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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1601/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 17th September 2026

Before:

James Wolffe KC
Tim Frazer
Professor Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr Sean Ennis

Class Representative

v

Apple Inc and Others.

Defendants

A P P E A R A N C E S

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

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

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE

Tel No: 020 7404 1400

Email: ukclient@epiglobal.co.uk

Thursday, 17 September 2026

(10.30 am)

THE CHAIR: Some of you are joining us livestream on our website so I must 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.

Mr Carall-Green.

MR CARALL-GREEN: Good morning, sir.

THE CHAIR: Good morning.

MR CARALL-GREEN: Sir, I appear for Dr Ennis with Mr Grimley, and Mr Kennelly King's Counsel appearing for Apple, together with Ms Simonsen.

May I please check that the Tribunal has the right bundles? We have a core bundle, hearing bundle, a supplementary bundle and an authorities bundle in two volumes.

THE CHAIR: Yes, I think we've got all that. This morning we've been sent a version of annex A with some highlighting.

MR CARALL-GREEN: Yes.

THE CHAIR: Okay. And parties have helpfully sent us an agenda.

MR CARALL-GREEN: Yes, sir. We can take the agenda in that order, but of course, if the Tribunal prefers otherwise, we can take it in any order the Tribunal prefers.

THE CHAIR: Well, I was minded, perhaps, to deal with some of the shorter points first and get those out of the way.

MR CARALL-GREEN: Yes.

Amendment

THE CHAIR: Amendment; I understand that's not controversial?

1 MR CARALL-GREEN: I think the position on amendment is that it's agreed in principle
2 and the only question is some timetabling on the draft order. That's likely to be agreed,
3 and so we'll provide that to the Tribunal when it's ready as a consent order. I think
4 that's all there is to that.

5 THE CHAIR: Mr Kennelly?

6 MR KENNELLY: That's correct, sir. Yes.

7 THE CHAIR: Thank you.

8
9 Cost budgeting

10 THE CHAIR: Cost budgeting. We've seen the parties' two alternative propositions.
11 We've seen the high-level figures that the parties have exchanged. Mr Kennelly,
12 unless you have anything to say on that, we were more attracted to quarterly
13 disclosure of the recovered costs than leaving it over until the end of the factual
14 witnesses.

15 MR KENNELLY: As you have anticipated, the only disagreement between us is the
16 period within which the cost budgeting is provided. But the difficulty with three months
17 is that, first of all, it requires significant work to produce these documents and they
18 themselves incur costs. The incremental value of having it done every three months
19 didn't seem clear to us. Every six months will secure the objectives of the cost
20 budgeting, and it will avoid the wasted costs.

21 There's also a concern that, by providing that level of granularity, one has to take
22 particular care in providing the cost budgeting so as not to disclose the work that's
23 being done on particular issues that may give an indication as to what's actually
24 happening behind the scenes in a privilege sense. That, of course, can be managed,
25 but it's just a further area of complexity in producing these cost budgets. That's why
26 the costs of producing them may actually increase in a disproportionate way.

1 THE CHAIR: Yes. Am I wrong to have -- point us to the document if I am wrong, but
2 my impression was that the information that's been provided is at a pretty high level.

3 MR KENNELLY: Yes, it is.

4 THE CHAIR: Yes. It doesn't, on the face of it, disclose very much about what's going
5 on under the hood.

6 MR KENNELLY: No, indeed. In order to provide, even at a high level, accurate
7 information, it requires layers of review in order to avoid any indications being given
8 that in itself involves the incurring of costs. That's something we seek to avoid,
9 because we're all jointly seeking to manage this in a proportionate way. It's the point
10 we made in our letter that this Tribunal has seen about why our proposal, every
11 three months, is the proportionate one. It will provide a level of transparency which
12 the Tribunal and Scott+Scott are anxious to obtain.

13 THE CHAIR: Sorry, did --

14 MR KENNELLY: Sorry, six months. I said our proposal is every six months. That will
15 provide a level of transparency.

16 THE CHAIR: So your proposal is six months.

17 Mr Carall-Green, do you adhere to your quarterly proposition?

18 MR CARALL-GREEN: We do, sir. The incremental value may not be so enormous
19 for Apple, but it is of great value to Dr Ennis who, as the Tribunal will appreciate, is
20 monitoring both his own spending to budget and also his adverse costs exposure.
21 Insofar as it is difficult to provide information down to the pound and penny, a best
22 estimate is sufficient and Dr Ennis does appreciate that at times there will be, for
23 example, revisions to costs in the pipeline between WIP and billing, for example.
24 That's a point that's been made in the correspondence; we do understand that. But
25 that ought not to prevent a best estimate from being given.

26 THE CHAIR: Thank you.

1 At the risk of being thought to split the difference, we're going to order four months.
2 We take entirely the point that you've made, Mr Carall-Green, that the Class
3 Representative has an interest in understanding the level of costs exposure. Given
4 the high level of the information and the recognition that, on both sides, it will simply
5 be a best estimate, we're not persuaded that there's a significant risk of disclosure of
6 litigation strategy.

7 Neither of you has made any proposal in relation to cost budgeting. Subject to
8 anything that either of you wish to say on that, bearing in mind that the Tribunal did
9 have in mind that there might come a point where that is a useful exercise, I'm minded
10 to simply keep that under review in light of the ongoing disclosure. But if either of you
11 has got any observations you wish to make on that issue, I'm obviously very happy to
12 hear that.

13 MR KENNELLY: None from our side. Keep it under review seems to us to be the
14 appropriate approach.

15 THE CHAIR: Thank you.

16 MR CARALL-GREEN: We agree, sir.

17 THE CHAIR: Thank you.

18 Disclosure

19 THE CHAIR: Okay, disclosure. Can I first of all ask whether the orders that were
20 made in June, as amended, have now all been complied with, leaving aside the issue
21 about the procedure?

22 MR CARALL-GREEN: May I turn my back, sir?

23 THE CHAIR: Of course. (Pause)

24 MR CARALL-GREEN: Sir, the main issue is the search terms process. Apart from
25 that, which the Tribunal well knows is subject to some disagreement today, other than
26 that, the deadlines have been complied with. So if the Tribunal has in mind, for

1 example, a deadline was extended until 11 September and one was extended to
2 14 September, those have been complied with.

3 THE CHAIR: So those have been met?

4 MR CARALL-GREEN: We're up to date as of now.

5 THE CHAIR: Yes. There were a number of matters that, at the previous CMC, I was
6 told had been agreed and therefore no order was required. Are there outstanding
7 issues in relation to any of those matters?

8 MR CARALL-GREEN: Yes, sir.

9 THE CHAIR: Okay.

10 MR CARALL-GREEN: The list of those matters is given at paragraph 6 of my skeleton
11 argument. I can give some slight updates on those because I think one of
12 them -- I beg your pardon, two of them have now fallen away since Apple has complied
13 with the deadlines as amended. So do you see the list there starting with "territorial
14 exceptions"?

15 THE CHAIR: I do.

16 MR CARALL-GREEN: So items 4 and 5 have now fallen away, seeing as Apple has
17 complied with those 11 September and 14 September deadlines. But 1, 2, 3 and 6
18 remain outstanding. Sir, you are correct that, at the last CMC, the point was that the
19 parties were agreed that Apple would go away and think about what disclosure might
20 be given; therefore, no order was needed. But as at today, we're no further along.
21 And so, as adumbrated in my skeleton argument, Dr Ennis considers it would be
22 beneficial for some deadlines to be imposed around those exercises.

23 THE CHAIR: Yes. I don't think you've got an application before us for a specific order.
24 What do you -- or am I wrong about that?

25 MR CARALL-GREEN: No, you're right about that, sir. I mean, what I would say about
26 that is that, in a sense, this is CMC business from the last time.

1 THE CHAIR: Well, indeed.

2 MR CARALL-GREEN: There was an application before the Tribunal last time, and
3 effectively, the Tribunal was given assurances that there was no need to rule on those
4 applications because this, that and the other was going to be done and that was
5 accepted quite reasonably. Now, there comes a point where one has to say that some
6 discipline around the exercise should be imposed. We would respectfully suggest
7 that, given that we're all here today, it's not so much of a burden or an imposition or
8 indeed at all unfair for some deadlines and strictures to be imposed around how we
9 proceed from here.

10 THE CHAIR: Yes.

11 MR KENNELLY: I'm so sorry, may I interrupt?

12 THE CHAIR: You don't have the benefit of having been at the previous hearing. It
13 was an aspect of that hearing that I had in mind initially, a further CMC before the
14 summer with the expectation that things would be done. On reflection, I took the view
15 that there were enough issues with enough complexity that the CMC should be
16 deferred to September. But I'm slightly surprised to find disclosure issues which I was
17 told were agreed still outstanding today.

18 MR KENNELLY: Yes.

19 THE CHAIR: And I would be minded, subject to hearing you, to impose some
20 discipline by way of orders and deadlines to try and ensure that things do move.

21 MR KENNELLY: Sir, indeed. To update the Tribunal, in relation to those first three
22 matters, my learned friend said there were, from his list, items 1, 2, 3 and 6. We have
23 written this morning to Dr Ennis in relation to 1, 2 and 3: territorial exceptions, payment
24 processing contracts and the regional pricing data. We don't accept the suggestion in
25 the skeleton argument that Apple has delayed in this regard, and I can address you
26 on that. Their letter to us came on 2 September, which was itself very late considering

1 the concerns they had raised at the CMC. We've responded within two weeks of that
2 letter, the 2 September. So if there's any delay, it's delay on their part. Rather than
3 wasting time arguing about who is delayed --

4 THE CHAIR: Well, in a sense, that's neither here nor there. The point is that,
5 whoever's fault it is, it strikes me that it would be helpful if the Tribunal were to impose
6 some discipline by way of a deadline and both parties will then appreciate that they
7 will need to act in a way which enables the deadline to be met.

8 MR KENNELLY: Indeed. In terms of the -- in order, at least, for my learned friend to
9 have an informed approach to the debate, he probably should, in fairness to him, have
10 time to look at the letter that we sent this morning in relation to those first two matters.
11 I've been told, in relation to the regional pricing data, we've already given that. But
12 you'll see the letter that we sent, and we have copies for the Tribunal too. I'm in the
13 Tribunal's hands as to how you want to address it, but it'd be useful, I think, certainly
14 in fairness to my friend, to see what our last word was on it before we discuss what
15 deadlines or discipline the Tribunal may want to impose.

16 THE CHAIR: Yes. One is perhaps left with an impression -- but it may be an unfair
17 impression -- that there's been a flurry of activity in the period in the run up to this CMC
18 with not a great deal of application at an earlier period in the time since the last CMC.
19 Now, that may be an entirely unfair impression but it does reinforce my view that it
20 would be helpful to impose a deadline. That said, if you have provided further
21 information to Mr Carall-Green this morning -- Mr Carall-Green, I don't know if you're
22 in a position to address that or whether it's sensible to take up --

23 MR CARALL-GREEN: I am, sir. Just purely by way of example, the update on item 1
24 is, "Substantive investigations from responsive materials are ongoing and we will
25 update the Class Representative as soon as reasonably possible". That's all. That's
26 the totality of the update. So we could go through the others but I don't think it's very

1 fruitful. You get a flavour of what we've been met with. What we've been met with is,
2 "Hang on, we'll get back to you."

3 THE CHAIR: Okay.

4 MR CARALL-GREEN: And we would like a deadline for when that will happen.

5 THE CHAIR: I think what I would propose to do, Mr Carall-Green, is to invite you to
6 put in a written application.

7 Mr Kennelly, you will have an opportunity, obviously, to respond to that and then
8 I would anticipate dealing with that on the papers, unless there are any issues that
9 need to be clarified.

10 Do I need to impose any deadlines in relation to a written application and a response?

11 MR CARALL-GREEN: Very good, sir. You will have seen that one of our suggestions
12 in the skeleton argument was that any further debates about disclosure are probably
13 more fruitfully dealt with in writing, and so I'm grateful for that suggestion.

14 THE CHAIR: Well, if you can put in a written application in relation to the outstanding
15 matters from the last CMC within 7 days.

16 Mr Kennelly, if you have 7 days to respond then I can deal with that on the papers.

17 Mr Kennelly, I would be grateful if a realistic view could be provided of a timescale
18 within which it would be reasonable to expect things that should be disclosed to be
19 disclosed.

20 MR KENNELLY: Yes, absolutely.

21 THE CHAIR: Thank you.

22 MR KENNELLY: And the Tribunal doesn't want to hear any blame as to where we
23 are, but the points the Tribunal makes to us about a flurry of activity in anticipation of
24 a CMC sadly is often the case. But the summer vacation did come between the last
25 CMC and this. The parties, certainly on Apple's side, have worked very hard and very
26 rapidly in responding to the early September correspondence from Dr Ennis.

1 THE CHAIR: Yes. I'm grateful for that, Mr Kennelly, and, as I say, if the Tribunal is
2 sometimes left with that impression it may not be a fair reflection of work that's been
3 going on. Anyway, that's, I think, the way we should deal with that issue on disclosure.
4 Relevance review

5 THE CHAIR: I think that leaves the issue of the relevance review.

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

7 THE CHAIR: We're here concerned with paragraph 1 of the order of 15 June, which
8 is at page 102 of the core bundle.

9 MR CARALL-GREEN: Yes.

10 THE CHAIR: As I understand it, at this stage you do not seek further disclosure of the
11 documents in DMA.100203.

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

13 THE CHAIR: Yes. So we're concerned with the documents thrown up by the search
14 terms in relation to the other data sets.

15 MR CARALL-GREEN: That's right, sir.

16 THE CHAIR: Can I be clear where we are in the process that is set out in paragraph 1?
17 That envisaged two stages. One was search terms proposed, number of documents
18 revealed and then a process of agreement of search terms which was intended to
19 result in disclosure.

20 At what point in that process are we? In other words, are there agreed search terms
21 in the sense envisaged at subparagraphs 4 and 5 of that order?

22 MR CARALL-GREEN: Sir, I don't think there are agreed search terms. We are closing
23 in, I think, on the agreed search terms because the point of the process, as envisaged
24 last time, was for us to be able to say, "If we run these search terms, what does it look
25 like?" That gives you a million documents. Well, if you add the following words, what
26 does that look like? Well, that only gets you five. You know, take out the last one; oh,

1 that gives you 300. That sounds sensible, let's have those.

2 I think, at the moment, I can describe us as being sort of circling around the landing
3 zone for the number of documents that would be in that last category: the reasonable
4 number to be disclosed. You can see that, sir, we've said in our skeleton argument
5 that the list that is either the latest list or close to the latest list is yielding documents
6 in the hundreds from the relevant repositories, which feels like approximately the right
7 number of documents that we wanted to yield from these searches.

8 We have a further update that the Tribunal may find of assistance, which tells us the
9 total number of documents in the CMA and DMA repositories in total, i.e. before any
10 search terms are applied. I think we can hand up the information because I think it
11 was highlighted, which means I think the number may be confidential, which means
12 I may not be able to say it out loud, sir. (Handed)

13 MR KENNELLY: May I hand this back up to the --

14 MR CARALL-GREEN: I beg your pardon, I've also been asked just to remind the
15 Tribunal that there is a distinction between the CMA and DMA repositories which
16 yield -- is that right? The number is confidential; is that right?

17 THE CHAIR: Yes, the number is confidential.

18 MR CARALL-GREEN: Yes. There's a distinction between these repositories -- which
19 we might call the regulatory repositories -- which are small in total, as the Tribunal will
20 see from those figures, but also small, obviously, in the number of documents that are
21 returned when a search is applied.

22 Then, on the other hand, we have the US production set. Those repositories are larger
23 to start with and they yield larger numbers of documents once one runs an appropriate
24 search. But the analysis in relation to those repositories is different seeing as I believe
25 it's common ground that those have already been subject to a relevance review of
26 some kind or another, which at least means that the documents have a bearing on

1 a case which has a genetic relationship to this case to some degree.

2 So does that answer your questions about where we are and (overspeaking)?

3 THE CHAIR: Well, the reason I'm interested is that part of the purpose of this
4 procedure, as I envisaged it, was to -- in data sets which are, on the face of it, likely to
5 contain relevant documents, if the parties could agree search terms which ought to
6 generate relevant documents, that was the most straightforward and proportionate
7 way of identifying documents which would be relevant and that disclosure should then
8 follow automatically. The benefit to Apple being that they don't require Apple to review
9 the whole of the data set for disclosure of documents that are actually relevant.

10 The benefit from Dr Ennis's point of view: a more expeditious process. But we only
11 get to that point if the parties have agreed search terms. If the parties have not actually
12 agreed the search terms ...

13 MR CARALL-GREEN: Well, I think maybe that the parties have not actually agreed
14 the search terms because Apple has raised the anterior question of whether or not,
15 having agreed them, it will then perform the relevance review. Whereas, our
16 expectation was more or less precisely what the Tribunal has outlined, which is that
17 the process will result in a manageable number of documents.

18 I've noticed that I've been quoted several times in the papers as having said that we
19 don't want to receive untold millions. While I'm, of course, pleased to have coined
20 a catchy turn of phrase, the whole point of me saying that was to indicate that we
21 wished to look for maybe a few hundred or a few thousand, and not the millions. But
22 now that we've arrived at that point the next step is simply for the documents to be
23 produced without further ado.

24 THE CHAIR: Yes. Assuming that the search terms are agreed in terms of the process.

25 MR CARALL-GREEN: Assuming that the search terms are agreed. We're not aware
26 that any of the search terms are said to be objectionable in themselves. I'm not aware

1 of any objections to the terms themselves. As far as I'm aware, the only stumbling
2 block to agreement is the anterior question.

3 My robe is being tugged, sir. (Pause)

4 To clarify, the result is that the terms are not agreed because that process is ongoing.
5 But, in a way, we can't -- I think we can't break through to what the terms should be
6 until one understands what the process thereafter will then look like, because one can
7 see that if the parties are both operating on the basis that once we agree these terms
8 that set will simply be handed over; that's one thing. And you can agree the terms on
9 a particular basis, looking for a particularly small number, for example.

10 Whereas, on the other hand, if the parties are both operating on the basis that once
11 one agrees the terms there's then a further layer of filtering, one can see that that
12 affects one's view of what the search terms should be because you could say, "Well,
13 this might return 10,000, which feels topky, but actually I'm very happy with that
14 because I'm going to slice out quite a few of them in my relevance review".

15 THE CHAIR: That's helpful. Maybe I could hear from Mr Kennelly on ...

16 MR KENNELLY: Sir, the question of appropriate search terms and the need for
17 relevance review are two separate questions. The Tribunal set down a process for
18 agreeing search terms and the idea was that the Class Representative would propose
19 search terms.

20 In July -- so two months after the CMC -- the Class Representative wrote to us and
21 said, "Just apply the search terms from *Kent*". Despite the fact that the issues in *Kent*,
22 as the Tribunal knows, are far broader than the issues in *Ennis*.

23 We pointed this problem out to them but we ran the search terms as requested and
24 we sent a letter explaining the number of hits. They wrote to us a second time with
25 a different set of search terms. In your hearing bundle, hearing bundle 2, could you
26 just briefly look at that? This is just on the search terms issue and I'll move on to the

1 bigger question of relevance. It's tab 71 in your second hearing bundle. It's a letter
2 on page 1196.

3 If you turn over to page 1197, you see the lists of the production sets. Running the
4 new search terms, set 2 search terms, that were given to us you see that, for the US
5 production set, for example, on the far right-hand column the top was almost a million
6 documents. Those are documents which have been identified in addition to the
7 documents in the *Kent* disclosure.

8 Below that you see the number of documents from the US iPhone antitrust litigation.
9 A large number. Not as large but a much larger number than my learned friend
10 mentioned.

11 Immediately below that, then, much smaller numbers for the CMA and DMA files. But
12 the problem -- the reason -- why such a huge number on the US side was thrown up
13 was, again, because the search terms that were proposed by the Class
14 Representative were much, much too broad. We pointed this out to them. If you go
15 on to page 1197, bottom of the page, one of the terms we were asked to run was
16 simply, "app review".

17 Over the page, the terms that we sought to combine like "developer" and "quality" and
18 the root "app" alone captures tens of thousands of documents. The Class
19 Representative has failed to send us search terms that are sufficiently precise to
20 narrow down the scope of the search.

21 We've written to them, as you can see in this letter, and we are waiting for more
22 focused search terms. Search terms are definitely not agreed.

23 THE CHAIR: The purpose of the process, one looks at paragraph 4, was that there
24 should be a process of engagement, during which the Defendants could, of course,
25 propose alternative search terms, suggest refinements, ultimately with a view to
26 an agreement on a set of search terms with which parties are content, ought to

1 disclose material that one could -- taking a probably a reasonably rough and ready
2 approach to it, but would be likely to be relevant. And that one could then simply
3 disclose those. They are, of course, disclosed under the implied conditions, so they're
4 not going out to the world at large.

5 And I suppose the question I have for you is whether that is a process that is simply
6 still ongoing in relation to which it's premature to think that it's not going to work, or is
7 your submission, essentially, that the parties are never going to agree on a set of
8 search terms that will sufficiently narrow the search to produce a proportionate
9 outcome?

10 MR KENNELLY: That's a difficult question, sir, the very last question you asked. In
11 our submission, the Class Representative's search terms have been so inadequate
12 that it's hard for us to engage with them. The Tribunal may be suggesting that it's for
13 Apple to suggest a different approach to the Class Representative, and we hear what
14 you say. And you did order a process of engagement, which is a two-way process.

15 THE CHAIR: And I didn't accept Mr Carall-Green's proposition that Apple should be
16 required to propose its own search terms. But the objective here -- recognising that
17 both parties have a duty to co-operate in the production of and availability of relevant
18 material in a way that's proportionate. And there was perhaps an expectation that
19 there would be a process of engagement which both parties would require to engage
20 in, with a view to narrowing the search terms in a way that is going to produce the
21 result. I mean, if that's simply not going to happen, then the Tribunal would have to
22 consider whether it needs to approach the whole issue in a different way.

23 MR KENNELLY: Yes. And it would be a shame if the Tribunal had to start from
24 scratch at this stage. We want to move things along.

25 And perhaps that brings me to the point about relevance, because when one looks at
26 these document sets, for example, on one view, it might be open to us to take the *Kent*

1 search terms which we have been given, apply those to the document sets in the list,
2 and conduct a relevance review now, having run those search terms. The Class
3 Representative has said the *Kent* search terms are not sufficient. They said that at
4 the last CMC and it would be open to them, having reviewed what we give them, to
5 come back with different search terms that we would apply to the repositories, but at
6 least progress would be made. And, as you can tell, Apple's key concern here is the
7 relevance review. And if that were permitted, the process could move more quickly
8 because we could take even the inadequate search terms we've been given -- so the
9 *Kent* search terms -- run those, and start the relevance review against an agreed list
10 of issues which we could agree with the other side.

11 And may I address you, at least at a high level, on the need for relevance review?
12 Because the key point is that each of these cases from which the repositories are
13 made have a much broader scope than the Ennis case, in this case. And so, of
14 necessity, even applying these search terms, or any search terms, the risk of irrelevant
15 documents being produced is significant. And the Tribunal's practice direction, your
16 rules or case law, tells us that only relevant documents should be produced. These
17 are not only irrelevant, but highly sensitive, especially in the regulatory sets. And so
18 Apple does have a right to say that it should not be required to produce both sensitive
19 and irrelevant documents. And that is the purpose of the relevance review and why
20 it's important that it can be done quickly. And we've been saying that consistently to
21 the other side.

22 THE CHAIR: Are you able to put a -- when you say quickly --

23 MR KENNELLY: Well. I took instruction, I anticipated the Tribunal's question. So we
24 had a discussion about this this morning. And if the search terms were agreed, for
25 example, if we apply the *Kent* search terms as a starting point, and we had a list of
26 issues against which we could run a relevance review, it could be done, I am told, and

1 I'll be told if this is still good, within three weeks, after search terms and the list of
2 issues have been agreed. And I'll turn around to make sure that I've got that right.

3 (Pause)

4 Sorry. I'm told it's an important point that the documents that we're discussing are the
5 2,000 documents that were mentioned by my learned friend today, the total numbers
6 for the CMA and DMA sets. (Pause)

7 So I'm told that that three-week proposal relates to the CMA and DMA sets because
8 that is a much smaller total set of documents. So we apply the search terms and then
9 the relevance review. That can be done within three weeks for the CMA and DMA
10 sets. The American set is much bigger. More time would be required for that.

11 THE CHAIR: And you're not able to put any estimate on that?

12 MR KENNELLY: Not right now. This was a proposal we discussed just this morning
13 in anticipation of the Tribunal's question. And in particular, because my learned friend,
14 in all fairness to him, had stressed in his skeleton that he was particularly interested in
15 the smaller document sets from the CMA and the DMA because, on the face of it,
16 those look more manageable and irrelevant so you ought to be done more quickly in
17 relation to those. The relevance review is normally a difficult exercise, which is why
18 three weeks is a very rapid period in the context of an exercise like this. But that would
19 again be progress.

20 THE CHAIR: Which was precisely one of the reasons why -- and you're right about
21 the general principle that only relevant documents require to be disclosed. But,
22 equally, if one can design a proportionate search which can be expected to generate
23 relevant documents, then using search terms applied to a digital data set, imposing
24 a further process on top of that may be disproportionate.

25 MR KENNELLY: The problem we have, as you can tell, is that the search terms
26 agreement exercise is proving difficult. And a quicker way to move things along may

1 be to short-circuit that, to say, if we want to move very quickly, let's apply the *Kent*
2 search terms to the non-US documents and then do a rapid relevance review to those,
3 which would be three weeks, and then we'd see some progress. Whereas if we have
4 this iterative process with the search terms, it'll take a lot longer than three weeks at
5 the current rate of progress, even with the Tribunal's deadlines and Tribunal's efforts.
6 I've been given instructions as to the time needed to do a relevance review on the
7 larger US document set. And I'm speaking now for applying the *Kent* search terms to
8 that set and then doing a relevance review. And that's about 60,000 documents. And
9 that would take six weeks, I'm told. And, again, that is a rapid process. If my learned
10 friend says it can be done more quickly, Apple is in court. They understand the need
11 to offer the very fastest timetable to the Tribunal. It couldn't be done any more urgently.
12 And so, of course, after the list of issues is agreed, because the problem we have at
13 the moment is there's also a dispute about: how does one assess relevance? In this
14 case, we need a list of issues against which we can do the relevance review.
15 Otherwise there'll be an internal dispute about how relevance is to be assessed in the
16 first place.

17 THE CHAIR: Thank you.

18 Mr Carall-Green, you've heard what Mr Kennelly has to say.

19 MR CARALL-GREEN: Yes, sir.

20 THE CHAIR: He tells us that a relevance review could be undertaken on the basis of
21 the existing proposed search terms in six weeks. I suspect that if I left it to you to try
22 and agree narrowing the search terms, it would take longer than that. I wonder
23 whether a way forward is to invite Apple to undertake that relevance review, disclose
24 the documents that that reveals, and then you can consider where you are in terms of
25 whether that invites a further round of disclosure requests.

26 MR CARALL-GREEN: Yes, sir.

1 Can I address you on the key difficult step in that process, which I think my learned
2 friend has actually already adverted to, which is the agreement of the list of issues?

3 THE CHAIR: Presumably, the Tribunal today could direct you to propose a list of
4 issues within the same seven days that we've allowed for in your application. Give
5 Mr Kennelly an opportunity to respond within seven days, and the Tribunal can
6 adjudicate on that exchange if the parties can't reach agreement.

7 MR CARALL-GREEN: Of course.

8 THE CHAIR: And you then have a relevance review against that list of issues within
9 six weeks, we're told. And I can set a deadline. And you would then have that
10 universe of documents in eight or nine weeks. And if that doesn't happen, then
11 obviously one would have to take stock and see where we are, and if you do receive
12 that universe of documents, then at least progress has been made. And if those
13 documents throw up further issues to be explored by way of disclosure, well, you can
14 bring another application to the Tribunal. And what I'm really concerned about is that,
15 with the best will in the world, we've set up a process which is actually going to end up
16 with things taking longer than --

17 MR CARALL-GREEN: It may or may not, sir. If I could perhaps compare the relative
18 difficulty of the two procedures that are now theoretically on the table. I, of course,
19 take account of what the Tribunal has said, which is a process which involves, first of
20 all, the agreement of a list of issues, possibly with reference back to the Tribunal,
21 followed by, of course, with submissions, followed by an adjudication, then that starting
22 a clock of six weeks.

23 If one compares where we've got to on the existing process -- sir, if we could just go
24 back to what my learned friend said about the search terms, the story that you were
25 told was Dr Ennis proposed a set of search terms and it yielded large number. And
26 then he proposed a second set of terms and it yielded a large number. And so it's all

1 | terrible and it's not working. But, of course, that is the process that you wanted us to
2 | embark upon. And if I may clarify something from the letter that you've seen referring
3 | to the large number of 1.2 million, the set of search terms that Dr Ennis proposed as
4 | part of that process was a bundle: some wider sets, some narrower sets; the idea
5 | being that he wanted to see, well, "If you search for this, how many? If you search for
6 | that, how many? If you search for the other thing, how many?" And once he knew
7 | that, he could then select from among the options that he had put forward, or perhaps
8 | a further bespoke option informed by the results he had suggested, to yield a sensible
9 | number of documents.

10 | And what you see there for the 1.2 million is the grand total of all of them. That's not
11 | telling you that all of the search terms that Dr Ennis has in mind yield millions of
12 | documents. That is not what's happening. What's happening is the process that you
13 | envisaged, which is that Dr Ennis is developing however many it is, a handful of
14 | proposals, all designed to reach a sensible number of documents. So, as far as we
15 | are concerned, as long as Apple then does not interpose a further relevance review to
16 | delay the process further, there's really nothing wrong with that process. It will
17 | eventually yield the kinds of numbers that you've seen in our skeleton argument:
18 | somewhere in the hundreds or in the thousands. Something sensible.

19 | THE CHAIR: I mean, the numbers in a sense are perhaps not the critical point. The
20 | critical point is there has to be agreement on the search terms that will result in
21 | disclosure. And, what I wonder is whether -- I mean, this is without prejudice to the
22 | potential for the parties to maintain the existing process, and reach agreement, and
23 | following through. But what I'm wondering is whether, in fact, progress in getting
24 | disclosure made, which is what we want to see, might, given where we are, be better
25 | achieved by approaching it in a different way.

26 | MR CARALL-GREEN: May I take further instructions on the different ways?

1 THE CHAIR: Yes. (Pause)

2 MR CARALL-GREEN: So Dr Ennis's suggestion would be that the other way or the
3 further way be used as a kind of plan B so that the attempts to reach agreement on
4 the search terms process should be given a chance. And then perhaps if a point
5 comes where agreement cannot be reached, and there could be a deadline around
6 this, or it could be Dr Ennis's option, we can trigger the process that the Tribunal has
7 described.

8 THE CHAIR: I suppose what troubles me about that proposal, Mr Carall-Green, is that
9 we end up with a process about design to try and promote agreement on search terms,
10 which simply adds in another layer at this point.

11 MR KENNELLY: Yes. I see that.

12 THE CHAIR: You know, it's disappointing that matters have not progressed further
13 than they have at this stage. Standing where we are, I think the right course to take
14 would be to direct you to propose a list of issues within seven days. Mr Kennelly, if
15 you could respond in seven days. If necessary, the Tribunal will adjudicate on that list
16 of issues.

17 Then what I'm envisaging is the Tribunal will direct that Apple will disclose all relevant
18 documents which have been generated from the data set of documents which have
19 already been, in a sense, identified through the application of the first round of search
20 terms. I'm minded that we should fix a deadline for that which will take into account
21 your instructions that the exercise can be done within six weeks. So I wonder if that's
22 enough direction to allow the parties to put together an agreed order.

23 MR KENNELLY: Sir, yes, we are content. May I just take instructions on the
24 seven days? I hesitate just because it's particularly quick, and ...

25 THE CHAIR: You know what the issues in the case are, Mr Kennelly. It shouldn't be
26 too difficult to respond in terms of either agreeing a list of issues or identifying where

1 the problems are.

2 MR KENNELLY: I understand. And the list of issues is a good discipline for us to
3 have in any event, in this stage in the litigation.

4 Turning, then, to the six weeks. If there's any problem with that six weeks figure,
5 obviously I'll attend it today, we will let the Tribunal know immediately. That's a best
6 estimate based on what I've been told today.

7 THE CHAIR: Yes.

8 MR KENNELLY: If there's a difficulty that arises in relation to the review, we will let
9 the other side know and the Tribunal know immediately. We understand that the
10 direction is clear.

11 THE CHAIR: Yes. What the Tribunal will do is fix a deadline based on that six week
12 estimate. I think at the last CMC, Mr Piccinin at one point said, "If the Tribunal fixes
13 the deadline, then, well, the work will just have to be done". Of course, I appreciate
14 that sometimes things prove to be more difficult, but I would expect that if there is
15 going to be a difficulty with meeting the deadline, that an application is made to extend
16 it in good time before it reaches its termination.

17 MR KENNELLY: Indeed.

18 MR CARALL-GREEN: Sir, may I ask a point of clarification?

19 THE CHAIR: Yes.

20 MR CARALL-GREEN: Which is that -- and forgive me if this was in fact clarified while
21 I had my back turned -- I think the Tribunal's referred to running search terms over the
22 existing populations of the repositories of documents that have been identified. Did
23 the Tribunal have in mind the *Kent* search terms for that purpose?

24 THE CHAIR: Well, that was the set of search terms that Mr Kennelly was referring to.
25 If you have in mind a narrower universe, then --

26 MR CARALL-GREEN: Well, sir, it wouldn't be a narrower universe. The reason

1 I raised the point is because part of the process that we were trying to undertake was
2 driven by the fact that the *Kent* search terms are not -- Dr Ennis doesn't accept that
3 those are necessarily adequate for his case. The question was, therefore, under the
4 old process, whether the search terms should look different. Under this process, we
5 would effectively revert to the *Kent* search terms. I wonder if a compromise would be
6 to say that, now that the Tribunal knows that the documents from the regulatory
7 repositories are in fact not very large in number, those don't need to be subject to
8 search terms. If there is a relevance review that's going to be conducted in short order,
9 then the entirety of those small number of documents should be subject to the
10 relevance review without going through the additional filter. The search terms.

11 THE CHAIR: Would that cause any difficulty, Mr Kennelly?

12 MR KENNELLY: Yes, I'm sorry, sir. The *Kent* search terms were suggested by
13 Dr Ennis. And the proposal, which I've made today on instructions from Apple directly,
14 was based on applying the search terms, which Dr Ennis himself suggested as part of
15 the set one process. So if that's to be reopened, I'm afraid I have to go back to the
16 drawing board and see what can be done.

17 THE CHAIR: Okay. What we'll do is we'll do it based on the *Kent* search terms, but
18 this is without prejudice, Mr Carall-Green, to you coming forward with another
19 application which may perhaps be informed by the documents that you, on this basis,
20 ought to be receiving. Perhaps under three months might be, I hope, not too
21 optimistic. And if those disclose lines of inquiry that need to be pursued by further
22 disclosure requests, or if there are issues which you consider are not covered by the
23 *Kent* search terms which require a further exercise to be undertaken, again, you're
24 free to either propose another set of search terms, applying the process that I laid
25 down in June, or indeed to come back to the Tribunal with a specific application.

26 MR CARALL-GREEN: I'm grateful.

1 THE CHAIR: Is that everything we need to deal with on disclosure?

2 MR CARALL-GREEN: Yes.

3 Expert and survey evidence

4 THE CHAIR: Okay. Expert and survey evidence.

5 MR CARALL-GREEN: Yes, sir. There are a few within this, sir, so I will take them in
6 whichever order the Tribunal would prefer.

7 THE CHAIR: Well, shall we deal first with the issues to be addressed by the experts
8 that have already been approved?

9 MR CARALL-GREEN: Oh, yes.

10 THE CHAIR: That's Annex A, list of expert issues which was provided to the Tribunal
11 this morning. We can see the various alternatives that are being suggested and can
12 see the points which you have suggested and upon which issue is taken. Is there
13 anything you wish to say about all of these?

14 MR CARALL-GREEN: Yes, sir. There are, I believe, even though the drafting can
15 look a bit complicated, five points in dispute. We've set them out in the skeleton
16 argument.

17 We have point 1, which is whether the app industry and software technical experts
18 may address the operation and effects of the restrictions on app distribution and in-app
19 payments.

20 Point number 2 is how the work of the accounting and competition economics experts
21 is divided up for the purposes of the limb 1 test under *United Brands*.

22 Point number 3 is whether the app industry and software technical experts can
23 address the innovativeness of Apple's products and services.

24 Point 4 is whether the economists should address the relevant economic framework
25 for considering the appropriate approach to interest.

26 Then there's also a point 5, which is that the list is showing some areas of

1 | disagreement that are effectively contingent on the Tribunal's decision regarding
2 | valuation evidence.

3 | You'll see, sir, there that Dr Ennis considers that the various issues relating to
4 | unfairness should be addressed by the economists, whereas effectively Apple's
5 | amendments would have those issues moved to the valuation expert. And so clearly
6 | if a valuation expert is permitted or not permitted, that's important.

7 | There's a further question, which is that Dr Ennis would say that, even if the valuation
8 | expert is opining on these points, the competition economics expert should also opine
9 | on them as well. That is because of Dr Ennis's position on what economic value
10 | means. It may be that that's best addressed within the context of the discussion about
11 | the valuation evidence. If that's right, then we just take the first four points.

12 | So on the first point, Dr Ennis is saying that the industry expert should address the
13 | significance of the restrictions placed on iOS apps in respect of distribution and
14 | payments. Apple says that that's all about exclusive dealing which isn't part of this
15 | case and this is duplicative and, in any event, these are economic issues. I take those
16 | objections in order.

17 | The Tribunal will have seen in the pleadings that Dr Ennis relies on developers'
18 | inability to escape the commission. Sir, if you need to turn that up, it is in the Claim
19 | Form at 140.1 and 140.2 which can be seen in the hearing bundle at page 924. It may
20 | be unnecessary to turn it up because the Tribunal may feel familiar with this aspect of
21 | Dr Ennis's pleading. There are various aspects of unfairness on which Dr Ennis relies,
22 | and these are the first two of them.

23 | Now, this is relevant to unfairness, but it's also relevant more generally to the
24 | assessment of Apple's monopoly position. Because if Dr Ennis is right that app
25 | developers have no real choice about who to use for app distribution, then that will
26 | support his case that Apple is a monopolist. Therefore, Dr Ennis will want the experts

1 to address the question of whether he's right that, in practice, developers cannot
2 escape the commission.

3 Now, this is not duplicative, because one of Apple's responses to Dr Ennis's case on
4 this front is that app developers have other means, other ways of monetising their
5 apps. They can avoid the commission by using another monetisation strategy.
6 Therefore, Dr Ennis's points 1 and 2 in his list of unfairness, they're wrong points
7 because the commission can be straightforwardly sidestepped. Sir, you'll see that in
8 Apple's Defence which is in the hearing bundle, tab 73, starting on page 1210. Apple
9 says at paragraph 25.2 that there are six additional purchase methods that are
10 permissible under the guidelines. Then Dr Ennis in his reply, which is at page 997,
11 replies to that point and says at paragraph 10.4 of his reply that the supposed
12 additional purchase methods to which Apple refers are not alternatives at all or are
13 illustrations of the arbitrary and unfair way in which the commission is imposed.

14 This debate continues in other places. Returning to page 1214 of the Defence, at
15 paragraph 37, Apple says that there are various business models that a third-party
16 app developer may adopt and other developers may monetise their apps through
17 a combination of these models or through other models and features. Once again,
18 I can take you to the reply. I don't want to tire the Tribunal out with leafing backwards
19 and forwards, but in the reply at paragraph 17, Dr Ennis pleads that those alternatives
20 are not real ways for developers to monetise their apps. That comes up at the Defence
21 at 75 and the reply at 41. Again, the same debate: Apple says you can avoid the
22 commission by using a website; Dr Ennis says, well, a website is not a real alternative
23 for an app developer.

24 So what's going on here is that the question being debated is whether developers have
25 meaningful alternatives available to them whereby they can distribute their apps
26 outside the App Store. That question, Dr Ennis says, can usefully be addressed by

1 somebody who knows the industry. We can ask that person, in short, whether certain
2 business models or distribution routes are really viable for developers. We can think
3 about them in the abstract, but the Tribunal will be assisted by somebody telling it
4 whether or not that is a realistic outcome for the majority of app developers in this
5 market and therefore whether Dr Ennis is right about his case on unfairness.

6 THE CHAIR: Can I just -- so we've got the right focus for this, are we dealing with the
7 disputed item at pages 6 to 7 of the annex?

8 MR CARALL-GREEN: Sir, I want to make sure that I'm looking at the same --

9 THE CHAIR: It's "Annex A -- List of Expert Issues" provided to us this morning with
10 red text inserted by Dr Ennis and not agreed, green text inserted by Apple and not
11 agreed. At pages 6 to 7 under the heading, "In Connection with App Industry Expert",
12 there's a paragraph 6 which talks about the significance of the restrictions placed on
13 distribution of iOS apps. It's just so that we can focus on the point we're actually being
14 asked to --

15 MR CARALL-GREEN: We should be in the same -- the reason I'm hesitating is
16 because I think I'm looking at a different document in the bundle. So I'm going to turn
17 around and get a paper copy of the bundle and see if ...

18 THE CHAIR: We're being asked, effectively, to determine what this document should
19 contain. So if you could make sure we're focused on the part that --

20 MR CARALL-GREEN: Yes, that's it. I think you're right, sir. I think you said on
21 pages 6 and 7 --

22 THE CHAIR: That we're adjudicating.

23 MR CARALL-GREEN: -- starting 6.

24 THE CHAIR: Yes.

25 MR CARALL-GREEN: So you see there, sir, that I've boiled the question down to: is
26 it realistic to expect app developers to be able to avail themselves of alternative

1 routes?

2 THE CHAIR: Just again, sorry, to make sure we're focused on the right thing: this
3 point is also addressing the disputed paragraph on the final page under the heading,
4 "Apple's security and privacy restrictions"?

5 MR CARALL-GREEN: Yes, sir.

6 THE CHAIR: Yes.

7 MR CARALL-GREEN: That is subject to -- there's a bit of an overlap between that
8 and the question of whether or not you will allow privacy and security evidence
9 generally.

10 THE CHAIR: Yes.

11 MR FRAZER: We're just looking at the red text under 6 of the issues for the app
12 industry expert. Looking at 6(c):

13 "Whether the relevant restrictions are pro-competitive (because it increases
14 choice/competition in the market for mobile devices);"

15 Is that really something that an app industry expert would be able to opine on, as
16 opposed to the competition economist?

17 MR CARALL-GREEN: Well, sir, I think the point is that that could be addressed
18 from -- what we're looking for is for that to be addressed from the perspective of
19 somebody who knows the industry. So I take the point, that the phrasing,
20 "pro-competitive" in the technical sense is probably an economic issue. But what we're
21 looking for is for the industry expert to tell us, "Well, in light of what happens here, do
22 you agree or disagree that this helps developers to access customers, develop new
23 products, find new ways of getting to them? What are the effects from an industry
24 perspective of these restrictions? What do they mean to you?"

25 MR FRAZER: And is that not covered by (d)?

26 MR CARALL-GREEN: Well, sir, I think innovation is probably a subset of competition

1 because there are different competitive parameters. (Pause)

2 Would it be helpful for me to move on to the second point or would you prefer to take
3 these points in order by themselves?

4 THE CHAIR: It might be helpful just to hear Mr Kennelly immediately on that point and
5 deal with them sequentially.

6 MR KENNELLY: So, sir, the concern here has an echo of what I was discussing
7 earlier. These sub-issues for the app industry expert are straying into matters that
8 don't fall within the scope of this case at all.

9 The question of whether the restrictions are pro-competitive would be relevant in
10 a case alleging an exclusionary abuse. But it has no business in a case concerning
11 excessive and unfair pricing.

12 If we look at sub-issue (a) under 6: whether the commission is effectively inescapable.
13 It's common ground as a matter of fact that the commission applies exclusively in the
14 fields where it applies. There's no dispute about that. There's nothing for the expert
15 to opine on.

16 When we move over the page to these questions about whether the restrictions are
17 pro-competitive, that has nothing to do with the case which is about whether the
18 commission was fair. Was it fair by reference to the economic value of what the
19 developer was receiving? Whether the restrictions are pro-competitive or not doesn't
20 matter. The Tribunal has to decide: is the commission excessive and fair or unfair by
21 reference to the value, among other things, which Apple provides to developers.

22 Similarly, whether the relevant restrictions stifle innovation: again, that's a question
23 about whether the restrictions themselves are harmful or whether they can be justified.
24 But the restrictions are not challenged in this case. What's challenged is the fairness
25 and the level of the commission.

26 The sub-issues (e) and (f) that follow from that are parasitic upon those questions

1 | which arise in an exclusionary abuse case and not an excessive pricing case. When
2 | we pointed this out to the Class Representative, in their skeleton they say, "Well, this
3 | is relevant to unfairness and more generally to Apple's monopoly position". We had
4 | a flavour of that from my learned friend today when he said he was boiling it down to
5 | something else. But this is an area where we would urge caution in the Tribunal. The
6 | case is not about unfairness generally or monopolies generally. It's an excessive
7 | pricing claim and we must try to confine the issues for the experts to ones that relate
8 | to excessive pricing.

9 | In our Defence when we describe how the rules operate, that is by way of background.
10 | The issues between the parties go to the excessive and unfair pricing allegations. I'll
11 | come back to similar objections to other issues that have been proposed. But that's
12 | our main problem with sub-issue 6 for the app industry expert.

13 | MR FRAZER: Just before you go on, Mr Kennelly, would these be relevant to any
14 | anticipation of a defence of an objective justification? In other words, that the
15 | commission, even if excessive, is objectively justified or has an efficiency explanation.
16 | Would the impact of the restrictions on competition affect your ability to run such
17 | a defence?

18 | MR KENNELLY: It would be if there was an objective justification defence in this case.

19 | MR FRAZER: Right.

20 | MR KENNELLY: And there was an objective justification defence in *Kent* --

21 | MR FRAZER: Yes.

22 | MR KENNELLY: -- because we were facing an exclusionary abuse allegation. So we
23 | sought to say that the restrictions were justified, among other things, on the basis of
24 | the benefits and privacy and security benefits provided. But that is not an issue in
25 | fairness. What's happened here, we suspect, is that some of these sub-issues have
26 | been carried across from *Kent* unwittingly into this list, and we seek to apply some

1 discipline here. Because we're not making that objective justification defence in the
2 Ennis case.

3 MR CARALL-GREEN: Sir, please, I'd like to address the point that my learned friend
4 made about this being an impermissible expansion into areas that this case doesn't
5 touch, because we're told that whether or not the relevant restrictions are
6 pro-competitive doesn't really arise in this case.

7 So, if I could take you to Apple's Defence at page 1219 of the hearing bundle. I'm
8 looking at paragraph 47, sirs. Here you see that Apple admits and avers that apps
9 may be distributed through the App Store. It then makes various comments about its
10 approach. I'm skipping to the penultimate line on the page:

11 "Apple's approach [therefore] improves [and here's a list of things that it improves] ...
12 It is pro-competitive and increases consumer choice by offering, among other things
13 [this, that, and the other]."

14 So for us to be told that whether or not the restrictions are pro-competitive is not in the
15 case is rather surprising when it features in Apple's Defence as its justification for
16 imposing the restrictions that we say are unfair.

17 I think I've shown you that the debate is really like this. You stop us from distributing
18 by other means and that is a factor of unfairness. The response is, "No, you may
19 distribute by other means and, in any event, it's fair". So the reply that we seek to
20 make is, "Well, no. In fact, we don't have the ability to distribute by other means and
21 it's not fair because it doesn't have all of these benefits that you positively allege it
22 does have by way of justification".

23 So, in response to your question, sir, I think the way I would put it is: it's not an
24 objective justification defence in a formal sense, but it is a justification in the sense
25 that the Tribunal is required to consider whether or not the raw price and, by the way,
26 the system of charging -- and we'll come to this because that is part of Dr Ennis's case

1 as well -- as pleaded is unfair.

2 Apple will advance a justification, if you like. It's probably not that helpful to use the
3 term, but a reason why it is fair. So it's relevant to not a technical defence, but it's
4 relevant to the argument about the core of the case about whether there is unfairness
5 here.

6 Once one sees through that lens, one can see that all of these issues are within the
7 case. So (a) and (b), I've shown you the debate there is straightforwardly disclosed
8 on the pleadings. (c) we've just seen. (d), as I've discussed with you, sir, is effectively
9 a component, or one is highlighting an element of what pro-competitiveness looks like.

10 It is, incidentally, also part of Apple's justification, they say, that their system promotes
11 the quality of apps which is, in a sense, innovation or quality more generally.

12 The question of what's happened in other territories like the Netherlands and
13 South Korea: that is a pleaded issue. The Tribunal will know that Dr Ennis has
14 specifically pleaded that, in the Netherlands and South Korea, the regulatory
15 interventions have led to changes to the commission and specifically relied on the
16 experiences in those jurisdictions as being potentially -- it's a matter for evidence in
17 due course -- relevant or informative to the question of what happens if you lift the
18 restrictions which, again, has a direct bearing on the central debate between the
19 parties, which is: are these fair? Well, let's see. Where you've taken them away, what
20 are the outcomes like? Are they more fair or are they less fair?

21 So all of these things, we say, are squarely within this case and the actual problem is
22 that Apple doesn't want to revisit any of the things that were visited in *Kent*, and so is
23 artificially constraining this case to one about the brute question of the price,
24 notwithstanding that it itself has introduced the question of innovation,
25 pro-competitiveness, in its own pleading.

26 THE CHAIR: We should give the transcribers a break. So we're going to rise for

1 15 minutes for that purpose and we'll come back and continue thereafter. Thank you.

2 (11.48 am)

3 (A short break)

4 (12.05 pm)

5 MR CARALL-GREEN: So I think we were going to move on to the second point on
6 the list of issues.

7 THE CHAIR: I should say, what we're minded to do is hear parties on all the issues
8 relating to experts and then consider whether we can give you a decision now or if we
9 need to think about it.

10 MR CARALL-GREEN: Thank you. Does that include the, in principle, applications for
11 adducing expert evidence as well, or just the ...

12 THE CHAIR: Yes, yes.

13 MR CARALL-GREEN: Yes. Very good.

14 So now we're just on the second point on the list of expert issues, which is page 2 of
15 the document that we've been looking at, sir. Now, there are a few drafting issues
16 here but just to look at the matter in the round. The point here is that, under limb 1 of
17 the United Brands test, which is the question of excessive (inaudible), Dr Ennis
18 proposes that the economists are the persons who should address things like the
19 business activities by reference to which Apple's profitability should be assessed, the
20 evidence that might be relevant to excessiveness, and the identification and
21 application of the profitability benchmarks.

22 So Apple identifies these as accounting issues. Dr Ennis does not say that the
23 accountants are irrelevant here. Dr Ennis perfectly well accepts that the accountants
24 are going to be of assistance to the Tribunal. But the real question is about the division
25 of responsibilities. So, as Dr Ennis sees it, it is normal and helpful for the accountant
26 to interpret financial statements, interpret data, maybe handle large volumes of data

1 to calculate the various metrics. But then the interpretation of the outcome of those
2 exercises is a different matter because it is the economists who should be opining on
3 how meaningful the metrics are and applying them to what is essentially an economic
4 framework for determining whether or not a price -- and the Tribunal will know this is
5 the test -- bears a reasonable relationship to its economic value.

6 That, really, in a nutshell, is all this drafting is driving at, is Dr Ennis is trying to get that
7 division of responsibilities clear. I'm happy to answer questions on the specific
8 wording, but that is the thrust of where we're trying to go with this.

9 MR FRAZER: So under that approach, then, am I right that the accountants would
10 measure things like rate-of-return on sales or return on assets or return on capital
11 employed and WACC, et cetera, and the economists would then use that data in order
12 to determine whether limb 1 was satisfied?

13 MR CARALL-GREEN: Exactly. Yes. So there's a division, effectively, between a sort
14 of forensic accounting investigation: what, mathematically, can we glean from the data
15 that is available to us at trial? And then once the learnings from that exercise have
16 been completed, the economist can say, "Well, I know about limb 1. Let me explain
17 how this all fits into the overall picture".

18 THE CHAIR: Thank you.

19 MR KENNELLY: There may in fact be very, very little between us on this issue. And
20 the question, then, is for the Tribunal to decide which drafting, if either set of drafting,
21 best addresses the point, because it seems that we agree that, as my learned friend
22 said, the accountants will deal with things like the profitability benchmarks, but then
23 it's for the economists to consider the implications of the accounting analysis from an
24 economic perspective.

25 Our concern with the drafting was the suggestion that the economists would be
26 assessing, for example, profitability benchmarks, because, really, it's for the

1 accountants to assess profitability benchmarks and for the economists to consider the
2 implications of the accounting analyses from an economic perspective. So, in the red
3 drafting that you see on the page beside subparagraph 5, near the bottom of the page,
4 Dr Ennis suggests for the competition economists the identification and application of
5 appropriate profitability benchmarks. We prefer, and I think it's closer to what my
6 learned friend said just below that, that the economists would deal with the implications
7 of accounting profitability benchmarks, if any, for economic analyses of excessive
8 pricing. And that's the difference. We want to avoid any suggestion that the
9 economists would be assessing matters for the accountants like profitability
10 benchmarks.

11 So, in order to achieve what both I think my learned friend and I agree is the proper
12 approach, we commend our drafting to the Tribunal.

13 THE CHAIR: Thank you, Mr Kennelly.

14 MR CARALL-GREEN: We may be in furious agreement in that case, but to explain
15 the red drafting, when we say the identification and application, what that means is
16 identifying an appropriate benchmark. An accountant will come to the information and
17 say, "Well, look at this EBITDA. Very interesting."

18 But the point there is that the economist is the person who should control what
19 benchmarks are actually relevant in the economic context. I don't want to hear about
20 EBITDA. I need to hear about return on capital employed, or whatever it is. And then
21 the application, not the derivation of the figure or the calculation of it, but the application
22 of it for the purposes of the test. That's what that drafting is intended to capture. But
23 I think, as I say, sir, that may just be a way of saying that my learned friend and I are
24 actually quite close.

25 THE CHAIR: Thank you. Item 3.

26 MR CARALL-GREEN: Item 3, sir, is the point about the creative spark. And this can

1 be found on page 6 and also on page 8, where Dr Ennis has proposed that the app
2 industry expert and also the technical expert opine on the extent to which Apple's
3 products and services are the result of a creative spark or innovation. So this derives
4 from Apple's Defence at 94.1, which is to be found on page 1244 of the hearing bundle.
5 It's in the middle of that paragraph:
6 "The cost of a creative spark is often fixed and low."
7 When it results in something very wonderful, people can pay a lot of money for it.
8 Now, Dr Ennis denies that Apple's innovation is all that. And you can see that in the
9 reply at 53.3, which is found on page 1036 of the bundle. At 53.3.2, it's denied that
10 the distribution services are innovative or the results of a creative spark. And, in fact,
11 sir, Dr Ennis has a factual basis for that, in that he says that, for example -- there's
12 more to it than this, but just to show you that this is a serious point worth consideration.
13 Dr Ennis says in the pleading, in the reply, he gives the example of Steam, which is
14 a software distribution platform that is older than, it predates, the introduction of the
15 App Store. And in his Claim Form, he gave the example of Cydia, which was another
16 software distribution platform that predated the introduction of the App Store. So
17 there's a factual basis for Dr Ennis's case that, in fact, the App Store is not so creative
18 or so innovative as Apple would have us believe.
19 Now, Apple says that this is important. The Tribunal may be familiar with Apple's
20 grounds of appeal in the *Kent* case and the skeleton argument; we'll probably come to
21 that later when we're talking about the application regarding the timetable. But the
22 Tribunal will have seen that one of the points that Apple has made in *Kent* is that where
23 something is cheap to produce, but very valuable to the user, then one has to factor
24 that into one's understanding of the costs. So I think they give the example of
25 *Attheraces* and the collecting society cases, which are to do with, essentially,
26 information. *Attheraces* is about where information is given out. It doesn't cost all that

1 much to produce, but there might still be some justification for the customer paying
2 a very large amount to purchase it.

3 And so Apple is heavily committed to this argument that the App Store is a bit like the
4 race data or a song or a piece of intellectual property that might not cost very much to
5 produce, as it says in its Defence. The cost of the creative spark is negligible, but it
6 produces enormous economic value.

7 All Dr Ennis is really saying is he'd like to be able to test the assertion on which that
8 argument is based. Apple says that the issue is duplicative and falls outside the remit
9 of either expert. Dr Ennis says that's wrong because, at a basic level, as I've
10 explained, Apple is just saying that its product is very innovative and that the price
11 should reflect that. If it isn't innovative, one can see that the analysis changes. So the
12 Tribunal will want evidence on whether or not there really is a lot of innovation here.

13 And, if I can explain why it appears in two places, sir, the issue appears in two places
14 because Dr Ennis thinks that when one is thinking about innovation, it's appropriate to
15 think about it from two different perspectives: the perspective of the consumer and the
16 perspective of the producer. So if a new dish in a restaurant could be innovative
17 because nobody has ever tasted it before -- there was a time when nobody had had
18 egg and bacon ice cream or snail porridge -- and so from the perspective of the person
19 eating the dish, it was innovative. But there's a flip side, because it's possible for a dish
20 to be something that we've all had before, but to be produced in a new way. Before
21 1945, nobody had ever had a baked potato made in a microwave. Before the 1970s,
22 nobody had ever had a sauce thickened with xanthan gum.

23 Those are innovations which are seen from the perspective of the producer on the
24 technical side, and so Dr Ennis seeks permission to approach the question of whether
25 Apple's case is right from both perspectives.

26 THE CHAIR: Thank you.

1 Mr Kennelly.

2 MR KENNELLY: So my starting point is when my learned friend refers to the pleadings
3 and pulls out a phrase such as "creative spark", our response is that not everything
4 that is mentioned in the pleadings warrants expert evidence. We have to isolate the
5 issue to which the expert evidence is going. And this concept of "creative spark"
6 doesn't form part of any legal test. The Class Representative hasn't identified the
7 particular legal issue it goes to. The reference that is made to value is, of course,
8 an issue before the Tribunal, the question of the value to the developers who pay the
9 commission. And my learned friend, interestingly, identified a point that's on appeal
10 in *Kent* that is central in this case, which is the extent to which one must take account
11 of IP protection in assessing the value, which we say is being provided to the
12 developers. And implicit in the fact of IP protection is that the thing that is protected
13 by IP was innovative. And that is relevant to the question of value, and we'll come to
14 our need for a valuation expert in due course.

15 But that does not mean that they need separate evidence from an app industry expert
16 about whether there was, whatever it means, a creative spark in relation to the
17 particular tools, technologies and services that are in issue. It just seems to us to be
18 entirely unnecessary and unconnected to the issues in the case.

19 THE CHAIR: It's a phrase in your pleadings, Mr Kennelly.

20 MR KENNELLY: It is. It's a phrase in our pleadings, but it simply serves to illustrate
21 a different point which is already covered by the expert issues. And there's no
22 separate point that arises from it.

23 And the second major objection is that it's duplicative for an app industry expert and
24 a software and technical expert both to address this question of whether the product
25 or service is the result of a creative spark. If the Tribunal is to allow one expert to
26 address it, it appears to be the very same question being addressed by a different

1 expert, and that is duplication. But my key concern is that this is unnecessary and
2 unconnected to the issues in the case. If anything, my learned friend has explained
3 how it might be an aspect of an issue that is already before you, and requires no
4 additional analysis of this particular phrase.

5 MR CARALL-GREEN: So I've addressed you on the point of duplication. I don't
6 propose to say anything further on that.

7 But, in response to the accusation that we've not identified what legal issue is relevant
8 here: well, that's true. We haven't because Apple has. Apple has put forward this as
9 an important point within the context of the defence on economic value. The chapeau
10 of paragraph 94 says -- so this is a summary of its whole case on unfairness -- in
11 summary, the commission is not excessive or unfair because Dr Ennis has failed to
12 take account of demand-side factors when assessing economic value. So if there's
13 a legal issue, Apple has specified what it is. It is economic value. The Tribunal will be
14 aware that it is a central question on any unfair pricing case, and Apple will be saying
15 to this Tribunal at trial, we apprehend that one of the reasons that this provides so
16 much economic value is because it's a wonderful, innovative, shiny,
17 never-before-seen product. And so the question that we want to address in our
18 evidence is whether or not it really is true that there's some great innovation here,
19 some great novelty, something that can't be found anywhere else that deserves to be
20 rewarded by a price that far exceeds the cost.

21 That's all I wanted to say on that, sir.

22 MR FRAZER: To what extent will this be covered by the forensic accountants when
23 looking at WACC in innovative industries, et cetera? I understand the point you're
24 making that you want to look at the extent to which this provides economic value and
25 the extent to which it indicates or doesn't indicate excessive pricing. But will the
26 accountants be taking account of that in determining the relationship between ROCE

1 and WACC, for example?

2 MR CARALL-GREEN: It's not irrelevant to the question of the cost of capital, but the
3 cost of capital in an entrepreneurial or an innovative industry -- I think what we're
4 getting at, sir, is, of course, it builds in a certain assumption about what are termed in
5 Apple's pleading "hits and flops". So the WACC will build in a certain amount of hits
6 and flops and allow for whatever it is, nine flops and one big hit.

7 That's a way of assessing the question, but essentially, a much more direct way of
8 assessing the question might be to say, "Well, I actually don't know in this particular
9 instance whether this is the hit or the flop or something in between", because the
10 WACC is going to be, generally speaking, the enterprise-wide WACC and then we
11 have to apply certain assumptions if we want to filter it down to the WACC applicable
12 to a certain segment of the business.

13 A more direct way, and we would suggest quite an informative way, of assessing the
14 question is for somebody to look at this product and say, "Is this the kind of product
15 that was available to anybody before 2008 when it was introduced?" If you have an
16 expert who will say to you, "Well, yes, it was actually because there was this thing
17 called Cydia and it did all of the same things that the App Store did. Effectively, there's
18 nothing very interesting about the App Store; it looks to me like a carbon copy." Maybe
19 that will be informative. Conversely, Apple will probably want to say: well, no, this
20 person is going to tell you how Steam existed for five years before the App Store
21 existed, but the App Store did something actually very different and much more than
22 what Steam was doing. Therefore, this will help you to identify whether you're looking
23 at a hit, a flop or something in between and quite rapidly.

24 MR KENNELLY: Sorry, just to point out, a point I made in opening is that this reference
25 to whether something was a first mover in a market or not, again, we say, appears to
26 have only tangential relevance to the question of value. The question is not who came

1 first; the question is what is or was the value of the tools, technologies and services to
2 the developers at the time it was offered. Who developed technology first appears to
3 us to be entirely subsidiary. The question of assessing value at the time the service
4 was provided is one which is already before the Tribunal and is already included in the
5 list of issues.

6 MR CARALL-GREEN: So shall we go on to the fourth point?

7 PROFESSOR NEUBERGER: Can I please --

8 MR CARALL-GREEN: Sorry. Yes, sir.

9 PROFESSOR NEUBERGER: If I look at the app industry list of issues, there's the
10 reference to creative spark or innovation. If that paragraph were removed, wouldn't
11 the same issues anyway come out under earlier things about what other tools and
12 technologies performing similar functions were offered by third parties? Isn't that
13 materially overlapping?

14 MR CARALL-GREEN: There is some overlap, sir. I think we're trying to make the
15 point -- if you have in mind, for example, point 1, where we say that one thing that
16 should be covered is the historical development --

17 PROFESSOR NEUBERGER: Yes.

18 MR CARALL-GREEN: -- then yes, of course, you're right that we'll be covering one of
19 the -- one of the issues will be what were the antecedents to the App Store? But the
20 question that we really want to alight upon with some force, because we think that
21 Apple is going to alight upon it with some force, is what was the step change, what
22 was the added value, that was supposedly brought by the App Store? Because that
23 really is the question. If one looks at the historical context and says, "Well, this is how
24 these things were developed", the question is, well, when the next product came along
25 or when Apple's particular version of the product came along, what was it bringing to
26 the table in terms of value? That's really where the payoff is, if you like.

1 PROFESSOR NEUBERGER: But I still don't understand how that differs from the
2 first -- well, under the apps industry, the first subparagraph 2, whether and, if so, to
3 what extent the tools and technologies are materially different from the kind of tools
4 and technologies that the platform would offer developers?

5 MR CARALL-GREEN: Sir, if you accept that what I'm asking for is already covered,
6 then in a sense, I'm content because I don't need to ask for the further issue. But
7 I think we want to be clear that the focus of 2 might be taken to be more of a market
8 definition question, as in what are the substitutability possibilities. Whereas what we're
9 trying to put a fine point on here with this expert issue is the question of innovation that
10 Apple has put in issue.

11 Now, I totally accept that when one has a list of expert issues, there's frequently a level
12 of overlap or a level of flexibility about exactly where one pigeonholes all of these
13 things, because realistically, it's going to come out as a continuous discussion, not as
14 a list of bullet points. The reason that we've included it is because we want to
15 emphasise and be clear that this is an issue that Apple has put on the table and one
16 to which we wish to respond squarely.

17 THE CHAIR: Thank you, Mr Carall-Green. Interest.
18 Interest

19 MR CARALL-GREEN: Interest. Yes, sir. Interest, hopefully not in name only. This
20 is a small point which is simply that Dr Ennis suggests that economists can, and
21 commonly do, provide views on the way that the Tribunal might go about thinking about
22 whether, and if so how, to apply the question of compound interest to a class made up
23 of various different sizes of businesses.

24 So the question for the Tribunal will be, if it wants to award interest, will it be awarding
25 interest on a compound or simple basis, and then if compound, how does one go about
26 thinking about the rate. It's not necessarily just a question of picking a number out of

1 the air. When it comes to simple interest, perhaps the calculation is a little bit more
2 straightforward, but the Tribunal may want a small amount -- I don't imagine this is
3 going to be a very complicated issue -- of assistance on how to model the
4 characteristics of a class of whatever it is, 10,000-odd businesses with certain
5 common features and certain differences between them. How does one model on an
6 aggregate basis what the time value of money looks like? That's all there is to it.

7 THE CHAIR: Mr Kennelly?

8 MR KENNELLY: Yes, sir. On interest, we agree, as you can see from the document
9 page 4, that the economists would consider the appropriate rates. That's issues 2 and
10 3. Again, if that's what my friend is seeking to do, and that's what he spoke to
11 a moment ago, then, as the Tribunal can see, we have no objection.

12 Our legal objection is to 1, because the economist should not be opining on the
13 economic framework for interest because it is legally irrelevant. As the Tribunal
14 knows, and we've canvassed this in our skeleton, since the decision in *Sempra Metals*,
15 the claim for compound interest has to be pleaded and proved. You've got to prove
16 what loss you have actually suffered. And the theoretical economic framework is
17 irrelevant to that question. It has to be pleaded and proven as a matter of fact.

18 That's why we say that the framework that must be adopted in approaching compound
19 interest is a legal one and that has been set out in, most recently,
20 *Sagicor Bank Jamaica* in the Privy Council. We have copies for the Tribunal, but
21 I think the principle is well understood. Compound interest must be pleaded and
22 proved in fact. And so the question of an economic framework for considering the
23 appropriate approach appears to be straying into what is exclusively a legal question.
24 The legal question and the question of fact for compound interest is well-established,
25 and then it is for the economists to debate the appropriate rate of compound interest,
26 if the entitlement to the time value of the money has been pleaded and proven. That's

1 the right approach to compound interest.

2 THE CHAIR: Has the Tribunal previously, as far as you're aware, had to grapple with
3 how you plead and prove compound interest in the case of a collective proceedings
4 where you're dealing with an aggregate award of damages?

5 MR KENNELLY: The point has been debated in Tribunal. I'll come back to you,
6 perhaps after the short adjournment, with more detail on that. Hopefully that's quite
7 a long way down the line, but yes, the point has been discussed in the Tribunal. But
8 the legal point, the legal approach is not in dispute and hasn't been.

9 THE CHAIR: And I didn't, Mr Carall-Green, take you to be disputing that legal
10 proposition.

11 MR CARALL-GREEN: That's right, sir. This may be an area where we are, again, in
12 furious agreement. I think Mr Kennelly says that the Class Representative needs to
13 prove the entitlement to compound interest. That is what we're trying to do here,
14 because the Tribunal will want us to explain, with evidence, how to compensate class
15 members if they're entitled to any compensation for the time value of money, whatever
16 it is, however it is one conceptually justifies interest on an aggregate basis. And does
17 one approach that on an aggregate basis? The economist will help.

18 THE CHAIR: So you're not really looking for evidence on the relevant economic
19 framework. You're looking for evidence as to how you model the time value of money
20 when you're dealing with a class.

21 MR CARALL-GREEN: Yes. It may be that if the words "on an aggregate basis" were
22 added at the end of that paragraph, that would assist.

23 THE CHAIR: I think we understand what both parties are trying to achieve and it may
24 be simply a question of getting the wording right. Perhaps we can leave parties; if they
25 are able to reach furious agreement on that over the short adjournment, that would be
26 great. Otherwise, the Tribunal will simply find a form of words which encapsulates

1 | what we've heard. Thank you.

2 | MR CARALL-GREEN: Sir, I think that brings us to the end of the small parts on the
3 | list of issues. And so I leave it to the Tribunal to decide where to go next in our tour.

4 | THE CHAIR: Your applications, I think.

5 | Application to adduce expert evidence on security and privacy

6 | Submissions by MR CARALL-GREEN

7 | MR CARALL-GREEN: So we have two applications for permission to adduce expert
8 | evidence. Very briefly on the tests to be applied: the Tribunal, under its governing
9 | principles, will seek to secure that the proceedings are dealt with justly and at
10 | proportionate cost, of course, at all times. Then the test for expert evidence with which
11 | the Tribunal will be familiar is the reasonably required test. I don't intend to elaborate
12 | on those.

13 | I start with Dr Ennis's application to adduce evidence on security and privacy. Sir, if
14 | we could go to Dr Ennis's pleading, starting with his Claim Form at 101 which is on
15 | page 899 of the hearing bundle. Here, Dr Ennis pleads that:

16 | "Apple maintains the App Store as the only mechanism by which Third-Party Apps can
17 | be commercially distributed or monetised."

18 | Then in the paragraphs that follow, Dr Ennis identifies various provisions of a contract
19 | called the DPLA -- the Tribunal will know the DPLA; it's the standard form contract
20 | between Apple and developers -- and provisions of a document that is effectively
21 | incorporated into the DPLA, and that's called the Guidelines. He refers to them at 102,
22 | those provisions that he identifies as "the App Distribution Conditions".

23 | Then scrolling on to page 916 at paragraph 122 of his pleading, Dr Ennis says that by
24 | these app distribution conditions, Apple has ensured that there is no alternative
25 | channel for distributing apps.

26 | Then, sir, as you've seen earlier, at 140.1 and 2, Dr Ennis then relies on the

1 inescapability of the commission as two of the factors of unfairness.

2 Now, sir, just to forestall one thing that I think may be causing some confusion here,
3 it's important to bear in mind the point that I raised earlier, which is that Dr Ennis's
4 case is not purely a case that the raw price by itself is excessive and unfair. It is that,
5 but it is also that Apple's system of charging is unfair. You see that, for example, at
6 page 857 of the pleading. This is paragraph 3.1. Here we see that, in the summary
7 of Dr Ennis's case in paragraph 3 of his Claim Form, he says these prices are
8 "excessive and unfair in their own right" -- the headline is 30 per cent -- and/or they're
9 "unfair and abusive as a system of pricing" because of a variety of factors. And sir,
10 you will have seen that same concept arising when we looked at paragraph 140.2,
11 which is on page 925 of the bundle. Again, this feeds into Dr Ennis's explanation of
12 why the price is unfair. The last sentence of that paragraph says:

13 "There is ... no competitive pressure from rival app stores ... including as respects the
14 Commission and system of charging Commission."

15 Finally, sir, on 928, paragraph 140.9.5:

16 "The facts and matters described in this paragraph ... [give] rise to an additional
17 reason ... why the Commission and/or the system whereby the Commission is charged
18 is, overall, unfair."

19 It's important not to lose sight of that, sir, because I think part of what's happening is
20 that we say, price. And then Apple says, okay, so exclusion is not -- the system is not
21 relevant. We don't need to worry about whether the system does this or that or
22 anything else. But the reply to that is, "No, no, the case is squarely put on the basis
23 that the abuse is either the raw price itself or the system of charging, the way the
24 system operates". And it's both; it's Android.

25 So in response to that, now we see what the case is, we need to look at what Apple
26 then says in response to it in its Defence. We start with page 1206 of the bundle which

1 is paragraph 16.1 of the Defence. So Apple says the DPLA and the guidelines -- now,
2 recall Dr Ennis says the DPLA and the guidelines contain these restrictions and they
3 are therefore a source of unfairness. Apple says, "Wrong":

4 "The DPLA and the Guidelines are facilitative. Through them, Apple safeguards the
5 reliability, security, quality and privacy of users' iOS Devices and of the iOS
6 ecosystem."

7 So Dr Ennis says, "This thing is unfair" and Apple says, "No, this thing is not unfair. It
8 promotes security and privacy".

9 Similarly, at paragraph 47 which is to be found on page 1219 of the bundle. (Pause)

10 This is a longer paragraph but what we need is at the end. Apple's approach: is it
11 unfair? No, Apple says. What does it improve? Six things:

12 "(i) security... (iv) privacy;"

13 Then paragraph 85.1, to be found on page 1241. I'm starting at the penultimate line
14 of the page:

15 "The so-called 'App Distribution Conditions' [so this is now -- we are precisely on the
16 conditions on which Dr Ennis relies as giving rise to the unfairness] enforce the [what
17 do they enforce?] ... safety, security and privacy ... [among other things]."

18 And then the summary is 97.4, which is to be found on page 1246. Starting at the third
19 line:

20 "Developers choose Apple because of that value, [see the first line, economic value]
21 including the secure, safe, private, reliable [and so on] ..."

22 So what's Apple's case? Apple's case is: these things that Dr Ennis says are unfair,
23 that give rise to the unfairness of the price, that constitute the unfair charging system;
24 they are not unfair. Why are they not unfair? Because they enhance privacy and
25 security. Oh, and by the way, that contributes to the economic value that you have to
26 take into account in your assessment of the unfairness of the price. (Pause)

1 I'm not going to take you to all the paragraphs of the Reply that then reply to those bits
2 of the Defence, because I think that's unnecessary. But if you could take it from me
3 that Dr Ennis disputes those propositions that appear on the face of Apple's Defence.
4 So the point that one gets from the pleadings is that Apple has raised in its Defence
5 the argument that Dr Ennis is not justified, sir. If we go back to this concept, it's not
6 an objective justification but it's a reason why it's not unfair. So Dr Ennis is not right in
7 his complaint about the DPLA or the guidelines because -- and this is Apple's own
8 argument -- they promote privacy and security. So all Dr Ennis seeks to do in his reply
9 pleading and, therefore, in his evidence is to challenge that narrative and to say, "No,
10 they don't". The DPLA and the guidelines do not promote security and privacy. That's
11 not what they're designed to do and that's not and they're not required for that end.
12 One can see how the outcome of that debate is material to the Tribunal's view of
13 whether or not Apple has a good point here. So the proposed evidence that we have
14 put forward from Professor Somayaji would address two narrow issues.
15 First, whether the restrictions are required or designed to enhance security and privacy
16 and so forth.
17 Secondly, whether allowing other means of distribution -- and I'm summarising, sir, to
18 just capture the flavour of it -- would improve or jeopardise these features of privacy
19 and security. So, really what it boils down to is: are these restrictions there -- is that
20 what they're there to do? To improve privacy and security? And do they actually do
21 it? That's the second point. If you remove them what would be the outcome, is
22 effectively assessing what efficacious properties they have. What do they achieve?
23 So the Tribunal will see that that broadly tracks the language of what we've seen in
24 the pleadings. But, even in very general terms, these two topics are relevant to the
25 argument. Because if Dr Ennis says that the restrictions contribute to unfairness, and
26 Apple says that they don't because they're a dreadfully good thing, then the Tribunal

1 needs to have some way of cutting through that discussion.

2 So, sir, I do say that because it is Apple itself who relies on privacy and security in its
3 Defence, for Apple now to turn around and shut out evidence on that very point is not
4 right. Dr Ennis should at least be allowed the chance to reply to the point in his
5 evidence. Apple, in its skeleton argument for today at paragraph 30 -- there's no need
6 to turn it up because I know the Tribunal has read it -- says:

7 "Apple's case is instead focussed(sic) on showing that the Commission is not
8 excessive and/or unfair ... because of the benefits that developers and consumers
9 derive from the privacy and security of Apple's ecosystem."

10 So we agree with that. But where does Apple say that the security and privacy benefits
11 come from? We've seen it in the pleadings. They say that they come from the
12 restrictions that Dr Ennis complains are unfair. So all Dr Ennis is trying to do with this
13 evidence is to address whether or not Apple makes a good claim by way of defence.

14 Now Apple, for its part, does not need to fear the absence of expert evidence, sir -- I'm
15 about to make an equality of arms point -- because Apple is able to call factual
16 evidence with relevant expertise. So we can see from *Kent* -- sir, I don't wish to turn
17 it up because I'm very aware that you know it better than I do. You will know, sir, that
18 Mr Federighi gave oral evidence for Apple and he specifically addressed the security
19 architecture and gave answers on the questions of security. If the Tribunal requires
20 a note of that, it can be seen in the *Kent* judgment at paragraphs 139(2) and 745(9).
21 So Apple is happy not to have expert evidence on this because it can always deploy
22 factual evidence on the topic. But Dr Ennis cannot do anything similar so will need
23 expert evidence in order to avoid inequality of arms.

24 Now, finally on this topic I should add, sir, that Dr Ennis has noted what you said to
25 me at the last CMC which was that you asked me whether or not it would be
26 appropriate for one person to give evidence across multiple fields. Dr Ennis has

1 concluded that it should, by his proposal to call Professor Somayaji to handle these
2 aspects.

3 THE CHAIR: There is an additional cost here of instructing an expert.

4 MR CARALL-GREEN: There's no additional cost of instruction. Obviously, we don't
5 shy away from the modest cost of dealing with -- writing some more paragraphs and
6 thinking about more evidence and all the rest of it. But that is a way that we have
7 sought to address the Tribunal's previously articulated concerns about proportionality.

8 THE CHAIR: And, if this evidence is allowed, you're satisfied that he's qualified to
9 speak to these additional issues as well as those he's already --

10 MR CARALL-GREEN: Yes. Dr Ennis has considered the options and has concluded
11 that this is the right way to balance the competing objectives, if you like.

12 THE CHAIR: Thank you very much.

13 MR CARALL-GREEN: Sir, that is the application on privacy and security. So I might
14 rest.

15 THE CHAIR: (Inaudible) Mr Kennelly to answer on that point.

16 Submissions by MR KENNELLY

17 MR KENNELLY: Thank you. Thank you, sir.

18 So the parties agree that permission should be granted only if the expert evidence is
19 reasonably required to resolve the case and, in resolving the case, we have to look at
20 the issues in the case and be reasonably precise about that. The Class
21 Representative's skeleton reveals the problem with the basis on which they seek this
22 expert evidence. I'm conscious that Mr Piccinin covered this with you at the previous
23 CMC, so I'll try to be brief. But could we turn up, please, the Class Representative's
24 skeleton argument and turn to paragraph 16?

25 THE CHAIR: Yes. I should just remind you that the other members of the Tribunal
26 were not at that CMC, so --

1 MR KENNELLY: Of course.

2 THE CHAIR: If there are things -- don't take everything as read.

3 MR KENNELLY: I'm grateful for that reminder. Turning then to the skeleton argument
4 of Dr Ennis. We see there the very problem that concerns Apple, because we're told
5 that the issues that this evidence will address are, 16.1, not whether the commission
6 doesn't properly reflect the value that Apple provides to developers. The question is
7 whether Apple's restrictions on app distribution are required or designed to safeguard
8 the reliability, security, quality and privacy, and so on. So the question is: are these
9 restrictions necessary or do they have that purpose? For example, and of course, the
10 restriction is on preventing third-party app stores on iOS devices.

11 Over the page at 16.2, the issue that the expert will speak to is whether allowing iOS
12 apps to be distributed through means other than the App Store would improve or
13 jeopardise security, privacy and so on. So without the restrictions, would quality
14 suffer? At 17, the first sentence:

15 "Apple says that the real question in the case is about 'the privacy and security benefits
16 of the ecosystem', not about 'whether [the] distribution and payment requirements are
17 justified or required ...'"

18 That's our response to the expert evidence application. We make that point because,
19 as I've said already, the only claims advanced in these proceedings are based on
20 allegations of excessive or unfair pricing. Whether what are called Apple's restrictions,
21 or requirements, whether they're justified or not makes no difference to whether the
22 commission is fair.

23 Now in *Kent*, of course, the Tribunal granted permission for each party to rely on
24 a security expert because, in that case, Apple's requirements -- its so-called
25 restrictions -- were challenged, as well as the level of the commission. The
26 exclusionary abuse was the prohibition on third-party app marketplaces and

1 restrictions on alternative payment methods.

2 Apple's response, as Mr Frazer reminds us, was that the restrictions were objectively
3 justified by security and privacy concerns. So that was squarely an issue in *Kent*. But
4 that allegation is not made here and we have not pleaded a defence that the so-called
5 restrictions are justified or pro-competitive. The issue doesn't arise, and this is the
6 point I made earlier. Because something's mentioned in the pleading doesn't mean it
7 requires expert evidence. Perhaps the pleadings could have been more precise. The
8 key question is: what legal issue is this going to?

9 One of the passages in the Defence that you were taken to, paragraph 94.4 of our
10 Defence, did say that privacy and security benefits are relevant to the value which
11 Apple claims is provided to developers, and that is an issue. But the question of the
12 justification for the restrictions, or whether the restrictions are required or what their
13 purpose is; that is irrelevant. A good way of testing it is this: even if it's correct that
14 what I call the restrictions are not necessary for safety and privacy, if safety and
15 privacy can be secured in some other way, there's still value in the safety and privacy
16 that is provided to developers and their users on the App Store. That value will need
17 to be quantified and the Tribunal will decide if, combined with the other benefits, it
18 shows that the commission is not excessive or unfair. That'll be the exercise whether
19 or not the restrictions are justified in their entirety or not.

20 THE CHAIR: Do you have anything to say in regards to Mr Carall-Green's point that
21 this case is also put on the basis of an allegation that the system of charging, in
22 a rather broader sense, is unfair?

23 MR KENNELLY: With all due respect, sir, I struggle to understand the legal basis
24 upon which that is put in a case of excessive and unfair pricing. But however it's
25 formulated, whatever it means, it ultimately has to go to the issue of whether -- it is the
26 only pleaded legal issue in the case -- the commission is excessive and unfair. That's

1 something, of course, which the competition economist or valuation expert, if he seeks
2 permission for one, will address.

3 The question of whether the restrictions are justified or whether a less restrictive
4 approach would generate greater benefits is entirely beside the point. That's why,
5 ultimately, it's a matter for the Tribunal.

6 And we understand that valuing security and privacy benefits is important. This issue
7 of restrictions and analysing whether they're justified, that seems to us to be entirely
8 outside the case. And because expert evidence, when it is allowed, tends to increase
9 the cost and complexity of the underlying proceedings, we've all learned in this and
10 other cases, we urge the Tribunal to apply some discipline. But ultimately, of course,
11 it's a matter for you.

12 THE CHAIR: Before you sit down, Mr Carall-Green made a point about equality of
13 arms. Would you intend to lead factual evidence on these matters at trial, or is that
14 a matter that remains open and yet undecided?

15 MR KENNELLY: Certainly (overspeaking) in our pleaded case, as you saw in
16 paragraph 94 of our Defence, is that part of the value that developers receive on the
17 App Store is the privacy and security that Apple guarantees. And we certainly
18 consider ourselves open, it's open to us to adduce factual evidence, and we may well
19 adduce factual evidence that speaks to that benefit. And we would expect a valuation
20 expert to examine and quantify the value of that benefit in this case.

21 So I take the point that, to the extent that the privacy and security benefits are to be
22 valued, that's plainly an issue before you, but what we struggle with, and it's repeated
23 in the skeleton argument, is the idea that this expert will be addressing whether the
24 restrictions on app distribution are required or what their underlying purpose is. That's
25 a different issue, and it doesn't arise in these proceedings.

26 THE CHAIR: Mr Carall-Green.

1 | Reply submissions by MR CARALL-GREEN

2 | MR CARALL-GREEN: Sir, I wish to say, by way of reply, that this discussion has
3 | echoes of the discussion we were having earlier about issues that arise on Apple's
4 | pleading, apparently not arising. So we need to look at two more of Schrodinger's
5 | issues by turning first to page 1212 of the hearing bundle, where we see in
6 | paragraph 28 of Apple's Defence, Apple here specifically pleads that it invented iOS
7 | as an operating system optimised for, and then gives some explanation. Starting on
8 | the pre-ante-penultimate line:

9 | "Apple's approach to the design of its iOS ecosystem ... aims to provide better
10 | performance, reliability, safety, security, and privacy for consumers."

11 | So, this is an issue, whether or not the systems are designed to enhance security and
12 | privacy, on which Apple has pleaded a defence. This is Apple's Defence. And, in fact,
13 | it now appears that we are going to be seeing factual evidence from Apple on the
14 | privacy and security benefits of the design of the system. So when we ask the question
15 | of the expert: is Apple's system designed to promote privacy and security? We're not
16 | making it up, sirs. We're just asking the expert the question that Apple itself has posed.
17 | Second one, we have to go back to paragraph 47, which is at page 1219. Again, we
18 | were told that what would happen if you got rid of all of these restrictions is just not
19 | an issue that arises in this case. We've already looked at this paragraph, sir, but
20 | I skipped past the bit that I now want to look at, which is it beginning sort of halfway
21 | down the paragraph at "Depriving":

22 | "Depriving Apple of that mechanism [which is about distribution in the application of
23 | the Guidelines] would jeopardise the user's experience of iOS devices, and of the
24 | broader iOS ecosystem."

25 | So, once again, when we ask the expert, what do you think would happen if Apple did
26 | not apply the Guidelines or apply these restrictions, the DPLA, we're asking the expert

1 the question that Apple says we should ask.

2 So that's all I wanted to say by way of reply. It may be that I should now go on to
3 the -- well, I've just looked at the clock, and I wonder if you might say to me that
4 I should make my application on payments evidence after lunch, but I leave it to you,
5 sir.

6 THE CHAIR: That would be sensible. How are we getting on in relation to time?

7 MR CARALL-GREEN: Well, sir, I have one more application to make on experts. My
8 learned friend has two: one expert, one survey. And then we need to come to the
9 question of timetable.

10 THE CHAIR: Yes. We'll come back at 1.45.

11 Thank you very much.

12 (12.59 pm)

13 (The short adjournment)

14 (1.49 pm)

15
16 Application to adduce expert evidence on security and payments

17 Submissions by MR CARALL-GREEN

18 THE CHAIR: Yes, Mr Carall-Green.

19 MR CARALL-GREEN: Sir, I think I'm going to make my payments application now.
20 To introduce this application, it is, in one aspect, a sister of the application that I just
21 made. Because, as I'll show you, just as there is a debate about the distribution
22 conditions, so also there is a debate about what we have termed the Payment System
23 Conditions and the way that they affect fairness and value. And so what I'm going to
24 show you effectively tracks the justification for my earlier application, that they run
25 somewhat in parallel. But there is an additional layer of value to the evidence that I'm
26 proposing on payment systems, because it also enters into the Tribunal's analysis

1 when it comes to the comparators exercise, because we say that one of the important
2 questions will be: what price one ought to expect for the services being rendered under
3 workably competitive conditions. It may be that effectively is the whole question, but
4 that's at least one of the questions that the Tribunal will need to answer.

5 And I don't think it's in dispute that payment services are one of the services that Apple
6 offers as part of its package, and, therefore, when assessing whether or not the price
7 is fair, the Tribunal will want to look at what that price will realistically be in workably
8 competitive conditions.

9 So those are the two main strings to this application. To make the first part good, we
10 should go back to the Claim Form to some passages which are close to, but not
11 identical with, the ones that we saw in relation to the earlier application. I start on
12 page 905 of the bundle, which is the Claim Form at 106.

13 And you'll recall from earlier, sir, that we say that Apple imposes restrictions so that
14 distribution can only be effected in a certain way. Well, now we say that Apple imposes
15 certain restrictions so that payments can only be made in a certain way. And we refer
16 there to the ASPPS, which is Apple's proprietary payment system. That's not a piece
17 of nomenclature that's been picked up in subsequent documents, but that's what that
18 means.

19 So you see at 106, some of the restrictions are identified. And then at 109, if one
20 moves down, Dr Ennis describes the technical conditions and contractual terms
21 described at 106 as the "Payment System Conditions". So there's the defined term.

22 And then at paragraph 132, which is on page 918, Dr Ennis then pleads that the
23 Payment System Conditions mean that developers making relevant sales are unable
24 to avoid payment of the commission.

25 And, then, sirs, we culminate back on page 924, where we've now been several times,
26 which is the factors of unfairness on which Dr Ennis relies. We've looked at 140.1 and

1 140.2 before. And I just observe that if you look at the wording of those two
2 paragraphs, you see that Dr Ennis relies not only on the distribution conditions, which
3 is what we were looking at earlier, but also on the Payment System Conditions. So
4 that's another branch to Dr Ennis's argument in support of these two factors of
5 unfairness.

6 Then we can go and see Apple's response to that in its Defence. And again, passages
7 that are close to, but not identical with, what we've seen before, starting on page 1245.
8 We have paragraph 97 that the Tribunal has already seen. This is the general denial
9 of the factors of unfairness at paragraph 140. And the first thing that Apple does is it
10 repeats paragraph 94. So if one turns back to paragraph 94, we see that Apple's main
11 point here that it's developing in the subparagraphs is that Dr Ennis's approach fails
12 to capture the economic value that developers derive from the App Store and the
13 ecosystem. And it develops that in the subparagraphs. So, subparagraph 1, it's
14 an innovative intangible product. Subparagraph 2 it reflects economic value.
15 Subparagraph 3, enormous value. And we've already seen -- I don't need to take you
16 back to the passages, sir, where we've seen that Apple says, if one asks the question
17 'where does this value come from?', Apple has a number of points that it makes, but
18 one of the points it makes is that the privacy and security benefits of its system
19 contribute to the value.

20 So, then, recalling that 94 was repeated at 97, we can go back to the rest of 97. And,
21 here, Apple says several things, but just to pull out a couple of points is that Apple
22 repeats paragraph 75. It does that both in response to -- so we're looking at 97.1,
23 97.2 -- in response to the two factors of unfairness that I've drawn your attention to,
24 140.1 and 140.2. Part of Apple's response is to repeat the paragraphs above,
25 including 75 to 77, and paragraph 75 above, which is on page 1234. That is about
26 Apple competing with other platforms both on and outside iOS that are subject to

1 differing underlying competitive constraints. And similarly, sirs, at 97.2, Apple makes
2 the point that the commission is subject to competitive pressure because of the
3 competitive constraints.

4 So the reason I'm drawing your attention to these paragraphs is to -- I'm on the sort of
5 second limb of my justification for the application. The debate is twofold. We have: if
6 Dr Ennis is right that it's unfair for developers to be compelled to use Apple's payment
7 systems, e.g. on privacy and security grounds -- and that's what we're focused on
8 here -- he says that that's a source of unfairness. And Apple says, no, it's not. And
9 then there's this second aspect, which is that Apple says that the price that is being
10 charged reflects economic value. And so the question is then: "All right. Well, part of
11 the service that's provided is payments. What is the value that you would expect to
12 attach to a payment service?"

13 So in light of these two questions, we propose that the evidence from Mr Burelli
14 address the following four issues. I'll take them in turn.

15 First, the costs to app developers associated with providing alternative payment
16 systems. Now that, sirs, is that part of the second question, which is effectively the
17 question of benchmarking comparators, because the evidence is what you would
18 expect Apple's price to be under workably competitive conditions. We say that
19 an effective and proportionate way of reaching a conclusion on that is via expert
20 evidence, because the expert can give you a view and make adjustments for the
21 nature and quality of the services that are available in the market to make sure that
22 the Tribunal is comparing like with like. Now, Apple objects on the basis that the
23 evidence of Mr Burelli in *Kent* was quite simple. They've noted that from the skeleton
24 argument.

25 But we don't take that to be a disadvantage. We take that to be an indication that this
26 expert evidence, at least on this point, will not be overly complex. And we do resist

1 the notion that a non-expert is in just as good a position to go out into the market and
2 gather pricing information in order to make these comparisons, because a non-expert,
3 we say, is not going to be able to give the Tribunal a very good sense of what's actually
4 being bought. It's all very well to know, for example, that a Rolls Royce jet engine is
5 more expensive than a Pratt and Whitney, but you don't know the fuel mileage or the
6 service requirements or the use cases of these two engines.

7 We're saying that in the case of payments, there are many different things that
8 a payment service provider could or could not provide, whether that's FX services,
9 enhanced security checks, merchant of record services, and so on and so forth. And
10 there are also differences in quality that may be relevant to an assessment of whether
11 or not various different prices are comparable. So when one is assessing, when one
12 wants to get an idea of what does this sort of thing cost in a market where the service
13 levels are variable and the service packages are variable, a good way of just cutting
14 to the heart of it is to ask somebody who knows the market. That's what we propose.
15 There's no answer to say, I interject, that the commission is in fact charged for a wider
16 bundle of services. That may or may not be the case, but you will have seen from our
17 skeleton argument that the Tribunal in *Kent* engaged in a process of isolating the
18 payment services in order to determine what a fair price for those would be. So an
19 element of looking within the bundle and seeing what would be a fair price for elements
20 within a bundle is a perfectly legitimate exercise that the Tribunal has already carried
21 out in *Kent*.

22 So that's the first topic that we would want Mr Burelli to opine on.

23 The second is the security and privacy standards of alternative payment systems
24 providers, as distinct from the wider security and privacy of iOS devices and the iOS
25 ecosystem. Now, sirs, this goes to both questions really, because on unfairness, the
26 question is quite similar to the question that's being answered by the security and

1 | privacy expert if permission is given: i.e. is Dr Ennis's complaint about unfairness
2 | a good one, or is it actually a bad one because of the security and privacy benefits
3 | that are being provided by Apple's services?

4 | Then on benchmarking, obviously one dimension of quality must be privacy and
5 | security, one would think, when one is talking about payment services. We know that
6 | Apple relies on that as part of its case. So the expert should be addressing whether
7 | the relevant comparators or benchmarks are similar or different in terms of the
8 | standards that they offer. So there is case law, sirs, about making sure that
9 | comparators are comparable, but there's a sense in which that's rather obvious and
10 | I don't think we need to turn it up. You need to know, if you're benchmarking a service
11 | against somebody else's service, that the two are offering roughly comparable
12 | standards.

13 | The third topic that we would like Mr Burelli to opine on is the nature of the services
14 | rendered by the alternative payment systems providers. That's a similar point; I've
15 | already covered it really. It's the difference between quality and scope. So payment
16 | processing: is it multi-currency; do we have FX support, fraud detection, analytics,
17 | invoicing; what's actually being offered? Because again, if you're trying to benchmark
18 | prices, you'd probably like to know if this price is for these three services whereas the
19 | other price is for ten.

20 | In *Kent*, it was significant that Paddle's offering -- sir, you may remember from the
21 | judgment that, for your pen, is 492 -- it was significant that Paddle, which was
22 | a comparator, was said to encompass substantially all the services needed. So the
23 | Tribunal asked itself the question, "Is Paddle a good comparator or a bad
24 | comparator?" And in answering that question, it looked at what the services were that
25 | Paddle was actually providing.

26 | The fourth issue that we propose Mr Burelli to opine on is the introduction and

1 significance of the ability for app developers to offer alternative payment systems.
2 Now, again, this goes to both questions, i.e. the question of unfairness and the
3 question of benchmarking. We've already discussed the point that Dr Ennis pleads
4 explicitly in his Claim Form that there are other territories where Apple's closed
5 ecosystem has been required to be opened up. Specifically in the Claim Form at 111,
6 Dr Ennis cites the experience of the Netherlands and South Korea, where payment
7 systems specifically have been split out and are charged for separately with separate
8 levels of commission of 3 or 4 percent. And so we say that it's reasonable to expect
9 that the experience in those territories -- perhaps others, but we've pleaded those
10 two -- could be real world evidence of what happens to both price and quality when
11 Apple is required to open up its system and other payment services providers enter.
12 That's going to give you an indication of, again, are outcomes more or less fair in those
13 natural experiments and what do prices look like in the wild? I'm not saying that that
14 evidence will necessarily be determinative, but we say that it's potentially relevant,
15 useful and informative, and therefore that some evidence on it is likely to be of
16 assistance.

17 Now, I'd like to deal with the point made in Apple's skeleton argument at 34(c) that it's
18 not clear how Mr Burelli is going to find out the pricing information. I think the short
19 answer to this is to go to his CV, sir, which is on page 16 of the hearing bundle. The
20 short point that I want to make is that this is a person who has spent many years
21 working in the industry, and so is the kind of person who is going to have a view of the
22 market generally. We see recent experience consulting; the first item is analysing
23 payment scheme issuing and acquiring pricing for a European bank. Second item,
24 advising a neobank with the development of a digital wallet. Previous roles have
25 included -- essentially, more or less all the roles involve something to do with
26 payments. Open banking, payments, cards; if one looks down the bold text, that is the

1 theme that emerges from Mr Burelli's years of experience.

2 So, Apple has suggested in its skeleton and previously that what we're seeking to do
3 is, "internally inconsistent" because we want the evidence to be both market-wide and,
4 they say, representative and those two things are incompatible with each other. But
5 they're not; it's the same point. If you want to know how much a house in a particular
6 area is likely to cost you, you probably will ask an estate agent, not because that estate
7 agent knows every single house in the area, but because they have a good
8 market-wide overview of what you ought to expect in terms of pricing. That's
9 essentially what we're trying to do with Mr Burelli: we want somebody to come to the
10 Tribunal to explain, "These are the kinds of things that are on offer, and these are the
11 kinds of prices that you ought to expect to pay for them".

12 Finally, sir, I would again make the equality of arms point in this context, because
13 Apple would no doubt be able to deploy evidence from among its own employees on
14 the question of payments, given that it effectively administers the payment system and
15 will have something to say about it from within its own ranks. But Dr Ennis has no
16 such ability.

17 MR FRAZER: Just one very simple question: what does digital banking add to
18 payment services in the description of this area of expertise? I didn't see any of the
19 questions relating to digital banking as opposed to payment systems.

20 MR CARALL-GREEN: I think it essentially is payment systems. Digital banking is
21 perhaps the genus and payments is the species.

22 MR FRAZER: Right.

23 THE CHAIR: I have a similar technical point. I take it from the way you presented it
24 that, and I suspect this applies to both of your proposed additional experts, that we
25 remove the words, "including, inter alia, discussion of" in annex A.

26 MR CARALL-GREEN: Yes, I think we are all now sufficiently clear on --

1 THE CHAIR: You're asking us, if we approve your applications, to approve evidence
2 on these issues from this kind of expert rather than an expert on this broad topic,
3 including?

4 MR CARALL-GREEN: Yes.

5 THE CHAIR: Thank you.

6 Okay, Mr Kennelly.

7 Submissions by MR KENNELLY

8 MR KENNELLY: I'll try and be brief on this one because, of course, it overlaps largely
9 with what we've been discussing before. I'd ask you to go back to my learned friend's
10 skeleton argument, paragraph 21, that you've been looking at. The problem, we say,
11 with this application is similar to the one that we discussed before the break. We turn
12 to paragraph 21.1, the Class Representative identifies the first question which they'll
13 ask Mr Burelli to address.

14 The first question is whether it is fair for developers to be compelled to use Apple's
15 payment system, apparently on the grounds of privacy and security. That, again, is
16 the question; it's a challenge to what they call the restriction, the Apple requirement,
17 and it asks if the restriction is justified. Again, this is not *Kent*. The restrictions,
18 so-called restrictions, Apple's requirements, are not challenged and they're not sought
19 to be justified on the grounds of privacy and security.

20 Then we have, at paragraph 21.2, the second question which ultimately boils down to
21 what third parties charge for similar services. That is expanded, as my friend
22 explained, over the page at paragraph 23. He explains here the kinds of information
23 he would expect Mr Burelli to find. As he noted from our skeleton argument, a simple
24 point here is it's not been demonstrated why expert evidence is necessary for this
25 information. Because if the question is what third-party payment providers are
26 charging, well, that is publicly available. To the extent that those charges are

1 discounted or subject to confidential negotiations, that is not something you would
2 expect to be accessible by an expert like Mr Burelli. My learned friend hasn't explained
3 how Mr Burelli is supposed to get that information. And we say that based on the
4 experience in *Kent*, because in the *Kent* case, as my learned friend fairly
5 acknowledged, all that Mr Burelli provided in relation to what third parties were
6 charging was evidence of prices offered by those providers on their websites. That's
7 what -- if you're in the core bundle already, just go back to tab 20 -- we attached to our
8 objection to the expert application at annex 1, page 90, page 90 of the core bundle,
9 the table 5 from Mr Burelli's report. It simply lists the payment providers and gives the
10 fees that they offered and the fee structure footnoted to the websites of those
11 providers.

12 This is material because my learned friend said today that this is a sign of what to
13 expect from Mr Burelli in this case. My learned friend indicated today that this is the
14 kind of approach -- simple approach, he said -- that Mr Burelli would be expected to
15 adopt. He said the simplicity of it is a point in its favour. We repeat our concern that
16 this is just publicly available material and could be supported by fact evidence. It's
17 hard to see what Mr Burelli adds to it as an expert.

18 The second list of matters that Mr Burelli is supposed to address go from
19 paragraphs 23.2 to 23.4 of my learned friend's skeleton. In summary, those are the
20 nature of the services and the quality of the services that third-party payment providers
21 offer. Again, those are questions of fact and those can be addressed by access to
22 publicly available material as occurred in *Kent*. Really, they are best addressed by
23 witnesses of fact, such as developers. And in fact, my learned friend himself said and
24 drew attention to the fact that in the *Kent* case, it was the evidence of a developer,
25 Mr Owens from the developer of Paddle, that was relied upon by the Tribunal for the
26 purposes of this question of the kinds and quality of services offered by other payment

1 providers. That's a question of fact, not a question for Mr Burelli, which is why the
2 evidence of Paddle was relied upon chiefly for this purpose in the *Kent* judgment.

3 In answer to this concern, my learned friend said, "Well, Mr Burelli will find out
4 confidential matters based on his industry view of the market generally". In our
5 respectful submission, that falls far short of explaining to the Tribunal why his expert
6 evidence is reasonably required in this case. Mr Burelli's evidence was found to be
7 helpful by the Tribunal in *Kent*, but you saw the reference we gave to the part of the
8 judgment in *Kent* where the Tribunal did note that Mr Burelli's evidence had limitations
9 in the empirical aspects of his evidence. That was precisely this problem: that although
10 he spoke from his own personal experience, he was unable to substantiate much of
11 that with empirical evidence. The Tribunal acknowledged that at paragraph 17 of the
12 judgment in *Kent*. What we have not seen here is an explanation from the Class
13 Representative as to how Mr Burelli is going to address that problem in this case. And
14 so --

15 THE CHAIR: I suppose in one sense, just looking at the issues, most of them, or
16 perhaps not quite all of them, are questions of fact, but there are questions of
17 descriptive fact or in relation to the systems that are available in the market. It doesn't
18 seem entirely odd that you might need someone with experience of the market to be
19 able to describe, assuming it's relevant evidence, factually what is available. And if
20 that's a correct analysis, then query whether we're dealing with an expert who requires
21 permission at all.

22 Now, there is potentially some opinion built into the issues, particularly the last one
23 where it refers to commercial significance, where perhaps one might be going beyond
24 descriptive fact about the market. So I'm sure Mr Carall-Green is right to make the
25 application and be clear that he would like to lead this sort of evidence and to seek
26 permission to do so.

1 But if one thinks about it in that way, and bear in mind that you will have witnesses
2 who are able to speak to these things, is there anything objectionable about the
3 Tribunal knowing that descriptive market context?

4 MR KENNELLY: First, sir, I respectfully agree with your analysis of the fact that much
5 of it is fact evidence and could be spoken to properly by a witness of fact. On the
6 small amount of opinion evidence which is referred to: again, if that were expressed
7 as opinion evidence going to the value of the particular payment services, the
8 commerce engine offered by Apple, our objection would be much weaker. So the
9 objection, as Mr Piccinin explained at the last CMC, not dying in a ditch over this.

10 THE CHAIR: Really, it's the point you've made in relation to the previous one, that if
11 one is analysing rigorously what is the issue in the case, you would say these areas
12 of evidence don't really go to that core issue.

13 MR KENNELLY: Yes, indeed. That's our concern. We're not seeking to shut anyone
14 out unfairly or have inequality of arms. It's to make sure that, at this important stage,
15 the issues for the experts are properly delimited and, if they had a combination of
16 fact evidence and expert evidence that went to an issue in the case, our objection
17 would be quite different. But, as currently formulated, unfortunately, we cannot
18 consent to the application.

19 THE CHAIR: Thank you.

20 Okay. I think that those are your applications, Mr Carall-Green.

21 Application to adduce expert evidence on valuation

22 Submissions by MR KENNELLY

23 THE CHAIR: Mr Kennelly, you've got an application for a valuation expert.

24 MR KENNELLY: I do, and an application for permission to adduce survey evidence.

25 I'll begin with the valuation evidence application and I'd ask the Tribunal first to go to
26 the May CMC order, tab 23 of the core bundle, page 104. Just to set out to recall what

1 the Tribunal required us to do at the end of the May CMC. Paragraph 8. So we were
2 asked to identify the expert and you have that, Dr Mario Lopez. The expert's CV,
3 we've given that and there's no issue taken about it. Then a list of issues the
4 Defendants propose the expert should address, with a note setting out our reasons for
5 requiring expert evidence on valuation.

6 The note is also in the core bundle at tab 11. I'll ask you to go to that next. It begins
7 at page 39. If you could go, please, to paragraph 4 where we make the point that:

8 "... the centrality of economic value to [our] Defence, and the highly specialised nature
9 of the field of valuation ... [I emphasise this]. The value and significance of Apple's
10 IP-protected tools, technologies and services made available to developers cannot
11 reasonably or reliably be determined through factual evidence alone. The issues to
12 be addressed by a valuation expert [as the Tribunal has seen] are highly relevant to
13 the unfair pricing analysis that [you will have to determine]."

14 And over the page at paragraph 5, we deal with Dr Ennis's concern that this falls to be
15 opined on as a matter of competition economics. We make the point that valuation is
16 a distinct discipline. We also agree that we are looking for economic value but the
17 question of valuing tools, technologies and services in the technology sector, when
18 one is looking for economic value, is a very specialised role, which is why we have
19 sought out an economist with particular valuation expertise:

20 "[That's] particularly helpful ... where the value provided to customers ... derives, at
21 least in part, from tools, technologies, and services that are protected by IP."

22 That's why Dr Lopez is particularly valuable.

23 THE CHAIR: The information you've provided is not particularly informative on the
24 methodology which it's envisaged will be applied to this question. We've got a list of
25 issues and your issue, I put it that way, is the first one, is framed at the most general
26 level under reference to economic value. One is familiar with questions of, sort of,

1 valuation by valuers who are looking for a market value of a particular item, assuming
2 a willing seller and a willing buyer and so on.

3 Not at all clear that that's the kind of valuation question you're looking at.

4 MR KENNELLY: May I --

5 THE CHAIR: Sorry, I certainly would find it very helpful to have some insight into the
6 focus of the valuation question and the sort of methodological approach that you
7 envisage is going to be taken by this particular expert.

8 MR KENNELLY: Yes. And, to that end, can I show the Tribunal a letter that we sent
9 to Dr Ennis's solicitors on the same point? That's in the hearing bundle, tab 37. The
10 second volume of the hearing bundle. Page 661 of the hearing bundle in the second
11 volume. (Pause)

12 Dealing, in the middle of the first page, with the scope of the issues. In view of your
13 question, sir, I'd ask you to turn to paragraph 5 just to begin the response. So we
14 repeat the fact that Dr Lopez will be determining the economic value of the tools,
15 technologies and services. That means he will be asked to quantify that economic
16 value. That's to make clear that he's engaged in a quantification exercise.

17 Over the page, to avoid any ambiguity, at paragraph 6 we clarify to the Class
18 Representative that when we refer to him quantifying the value of what we call the
19 TTS, as well as Apple's ecosystem, that is a reference to the fact that the package of
20 tools, technologies, and services that Apple provides to developers forms part of
21 Apple's ecosystem. That has an incremental effect on the value, our case, that will be
22 provided to developers.

23 Then on subparagraph 6(b), by reference to our noting that the tools, technologies,
24 and services that we provide are protected by various intellectual property rights,
25 including copyrights, patents, and trade secrets, we clarify that our IP assets are
26 relevant to the proposed valuation evidence because they protect these tools,

1 technologies and services, and they reflect Apple's innovation and investment in them.
2 They're not different valuation matters.

3 But, to be clear -- and this goes to the methodology point that I'll come to as well -- we
4 are not proposing to have an itemised list of specific IP assets. The evidence will be
5 referring, it's a matter for the expert, but we anticipate reference will be made to some
6 of the underlying intellectual property by way of illustration. But it is not our intention
7 to provide a comprehensive list, which would be very, very difficult in any event.

8 Nor is the exercise one of calculating individual intellectual property right royalties. No
9 particular IPR, as far as we understand it, is going to be given a particular value. The
10 relevance of the intellectual property is that it underpins and enhances the value of
11 Apple's tools, technologies and services. The fact that someone else just can't
12 reproduce it like, we would say, was the case in the pharma cases: *Phenytoin*,
13 *Hydrocortisone*, and so forth. In those cases, there was no relevant IP. The products
14 were all off patent.

15 Then to paragraph 7:

16 "... on the question of which valuation perspective is adopted:"

17 Apple proposes that he will determine the value of these technologies, tools and
18 services that are provided to developers. So we're concerned with the economic value
19 provided to developers:

20 "That reflects Apple's case that the Commission it charges to developers is not
21 excessive and/or unfair in light of the [value that's provided] ..."

22 There is a reference to consumers or end-users. That's not imprecise, we say,
23 because:

24 "The value to consumers/end-users is obviously relevant to an assessment of value
25 provided to developers. [Because] developers are able to monetise their content in
26 part because consumers are willing to pay the economic value they derive from Apple."

1 And then to the methodological question, sir, that you asked me. Over the page,
2 page 663, paragraph 13. Obviously, it's a matter for Dr Lopez to consider how best to
3 make the quantitative assessment:

4 "... but it is likely [that it will] include an analysis [this is one methodological approach
5 that could be adopted] comparables for various of the tools, technologies and services
6 that Apple provides to developers."

7 To seek out in the market (inaudible) analogous tools, technologies and services which
8 can be used to compare those provided by Apple, and it would be our case that those
9 provided by Apple are superior and therefore, we would say, an adjustment ought to
10 be made for the superiority of Apple's tools, technologies and services. That's one
11 methodology and that's a very common methodology in a market analysis like this
12 one.

13 So I hope that went some way to answering your question and I apologise if that detail
14 ought to have been in the note which we produced, which was necessarily short.
15 Hopefully, we supplemented it with this letter.

16 MR FRAZER: Mr Kennelly, to what extent would that last explanation suffer from the
17 same issues in which you criticised the methodology of Mr Burelli: an analysis of
18 comparables for various of the tools, technologies and services, i.e. going into the
19 market as you said. They'll either be on the websites or they won't be disclosable.

20 MR KENNELLY: Well, sir, that is, if I say so, a very perceptive observation because
21 it goes directly to an evidential gap in the case which we will seek to fill through
22 disclosure and evidence -- disclosure certainly -- from the developers themselves.
23 That is why we've been pressing this issue of disclosure from class members.
24 Because the developers who are in the class, especially the large ones, will be well
25 placed to speak to the value they get from Apple's tools, technologies and services.
26 And to the extent they're using tools, technologies and services provided by our rivals,

1 they'll be able to speak to that too, directly. It's the value they're receiving that's
2 material to the purpose of the Tribunal's analysis. I'll come to that. That's why that's
3 a key area of disclosure and potentially evidence that will be needed in the case.
4 That's why we seek to communicate with the class members. But you've heard that
5 now at some length. I shan't repeat it, but I'll come back to it in my timetable
6 application.

7 It's another reason why we say that the timetable needs to be adjusted. That's why
8 Dr Lopez will do his best through publicly available materials to undertake an analysis
9 of that type. But, plainly, it would be extremely useful for him to have disclosure and
10 even evidence from developers speaking to these points.

11 That was to answer the question put to me by the Chairman. The question about
12 whether this has been determined in *Kent* and the extent to which the judgment in
13 *Kent* is relevant to the need for this evidence: as we've said in our skeleton, the
14 approach of the Tribunal in *Kent* supports this application for valuation evidence. Can
15 I just show you why we say that's the case? I'd now ask you to turn up the *Kent*
16 judgment in the authorities bundle, tab 23, page 1159, paragraph 618.

17 So our contention in the *Kent* case was that Apple provided economic value to
18 developers through these intangible assets in which Apple had invested. It's explained
19 at paragraph 618 the kinds of aspects in which economic value is provided.

20 At paragraph 619, the Tribunal records Apple's submission that the comparator
21 platforms relied upon by the Class Representative's expert were nothing like the level
22 of tools, technologies and so forth that Apple provided, and therefore of no assistance
23 in assessing economic value.

24 If you go, please, to page 1161, at paragraph 623 we see the findings of fact that the
25 Tribunal made in *Kent*. The Tribunal says:

26 "... we make the following findings of fact in relation to the demand side economic

1 value of the App Store's services, including the intangible assets [to which I've been
2 referring] ..."

3 At subparagraph (2), the Tribunal notes that:

4 "Apple has put forward no valuation of any of that [of any of the intangible
5 assets] -- despite having had permission to submit evidence from an IP valuation
6 expert ... It has chosen to assert the existence of intangible assets, to challenge the
7 Class Representative's approach, but not to advance any positive case as to value."

8 And if you go over the page, please, to subparagraph 9.

9 THE CHAIR: Was the permission given in *Kent* for evidence for an IP valuation
10 expert? Is that essentially equivalent to the permission that you're seeking from us
11 today?

12 MR KENNELLY: Yes. Except that in this case, before you, we are asking you to give
13 permission for a particular valuation expert. I can't recall, my recollection in *Kent*, I
14 could be reminded, was that we did not identify valuation. I'll have to go back and
15 check because it was -- I'll have to look at that application and see how it resembles
16 what I'm doing today. It was obviously some time ago, so I won't say anything.

17 THE CHAIR: I'm not pressing you for an answer on the hoof. It's just interesting that
18 the Tribunal in *Kent* appears to have given permission to submit evidence from an IP
19 valuation expert, which looks a bit like what you're asking us to do in this case.

20 MR KENNELLY: It does. (Overspeaking) The extent to which IP is going to be -- as
21 I said earlier, it's not the proposal that the intellectual property rights will be broken
22 down and valued individually. I don't want to suggest that that's what's envisaged.
23 But it's true, sir, that the question of valuing the tools, technologies and services was
24 before the Tribunal in *Kent*. We did seek permission to value that, and we chose not
25 to. And the Tribunal's analysis is there before you.

26 And, of course, the consequence of that, if you look over the -- I say we chose not to.

1 We chose not to quantify in a positive way. The case we made in *Kent* was that it was
2 obvious from the value that we could identify by reference to Professor Hitt's evidence
3 without having a particular number on the level of the value provided. It more than
4 compensated for the level of the commission by reference to all the parameters that
5 our expert evidence adduced.

6 But, as the Tribunal says here, they found that -- wrongly, we say and of course, it's
7 subject to our application for permission to appeal -- that they could not put a precise
8 estimate on the value for reasons including the fact that we did not produce a positive
9 case on value. And what that means is the Tribunal found that the value of our tools
10 and technologies was relevant in principle, but, we say, wrongly gave it no value
11 because it took the view that it was not possible to make a reasonably precise
12 estimation on that value based on the evidence before it.

13 Just to be absolutely clear, our case was and is that the evidence of the value that we
14 put forward was plainly sufficient to show that the value exceeded the commission. It
15 wasn't necessary to put a precise number on what that value was. And then the
16 Tribunal went on to analyse fairness in the round, page 1178. Paragraph 673. This
17 is the legal conclusion. Having analysed the factual evidence, the Tribunal said that
18 four lines down from the top of 673:

19 "We are not satisfied that the level of those benefits can in itself reasonably be taken
20 to explain the ... profitability of the App Store."

21 And then sub 1:

22 "... we have little evidence before us that would allow any quantification ... of the
23 benefit."

24 And then down at subparagraph 4 on page 1179, despite having had the opportunity
25 to do so:

26 "... Apple has not chosen to seek to quantify the value of its intangible products which

1 is said to justify the Commission."

2 So at paragraph 674, that leads to the conclusion that the commission was unfair in
3 itself.

4 So, to address the Class Representative's skeleton argument, the first point they made
5 was that the Tribunal in *Kent* decided, as a matter of law, that the value provided by
6 way of tools, technologies and services was not a consideration for the commission,
7 and that the value of the services is therefore irrelevant. I'm not sure that point is even
8 being pressed by my learned friend, but it's wrong, as you've seen from the Tribunal's
9 judgment in *Kent*.

10 Paragraph 25.1, the Class Representative says it's not clear what's being done --

11 THE CHAIR: And, in any event, it would be open to you to seek to argue before this
12 Tribunal that the law is not --

13 MR KENNELLY: Absolutely.

14 THE CHAIR: -- yes. Well, if it was decided as a question of law.

15 MR KENNELLY: It's open to us to make the point to you.

16 THE CHAIR: Yes.

17 MR KENNELLY: Indeed. And we made that point in our skeleton for this case
18 management conference.

19 As to the Class Representative's objection that it's not clear what's being valued,
20 I sought to address that earlier today when I took you through our letter back to the
21 Class Representative. And the Class Representative makes a point at paragraph 25.3
22 that we said in our list of issues for the valuation expert that he should take into account
23 the value provided by developers to the tools, technologies and services, comma, if
24 any, and they object to the words, "if any".

25 Well, that's there because our case is that we don't accept that the contribution which
26 developers are alleged to make is correct, but it's for the expert to decide if the

1 contribution from the developers is as the Class Representative says or not. That's
2 why, "if any" is there.

3 Then, in paragraph 25.4, this is a very important point because it goes to the timetable
4 application that I'll be making later. May I show you that? The Class Representative's
5 skeleton argument, 25.4.

6 They say:

7 "... economic value is a distinct concept ..."

8 Skipping down about five lines from the bottom:

9 "[It doesn't mean] what the goods or services can fetch in the market. ... [It's] what
10 price would obtain under counterfactual competitive conditions."

11 That is, to paraphrase, what price would be obtained in conditions of workable
12 competition.

13 The Class Representative's case -- and I'll show you this when we come to the
14 timetable application -- is that in assessing what the price would be in conditions of
15 workable competition, it is necessary to strip away any market power that arises from
16 the existence of IP protection. That IP protection, to the extent that it's providing
17 market power and value, that should be stripped away. And that's an issue of law
18 under consideration in the *Kent* appeal. It's ground 4(b) of our appeal. We rely on the
19 *Latvian Copyright* case in our appeal on that point. It's a very important point of law.

20 Our position in the Court of Appeal is that even if Apple is dominant and, of course,
21 we say Apple is not dominant, Article 102 of the Treaty does not limit an IPR holder
22 from earning the profits that could be earned if third parties could infringe intellectual
23 property rights without compensation. We say that competition law stands the
24 pro-competitive nature of intellectual property, and allows intellectual property to be
25 taken into account when assessing value, even if the rights are held by a dominant
26 undertaking. And that question of law is open before the Court of Appeal. It goes,

1 obviously, to what the experts will have to think about when they come to assess the
2 value of our tools, technologies and services. I'll come back to that when we talk about
3 the timetable.

4 It's a very different exercise to strip away any market power on any value that arises
5 from the existence of IP rights to one where that may be taken into account. It's
6 a different valutive exercise. But, to come back to why we need a valuation expert,
7 even if I'm wrong in the appeal and the approach in the *Kent* Tribunal stands, the
8 question of what the tools, technologies and services are worth is still a question of
9 valuation. Because, even if I'm wrong about what I said about the treatment of
10 intellectual property protection, the valuation expert has to ask: what is a fair market
11 value? And to the extent that anything needs to be stripped out, that is a valuation
12 exercise, which is commonly done by valuation experts in this Tribunal and in the
13 High Court. We see it in (inaudible) litigation. I'm not reinventing the wheel here. This
14 is something which is done and done, especially in cases where what is thought to be
15 valued are complex bundles of tools, technologies and services, especially when
16 they're underpinned by intellectual property protection.

17 And that is why we've gone further than simply asking our economic expert to assess
18 the economic value of these tools, technologies and services. We're saying that's not
19 for the economist. We're not duplicating. We're saying that's a task for the valuation
20 expert. And our economists will then take into account what the valuation expert
21 produces.

22 So those are my submissions as to why we need a valuation expert. Unless I can be
23 any further assistance, I'll --

24 PROFESSOR NEUBERGER: Can I just follow up a bit, because I'm not clear in my
25 own mind about, on the one hand, valuing the package of services to the user, the
26 developer, and, on the other hand, the exercise which you're talking about, valuing the

1 intellectual property. It seems to me those are fairly distinct exercises.

2 MR KENNELLY: Yes, they are. Indeed, sir. So I'm not saying that the only exercise
3 which the experts are going to undertake is focusing solely on the implications of
4 intellectual property protection for the tools, technologies and services which Apple
5 provides to developers. But in assessing the value of what is provided to developers,
6 as I explained when I took you to the letter, it's also appropriate to refer to the broader
7 ecosystem that Apple is providing to those developers as part of the broader exercise
8 to the extent that the services Apple provides to -- it's quite intuitive if it's attractive to
9 users. If, for example, the privacy and security that Apple provides, that private and
10 secure environment is attractive to users, a developer offering services in that
11 environment can monetise. It can charge a premium for the fact that his or her app is
12 offered in that environment. And if the user is prepared to pay a premium because
13 they're trading in a particularly private and safe environment, the App Store, if the user
14 is prepared to pay a premium because the user values that and the developer benefits,
15 that is a value the developer receives by reference to the user's view.

16 Now, if the concern is that we can't have double counting, well, that's plainly something
17 the valuation expert will have in mind. We have to make sure that it's properly isolated
18 and quantified. But that's the focus. I don't understand it to be necessarily linked to
19 the significance of intellectual property protection.

20 PROFESSOR NEUBERGER: I guess my problem is that I can see an argument to
21 the effect that in return for the commission, the developers getting stuff which is of
22 great value, and it's important to value that, and that's valuing it from the developer's
23 perspective. It seems that if one were doing a kind of valuation exercise for, I don't
24 know, the purposes of a patent or transferring the knowledge or whatever, one would
25 be engaged in a completely different sort of exercise, which wouldn't obviously be
26 helpful in answering the questions that are before us.

1 MR KENNELLY: Yes, I can see it's --as I said earlier, it's important that the expert is
2 properly confined to the legal issue before the Tribunal. As we said in our letter to the
3 Class Representative, the focus of the valuation exercise is the value of the tools,
4 technologies and services to developers. What's not proposed is an entirely separate
5 exercise of the value of Apple's services to users. I don't understand that to be the
6 request. It was a concern that the Class Representative raised. They wanted clarity
7 from us, and he wanted clarity from us as to the focus of the valuation exercise. And
8 we were very clear that it's the developers, the value to them, that is the exercise that's
9 being undertaken.

10 PROFESSOR NEUBERGER: But then it's not entirely clear to me why you need
11 a separate expert from the economic expert if you're simply trying to value the services
12 from the perspective of the developer.

13 MR KENNELLY: One can understand the concern because, of course, Dr Lopez is
14 an economist. You might well ask: surely our economics expert could do the same
15 job. But as we explained in our application and based on the lessons that we've
16 learned from the *Kent* case, valuing complex bundles of tools, technologies and
17 services and the value of them to developers is a particularly complex exercise. This
18 is a particularly complex branch of the work that economists do, and there are
19 specialists in it and there are economists that specialise in valuing tools, technologies
20 and services in the tech sector, especially when they're supported by IP and can have
21 experience in doing this work.

22 Now, our expert economist is a very distinguished economist, but he does not have
23 the same level of expertise in conducting these valuation exercises that Dr Lopez has.
24 Our submission to you is, provided we avoid duplication, we should be allowed to
25 have, for such a critical aspect of our positive case, an expert that deals with valuation
26 itself. It is a complex exercise in this area: the tools, technologies and services that

1 Apple provides are extremely complex. In the *Kent* case, we scratched the surface
2 with a document in the annex to our opening submission, Mr Frazer will remember,
3 which just gave the highlights of what Apple is providing to developers. But it is far,
4 far more than that. Focusing only on the tools, technologies and services provided
5 directly to developers.

6 PROFESSOR NEUBERGER: But in explaining the possible methodology that the
7 expert would be using, you referred to, as an example, the use of comparables and
8 so on, which sounds like a fairly conventional approach to valuation which would not
9 require any very specialised knowledge. I mean, it requires considerable skill to do it
10 well, but it doesn't seem to be a particular specialist valuation exercise.

11 MR KENNELLY: The exercise of seeking out comparators and making comparisons
12 is a very standard approach to valuation and valuing economic value. But how one
13 does the comparison, how one identifies the key things to compare and undertake that
14 exercise, is a very complex task. And the economists who specialise in it, who
15 specialise in valuing these very complex sets of tools, technologies and services, are
16 able to do the job particularly well. Dr Lopez has that specialism. This is genuinely
17 a specialist area. The underlying concept is straightforward, but the application of it is
18 very complex. This is something which Apple speaks to with some expertise of its
19 own because it's conscious of what it provides. That's why we do seek to have
20 a specialist economist, Dr Lopez, dealing with it.

21 The key concern we thought the Tribunal might have is to avoid any duplication. That
22 was the concern I think was raised at the previous CMC. We sought to make it clear
23 that there'd be no duplication, but we would definitely benefit and the Tribunal would
24 benefit from having a specialist look at the valuation exercise. And Dr Lopez has that
25 expertise to a very significant degree. I'm not taking you through his CV to
26 demonstrate how, in distinction from Professor Gowrisankaran, I could explain why

1 one is more specialist than the other in this area of valuation for tools, technologies
2 and services in the tech sector, but the Tribunal can see that for themselves. The key
3 point here is that he is genuinely specialist in an area that demands specialism.

4 THE CHAIR: Thank you.

5 Mr Carall-Green.

6 Submissions by MR CARALL-GREEN

7 MR CARALL-GREEN: Yes, sir. A small correction, and then I would like to focus on
8 responding to the discussion that the Tribunal has just had with my learned friend.
9 The small correction that I just want to bring to your attention is that, in relation to this
10 issue about what the Tribunal determined about the meaning of the contractual terms
11 in *Kent*, we said in our skeleton argument that Apple had not challenged that on
12 appeal. But actually, my learned friend points out fairly that they do so in their skeleton
13 argument. I don't want to dwell on that, but I just wanted to make sure that the Tribunal
14 was not under a misapprehension on that point.

15 Now, I want to respond to the discussion that the Tribunal has just had with my learned
16 friend, which is that a core problem with this application is that Apple has not said, not
17 specified with any precision, what the expert would be valuing, to whom or how.

18 THE CHAIR: It's fair to say, I mean, the force of Mr Kennelly's application seems to
19 me, speaking only for myself, at least to the untutored reader who wasn't present in
20 *Kent*, the *Kent* judgment looks like it's identified an area of evidence which could have
21 been open to the Defendants and which wasn't led and which had consequences. And
22 it's, in that context, pretty unsurprising that the Defendants are looking to address, you
23 know, what looks like an evidential gap.

24 MR CARALL-GREEN: Yes.

25 THE CHAIR: The area that I think -- again, speaking solely for myself -- that I'm
26 struggling with is the question of methodology and just what it is, what is the exercise

1 that we are envisaging? What I have in mind is -- we haven't discussed this, but what
2 I'm wondering is whether a fair approach to this would be not to determine
3 Mr Kennelly's application today, but to give him the opportunity to file a short note from
4 the expert, maybe a two or three-page document which would explain what it is that
5 the expert envisages. He would bring in terms of the headline issue that seems to
6 arise from the *Kent* case. As I say, I'm -- yes, I think, I think we're agreed that that --

7 MR CARALL-GREEN: It sounds like I might be pushing at a closed door. It's one
8 against three at this point.

9 THE CHAIR: Well, if I put it this way, we're neither granting nor refusing the
10 application, if that's the approach we take; we're simply not determining today. We're
11 recognising, subject to anything that you might have to say, that there is some force
12 in the sort of headline point that there's an apparent gap identified in *Kent* which the
13 Defendants are clearly entitled to investigate whether they can address. But the
14 material before us in relation to the area of expertise at this point is leaving the
15 Tribunal, it's fair to say, somewhat not entirely clear what it is precisely that we're being
16 asked to approve with the consequence that, in a sense, you're handicapped because
17 you can't really answer with clarity what it is that you're dealing with. So I think that's
18 where we are in our thinking on this application at the moment, subject to anything you
19 want to say to dissuade us from that.

20 MR CARALL-GREEN: Well, I'm grateful, sir. Taking it in the order in which you
21 addressed it, sir.

22 THE CHAIR: Yes.

23 MR CARALL-GREEN: The passage from *Kent*, we say, is rather informative, but
24 perhaps the other way round. Because what the passage from *Kent* says is that there
25 was the opportunity to put forward a valuation which was not done despite -- and this
26 is the important part -- despite Professor Hitt's expertise in this area. So the point that

1 we make is exactly right: an economist who is already giving evidence in those
2 proceedings could have opined on this point. This is Professor Neuberger's point,
3 I believe, which is that it's not clear why we need to introduce a whole extra person
4 when, in *Kent*, the Tribunal's own suggestion was, well, there was somebody already
5 here who understands how this could have been done, but it was not done.

6 THE CHAIR: But that doesn't really answer the point that, for whatever reason, and
7 we can't speculate as to the reason, evidence wasn't led. The Defendants now want
8 an opportunity to at least consider whether they can, as it were, plug that gap if it was
9 a gap. I appreciate that they say it wasn't a gap; that's a larger point. On the face of
10 it, why shouldn't they be allowed to at least explore that question? Provided at least
11 they can satisfy us that there's a methodological approach which, you know, makes
12 sense and seems to address the questions that the Tribunal will have to grapple with
13 in due course.

14 MR CARALL-GREEN: It's probably worth saying at that juncture that that is what this
15 CMC was for. You'll recall, sir, that in your ruling in the last CMC in June -- I hope you
16 don't mind if I quote you, sir:

17 "... the nature of the valuation exercise which the Defendants propose to undertake is
18 undefined, as is the precise focus of the expertise on which they propose to rely."

19 And they were supposed to come back today with a more focused and more intelligible
20 proposal on, for example, what is to be valued. At the moment, what's being valued
21 is actually whatever's in the box. That's what my learned friend's submission amounts
22 to: we've got a box over here that's full of "various" intellectual property rights, including
23 copyrights, designs, patents, trade secrets, not particularised, not enumerated. So
24 we're going to have a valuation exercise of just whatever he's got in his box, not
25 specified, and we don't have a methodology for how. And, I would respectfully submit,
26 we don't have a serious answer to the question why that issue can't be addressed by

1 the economists, especially when the only methodology that's being put forward is
2 effectively a comparator analysis that the economists are going to be doing anyway.
3 They're going to be doing a comparator analysis because -- well, I can't promise what
4 they'll do because they'll do what they consider they ought to do in accordance with
5 their instructions. But realistically, everybody's going to be looking at a comparator
6 analysis in any event.

7 So what I would submit to you, sir, is that the exercise of going away and having
8 another attempt to specify is precisely what this CMC was for, in part. That's what
9 they were asked to do for today, and you're still left without a good sense of what is
10 going to be valued, how it is going to be valued and in what way that valuation exercise
11 is useful given the legal issue of the economic value to developers, as distinct from
12 the value of an IPR. How much could I charge to license this ground, that kind of
13 valuation exercise. As Professor Neuberger has pointed out, that's actually the wrong
14 side of the coin. The right side of the coin is what's the value to the recipient.

15 So you don't have any answers to these core fundamental questions, and you asked
16 for them today. So I would respectfully submit that a third bite of the cherry is neither
17 fair nor proportionate nor really likely to result in anything better than what we've
18 already got.

19 MR KENNELLY: Just in view of the importance of the issue, I just had to jump up
20 very quickly. Well, obviously the Tribunal is saying that we have an opportunity to put
21 in a further note. I gladly accept that; it's far preferable than having the application
22 refused because, to be clear, this case is -- as the Tribunal knows well -- said to be
23 worth hundreds of millions of pounds, and the question of the value of the tools,
24 technologies and services are the central issue. It is the central issue at the heart of
25 the case. So I apologise if the level of detail isn't sufficient. Some of the points that
26 Professor Neuberger's raised are certainly new to me, and therefore we have

1 to -- I would be grateful of the opportunity to speak to Dr Lopez and get a note together
2 for the benefit of the Tribunal. We are taking instructions as to how long we would
3 need for that because, of course, that's not a matter for the lawyers to produce; it has
4 to come from him and I can't speak for him so we need to find that out. So I'm afraid
5 if the Tribunal would wait before setting a deadline for that until we have some
6 instructions from Dr Lopez, if the Tribunal is minded to proceed with giving us that
7 opportunity, I would be grateful for it. Not least because the Tribunal's interventions
8 have clarified the concerns you have and therefore gives us a steer as to what
9 Dr Lopez has to be addressing.

10 THE CHAIR: Well, we'll deal with this when we deal with all the other expert issues,
11 certainly evidence. Yes.

12 Application to adduce survey evidence

13 MR KENNELLY: So again, the burden is on us to show the survey evidence has real
14 value and that the likely utility justifies the likely cost. And just the headline, of course,
15 as to the value of the survey, it goes to a key argument regarding market definition
16 and dominance. In a case of this size, it's obvious that the cost involved is justified by
17 the importance of the issue in *Kent*, again, learnings from *Kent*.

18 THE CHAIR: I just want to test that. It can't be an answer to say this case is of such
19 a large value that, in effect, any -- and I'm sure that's not what you're saying.

20 MR KENNELLY: Not at all.

21 THE CHAIR: It doesn't take you all that far, other than I suppose you're emphasising
22 to us the care with which we need to approach the issues that you're putting before
23 us.

24 MR KENNELLY: Of course. And the concern that the Class Representative has
25 raised is not so much about the cost of doing the survey; the concerns are different.
26 You've seen in the submissions.

1 THE CHAIR: Yes.

2 MR KENNELLY: This isn't a case where the benefits are borderline and therefore one
3 looks very closely, even at this stage, at the cost. Because the case law requires us
4 to engage with the Tribunal and the Class Representative at a very early stage, it is
5 hard to say with precision what the cost would be. But that was something which,
6 again, we can discuss with the Tribunal. It will depend a bit on what we agree with the
7 Class Representative. The Class Representative has a role to play in designing or
8 certainly being consulted on the approach that will be adopted and to correct any errors
9 that they think we've made in the design of the survey.

10 THE CHAIR: Yes. Am I right, the questions we have to ask ourselves are: would the
11 proposed survey be of real value? Question 1. Question 2: is it of sufficient value that
12 it justifies the cost?

13 MR KENNELLY: Yes.

14 THE CHAIR: And you haven't put before us any costs of what would be involved in
15 a survey and you're asking for more time if that is a gap. It strikes me the costs here
16 are not simply the costs of the survey exercise, but the costs -- if the methodological
17 points that Mr Carall-Green makes have got force and, you know, that would remain
18 to be seen -- of the testing, challenging, discussing of the exercise at trial, the time
19 taken up at trial. All of which means that I think we have to be satisfied that this is
20 really an exercise that is going to add value to the sum of useful knowledge on the
21 issues that we need to ultimately determine.

22 MR KENNELLY: Indeed, yes.

23 THE CHAIR: So I think if you could acquaint us on that.

24 MR KENNELLY: One of the difficulties with -- it's impractical at this stage to give you
25 a precise figure for precisely that reason, because we are at the stage of discussing
26 methodology with the Tribunal and with the Class Representative. But the first key

1 question is the value that a survey would provide. As you've seen in the *Kent*
2 judgment, Apple argued that the Class Representative's market definition was wrong
3 because Apple was constrained competitively. We argued, to give you one example,
4 a user, a customer, consumer, could use a developer's website to purchase in-app
5 content and then use that content in certain contexts when playing with the app on the
6 iPhone. So a user could avoid, in certain contexts, purchasing the content on the
7 iPhone and incurring the commission if that's what the user wanted.

8 Our argument was that if there was a price increase for the content on the App Store,
9 users, consumers, would purchase the content on, for example, the website the
10 developer had and that would actually constrain Apple from imposing such price
11 increases. The possibility of users doing the purchasing through the website acted as
12 a constraint on Apple, increasing prices on the App Store. That's relevant to market
13 definition and dominance and that's especially the case, we said, if these were high-
14 spending users. We said these might be particularly sensitive to price increases and
15 a large volume of the commerce was concentrated in them. It was the risk of them
16 switching their purchasing to, for example, gaming developers' websites; that's
17 a powerful constraint.

18 We'll see what happened in *Kent* when that argument was put. So we go back, if we
19 please, to the *Kent* judgment. Authorities bundle, tab 23, and the treatment of
20 dominance on page 1058, paragraph 331. So we see at paragraph 331 what
21 Professor Hitt said for Apple. He said:

22 "If prices on the UK Storefront increased, I would expect these high-spending
23 consumers to substitute away from the App Store because such a price increase
24 would have a large impact on their total expenditure. While this is a small proportion
25 of the overall user base, if these users substitute their spending -- even
26 partially -- away from the App Store, Apple will lose a substantial share of App Store

1 revenue and associated margins ..."

2 A large volume of the spending was concentrated in the hands of high rollers. Then
3 at 332, we see what the Tribunal said:

4 "This view was however entirely unsupported by any survey evidence [that's survey
5 evidence of users, of consumers] or even any internal Apple analysis available to us."

6 And at 333, the Tribunal said:

7 "There is therefore no evidence before us that high value users would take a different
8 view from other users (as set out in the Accent Survey), apart from Professor Hitt's
9 speculation ... It is also difficult to understand why Apple would not have produced
10 some survey or other analysis at this point if it thought it was so important."

11 And our expert, Dr Gowrisankaran, explained why this would be valuable for his work
12 in the core bundle, that's at tab 7, page 27. The proposed survey, he says, at
13 paragraph 2:

14 "... aims to assess the relevant market(s) and competitive constraints Apple faces.
15 Specifically, Apple proposes to survey:

16 "(a) The extent to which consumers multi-home [that means the extent to which they
17 use different platforms for their transactions].

18 "(b) The extent to which consumers switch between the App Store and other channels.

19 (c) "The extent to which consumers are aware of alternative channels through which
20 they could acquire apps/in-app content, and whether they consider prices on those
21 channels.

22 "(d) The extent to which there is heterogeneity across consumers, i.e., whether
23 multi-homing, switching, and awareness vary across groups of consumers and, in
24 particular, between 'high-' and 'low-spending' consumers."

25 And then he says at 3:

26 "The proposed survey will help me assess whether consumers' preferences and

1 behaviours -- and in particular those of the high-spending consumers [it is common
2 ground that a huge proportion of the revenue and profits were concentrated in the
3 spending by a smaller number of high-spending consumers] -- are consistent with
4 Apple facing significant competitive constraints."

5 So, in response to that -- but that's why we say this is valuable. It goes to a critical
6 point for market definition and dominance. It fills a gap which was identified by the
7 Tribunal in *Kent*. Our expert explains why it's valuable for the work he will be doing
8 and we see what the Class Representative says in response.

9 Could you take up, please, the skeleton argument at paragraph 28. So paragraph 28,
10 go over the page. The Class Representative says that we're asking the wrong people:
11 "The relevant market ... [is] the market for the provision of services to developers. But
12 Apple's survey is about the conduct of device users."

13 But, as I have tried to explain to the Tribunal, if users switch their purchasing readily
14 away from the App Store and to a developer website, for example, in response to
15 a change in price or quality, that is demand-side substitutability. It's exactly what we
16 give the developers an incentive to distribute through those other channels.
17 Developers, we say, could render a price increase by Apple unprofitable if they could
18 divert a small share of users, these high-spending users in particular when they
19 account for a significant share of consumer spend on the App Store.

20 So it's nothing to the point to say, "Why are you asking users these questions?" if we
21 can establish through a survey that high-spending users are sensitive to price and
22 would switch. That answers the question, we say, as to how developers have an
23 incentive to distribute using those other channels.

24 So it's really quite straightforward, we hope, in terms of its value. The real concerns
25 are about the design of the survey -- the real concerns, the concerns which, we say,
26 require an answer. These are set out in the response to our application. They are not

1 set out in the skeleton. They've not been developed there. We disagree with all of
2 them but, in the time available, we'll see if they're developed orally or whether the
3 Class Representative is focusing on the point of principle, which is what they've
4 stressed in their skeleton argument.

5 But the key point there is: if Dr Ennis has concerns about the framing of the questions,
6 the selection of the target population, if he thinks those can be improved, those can all
7 be taken into account before the survey is finalised. That's exactly the kind of iterative
8 process which this Tribunal said ought to be undertaken in *Bulk Mail*.

9 Now, the Tribunal said in *Bulk Mail* that the parties should engage about the design of
10 the survey at the earliest possible stage, including before any pilot survey has been
11 carried out. So it's quite wrong for Dr Ennis to say, "Well, you haven't done a pilot
12 survey to help us understand that this is worthwhile". The Tribunal in *Bulk Mail* said
13 that you're supposed to engage with the Class Representative before the pilot survey,
14 which is what we've done. There was no suggestion at the May CMC that we had to
15 do a pilot survey before coming back before you. On the contrary, our understanding
16 was, consistent with *Bulk Mail*, we had to produce the proposal we have done -- which
17 is a very detailed one -- and I'll see what my friend says about the detail of it, and I'm
18 happy to answer any concerns he has about the detail. But really, detail concerns will
19 be addressed in the discussion between the parties. The real question for the Tribunal
20 is: in principle, is the survey valuable? And from what I've explained so far, is its value
21 likely to outweigh the costs that would be incurred and involved in having to undertake
22 the exercise?

23 THE CHAIR: Presumably, if there were issues of detail that could be lost out in a pilot,
24 either you shouldn't read anything into the question, one way or another, on the
25 question of principle. But it would be open to the Tribunal to approve an exercise to
26 the stage of a pilot, on the basis that the Tribunal would then consider whether

1 pursuing the matter any further would be valuable or not.

2 MR FRAZER: Can I just ask a question at a higher level then? Not in detail. As
3 I understand it, the objective is to determine the extent to which Apple was constrained
4 in relation to the price they could charge, having regard to the price sensitivity and the
5 elasticity of the users. So you'd be asking a question of device users in relation to
6 their likely response in a previous period, the relevant period, to a theoretical price
7 rise. Because, as I understand it from looking at the paper so far -- I may be wrong
8 on this -- there was no increase in the commission which would have given rise to
9 a diversion of device users to a different platform?

10 MR KENNELLY: Yes.

11 MR FRAZER: To what extent will a survey be able to get you there? And I'm not
12 looking at the detail of the questions, but I can't quite understand at the moment how
13 your objective will be achieved by asking consumers these sorts of questions which
14 are very theoretical.

15 MR KENNELLY: Well, you can see from the survey itself, the design of the survey,
16 the consumers are asked about their sensitivity to price. To what extent are you aware
17 of other platforms? To what extent do you use other platforms? To what extent when
18 you consider other platforms do you bear in mind considerations of price or quality?
19 So those questions provide valuable evidence as to the willingness of those
20 consumers to switch in the event of a price increase. I mean, we can look in detail at
21 the design of the survey but even identifying the fact that consumers -- for example,
22 high-spending consumers -- use other platforms, are conscious of price and quality
23 differences, and would respond to those in the event of price increases. It's tough,
24 powerful, probative evidence of the constraint that exists to constrain Apple, for
25 example, from a price increase or a change in quality. Because, of course, we're
26 looking at the full parameters.

1 MR FRAZER: But aren't you almost asking consumers about a counterfactual in the
2 sense that they didn't have to respond to a price increase if there wasn't one. They
3 didn't respond, so you're asking them how would they have responded had there been
4 one, by reference to their awareness of other possibilities for downloading iOS apps?

5 MR KENNELLY: Consumers are asked those kinds of questions but this is typical in
6 survey design. Good survey design is able to ask hypothetical questions in a way that
7 is probative. That's really a question for how the questions are framed to avoid bias,
8 and that is the thing which our survey seeks to do. It seeks to ask the questions in
9 a way that will be useful and that avoids bias and avoids leading --

10 MR FRAZER: I'm not worried about bias. I think that could be easily avoided. I'm just
11 a little bit puzzled by how you get to the end result, since you're asking a question
12 about an event that didn't occur.

13 MR KENNELLY: Indeed. Well, some of the -- I'll go back and look at the questions
14 themselves. It's not been suggested, I don't think, by anyone that a survey is not
15 useful if it has to ask hypothetical questions. I think we would say that's not the right
16 approach. Sorry, that fails to appreciate what a good, well-designed survey can do.
17 And they do regularly ask hypothetical questions in a useful probative way, provided
18 that the steps have been properly built up.

19 THE CHAIR: So, in this case, for example, to ask the bold question: if the price went
20 up, would you switch? You would say that, wouldn't you?

21 MR KENNELLY: Well, no --

22 THE CHAIR: That's because any sensible consumer is going to say, "Well, of course
23 I would". But you need to design it in a way that actually builds in enough of the real
24 world.

25 MR KENNELLY: Exactly.

26 THE CHAIR: But it's a useful -- or you can draw something from the answer.

1 MR KENNELLY: One doesn't go straight to the question. One doesn't go straight to
2 the question if the price went up would you switch? The earlier question is very
3 important. They build up in a non-leading way, the extent to which consumers are
4 aware of alternatives, use alternatives, multi-home, and what considerations they have
5 when they decide to make purchases across these different platforms, including price
6 and quality. It seems to dig into what motivates them when they purchase, and then
7 it moves on to the reasons for switching in the past. But that's what makes it a useful
8 exercise. It's not been suggested -- this is the difference between -- if there was
9 switching in response to a price increase by Apple, then we would have data about
10 the consequences of the price increase by Apple. That's what we don't have. This is
11 what we have to fill that gap, by reference to other term setting in *Kent*.

12 PROFESSOR NEUBERGER: Can I just follow up on that a bit? If I look at the
13 questionnaire, I can imagine that if it all goes really successfully, you end up maybe
14 discovering that most users are sophisticated people who use multiple channels to
15 access their apps, who are very conscious of the prices, et cetera, et cetera. If we
16 discover all that, do we learn anything about their propensity to switch from one
17 channel to another?

18 MR KENNELLY: We would say yes. We would say that if the evidence shows that
19 there's a high concentration of commerce in a small number of users, but they
20 regularly multi-home, that they purchase, for example, gaming apps across different
21 platforms, they're acutely conscious of price and quality. Because they multi-home
22 they're very tuned in to differences in price and quality. And they may have less brand
23 loyalty, for example, because of their multi-homing. And then they're asked, "To what
24 extent have you decided to make purchases between the different platforms in the
25 past?"

26 One can infer from that collection of data, those survey responses, that if they were

1 faced with a price increase, they would switch. And that Apple, for example, is
2 constrained to maintain its prices and quality levels by reference to the risk that these
3 high value users would switch. Because if they did switch, it would render a price
4 increase by Apple unprofitable.

5 PROFESSOR NEUBERGER: Sorry, there's a gap here in the logic, in the sense that
6 you may have evidence that these people are very aware of the different channels,
7 but you have no evidence from a survey like this of their propensity to switch in
8 response to price changes. They may know perfectly well what the alternatives are
9 and use them on different occasions, but it doesn't tell you anything about their
10 readiness to switch in response to a price change.

11 MR KENNELLY: It does. Unless -- I mean, of course, sir, your observations are
12 extremely important. And so this will inform the development of the design of the
13 survey. But if the survey engages with reasons for switching, reasons for switching
14 that has taken place and the reasons for switching that would take place, that could
15 be informative of the existence of a competitive constraint. Because it's not just
16 a question of multi-homing and awareness; it also engages with the willingness of the
17 respondents to switch if faced with changes in price and changes in quality. And the
18 existence of that willingness to switch, if it's established in survey, is material to
19 the questionnaire.

20 PROFESSOR NEUBERGER: If you can effectively and reliably establish a readiness
21 to switch, obviously it helps you analyse the readiness to switch. It wasn't clear to me
22 from the questionnaire that this would enable you to make such a judgment.

23 MR KENNELLY: Well, we shall go back to the questionnaire, sir, and we will do our
24 best, as far as the survey can do, to engage with the question of -- the awareness of
25 multi-homers to switch and their practices and, when they have switched, their reasons
26 for doing so.

1 PROFESSOR NEUBERGER: The other element which hasn't come into this so far
2 and is a subsidiary worry in my mind is that, actually, we're not talking about Apple
3 raising prices or reducing prices to consumers. We're talking about Apple
4 hypothetically raising or reducing the level of commission, so there must be some
5 assumption there about how developers who are selling the same app in different
6 channels respond to a change in the commission level that Apple charges. And it's
7 not obvious that a change in commission on the App Store leads to a change in price
8 on the App Store.

9 MR KENNELLY: That question is a separate issue in the case, which a survey is not
10 going to -- survey users are not going to answer that question.

11 PROFESSOR NEUBERGER: Yes. But the extent to which it's a market constraint
12 depends in part on the response of developers to a price, to a commission change.

13 MR KENNELLY: Of course. And we'll have to make arguments about the extent to
14 which the commission is reflected in developer prices. But if we don't have the survey,
15 we won't even get there, because we risk falling into the trap that -- we risk having the
16 evidential gap the Tribunal identified in *Kent*, which is: you say, there's a concentration
17 of users.; you say they have high levels of awareness; but how do you know? Where's
18 the survey? And only a survey will get us that information.

19 PROFESSOR NEUBERGER: Well, yes. I mean, I think the question is whether the
20 survey will get at the information.

21 MR KENNELLY: The survey will get the information about the degree of multi-homing,
22 the level of awareness, the extent to which they do transfer spending between
23 platforms, and their reasons for doing so. And if we can improve the survey to dig
24 deeper into likely reactions to price increases or changes in quality, we will do so. And
25 maybe, sir, you're referring to your own scrutiny of the survey. We will pay very close
26 attention to what you said. But what is clear, in my submission, is that for sure it can

1 be improved, but the Tribunal can see what we are trying to get at. And the task itself
2 is undoubtedly a valuable one. We would say a necessary one for us fairly to defend
3 ourselves in this multi-hundreds of millions of pounds worth of litigation, according to
4 the Class Representative. And this is a critical aspect which allows us to engage with
5 the market definition and dominance. It was the key point at the end on competitive
6 constraints in the *Kent* trial. And you've seen what the Tribunal said in *Kent*.

7 THE CHAIR: Mr Carall-Green. I was actually just looking at time and are you going
8 to have much in reply? I'm not seeking to constrain you but we maybe need to take
9 a break at an appropriate time.

10 MR CARALL-GREEN: I mean, one option is to wrap this up because I think that might
11 leave us with a break, and then a separate topic.

12 THE CHAIR: Yes.

13 MR CARALL-GREEN: Which has some logic to it.

14 THE CHAIR: If you're able to wrap up, saying everything you need to say.

15 MR CARALL-GREEN: Or give me a nod if the point has already landed.

16 Sir, I think to start off with, I think we're ad idem that we need to establish that the
17 survey will provide real value at proportionate cost. And I note in passing that the word
18 "real" is in block capital letters in bold in Lord Justice Lewison's judgment in *Interflora*,
19 not something that my learned junior or I have ever seen before. But just to emphasise
20 that the reason that went to the Court of Appeal twice is because experience shows
21 that there are genuinely difficult questions about how to make these kinds of surveys
22 worthwhile in many different kinds of contexts.

23 Now, in this instance, the stated purpose is to provide support for Apple's case on the
24 relevant market, we've heard that. But the idea, and this has been discussed, is to
25 investigate the behaviour of device users. Now, that's important. The idea is only to
26 investigate the behaviour of device users. But, of course, in our case, in this case

1 before us now, the buyers are not the device users. They are the developers.

2 Now, the point that's made in response to that is, well, there's a separate question

3 about whether or not if you increase the commission, that results in a price increase

4 for consumers. Sir, previously we had disappearing issues, and now we have

5 appearing issues. It is common ground on the pleadings in this case that there is no

6 pass-on. So, the argument is, apparently, that if the commission goes up, the

7 developers will charge their customers more, which means that they might switch

8 away. That's the hypothesis that's being tested. But it's a hypothesis that can't

9 possibly arise on the pleading, because the pleading says that insofar as the

10 commission falls on the developers, the overcharge isn't passed on to the consumers.

11 So the whole hypothesis that's being tested here is one that is not an issue. It's not

12 just actually a dry pleading point, because even if that pleading point could be

13 overcome, it illustrates the wider issue, which I think, Professor Neuberger, you were

14 describing, which is that ultimately the question is always: even if one can establish

15 certain features, characteristics, behaviours on the part of the device users, the

16 question in this case is whether or not developers would react. Because if developers

17 wouldn't react and they would continue to sell through the App Store -- effectively

18 because they have no choice, which is what we say -- then Apple can continue to

19 charge whatever it wants to continue to exercise market power, because developers

20 have no alternative.

21 So the logical step that's always going to be missing from this survey is: what will

22 developers do in response? And we say that that just can't be answered by looking at

23 the behaviour of consumers. So, actually, what you're looking at here is you're getting

24 half an answer to a point about switching, which is one of a host of issues that's going

25 to be examined in the context of market definition. And we can go back to the

26 document we were looking at earlier, which is the scope of the issues to be addressed

1 by way of expert evidence. The competition economics experts are going to be giving
2 evidence on market definition, and that evidence is divided into 10 sub-points. And
3 this survey that's been put before you is giving you half an answer to one sub-point
4 within a larger issue of market definition. And that is why the Tribunal needs to stand
5 back and look really carefully at whether the "real" -- all caps, bold -- test is met. When
6 we look at the detail of the survey, those concerns should be compounded.

7 Now, I've been asked whether or not I press all of the methodological issues that we
8 put in our response. We stand by all of those. But I've heard what the Tribunal has
9 said about the time, and, of course, I see it as pressing. I'm not going to elaborate on
10 all of those orally, but I will just highlight a few, because there are some mission critical
11 ones that may mean that the survey, as currently designed, actually has zero value.

12 One of them is that the Tribunal will know that in recent history, under EU law, Apple
13 has been required to open up its system to allow more steering to other distribution
14 channels. Therefore, if one is not extremely careful and thinks about how to solve this
15 problem, if one goes out and asks consumers about switching in the current
16 environment, in today's environment, they're going to give you an answer which is
17 based on what happens today. But, of course, for most of the relevant period, that
18 level of switching wasn't possible because the European Commission hadn't stepped
19 in. And part of this case is actually about the application of EU law from 2017 until
20 2020, at least. So one of the methodological issues is not something that could be
21 ironed out by asking the right question. It's potentially looking at the wrong period.

22 There are other methodological issues. Dr Ennis would respectfully suggest that the
23 concerns articulated on both sides of the Tribunal are serious concerns. Asking
24 consumers about something that didn't actually happen needs to be weighed in the
25 balance. How much value is that really going to generate? Similarly, the point that
26 Professor Neuberger makes: even if you establish awareness of alternative

1 distribution, say you establish that today, people know, "Oh, yes, I can go to the
2 developer's own website", leaving aside the fact that they wouldn't have known that in
3 2018, which is part of the relevant period, it still doesn't tell you that they would have
4 switched. Some of our criticisms in the response drive at that because we give, for
5 example, I think, the illustration of a person who has a work phone and a family phone.
6 So they're aware that there are different ways of accessing these things, but that has
7 absolutely no bearing on whether or not they actually switch. So the logical step of
8 awareness to switching is a step that is not obviously taken by the survey.

9 But sirs, as I said, because of the time and because there are fundamental conceptual
10 flaws with this, I don't want to spend too much time getting dragged into that. Really,
11 what all of this emphasises is that the complexity and cost associated with getting this
12 right is likely to be very significant indeed. My learned friend suggested that perhaps
13 we weren't so concerned about the cost; we are extremely concerned about the cost.
14 So we put our objection on the dual basis that the value is very small and the cost is
15 very high.

16 Even getting to the point where we can design a pilot survey that meets all of the
17 requirements that we've discussed today, plus all the ones that are in the written
18 documents, is likely to be quite a significant distraction and involve an enormous
19 amount of work on the part of both Parties' legal teams. So I would urge upon the
20 Tribunal serious consideration of whether or not Apple has demonstrated that the
21 question that it's answering in this survey is one that actually is going to have a real,
22 valuable bearing on the issues that the Tribunal has to decide come trial.

23 I hope that was sufficiently brief.

24 THE CHAIR: Thank you. Thank you very much, Mr Carall-Green.

25 Reply submissions by MR KENNELLY

26 THE CHAIR: Are you able to answer this question briefly, Mr Kennelly: is it correct

1 that it's common ground there's no pass-on?

2 MR KENNELLY: No. So as you saw in the skeleton argument for the May CMC, we
3 have explained why we haven't currently pleaded a pass-on defence. But we
4 anticipate pleading a pass-on argument following the outcome of the *Kent* judgment
5 on appeal. But that is open on the basis of what we said to you in paragraph 36 of our
6 skeleton argument for the May CMC. Just very briefly --

7 THE CHAIR: Sorry, why do you have to wait for the *Kent* appeal if you think there's
8 a pass-on defence?

9 MR KENNELLY: Because, first of all, there's significant asymmetry of information in
10 relation to pass-on. As the Tribunal knows, the case law of this Tribunal is that you
11 can't simply plead a bare pass-on defence. If a defendant pleads a pass-on defence,
12 they need to plead it with great particularity and on the basis of a proper evidential
13 basis. And in relation to these developers, there is significant asymmetry of
14 information as to how they engage with the question of pass-on. They know how they
15 run their businesses; we don't. So we seek to obtain disclosure from these developers.
16 This is the point that I flagged earlier on. We'll come to it in the timetable application.
17 This is another reason why it's crucial for us to be able to communicate with class
18 members and get disclosure from them in order to plead a pass-on defence. If we
19 pleaded a bare pass-on defence now, it would be struck out. We need that disclosure
20 from the class members, from the developers, to understand how they deal with the
21 commission in order to be able to plead a pass-on defence. So it is not common
22 ground by any means. We just are not in a position at the moment. First of all, the
23 *Kent* judgment on appeal would establish the legal approach to pass-on, and more
24 importantly, we need class disclosure to plead pass-on on a proper evidential basis.
25 Pass-on, of course, is concerned not only with price but also with quality.

26 THE CHAIR: I think, and correct me if this is a wrong characterisation, at present, you

1 don't have an evidential basis to plead a pass-on defence. That's part of the rationale
2 for seeking disclosure from class members?

3 MR KENNELLY: Yes. We shouldn't be prejudiced by the fact that we haven't been
4 able to plead one.

5 MR CARALL-GREEN: Sir, it goes slightly beyond that, because Apple in *Kent* actually
6 has a positive position on pass-on. So this is this defendant saying to the judiciary in
7 this country that it has a position on pass-on, but there was no pass-on. So it's not
8 merely that there's no evidential basis in this case, which is true; it is in fact Apple's
9 case in a large set of proceedings.

10 MR KENNELLY: That was a jury point if ever I saw one. We are in this Tribunal and
11 we're entitled to plead a case on the basis of my learned friend's client's disclosure on
12 a proper basis and that's what we are seeking from him. How we survive in the Court
13 of Appeal is a different battle. We are concerned here with justice and fairness in this
14 Tribunal. And if my learned friend wants to take an abuse of process argument against
15 me, he can go ahead, but there's no such application before you today.

16 Now, he said it was common ground; it is not common ground. I've tried to explain
17 why pass-on is not common ground. The point he made about the recent period being
18 inappropriate: again, if he has a suggestion to make about a different period, he can
19 go and we will obviously entertain it. The last three months were chosen as opposed
20 to the whole claim period so that the respondents have their own decisions clear in
21 their own minds. We were asking people about decisions they've made, where they
22 multi-home, purchasing choices they have made. In order for that to be useful, it has
23 to be by reference to something done recently.

24 And in terms of consumers from the countries that are being tested, again, we'll take
25 into account what my friend said about making sure that those are selected in a way
26 that avoids any infection by regulatory changes in those jurisdictions.

1 To come back very briefly to the concern that was raised about hypotheticals, you saw
2 in our application what I said about good survey guidance. We'll be able to deal with
3 those kinds of hypothetical questions. The CMA asks hypothetical questions all the
4 time in its surveys. It has guidance on survey questions, including how to ask
5 hypothetical questions. We are tracking that guidance in the survey that we have
6 formulated. And that's clear at footnote 7, page 19 of the core bundle in our
7 application. Thank you.

8 THE CHAIR: We'll take ten minutes.

9 (3.37 pm)

10 (A short break)

11 (3.51 pm)

12 THE CHAIR: The Tribunal is grateful to counsel on both sides for the submissions
13 we've had on the various issues of expert evidence and survey evidence. We are not
14 going to issue a decision on those today ex tempore. We're going to, in effect, reserve
15 judgment on those applications. We don't expect to take very long in terms of coming
16 to a decision, but we don't consider we should hand down a decision now.

17 I think that leaves the question of time to trial. I think probably it's, Mr Kennelly, your
18 application in the sense that there's a provisional listing for February. I think, in
19 a sense, you're the person who's seeking to invite us to dislodge that. I'm conscious
20 you may be having to do that on certain hypotheses about what we may or may not
21 decide, but I'm sure you're well able to absorb that into your submission.

22 Application to amend timetable

23 Submissions by MR KENNELLY

24 MR KENNELLY: Indeed. Thank you, sir. And our application is also, obviously, to
25 extend the expert evidence deadlines.

26 THE CHAIR: Indeed.

1 MR KENNELLY: There is an actual order (overspeaking).

2 THE CHAIR: And as I understand it, you have a fallback position, which is that the
3 expert evidence deadline should extend anyway. But I think you very fairly observe
4 that that would be capable of being done within the existing timetable to trial if we
5 weren't otherwise persuaded to move the trial date.

6 MR KENNELLY: Yes.

7 THE CHAIR: Thank you.

8 MR KENNELLY: So just by way of background, ever since the Tribunal decided to try
9 the Ennis case and the *Kent* case separately, the concern has been to avoid an
10 outcome where the result of the Ennis trial is inconsistent with the principles of law in
11 the *Kent* case. Just going back to the beginning of this story and the CMC in
12 April 2025, Apple supported Dr Ennis's application to list a trial in November 2027 on
13 the basis that the timetable would leave sufficient time for the expert evidence to take
14 account of any judgment from the Tribunal and any appeal from any judgment of the
15 Tribunal in the *Kent* proceedings. Dr Ennis did not disagree with that, and the Tribunal
16 ultimately ordered the listing to be made after February 2028. Unfortunately, *Kent* has
17 taken much longer than expected to come before the Court of Appeal, and my skeleton
18 argument explains why that is; I'm not going to go back to that detail. The fact remains
19 that the appeal hearing is in May 2027.

20 There are three main reasons we say why the trial in this case should be listed in
21 September 2028 and not February 2028. The first, as I will show the Tribunal, the
22 Court of Appeal's judgment in the *Kent* appeal on legal issues will have significant
23 implications for the parties' expert evidence in these proceedings. On the basis of
24 a judgment within six months from the *Kent* hearing, the experts can be expected to
25 have taken account of the judgment in their reports by the end of February 2028. If
26 their evidence --

1 THE CHAIR: Is the difficulty with that submission not that there may be all sorts of
2 cases where decisions will be made on points of law that could affect the outcome of
3 this case, but if one deferred trial to await every potential appeal case that could affect
4 the analysis, we would never list any case for trial?

5 MR KENNELLY: Of course.

6 THE CHAIR: And I appreciate there's a particular nexus between this case and the
7 *Kent* case, but at a high level, if we're talking about questions of law, then, you know,
8 I think you'll need to persuade me that they're such as would really justify departure
9 from that sort of broad point. To some extent, parties have to prepare a case on what
10 they consider to be the right view of the law and, you know, come and be prepared to
11 argue that before us. And if an appellate decision comes along that requires that to
12 be adjusted, well, that's one of the exigencies of litigation. So I put my cards on the
13 table about where I come from --

14 MR KENNELLY: Of course.

15 THE CHAIR: -- you know, so you can tell me why that's wrong.

16 MR KENNELLY: As a matter of principle, everything that you say, sir, is correct. The
17 question here is you've got conflicting proposals, a trial beginning after February 2028
18 or September 2028. So there is a gap. In litigation of this nature, it's not an absolutely
19 enormous gap. The question, then, is what are the benefits; what is the proportionate
20 response faced with challenges in this case?

21 There is a particular nexus between the appeal in *Kent* and this case. The range of
22 overlapping legal issues is unusually significant. I'll take you to three in particular. But
23 there are two other important reasons why we say the trial should be pushed back.
24 The second of my three reasons is that disclosure has taken much longer than the
25 Tribunal anticipated when it set the timetable in 2025. That process, some of which
26 we've been debating today, is now not likely to be completed by January 2027.

1 Then finally --

2 THE CHAIR: As long as we take account of that in the expert timetable, does that
3 have any other consequences?

4 MR KENNELLY: No, but it does mean the expert timetable has to be pushed back
5 and, if it's pushed back to a point where one puts pressure on a February 2028 listing,
6 then the Tribunal has to weigh that in the balance when asking which is the appropriate
7 slot for a trial. Because if the February 2028 listing starts to look difficult for reasons
8 that have nothing to do with the *Kent* appeal, well, then that is support for my overall
9 submission which is that the Tribunal should move the trial to after September 2028.

10 The third reason is this question of Apple gathering evidence from class members.
11 Again and again, I've made the point to the Tribunal today. This is a crucial exercise
12 which will allow Apple to defend itself in these proceedings to obtain disclosure from
13 class members. The developers in this case stand to benefit. The fruits of that
14 exercise from developers are needed by the experts. But for the reasons I'll explain,
15 and the Tribunal is very familiar with, it's going to be very unlikely to get that material
16 from developers for the experts by May 2027. Dr Ennis has caused very significant
17 delay to Apple's ability to gather evidence from class members. I'll come back to that,
18 and that's another reason why the timetable for expert evidence should be pushed
19 back and that has consequential effects for when the trial ought to begin.

20 I'll begin then with the significance of the legal issues in *Kent*, and they are summarised
21 in our skeleton. I'm not going to go through each and every one of the overlapping
22 legal issues. I'll pick out three.

23 The one I'll start with is the one we've touched on already today: the legal principles
24 regarding excessive and unfair pricing. We've already discussed the test which is to
25 ask what the price would be in conditions of workable competition. That's what the
26 Court of Appeal said in the *Phenytoin* case. The question in the *Kent* appeal is: what

1 is the significance of the fact that the product or service is protected by intellectual
2 property rights? Because, as the Tribunal knows, an IPR can confer market power on
3 an undertaking. But the case law tells us that even where IPRs confer market power,
4 they can still be pro-competitive and are respected by the competition rules.

5 Does workable competition mean that you assume the product is not protected by
6 intellectual property? That the intellectual property rights could be used without
7 compensation? Or, in assessing economic value, should the experts take account of
8 value that arises from the fact that the product has IP protection, even if that confers
9 market power on the dominant undertaking?

10 Obviously, our position -- that the Tribunal well knows -- is that Apple is not dominant
11 despite the intellectual property rights it has. That's because we say Apple faces
12 competition from other sources, some of whom already have themselves IP protection.
13 But even if Apple is dominant, it's entitled to fair compensation for the use of its tools,
14 technologies and services that it provides to developers and which are protected by
15 IP.

16 This is a major issue in the case. We see that, in fact, in Dr Ennis's response to our
17 application for a valuation expert. So, just to understand the significance in our case,
18 could you turn up the Ennis case. The core bundle, please. Tab 19, page 80. (Pause)
19 So paragraph 11. This is quite a handy way to see how the parties put their cases.

20 Paragraph 11 on page 80, very bottom of the page:

21 "Apple emphasises 'the centrality of economic value to Apple's Defence', and says
22 that, in this case 'the value provided to customers (here, developers) derives, at least
23 in part, from tools, technologies and services that are protected by IP."

24 Let me skip down to what Dr Ennis says. Paragraph 13, third line:

25 "Intellectual property rights are a form of state-sanctioned monopoly, where market
26 power is a good thing: the whole point of an intellectual property right in the first place

1 is to give the holder the right to exclude competition. Dr Lopez's expertise therefore
2 lies in measuring the value associated with exclusivity. The present exercise [that is
3 the exercise in the Ennis case] requires the opposite analysis: the identification and
4 removal of value attributable to market power."

5 And this legal issue is crucial for economists. In fact, as you can see, Dr Ennis is
6 saying there the legal question is so significant it should determine what kind of experts
7 are instructed in the case. This is squarely before the Court of Appeal in the *Kent* case
8 because we argued in *Kent* that, in assessing economic value it is not appropriate to
9 strip out the consequences of Apple's services having intellectual property protection
10 just because they confer market power -- even if, in fact, they confer market power.
11 I'll just give you it for your note, it's paragraph 554 of the judgment in *Kent*. Now, the
12 Tribunal --

13 THE CHAIR: Presumably, you would be adopting the same position before this
14 Tribunal. Let's say, hypothetically, this case was coming to trial before we get to the
15 Court of Appeal decision in *Kent*, you would be inviting this Tribunal to take the legal
16 view that you've outlined.

17 MR KENNELLY: Yes.

18 THE CHAIR: And would be instructing your expert to proceed on that basis. And you
19 might instruct the expert to do an alternative exercise, assuming that you're wrong on
20 the law. So I suppose the disruptive effect, potentially, of not waiting for the *Kent*
21 judgment is the potential need -- if you're right on the law -- to do that. To produce an
22 extra bit of work. Or, the other way round, if you're wrong on the law, the need to do
23 the first piece of work. Is that really ...?

24 MR KENNELLY: Yes. It's part of it. What that might mean is effectively two expert
25 reports and two expert reports, neither of which might be proceeding on the correct
26 legal basis because the Court of Appeal in *Kent* could produce a judgment that neither

1 fully upholds what the Tribunal said in *Kent* and doesn't fully uphold our challenge to
2 it. So there's a risk that our expert could produce two expert reports dealing with that
3 contingency and then, having just produced them, receive a judgment from the Court
4 of Appeal that requires those expert reports to be revisited. That is the risk and if it
5 happens at a certain point in time the very trial itself could be derailed. It's hard to say
6 but that's the risk we take if the experts have to revisit their reports. Putting one in the
7 bin or both before we get to trial. That's what we're seeking to avoid. That's the risk
8 if the expert reports have to be revisited, and this is a major issue. An exercise which,
9 if we're wrong, might turn out to be a complete waste of time.

10 Now, we say we're right because the Tribunal rejected our submissions in the *Kent*
11 case, relying on the *Phenytoin* judgment. Of course, we say the *Phenytoin* case didn't
12 engage with this point because it wasn't dealing with products protected by intellectual
13 property rights at all. They were off-patent drugs.

14 And you see how this point is before the Court of Appeal in our skeleton in the Court
15 of Appeal. May I show you that next? It's in the second hearing bundle. Page 1081,
16 so it's tab 52. Please go to page 1123. That tells you that we're dealing with ground
17 4 on unfair pricing.

18 If you go to page 1125, paragraph 162, you see it's ground 4(b) dealing with, "The
19 Tribunal's rejection of Apple's case on demand-side value". Then go, please, on
20 page 1129, paragraph 172. So we say that:

21 "... the Tribunal's [finding] is inconsistent with the approach in the Collecting Society
22 cases like *Latvian Copyright*. Those cases concern royalties charged by collecting
23 societies for access to music covered by copyright. Yet rather than limit prices to the
24 costs of creating music or hypothetical costs that might emerge if it was lawful to copy
25 the music without compensation, those cases all assess unfair pricing claims by
26 reference to other monopoly collecting societies ..."

1 The comparison is with other people who have market power by reference to their
2 intellectual property rights. We explain why we say that's the case. At 173, we argue
3 that the Tribunal's reasoning is tantamount to saying that any price set by a dominant
4 undertaking is unfair if it's not been set in conditions of competition. That disregards
5 the situation where a dominant undertaking is an IPR holder and is entitled to earn
6 profits that could not be earned if third parties infringe the holder's right to that
7 compensation.

8 So that's the legal point before the Court of Appeal. The Class Representative says
9 in his skeleton, "Well, don't worry, there's lots of authority on the meaning of economic
10 value" and he cites a list of cases in the Tribunal and in the Court of Appeal. But
11 Dr Ennis does not mention *Latvian Copyright* or any authority which explains the
12 approach to workable competition where the product or service in question is protected
13 by intellectual property rights. We say the economists need the Court of Appeal
14 judgment on that question in order to do their reports. That's the first of the three
15 relevant legal issues.

16 The second is the proper approach to comparators. The experts have to choose
17 comparators with which to compare the App Store and the 30 per cent commission.
18 So what is the correct approach as a matter of principle? Again, I'd ask you to look at
19 the issue that's before the Court of Appeal. This time please go to page 1100,
20 paragraph 70:

21 "In concluding that Apple was a monopolist, it was not sufficient for the Tribunal to
22 accept the PC game distribution comparators relied upon by [Dr Kent]. The Tribunal
23 also needed to reject the comparators put forward by Apple."

24 The burden of proof was on the Class Representative. We put forward as comparators
25 the Google Play store and other Android app stores like the Samsung Store.

26 Paragraph 72, we make the point that if these comparators had been accepted they

1 would have exonerated Apple. But they were rejected because the Tribunal said,
2 based on the CMA market study, there was a:

3 "...credible indication that Google had significant market power ..."

4 We make that point of law, paragraph 75, that you can't reject a comparator simply
5 because there's a credible indication that it has significant market power. That's not
6 sufficient to render a comparator inappropriate as a point of principle. Over the page,
7 paragraph 78, we put forward comparators such as Sony's PlayStation, the Xbox and
8 Nintendo Switch, who all charge 30 per cent commissions. Again, those are
9 appropriate comparators. That rescues Apple.

10 But at paragraph 79, the Tribunal rejected them, subparagraph 2, because they
11 operated:

12 "... exclusive digital distribution channels on their respective platforms ..."

13 We make the point at paragraph 80 that the mere fact that they have exclusive
14 distribution channels isn't capable of establishing that their competitor commission
15 rates are not competitive. It was only if it had been established that the commission
16 rates were not competitive that they could be rejected as comparators. If there was
17 a lack of evidence, the burden was on the Class Representative, not Apple.

18 So that question of how does one choose comparators? Is one, as a matter of law,
19 required to exclude comparators where an allegation of anti-competitive conduct is
20 made against you? It is very important because the experts need to know who they
21 should include and who they should ignore as comparators in this exercise.

22 Next point of law that's before the Court of Appeal and very important for the experts'
23 work. That's the status of regulatory and other court decisions. Now the Class
24 Representative says this is for trial. True it is. We're not asking this Tribunal to resolve
25 the question of the application of the Supreme Court in *Evans* to this case before trial.
26 That's not the point. The point is the experts need to know the legal position. That

1 will be determined in the *Kent* appeal.

2 The Supreme Court said, as the Tribunal knows, that findings by regulators and other
3 courts are inadmissible and reports like the CMA's market study are inadmissible.
4 Does that mean, as a matter of law, that experts should give them no weight at all and
5 ignore them in their analysis? The Tribunal found in *Kent* that experts should positively
6 address regulatory and court decisions which dealt with similar issues. They were
7 criticised for not doing so. That's paragraph 272 of the judgment. The challenge here,
8 to the Chairman's point about the practicability of it, is that now we have a huge
9 number of regulatory and court decisions involving the App Store and overlapping
10 issues.

11 Are the experts supposed to engage with each and every one of those, and positively
12 engage with them and explain why they are right or wrong? And until we have
13 a judgment in the *Kent* case, the experts will not know what the right approach will be,
14 and that could be a significant piece of work. For example, if we are wrong and these
15 proceedings are admissible, the expert for Apple may have to actually engage with the
16 granular findings and underlying reasoning in each of these decisions and explain why
17 he or she disagrees or doesn't disagree with them. And that's not just the ones in this
18 jurisdiction, but the regulatory decisions relied upon by the Class Representative from
19 all over the world. And you've seen them pleaded in the Claim Form.

20 But if the regulatory findings are found to be inadmissible, if the experts are not
21 supposed to engage with them, it's a very difficult task. Just as a matter of
22 practicability, that is a huge job, which we will not know if it needs to be done or not
23 until we get judgment in *Kent*.

24 That's the overlapping legal issues. Just three out of the list that we gave in the
25 skeleton. The second reason why we say --

26 THE CHAIR: Your position is that following evidence, the Supreme Court has told us

1 that decisions by other regulatory bodies and indeed other court decisions are simply
2 not relevant. Although I suppose there may be some scope for an argument since you
3 were party -- there are decisions to which you have been party that might or might not
4 be a qualification.

5 MR KENNELLY: That is itself a question which is being debated. It shouldn't matter,
6 even if we're a party on the basis of the findings themselves, we're on the basis of
7 different evidence and different analysis. The Tribunal --

8 THE CHAIR: In *Hollington v Hewthorn*, if the underlying objection to any reference to
9 other decisions is that you have not had an opportunity to contest them. That falls
10 away if you were party to the other decision. But I can see that that itself is
11 an interesting question.

12 MR KENNELLY: And the Tribunal may well say to me, "Well, have the courage of
13 your convictions and instruct your experts not to engage with any of this and base it
14 on the arguments before the case". And then we lose in *Kent* -- turns out that all of it
15 ought to be addressed, not just admissible, but positively needs to be addressed, as
16 the Tribunal said in *Kent*. And then our expert has to go back and start deciding how
17 he can engage with these reports and regulatory findings in foreign jurisdictions and
18 answer them to the best of his ability on the eve of trial.

19 THE CHAIR: And your point would be that, whilst you could no doubt instruct the
20 expert to operate on both hypotheses, that whichever way the decision goes in the
21 appeal might turn out to be -- that will be wasted effort one way or another.

22 MR KENNELLY: And not just wasted effort. Again, he produces two reports and they
23 both might need to go in the bin, because the Court of Appeal could well end up finding
24 and interpreting the Supreme Court in *Evans* in a way that is neither supportive entirely
25 of the approach of the Tribunal in *Kent*, or, indeed, our own arguments and appeal.
26 A possibility, especially in relation to this issue, which has already generated a huge

1 amount of argument in this Tribunal, in the numerous decertification applications that
2 you've seen.

3 THE CHAIR: If you were to lose on this in the Court of Appeal, it feels like the sort of
4 question which might result in an application to the Supreme Court and no doubt
5 (inaudible) be said, would you then be inviting us to defer trial until a future
6 Supreme Court decision on the same ground?

7 MR KENNELLY: In every case where one has to make an application to wait until
8 a Court of Appeal judgment, that point is raised and fairly raised. We cannot predict
9 what would happen. It is very difficult to get permission to appeal to the
10 Supreme Court in a competition case, especially in a case where the Supreme Court
11 would have thought they resolved it very recently. That makes it even harder to get
12 permission. So never say never. One doesn't know. But, in general, it is generally
13 difficult to get permission to appeal to the Supreme Court. It's even more so in what
14 I've seen as more commercial cases. And it's even harder when the points have been
15 before the Supreme Court recently.

16 So if the Tribunal is troubled about that, I think that of all the things that you need to
17 worry about, that's at the bottom of the list.

18 But, in many ways, I don't even need these points about overlapping legal issues,
19 because the disclosure process alone has shown why the deadline for expert evidence
20 is no longer appropriate. Can I just show you the order that was made in April 2025
21 that set down the listing for February 2028? That's in the core bundle at tab 22.
22 Page 97.

23 THE CHAIR: Yes.

24 MR KENNELLY: And you see the deadlines for disclosure at paragraph 6 on page 97.
25 And when this order was made in June 2025, we expected the *Kent* disclosure to be
26 provided in June 2025, and then a further CMC to deal with outstanding disclosure

1 | issues in January 2026. And all that final disclosure would be given by March 2026.
2 | That would be the end of the disclosure process; it would all be provided by then. Of
3 | course, the disclosure CMC didn't take place until May 2026, and we are obviously still
4 | in dispute. And the Tribunal had a flavour of that today. It's now highly unlikely that
5 | disclosure would be complete before January 2027. That's nine months later than
6 | envisaged in 2025, when this timetable was set. And we can see that already from
7 | today, for example. When we give the disclosure that has been ordered today, the
8 | Class Representative may well, as they are entitled to do, come back and say that
9 | was by reference to the *Kent* disclosure search terms. We have further search terms.
10 | As I said, we will have to engage with those. And further disclosure may well have to
11 | begin. So this process is taking a lot longer than was expected.
12 | To the extent that it's said, Apple, of course, is not responsible for these delays. There
13 | are various things that took place. And as Dr Ennis changed legal representation,
14 | there was a decertification application prompted by *Evans*. We're not looking to blame
15 | anyone, but factors intervened, which have meant that the process has taken a lot
16 | longer than we expected in June 2025. And, here, some blame is to be allocated.
17 | There's been minimal progress by Dr Ennis with the *Kent* disclosure, a very significant
18 | *Kent* disclosure. And you heard all about that in May this year.
19 | The third reason, and perhaps more important than the disclosure issue, is that
20 | Dr Ennis has caused very significant delay to Apple's ability to gather evidence from
21 | class members. The core issue in this case, as you've heard now a hundred times, is
22 | the value that developers receive in exchange for the commission they pay. And we
23 | need documents from the developers in relation to that. And it's not just economic
24 | value. It goes to market definition. The question we were discussing earlier, do
25 | developers have realistic options available to them to switch away from transactions
26 | that attract Apple's commission to other transactions through other channels, like their

1 own website? Is that sufficient to constrain Apple?

2 Now we need to know, and you need to know, from developers about what they do,
3 what they think, the analyses they have conducted. And we have zero visibility on
4 that. And large developers are very substantial businesses earning, in many cases,
5 hundreds of millions of dollars in revenue. They have these documents, and the
6 Tribunal needs them. The importance of the materials was explained to the Tribunal
7 at the CMC, we have not been slow to ask, we asked for them from April 2026, and it
8 has been strenuously resisted by the Class Representative.

9 We propose to ask a number of developers voluntarily to undertake searches and
10 produce documents covering the claim period from July 2017, and this was opposed
11 at the May CMC. And may I hand up the -- because I saw we didn't have it in the
12 bundle, the actual judgment you handed down last week from that CMC. Or, perhaps,
13 in view of the time, I'll just since it's such a recent judgment, I only need a little from it.
14 I'll read it, if none of it is controversial.

15 The point was: the questions Apple is going to ask or wants to ask the developers are
16 about Apple's services, tools, technologies, the pricing of apps, and in-app content
17 across the different marketplaces, multi-homing and substitution across the different
18 app marketplaces. Financial information relating to the download and purchase of
19 apps, in-app content, on the App Store and in other app marketplaces. This is
20 absolute gold in the context of the case that the Tribunal is going to try, without which
21 we cannot fairly defend ourselves. And when the Tribunal indicated that Apple could
22 engage in these requests to class members, the Class Representative sought to
23 constrain it, and they obtained interim relief in July of this year that required a hearing
24 in July.

25 And following your judgment last week, the Class Representative has a stay while they
26 consider whether to seek permission to appeal against your judgment. So, until that

1 happens, we cannot contact these class members, even to ask them to give
2 documents on a voluntary basis. Of course, if they refuse to give them voluntarily,
3 we're entitled to make an application for disclosure against them. But as things
4 currently stand, we are frozen.

5 The deadline for permission to appeal, I understand, expires on 22 September. If the
6 Class Representative seeks permission to appeal, they know that we will seek
7 a further stay. And, as I say, if they don't seek permission to appeal and we are
8 permitted to contact the developers, there will be significant delay before we get the
9 fruits of that exercise. And the fruits of that exercise are needed by the experts before
10 they do their work. And that's not going to be possible according to the current
11 timetable.

12 So, we step back and we ask: what is the big picture? The balance of convenience,
13 to come to the Chairman's point to me at the very beginning, favours delaying the trial
14 until after the judgment. And there is no prejudice. There is no prejudice to Dr Ennis
15 from this delay. Overall, there's far greater prejudice to Dr Ennis, to Apple, and to the
16 Tribunal if we have wasted costs arising from a trial that is listed prematurely in view
17 of the changes that have taken place in the process, and the outcome, and the legal
18 issues and the entropy.

19 So, really, it's in everyone's interests, that the timetable be adjusted to reflect the
20 disclosure issue, the class communications issue and the need for legal clarity from
21 the Court of Appeal in terms.

22 Those are my submissions.

23 THE CHAIR: Mr Carall-Green.

24 Submissions by MR CARALL-GREEN

25 MR CARALL-GREEN: Thank you, sir.

26 So I propose to deal with some of the environmental procedural factors first and then

1 to the more substantive points of legal principle emerging from the *Kent* appeal.

2 Like my learned friend, I also think we should go back to the beginning of the story,
3 which is that these proceedings were commenced in the summer of 2023. And that
4 when considering joint case management of this case with *Kent* at a hearing in
5 November 2024, Apple's position was that there should be a joint trial in *Kent* and
6 Ennis in October 2025. We can turn that up, but I don't think we need to because that
7 ought to be well understood. There is also an analogy that one might draw, sir, with
8 the *Rogers* proceedings on which you were sitting yesterday, which were started after
9 these proceedings, and were, until your decision of yesterday, sir, going to go to trial
10 in a couple of weeks.

11 So, all I seek to draw from that is that, from a standing start, nobody thought that it
12 would be impossible to have a trial in this case already. I start with that because,
13 previously, the only basis on which the application was made that you've heard today
14 was on the basis of the possible appeal in *Kent*. But, recently, further reasons have
15 been deployed, having to do with the way that the procedure has unfolded. I think that
16 there are five points that Apple raises. There's, first of all, the change in Dr Ennis's
17 legal representation, which, on my learned friend's analysis, led to a delay of
18 three months.

19 Second, Apple says that the decision in *Evans* and its decertification application
20 delayed the disclosure CMC earlier this year. Now, I do note, sir, that in their joint
21 letter to the Tribunal of 6 February, the parties wrote to you about when that CMC
22 should be, and stated in terms that they thought that the May CMC could be
23 accommodated in a way that did not disturb the proposed trial commencement date in
24 February 2028. So at that time, it was not being contemplated that a May CMC would
25 affect the trial date.

26 Third, Apple says that Dr Ennis made requests for disclosure before determining

1 whether they were covered by the *Kent* disclosure. Sir, I believe I addressed you on
2 this last time. Dr Ennis does feel that where he makes requests promptly, he's not
3 thought about it for long enough and where he makes them after careful thought, he's
4 taken too long. So Dr Ennis does feel that it's impossible to please Apple on this
5 particular front.

6 Fourth, Apple says that the disclosure exercise has turned out to be more involved
7 than expected. Even on Apple's forecast, disclosure is said to be finished by
8 January 2027. So it's not entirely clear that that's a huge problem.

9 Finally, Apple complains about Dr Ennis's stance on disclosure from class members.

10 Now, I do just want to put that one in context, sir, because, as you know, the case was
11 certified in October 2024. The question is: well, was Apple thinking about disclosure
12 from class members shortly thereafter? The answer is yes, because the transcript
13 from 14 April 2025, which we can see in the hearing bundle at page 85, reveals -- beg
14 your pardon, that's a bad reference ... (Pause)

15 While I try to find it, I can tell you that Apple said at that CMC:

16 "We have in mind some focused and targeted disclosure in due course from
17 a selection of class members."

18 So Apple has then waited for over a year until the CMC in May 2026 to bring forward
19 any proposals on that front. So the position that we're faced with is that when Apple
20 makes applications, that's fine and very useful; when Dr Ennis makes applications,
21 that's lamentable delay. So the only point I extract from this is that it's not right to say
22 that the way that the Tribunal, the way that the timetable has unfolded has been
23 characterised by delay on Dr Ennis's part, and it's also not right to say that it speaks
24 to impracticability of a February 2028 trial.

25 In that context, what we need to look at is, first of all, the downsides of delay, and
26 second, how or why does the *Kent* appeal overcome those downsides? As I said

1 before, the environmental factors and then the *Kent* appeal.

2 Sir, Mr Grimley has given me the bundle reference for the quotation I gave you, which
3 is page 278. That may not itself be right, but we'll come back to you on that to correct
4 myself.

5 Starting with the downsides, we've explained in our skeleton argument that the pure
6 delay here associated with pushing the trial beyond February 2028 is really quite
7 striking. The Tribunal does not need to be reminded that it seeks to deal with cases
8 expeditiously. And for a case that started in 2023, for us to be contemplating a trial
9 that would not see any damages, if awarded, distributed until into, say, 2030 is rather
10 a long time.

11 It's not just the pure delay; it's also the unfairness. My learned friend has said that it's
12 difficult to identify any prejudice to Dr Ennis on account of extending the timetable, but
13 we do say that that is not right. We have discussed today Dr Ennis is concerned about
14 keeping to budget and about adverse costs exposure. As we have said in our skeleton
15 argument, it is unfortunately inevitable that the longer proceedings continue, the more
16 they cost. Even if further steps are not introduced, sirs, there is, as it were, fuel to be
17 burned running the engine idle. It just is a normal feature -- the work will expand to fill
18 the time available. That might be another way of looking at it.

19 So there is real prejudice. And so the question then becomes, well, is that additional
20 cost and additional delay and lack of expedition something that a downstream Tribunal
21 ought to countenance and accept because what the *Kent* appeal is going to do is so
22 significant? As a starting point, sir --

23 THE CHAIR: I think that's --

24 MR CARALL-GREEN: That's the nub of it.

25 THE CHAIR: I think you may take it that the Tribunal accepts that --

26 MR CARALL-GREEN: There is some prejudice.

1 THE CHAIR: -- expedition is part of what we're about, if we can achieve it. Therefore
2 any invitation to delay trial requires to be justified. The real question is whether the
3 points that Mr Kennelly has made have force in terms of the impact and the disruptive
4 effect on both parties' preparations, such as to justify outweighing that normal
5 background assumption.

6 MR CARALL-GREEN: Yes. Thank you sir, and I agree. I think an important word in
7 the way that you phrased it there, sir, was the parties' preparations. Because one
8 thing I would emphasise is that it's not enough merely to identify a point of legal
9 principle that is likely to be decided in *Kent* that might have a bearing on this case.
10 That's only part of the way to the answer. In order to countenance delay to the
11 procedural timetable, what we really need to find is something that's going to be
12 significant in *Kent* that would affect the way that the evidence is prepared. In fairness,
13 I don't think that my learned friend disagrees with that; I think that was the point that
14 he was seeking to address. But that's important because if it's only a point of law that
15 can be applied by the Tribunal effectively in closing or in writing its judgment, then that
16 doesn't really move the needle.

17 So what I think you're looking at, sirs, is effectively a risk assessment about whether
18 or not it will transpire when *Kent* is handed down that the evidence has been prepared
19 on a wasteful or wrongful basis.

20 Before I actually come to the substance of the points, I know that the Tribunal
21 recognises this, but just to emphasise, Apple does not currently have permission to
22 appeal, so we don't know what grounds it may or may not get permission on. If it does
23 get permission, we don't know what the judgment will or won't cover. So we are
24 dealing here with a certain amount of speculation. Informed, yes, but speculation. We
25 can't proceed on the basis that all of these things will be addressed by the Court of
26 Appeal in its judgment. We can only say that they might be addressed. That is

1 | important when weighing the pros and cons of the delay.

2 | THE CHAIR: I suppose they might be addressed to the extent of saying --

3 | MR CARALL-GREEN: Well, they're not arguable.

4 | THE CHAIR: -- the point's a bad one.

5 | MR CARALL-GREEN: They might, sir, that's true. But again, it's not possible for us
6 | to say with confidence even that the judgment will lay out in clear terms how evidence
7 | should approach a particular issue. It may simply be that the judgment deals with
8 | these points very swiftly and we gain no additional knowledge from the judgment. So
9 | I just put that up front so that we don't proceed on the assumption that *Kent* will
10 | definitely be instructive on these points.

11 | I need to address the three points that my learned friend raised, which are the points
12 | of important legal principle that will have a bearing on the way that the parties prepare
13 | their evidence.

14 | The first is excessive and unfair pricing. Now, this has been described by my learned
15 | friend as really being a point about intellectual property. So the point is about how one
16 | addresses the question of economic value when the defendant says that it is providing
17 | something protected by an IPR. I'd like to go back, if we could, to Apple's skeleton
18 | argument on the appeal. Because my learned friend said that the question that we're
19 | looking at is the question being addressed under ground 4(b). So Apple's skeleton
20 | argument on appeal explains its position on 4(b), starting at paragraph 162 on
21 | page 1125 of the bundle.

22 | I'm going to quickly move through the section, make an initial point, and then return to
23 | the beginning. Paragraph 162, introducing this argument:

24 | "The Tribunal was wrong in law to conclude that demand side value cannot justify
25 | Apple's high level of profitability ... There was no evidential basis on which the Tribunal
26 | could reach that conclusion."

1 Then at 169: it was "irrational" of the Tribunal to accept Mr Dudley's profitability
2 analysis. And then at 170(c), the Tribunal is accused of making a finding "without
3 having any evidence at all on how Apple's commissions compare to anything other
4 than the costs that Apple incurs".

5 So there's at least some of this that is really a challenge to the Tribunal's evaluation of
6 the evidence.

7 But if we go back to paragraph 162, we see that the nub of the issue is, if there's a legal
8 issue here, it is that the Tribunal was wrong in law to conclude that the demand side
9 value doesn't justify the high level of profitability. So the question is whether or not all
10 of the work that's being done on the value can be treated as not mattering very much
11 in the final analysis.

12 When we return to the question of how the evidence is going to be prepared in Ennis,
13 nobody is seriously suggesting that the question of economic value is not going to
14 feature prominently in the evidence. My applications before you today have
15 demonstrated that the parties are committed to the point that the economic value is
16 very important. So if I have understood my learned friend correctly, the question that
17 the Court of Appeal will give guidance on is simply how important the value is in
18 a particular factual context. So if he's right that there are certain IP protections, and if
19 he's right that they're important, and let's say all the factual conditions are fulfilled, the
20 Court of Appeal give guidance on how the Tribunal should then treat the question of
21 the value that is provided to the buyer. The Court of Appeal will give guidance on how
22 the Tribunal should look at the value that is provided to the buyer. But there's no
23 suggestion that the evidence would be prepared without a thorough examination of
24 that economic value. Clearly, we're going to get into that and clearly it's going to
25 feature prominently. And at the end of the trial, the Tribunal may conclude that the
26 value was great, small, highly relevant, highly irrelevant, potentially guided by

1 something that the Court of Appeal has said on the weight to be given to that factor.
2 But what Apple has not identified is a reason to believe that the approach to drawing
3 up the evidence is going to be different depending on what the Court of Appeal has to
4 say about it.

5 So the second point of principle that my learned friend said was going to be decided
6 is in -- he took us to paragraph 74 of the skeleton argument, so we need to go back
7 a little bit. Page 1101, I think it is. What I wanted to say about this is that this challenge
8 is about the level of confidence that the Tribunal had on the evidence in that case, that
9 Google had market power. So my learned friend's point is, well, it's not good enough
10 to look at the evidence and say, oh, there are credible indications of market power;
11 you've got to do a bit better than that. But the answer to that is, well, if the parties
12 have got better than credible indications on any of their comparators, they're going to
13 put them forward. The Tribunal may or may not find that the judgment in *Kent* in the
14 Court of Appeal gives it some assistance when it comes to figuring out the test to be
15 applied when evaluating those comparators, but again, it doesn't seem terribly likely
16 that the parties are going to pull their punches on the evidence that they put forward
17 regarding comparators unless the Court of Appeal tells them that they have to prove
18 it to a higher standard.

19 I now need to deal with the third point that my learned friend raises, which is about
20 *Hollington v Hewthorn*. But before I get there, I would just like to add that the question
21 about the burden of proof and comparators specifically has been addressed by the
22 Court of Appeal quite recently. So my learned friend refers to our skeleton argument
23 where we point out that the Court of Appeal has given six judgments in recent times
24 on unfair pricing, four in the last two years. He says, well, maybe not on this specific
25 point, but if we want to talk about the burden of proof and comparators, we only need
26 to go to *Hydrocortisone II*, where the specific question of burden of proof regarding

1 comparators was considered. One can find that judgment in the authorities bundle
2 volume 1, tab 12. I'm at paragraph 94, which is on page 304. You see there it says
3 that the Court of Appeal there is considering the burden of proof:

4 "It is common ground that the burden of establishing abuse lies on the CMA [or the
5 person making the application] ... It is not for the alleged infringer to show that their
6 prices were legitimate or justified ..."

7 Then I skip to 96:

8 "The legal burden rests on the CMA throughout. But that does not preclude the alleged
9 infringer being subject to an evidential burden (i.e. the requirement to produce credible
10 evidence ...) on various points as they arise in the course of the analysis. That such
11 a burden may rest on an undertaking being investigated was made clear by this Court
12 in *Phenytoin I* ... That explains, for example, why the CMA need only evaluate such
13 comparators and evidence as are adduced by the undertaking under investigation,
14 and why the extent of the duty on the CMA to evaluate evidence ... is affected by the
15 quality of that evidence."

16 And the same point is made effectively at paragraph 107 where the court again says:

17 "The point made in *Phenytoin II* [so actually this point doesn't just come up in
18 *Hydrocortisone II*, it comes up in *Phenytoin II* as well; another one of the very recent
19 Court of Appeal decisions] is that the decision maker should undertake such an
20 analysis where it had the evidence before it. The burden on the CMA [the alleged]
21 depends heavily on the nature and quality of the evidence as to comparators placed
22 before it. Where, as here, no attempt at all was made by the appellants to indicate
23 what, if any, fairly comparable price for [a drug] could be extracted by a regression
24 analysis, and how that might be done, the burden did not lie on the CMA to do it for
25 itself."

26 So where that leaves us is, on the question of burden of proof and comparators, we

1 have very fresh Court of Appeal authority to the effect that the burden is on the
2 claimant. The defendant is allowed to adduce comparators by way of defence if it
3 wishes, and then that may trigger a duty of fair evaluation of the defendant's preferred
4 comparator. But the content of the duty depends on the nature and quality of the
5 defendant's evidence.

6 So it's not as if we're operating in a vacuum when it comes to putting forward -- I said
7 earlier we're not realistically going to pull our punches on putting forward our best
8 evidence and we're going to do so in light of very recent Court of Appeal authorities
9 that we already have.

10 So, finally, I will address the third point of legal principles to which my learned friend
11 refers, which is the question of other decision-makers' opinions or conclusions and the
12 rule in *Hollington v Hewthorn*. I think what this essentially boils down to is an argument
13 that the evidence will be very heavily influenced by whether or not the experts need to
14 conduct a long analysis of all of the other authorities' decision-makers' conclusions.
15 But I think we need to just step back and look at what *Hollington v Hewthorn* requires.
16 We know that *Hollington v Hewthorn* means that it is not permissible at trial for
17 a decision maker to rely on a previous decision maker's evaluative conclusion as
18 evidence of the facts found.

19 However, that does not mean that underlying facts that can be established from other
20 documents are inadmissible. And it does not mean that expert opinion from previous
21 decision-makers is inadmissible. The Tribunal will remember that, in *Evans*, the
22 Supreme Court specifically endorsed *Rogers v Hoyle*, and in *Rogers v Hoyle*, the
23 document in question -- the supposedly inadmissible document -- was a report of the
24 Air Accidents Investigation Branch. And the AAIB had expressed opinions that were
25 admissible as expert evidence.

26 So the reason that I draw this out is because the experts are going to have to engage

1 or -- I won't say they have to. Again, I made that mistake earlier. They will do what
2 they consider they ought to do in accordance with their instructions and their duty to
3 the Tribunal. They will do what they ought to do in considering what they can find from
4 previous decisions in the way of underlying facts, and also in the way of admissible
5 expert evidence, because doing that is going to be part and parcel of doing their duties
6 as thorough experts considering the materials that are available to them.

7 There may well be debates at trial. There may well be debates at trial about whether
8 or not this passage of such a report or that passage of such a decision is admissible
9 because it crosses the line over from an underlying fact into an opinion. But that is
10 just a risk that the parties have to take. These points are not all going to be adjudicated
11 before trial and I think it's common ground that this is really a trial issue. We've shown
12 you in our skeleton argument that the practice of the Tribunal, and indeed the advice
13 from *Rogers v Hoyle*, is that this is the kind of thing that the Tribunal should resolve at
14 trial.

15 So, until trial, we're not going to know which parts of the reports or prior decisions the
16 Tribunal will ultimately conclude it can or cannot take into account. So a judicious and
17 careful expert is always going to have to look at the material that, let's say, there's
18 a reasonable chance will be admissible at trial in order to form a sensible view. That
19 doesn't mean that they're going to be exhaustive, necessarily. It doesn't mean that
20 they're going to have to express an opinion on every single thing that might
21 conceivably be admissible. The point I'm trying to make is that waiting until the
22 Court of Appeal has ruled on how this works is not going to have enough of a bearing
23 on how an expert approaches looking at prior decisions to mean that we should derail
24 the process and push the trial off by another 9 months to a year.

25 Again, it comes back to, as I said earlier, a risk assessment. How much of a risk here
26 is there that the experts will be proceeding on a basis that is wasteful or wrongful?

1 Even if there might be some small elements of their reports that they might have done
2 differently had they been able to wait for the Court of Appeal's judgment in *Kent*, does
3 that really justify the corresponding downside of the loss of expedition and the
4 increasing cost?

5 In my submission, nothing that you've seen in any of the points that have been raised
6 in Apple's appeal skeleton in *Kent* really affects very profoundly the way that the expert
7 evidence is going to be prepared in this case. If you accept that then, as the Chair
8 suggested earlier, there may be a case for postponing the expert timetable but there
9 is not a case for pushing off the trial. That's all I wanted to say, sir.

10 THE CHAIR: Thank you very much. (Pause)

11 Yes, is there anything else you want to say about the point about class disclosure?
12 You made the point as a refutation of the suggestion that you had been, or Dr Ennis
13 had been, responsible for, as it were, deferring that. There's also a practical question
14 about whether that itself is going to have a delaying consequence. We've obviously
15 ruled that Apple is entitled to make enquiries of class members. From what we had
16 seen there may be disclosure applications that follow from that. These may well be
17 contested. There may be appeals. You are still considering whether to ask for
18 permission to appeal our decision.

19 There are certain imponderables about all of that but I think the headline point that
20 Mr Kennelly was making was that, you know, if one works on what may be
21 a reasonable assumption that some measure of class disclosure is justified here, that
22 there are issues which -- without prejudging any arguments you may hear about that
23 in due course -- that some measure of class disclosure is likely to be justified, that that
24 itself is now an issue which is -- we can today take a view as going to, or at least runs
25 a sufficient risk of prejudicing the trial timetable as to justify putting off the trial.

26 MR CARALL-GREEN: After I sit down, I will look through my papers to give you the

1 bundle reference. But my first reaction to that would be to say that it's no good for
2 a defendant to say that some evidence is very important, but because we thought
3 about it over a year ago but didn't do anything until this year, we should now delay the
4 trial. In my submission, it doesn't lie in the mouth of Apple to say that because they
5 forgot to do it earlier, we should push off the trial.

6 THE CHAIR: So your answer would be that, in a sense, regardless of whether that
7 issue was one that, you know, is now arising -- when it's arising and (inaudible) may
8 not be resolved for a certain period of time which we can't predict, you would say
9 because Apple took the time they took from the first sighting of that question, we
10 shouldn't at this point treat it as sufficient to justify the putting off of the trial.

11 MR CARALL-GREEN: So I'm sure that if I were to say to you that we omitted to ask
12 for disclosure on a very important point and we need to postpone the trial, that my
13 learned friend would make a very similar submission in response. So I do say that it
14 shouldn't be treated as a significant factor.

15 But I would add, sir, that it doesn't seem beyond the wit of man for this to be resolved
16 within the existing timetable because we shouldn't catastrophise. It's February 2028
17 we're talking about. So if things are very important there still remains some time in
18 which we can do them. (Pause)

19 Sir, I can say on instructions that Dr Ennis is not going to pursue an appeal on this
20 question of the Tribunal's recent judgment on class communications. I say that
21 because that may assist because, if the process needs to begin sooner rather than
22 later in order to assuage any concerns that the Tribunal has about running out of time,
23 then I think that means it probably can.

24 THE CHAIR: Thank you very much, Mr Carall-Green.

25 MR CARALL-GREEN: Sir, I'm going to make one last attempt to give you this bundle
26 reference. I think we've now sorted it out. It's the supplementary bundle -- and that

1 was my mistake -- page 85. You will see a transcript there. Page 4 of that transcript,
2 line 12. That is the transcript from 14 April 2025. That's where Apple says:

3 "... we have in mind some focused and targeted disclosure in due course from
4 a selection of class members."

5 I apologise for the delay in getting that to you.

6 THE CHAIR: Not at all. Very helpful.

7 Mr Kennelly.

8 Reply submissions by MR KENNELLY

9 MR KENNELLY: Very, very briefly. I see the time. On the overlapping legal issues
10 in *Kent*, three points. It was said that we haven't actually raised a proper legal issue
11 in the first place. You have my submission about that. It's just not correct and the
12 skeleton argument makes that clear.

13 Second, these are just the three samples I took from our long list. The second
14 question of principle isn't a question of valuation or fact. There's an issue of principle
15 about the proper approach to excluding comparators in excessive pricing cases. Is it
16 appropriate to exclude a comparator because there's a credible indication of
17 a significant market power? Is it appropriate to exclude a comparator because it has
18 an exclusive distribution platform even where there is no finding that any of those
19 comparators are themselves guilty of excessive pricing?

20 Finally, *Hollington v Hewthorn*. The *Hydrocortisone* case, as you've seen, is nothing
21 to the point. The question of the extent to which the experts can and should rely and/or
22 oppose analysis by regulators in other cases is the very question in the appeal. My
23 learned friend said, "Oh, it's all very clear because previous decision-makers can be
24 treated as experts and their analysis treated like expert evidence which is permissible
25 under *Rogers v Hoyle*." That is the very question which is before the Court of Appeal.

26 We say, reading paragraph 159 of *Evans*, that that kind of analysis by other

1 decision-makers is opinions on matters of fact which is inadmissible in its entirety. We
2 say that because, of course, the decision which was in issue in *Evans* was a European
3 Commission decision. My learned friend says, "No, no, that's expert evidence". That's
4 the question, and our experts need to know the answer to it.

5 On the question of disclosure, my learned friend didn't really refute the points I made
6 about the fact that the disclosure process is now taking significantly longer than we
7 anticipated, and that there are necessarily consequences for the orderly approach to
8 disclosure for the trial.

9 And then finally, on the question of class disclosure, we're very grateful for the
10 indication that they will not seek to appeal this Tribunal's order, but, of course, because
11 of their delays, because of their obstruction, we're now only at the stage of writing to
12 developers and inviting them to give very significant disclosure to us. If they refuse,
13 we will make applications against them, which will be contested, and they will take
14 time to resolve, and they may lead to appeals. And it is quite unfair to say that we've
15 raised this late. We raised this with the Class Representative in April of this year. And
16 there would have been plenty of --

17 THE CHAIR: I think the point that was being made was that you indicated to the
18 Tribunal in April 2025 that you were -- I haven't got the passage in front of me, but that
19 it was in your mind to seek disclosure from class members, and it then took until a date
20 sometime in early 2026 to actually surface that to the Tribunal. And I'm not suggesting
21 necessarily there's any blame, as I don't suggest there's any blame to be attached
22 necessarily to other matters that have been criticised going both ways. It is a fact.

23 MR KENNELLY: But, sir, just to be clear, we did not expect this to be controversial at
24 all. As you heard, the Court of Appeal in *McLaren* made it crystal clear that the kind
25 of communications that we wanted to make were permissible. And that was from
26 2023. So when we raised this in April 2026, we expected there to be no opposition

1 from the Class Representative. We wanted the Tribunal's engagement with the
2 process that we were undertaking. And had they engaged with us in April, there would
3 have been plenty of time to deal with voluntary requests in any applications. And we're
4 now in September.

5 So, had we known that there would be such an extraordinary level of opposition,
6 notwithstanding the Court of Appeal authority, certainly we would have raised the point
7 sooner, but we could hardly have anticipated that. They would have argued that black
8 was white right up until May of this year. They ought to have taken, we hoped they
9 would take, a constructive approach.

10 Anyway, we are where we are, and there's now a massive job of work ahead of us.
11 My learned friend said if the extension is granted, then the engine will be running idle.
12 It will not be running idle. This process of disclosure and, in addition, the class
13 disclosure is a major operation that has to be done properly and that disclosure is
14 critical for the fair defence of Apple's case. My learned friend said, and I come to the
15 end of my submissions, the question for the Tribunal is to ask: on the balance of
16 convenience, where is the merit in delay? The merit in delay is the benefit to the
17 evidence which has to be prepared. That is the question my learned friend said had
18 to be answered. The benefit of getting clarity from the Court of Appeal in *Kent*, and
19 avoiding the need to revisit the expert evidence and wasting significant costs in time;
20 the benefit of an orderly resolution of the disclosure process and; crucially, the benefit
21 of having developer disclosure from class members, which we need for the purposes
22 of market definition, dominance and economic value that can only be obtained from
23 the developers. And that is the benefit that we get from the extension.

24 So thank you for your patience and for the staff, because you've all sat much later than
25 normally expected.

26 THE CHAIR: Thank you.

1 Thank you to both counsel. Thank you to both of you and, indeed, as you say, to
2 everyone in the courtroom who's sitting slightly later than expected. It's helpful to be
3 able to finish today. I'm afraid I'm just going to run quickly through the agenda, to
4 record where we are.

5 On the debate we've just heard, we'll reserve judgment on the expert and survey
6 issues, in paragraph 2. We'll reserve judgment on disclosure. On the first point, what
7 I'm going to do is make an order directing Mr Carall-Green or someone representing
8 Dr Ennis to prepare a list of issues, that being the basis for a relevance review of the
9 documents that have already been identified by the running of the search terms that
10 we discussed earlier. The precise wording, I think both parties understand what
11 I mean by that, but I'm keen that the seven days start from today and that you,
12 Mr Kennelly, and those behind you have seven days to respond. The Tribunal will
13 then, you may anticipate, issue a direction directing you to disclose relevant
14 documents, documents relevant to those issues from that universe of documents that
15 we discussed, within -- and I'm minded to consider eight weeks as a period, given the
16 indication that you've given that it should be capable of being done within six. It gives
17 you a little margin.

18 On the other outstanding disclosure matters, Mr Carall-Green, you've got seven days
19 from today to make an application for any order you wish in relation to the other
20 outstanding disclosure matters. Mr Kennelly, you will have seven days to respond,
21 and the Tribunal will determine whether any direction is appropriate in light of those.

22 The pleading issues are agreed and you will provide us with an appropriate consent
23 order in due course.

24 Cost management, we will direct four-monthly disclosure of parties' best estimates of
25 the costs incurred to date. And we'll keep the issue of budgeting under review.

26 Is there any other business?

1 MR CARALL-GREEN: Sir, just a brief clarification on the list of issues. I may be
2 wrong, but I don't think I had a timetable on that, but it may be that I was writing and
3 you were speaking, so I missed it. Was it seven days?

4 THE CHAIR: Sorry, seven days from today. And the reason I'm making the point now
5 is I'm keen that the seven days run from today and don't await the other things that
6 we're having to deal with, and it gives you something to be getting on with.

7 MR CARALL-GREEN: Yes, of course. I'm grateful.

8 THE CHAIR: And so the engine won't be running idle for at least the next seven days.
9 I'm grateful to all parties. Thank you.

10 (5.08 pm)

11 (The hearing concluded)

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Key to punctuation used in transcript

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