to deal with the material by way of submissions. The agreements
3 are straightforward that we've seen so far.

4 But I understand that the Tribunal needs to proceed on the basis that that may not
5 prove to be the case. That Professor Rodger may take a different view as to the
6 material that he wishes to lead in relation to this. We see entirely that there is not time
7 for that to be dealt with ahead of trial, and it would be disruptive to the parties to attempt
8 to do so. We agree that there is a point of principle. We have material which is before
9 the Tribunal which will give some concrete focus to the discussion at trial.

10 THE PRESIDENT: Yes. So, you're not dealing with a completely abstract legal issue.

11 MR HOLMES: No.

12 THE PRESIDENT: If you're dealing with an issue on which you have had some
13 disclosure from the parties, albeit not witness evidence, that will frame your
14 submissions on the law. But it will need to be made clear that nobody will be bounced
15 into actually determining disputed factual issues on this point at the trial.

16 MR HOLMES: Yes. On that basis, the Tribunal can decide if we are right on the law,
17 except, of course, there's a legal point to be determined here. If we are right, then
18 arrangements will then follow as to how it can be determined.

19 THE PRESIDENT: Yes. I think what you will need to do is then address the legal
20 point in your submissions and also tell us what impact that has on the extent to which
21 we can make findings of quantum. We're not going to be -- so for example, you will
22 need to say, "This amount of the quantum calculation is in dispute. If the Tribunal is
23 with us on this point, it will then need to be dealt with separately".

24 MR HOLMES: Yes, that can readily be done.

25 THE PRESIDENT: So at least we know what the figure is and how that impacts on
26 what we can decide in relation to the quantum issues.

1 | MR HOLMES: Yes.

2 | THE PRESIDENT: Yes. All right. Thank you, Mr Holmes.

3 | Mr O'Donoghue.

4 | MR O'DONOGHUE: Can I just clarify, as of today, only one disclosure application has

5 | been granted?

6 | THE PRESIDENT: Yes.

7 | MR O'DONOGHUE: And there are a number of others which are (overspeaking).

8 | THE PRESIDENT: Which are pending. I understand they're going to be dealt with on

9 | the papers.

10 | MR O'DONOGHUE: Yes. So, is the premise of your Ladyship's proposal that they

11 | will be dealt with forthwith?

12 | THE PRESIDENT: Yes.

13 | MR O'DONOGHUE: And then whatever comes of that --

14 | THE PRESIDENT: Yes. And that you then don't need to deal anymore with the factual

15 | issue. The disclosure issue will be dealt with. And that nobody needs to worry about

16 | putting in detailed factual or expert evidence because insofar as there is a factual issue

17 | between the parties as to how the intra-group arrangements play out, that is not

18 | a matter for the trial. What will be in issue for the trial is the question of principle,

19 | effectively raised by your submissions about relevance.

20 | MR O'DONOGHUE: Yes. Well, that's very helpful.

21 | Now, madam, as you will have picked up from our skeleton, and as I think features in

22 | the order of Mr Malek and indeed in Google's draft order, there is a provision if

23 | disclosure is given, that the developer has the option of giving some supplemental

24 | explanatory --

25 | THE PRESIDENT: It seems to me that that's entirely sensible, and they can do that.

26 | MR O'DONOGHUE: Yes. Because frankly, my concern is that we have, for example,

1 | a bare agreement, and simply eyeballing the contract doesn't give you any context or
2 | understanding as to what is the true position.

3 | THE PRESIDENT: Yes.

4 | MR O'DONOGHUE: So, we think that if the point of principle is to be effective, there
5 | has to be the option on the part of the developers to give any necessary context.

6 | THE PRESIDENT: Yes. Where is that in the draft order? Is it even in the draft order?

7 | MR HOLMES: My Lady, it's in a separate draft order for disclosure. Apologies.

8 | MR O'DONOGHUE: For disclosure, which I think is before, Mr Malek KC.

9 | THE PRESIDENT: I see. It seems to me that it would be appropriate. Obviously, I'm
10 | not going to prejudge whatever he decides in the disclosure application, but it seems
11 | to me that if the developer wishes to put in an explanatory statement, I don't see that
12 | there's any reason why they shouldn't be able to do that. But what is not, I don't think
13 | anyone should come along expecting that the trial will go into disputed issues of fact
14 | as to the intra-group arrangements. All that we would be doing is deciding the legal
15 | issue in the context of what is currently said about the arrangements and what has
16 | currently been disclosed.

17 | MR HOLMES: That's very clear.

18 | THE PRESIDENT: Mr O'Donoghue, I think that that clarifies that question. On that
19 | basis, are you content with the proposal?

20 | MR O'DONOGHUE: Yes. Just one further clarification, if I may. Your Ladyship may
21 | also pick up from my skeleton that a number of developers have said we do not have
22 | a UK master local file document. In fact, it is a collection of other material. Some, for
23 | example, SMEs were exempt from that requirement. Now, for those developers, it will
24 | not simply be a case of handing over an agreement. It will be a composite set of
25 | materials and/or an explanatory statement. So we would want to make sure that
26 | insofar as they don't have a contract as such, they've got the option of giving an

1 | explanation of the arrangements and materials such as they are.

2 | THE PRESIDENT: Yes. Well, that seems sensible. But obviously I don't have the
3 | disclosure applications before me. I believe that Mr Malek is dealing with those, so
4 | I don't want to prejudge what he might say about those. But it seems to me appropriate
5 | that all of the developers against whom applications have been made, should have
6 | the option, if they want to, to put in their explanatory statement and providing such
7 | materials, as they think corresponds to the request, within the scope of the applications
8 | made if those applications are determined in Google's favour.

9 | MR O'DONOGHUE: Yes. Madam, it may well be a point we need to pick up with
10 | Mr Malek.

11 | THE PRESIDENT: Yes.

12 | MR O'DONOGHUE: But in circumstances where the question of principle may well
13 | be binary, and where the only disclosure order to date is developer B, that putting the
14 | other 15, or whatever the number is, to the hassle during the summer period of further
15 | disclosure is maybe totally unnecessary. But that may be something we should pick
16 | up separately with Mr Malek.

17 | THE PRESIDENT: Yes. Well, I think that's something that you will need to pick up
18 | with him because you'll need to think about whether further disclosure is necessary in
19 | order to frame the point of principle.

20 | MR O'DONOGHUE: Yes.

21 | THE PRESIDENT: It's important that the point of principle is fully dealt with and that,
22 | for example, someone doesn't come along and say, "Oh, well, this developer has got
23 | a slightly different configuration", and that's then not determined. Because we will
24 | want to determine as comprehensively as possible, the extent to which this entire
25 | pleaded issue is relevant and has an impact on the quantum.

26 | MR O'DONOGHUE: We will pick that up with Mr Malek. Because my Lady will of

1 | course have seen our concern that given the opt-out requests in response to the initial
2 | disclosure, in a sense, the more attrition is directed at the developers, the more likely
3 | that will continue. That is a very significant concern on this side of the court.

4 | THE PRESIDENT: Well, I'm not going to get into that. I haven't been asked to make
5 | any order in that regard.

6 | MR O'DONOGHUE: Yes, we will pick this up with Mr Malek.

7 | THE PRESIDENT: Yes. All right. So, subject to those confirmations and clarifications,
8 | are you content with the proposal?

9 | MR O'DONOGHUE: Well, madam --

10 | THE PRESIDENT: Or are you going to ask me to make a different order?

11 | Yes, of course. (Pause)

12 | MR O'DONOGHUE: It may be for another day. But, of course, if this is effectively
13 | hived off, depending on the point of principle, there is a real concern that this drifts,
14 | that there is delay. And at the moment it could, in effect, be a second mini trial. There
15 | is no funding currently in place, or insurance indeed, for a further trial perhaps in 2027.
16 | So I simply put down the marker today that the idea of substantial delay and
17 | substantial further cost is a real concern on this side of the court.

18 | THE PRESIDENT: All right. Well, I can tell you what I have in mind. If it turns out
19 | that we find against you on the question of relevance, then a mechanism will have to
20 | be found to deal with then the residual question of the intra-group arrangements. It
21 | seems to me that we would then want to schedule a date for a relatively short further
22 | hearing on that. We would not be envisaging a large further trial. This is not going to
23 | be a sort of trial 2. If anything, I would have thought that it ought to be capable of
24 | being dealt with within days rather than weeks at a further hearing later in 2027.

25 | Obviously, you're not expecting that a trial judgment is going to be given in January
26 | next year. The trial judgment will come at some point during the course of next year,

1 | and we would then need to find a date for a further hearing, which gives everyone the
2 | opportunity to put in such further evidence as necessary.

3 | MR O'DONOGHUE: Yes. Well, your Ladyship has my point.

4 | THE PRESIDENT: Yes.

5 | MR O'DONOGHUE: The longer the latency and, frankly, the longer that hearing, the
6 | more problematic it is.

7 | THE PRESIDENT: We absolutely understand. And if it were to get to that, then we
8 | would be making every effort to deal with that as quickly and as efficiently as possible,
9 | given the funding issues.

10 | MR O'DONOGHUE: Yes. I Lay down a marker.

11 | THE PRESIDENT: All right. So that will be the order then. We will deal with the
12 | issues of principle at trial. Yes. (Pause)

13 | Ms Kreisberger, I should just say there's not going to be an afternoon.

14 | MS KREISBERGER: Yes.

15 | THE PRESIDENT: So, once we've dealt with this we're going to have to come back
16 | and deal with your application to amend.

17 | MS KREISBERGER: Understood. I'll take instructions (inaudible) dealt with.

18 | THE PRESIDENT: Right.

19 | Yes. Mr O'Donoghue, is there anything else to say?

20 | MR O'DONOGHUE: Just to double check, there will be no factual determinations of
21 | any nature of any disclosure material?

22 | THE PRESIDENT: No, they will not, because we won't be able to, because
23 | I understand your position that simply producing agreements is not going to be
24 | sufficient.

25 | Now, it may be that Mr Holmes is right and that whatever further may be said won't
26 | affect the matter, and it will come down to the contract, but we can't assume that on

1 | the basis of where we are at the moment, therefore it will need to await the
2 | determination.

3 | Once you get our trial judgment, if the issue is live, we will then need to have an
4 | explanation of what further material is, in fact, required. That will be the time to decide.

5 | And you will all have had a good long chance to think about it by then as to the extent
6 | to which further witness evidence and factual and expert evidence will be required.

7 | But now is not the time to have that debate, at a point at which we haven't even had
8 | disclosure from most of the developers against whom disclosure is sought.

9 | MR O'DONOGHUE: Yes. We can pick that up with Mr Malek.

10 | THE PRESIDENT: Yes.

11 | MR O'DONOGHUE: As your Ladyship knows, as things stand, there is no order --

12 | THE PRESIDENT: No.

13 | MR O'DONOGHUE: -- new submission of any disclosure at trial.

14 | THE PRESIDENT: Yes. All right.

15 | MR O'DONOGHUE: It may simply be a need to clarify that.

16 | THE PRESIDENT: Yes, Mr Holmes.

17 | MR HOLMES: My Lady, my only concern is that on several occasions now
18 | Mr O'Donoghue has referred to picking matters up with Mr Malek. The parties have
19 | each put in submissions already to Mr Malek.

20 | THE PRESIDENT: So, he's going to be dealing with that on the papers, I understand?

21 | MR HOLMES: Yes, indeed. So, we don't understand why there should be any further
22 | round of submissions to Mr Malek. He's only determining the question of disclosure,
23 | applying ordinary disclosure principles. You've resolved how that will fit within the
24 | matrix of case management today.

25 | THE PRESIDENT: Yes. Maybe what is envisaged is simply that someone is going to
26 | send some submissions to Mr Malek as to, "Well, the trial Tribunal has said this. This

1 | has the following impact on the disclosure application." I don't know.

2 | MR HOLMES: Yes, I understand.

3 | THE PRESIDENT: So that's that may be what's envisaged.

4 | I'm assuming that Mr Malek will want to know what we've decided today in order to

5 | frame the order that he is making.

6 | MR HOLMES: Well, we would only ask that if there are to be further submissions it's

7 | dealt with quickly, because these materials, while they're not going to be the basis for

8 | factual findings at the hearing, will still be the basis for framing the legal submissions

9 | given that they provide the context for them. So it will need to be dealt with swiftly, in

10 | my respectful submission, and we don't want this dragging on.

11 | THE PRESIDENT: Yes. So have submissions been provided on both sides to

12 | Mr Malek?

13 | MR O'DONOGHUE: Well, madam, yes, but of course, what was held over for today

14 | was what happens next. I would find it quite extraordinary that your Ladyship, having

15 | decided what happens next, that we would not be in a position to make limited, speedy

16 | submissions to Mr Malek.

17 | So, I would suggest we write to Mr Malek today, suggest we put in anything

18 | supplemental by Wednesday, and that can be dealt with on the papers very quickly.

19 | THE PRESIDENT: Wednesday seems to be rather slow given that we are now at

20 | lunchtime on Friday, and really all that is necessary to be said is that this is what has

21 | been decided, and you might want to make some very, very limited submissions about

22 | what impact that has on his determination.

23 | But yes, I would suggest you do write to Mr Malek today with your proposal, and

24 | I suggest that any further submissions are made by very early next week and not

25 | leaving it until Wednesday. But I don't think I can make an order in that regard

26 | because I'm not dealing with the disclosure application. So that will be a matter for

1 | Mr Malek to determine.

2 | MR HOLMES: So, we'll write today --

3 | THE PRESIDENT: Yes.

4 | MR HOLMES: -- with a view to getting a date by which submissions are needed

5 | (inaudible).

6 | THE PRESIDENT: Yes, and he can give directions for that.

7 | All right. So that, I think, deals with the use of the disclosure at trial. Now we then

8 | need to return to the application by Ms Coll to amend.

9 | I should say we would have no problem in approving an application which goes up to

10 | the date of the PTR as with Professor Rodger's. The problem is any extension beyond

11 | that.

12 | Ms Kreisberger, are you able to deal with that now?

13 | MS KREISBERGER: I am, thank you, and I'm very grateful for the advance warning

14 | that we'd get to this before lunch.

15 | I've got three short points in response to Mr Frazer and then, madam, if I may, deal

16 | also with your point about up to the date of the PTR would be workable. The three

17 | short points include a solution, I should say.

18 | So, the first point is that it is the normal approach in a commercial claim,

19 | a business-to-business abuse of dominance claim, say, that damages go to the date

20 | of judgment. I should say, if the wording needs to be addressed, the intention was

21 | damages to date of judgment or settlement, not beyond date of judgment. So that is

22 | the standard, perfectly standard approach in any commercial trial.

23 | The *Kent* judgment, as Mr Frazer is very familiar, helpfully clarifies that the usual

24 | approach also applies in the context of collective proceedings. So that is the principled

25 | basis for the amendment.

26 | Then the third point is our suggested solution, which is that the question of any

1 | evidence relating to a change in position be a matter for consequential. So, if Ms Coll
2 | is successful at trial and makes out her case on infringement, there can then be
3 | a consequential hearing which would be a short matter. But if Google, for instance,
4 | wanted to argue that there's been some material change in circumstance and they
5 | wanted to advance evidence to, say, post the date of the PTR but before judgment,
6 | we've been charging 15 per cent commission instead of 30, for instance, they could
7 | advance evidence then and the Tribunal can address the question of whether there is
8 | some change in circumstance, which means that damages should not go up to the
9 | date of judgment.

10 | MR FRAZER: Does this not reverse the burden of proof? I anticipate Ms Smith is
11 | going to say it's your case to prove rather than hers to disprove?

12 | MS KREISBERGER: Well, it doesn't, as I said, because that's a standard approach.
13 | So, in any claim, it's right that you have evidence up to a certain date. I mean, we
14 | don't, in fact, have evidence to the date of the PTR, but it's a very helpful indication
15 | from the Tribunal that the date of the PTR is acceptable, but in workability, the usual
16 | approach to evidence means that there'll always be a stop date. So, the workable
17 | solution is, one assumes that the findings of the Tribunal apply and damages go up to
18 | the date of judgment in the usual way.

19 | But we certainly don't want to bar Google from saying there's been some material
20 | change in circumstance, or Ms Coll may wish to say there's been some material
21 | change in circumstance. So, it's a point that cuts both ways, but the pragmatic solution
22 | is that it's dealt with after trial in the event of a positive judgment for Ms Coll.

23 | MR FRAZER: Some of those changes and circumstances might be neither Google's
24 | nor Ms Coll's. There might be third parties, for example, comparative prices charged
25 | by other platforms, which would need to be the subject of further enquiry. So, it
26 | wouldn't even if Google were willing, as it were, to follow that process, it might not be

1 | practicable to say, well, what are other platforms charging in that period in order to
2 | determine whether there's an excessiveness, for example? I'm just pulling that out as
3 | an illustration. So, I'm not sure how that proposal would work in those circumstances.
4 | I know what you say about commercial litigation. Excessive pricing is uniquely
5 | complex in terms of having to gather together a huge concatenation of different
6 | circumstances in order to demonstrate that a price was excessive in a certain period,
7 | and that's what worries me about your proposal at the moment. (Pause)

8 | THE PRESIDENT: I mean, it seems to us that rather than putting the burden on
9 | Google to address this at the consequential hearing, isn't the right way forward, if the
10 | amendment is permitted, for Google to be able to say at trial, as Ms Smith has
11 | indicated, the evidence goes up to the date of the PTR; there is no evidence since
12 | then; and to explain why it is that the Tribunal cannot safely assume that the factual
13 | situation will be the same after the PTR. Because, really, if there is an argument about
14 | this, the trial is the place to be having the argument about it.

15 | Now, if you say at the trial there are the following five reasons why the Tribunal can
16 | assume that nothing has changed since the PTR and the factual evidence that we
17 | have in the case, that's your positive case and it's for you to make that positive case.
18 | Then Ms Smith can say in response, "Actually, there are five reasons why the Tribunal
19 | cannot assume and therefore, based on your pleaded case, the Tribunal can calculate
20 | damages up to the date of the PTR, but no further beyond because there isn't evidence
21 | for that". Then we will be in a position to decide, following the submissions at trial and
22 | the evidence at trial, whether we can make a conclusion that applies beyond the PTR
23 | or whether we can't.

24 | MS KREISBERGER: Yes. So, madam, on your proposal, the amendment would go
25 | in at this stage, and then the evidential battle would take place at trial, if I've understood
26 | it.

1 THE PRESIDENT: Yes.

2 MS KREISBERGER: In which case we would be absolutely content with that, and
3 grateful.

4 THE PRESIDENT: Yes. But there shouldn't be an assumption that it's for Google to
5 show that the position has changed, if I could put it like that. The burden of proof is
6 on you to show that the position is continuing on and hasn't changed on the basis of
7 the evidence that there is up till now.

8 MS KREISBERGER: Yes, we're very grateful for that.

9 THE PRESIDENT: Yes, Ms Smith, that was your proposal. Are you content with the
10 amendment being accepted strictly on that basis, that it doesn't reverse the burden of
11 proof?

12 MS SMITH: My Lady, yes, on the basis that you've already indicated that we only
13 have evidence up to trial. That is, I assume, I can't prejudge, the basis upon which we
14 will say you cannot extend the judgment beyond the date of the PTR. But we will have
15 that argument at trial.

16 THE PRESIDENT: Yes. And by making the amendment now, it enables you to have
17 the argument at trial, which of course, you can't do if you try to make the amendment
18 after the trial.

19 MS SMITH: Yes.

20 THE PRESIDENT: Yes. All right. On that basis, we'll allow that amendment.
21 I think that is everything. That certainly is everything on my list.
22 Is there anything that we haven't dealt with that we should have addressed?

23 MS SMITH: Nothing from us, madam.

24 THE PRESIDENT: No. And the cost order is costs in the case.
25 When could we expect to see a draft order from the parties? Is Monday lunchtime
26 possible?

1 MS SMITH: I'm being asked if we could have to the end of the day on Monday.
2 THE PRESIDENT: All right. But then I'm going to say 4.00, that being a hard deadline.
3 If there is any issue that is not agreed, you'll need to mark that up in the usual way,
4 either with comment boxes or very short brief covering submissions.
5 MS SMITH: I'm grateful.
6 THE PRESIDENT: Yes. All right.
7 That, I think, then concludes this hearing. All right. Thank you very much.
8 (12.36 pm)
9 (The hearing was adjourned)
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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?