IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1673/7/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

15th September 2026

Before:

James Wolffe KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Professor Barry Rodger

Class Representative

- V -

Alphabet Inc., Google LLC and Others

Proposed Defendants

A P P E A R A N C E S

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

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

Sarah Houghton (of Mishcon de Reya) on behalf of Dream Games

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Tuesday, 15 September 2026

(10.30 am)

JUDGE WOLFFE: Some of you are joining us via live stream on our website so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

Mr O'Donoghue, good morning.

Submissions by MR O'DONOGHUE

MR O'DONOGHUE: Sir, members of the Tribunal, morning. So the -- some of the cast will be depressingly familiar. Let me put them on the record. I appear on behalf of Professor Rodger, Ms Chambers to my left and Ms Blackwood to her left. Ms Smith is flying solo today, so we won't have the dulcet tones of Mr Holmes, and so in the appropriate middle point of neutrality, is Mr Bacon, King's Counsel. Sir, as you have picked up from Rodger 3, Mr Bacon advised Professor Rodger on aspects of the settlement pot division and in the light of the Tribunal's questions last week in relation to the amended LFAs Priorities Agreement, Mr Bacon was at the coalface of advising on those documents, and he is available to the Tribunal today insofar as is necessary. He does not as, Sir, you will have picked up from Rodger 3, form part of the Rodger trial team and he does not have any financial interest in the outcome of the proceedings, such as a conditional fee arrangement, so he is another layer of independence available to the Tribunal today if useful.

Sir I am very, very conscious that you have had a detailed application, two detailed skeleton arguments, supporting documentation, and in particular they have gone through the Rule 94(9) criteria in some detail. I wasn't proposing, unless the Tribunal thought otherwise, to go through those for a third time.

Again, Sir, with your permission, I had in mind a handful of points. Let me just list them and perhaps then, Sir, you can react in terms of the agenda. I would like to highlight at a high level a handful of key features of the settlement. Second --

JUDGE WOLFFE: I think I can perhaps -- it may be of some assistance, Mr O'Donoghue, to say that the Tribunal does not feel that it needs to hear from you having considered the detailed application on the headline settlement figure.

MR O'DONOGHUE: Thank you.

JUDGE WOLFFE: The Tribunal does have a number of issues that it wishes to explore with you as it were at lower levels in the process in terms of the details of the Settlement Agreement and the arrangements.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: But you will not need to address us on the settlement figure.

MR O'DONOGHUE: That is extremely helpful.

So my first topic of the handful of points is the nominal figure as such, it is really clear, it is a more general point. Then secondly, I want to spend a bit of time on distribution. That is obviously central to the Tribunal's function. And third I will of course deal with the Tribunal's questions from yesterday, and then finally I want to pick up on the two letters from the number of developers last week.

We have addressed those in the skeleton on Friday, and there is a bit more to be said and I think, Sir, you will have received shortly before the hearing a further letter from one of the developers.

JUDGE WOLFFE: Yes.

MR O'DONOGHUE: Dream Games Design.

JUDGE WOLFFE: Yes, I am not -- yes, we were going to refer to them as one of the developers or represented persons. We understand they may have legal representatives present.

MR O'DONOGHUE: Ms Houghton is here on behalf of Dream Games.

JUDGE WOLFFE: Yes. And there is a practical issue in that they have asked us for permission to either appear to make brief oral submissions tomorrow, the day in reserve, or to file short written submissions. I don't know whether you have any representations you would like to make on process. One of the possibilities that was in the Tribunal's mind was that, depending on the issues that we explore with you today and the discussion today, that we may need to convene tomorrow morning in any event and that that would provide an opportunity for the represented person to appear and make short submissions, if so advised, but I don't know whether you have any representations you would wish to make?

MR O'DONOGHUE: Sir, I will come on to that in terms of substance but in terms of process we will have to take stock in terms of where we get to --

JUDGE WOLFFE: Indeed.

MR O'DONOGHUE: -- today. It may be we are going into tomorrow in any event. As you will have picked up, Sir, of course there is a day in reserve envisaged but on the other hand there are a number of imminent events which are quite pressing in terms of next steps.

JUDGE WOLFFE: Indeed. And I should say on that, that the Tribunal envisages reaching a decision, potentially judgment to follow, and intimating that to the parties but it may be that that will be tomorrow rather than today.

MR O'DONOGHUE: Yes. We will see how it goes.

JUDGE WOLFFE: We will see how the day goes.

MR O'DONOGHUE: Skeletons are due next week.

JUDGE WOLFFE: Indeed.

MR O'DONOGHUE: And there are opt out and disclosure requests.

JUDGE WOLFFE: Indeed. And obviously things may emerge in the course of the day which mean that that intention on the part of the Tribunal gets derailed for one reason or another but we will see how we get on.

MR O'DONOGHUE: I certainly hope not but that is conceivable.

On the process, my short answer, Sir, is that I have read the letter. I don't think frankly it changes very much relative to what we have set out in the skeleton. I think there is -- in some respects we have addressed the points and in other respects there is a, I think, a misunderstanding on their part. Again, it depends how we go today but what I would say is if it is possible to finish today, Ms Houghton is here on behalf of Dream Games. She has, as I understand it, rights of audience and there is no reason why she shouldn't say what she feels she needs to say later. There is no point spilling into tomorrow for the sake of spilling into tomorrow but I have no objection in principle to something in writing today or permissions today. What we are anxious to avoid of course is drift.

JUDGE WOLFFE: Indeed. The reason I had in mind short oral submissions was precisely because I wouldn't want permission to file written submissions to delay the process. But you are right, if there is a representative of the represented person in the Tribunal today and that person wishes to make a short submission at -- if we get to that point today, then it may be that we can approach matters in that way. But let's see how we get on.

MR O'DONOGHUE: Sir, the other point of course is that we have engaged with particularly the developers for some weeks now, so they have had plenty of notice. It is not just a form of noticing. In my submission, if there is anything they want to get off their chest, they should be willing and able to do so today. But let's see how we go.

Sir, before turning to my first topic, there is one overarching comment, which is important. In the Merricks case, Mr Justice Roth noted that the joint application by the Class Representative and the defendant can give rise to what is called an adversarial void, where everyone before the court, absent objecting represented persons, is a friend of the deal. Now, as I said at the outset, Professor Rodger has done his utmost to avoid or certainly mitigate that risk. I am thinking in particular of the Government's arrangements involving Mr Bacon and his consultative panel, but I am sure the Tribunal will be quick to pull me up if they feel a submission is being made to the effect that all my geese or swans, or the benefits or disbenefits, are being over or understated. I am emphatically not a salesman for the settlement.

So that is by way of introduction. Then quickly a handful of points on what I would describe as the tectonic plates of the settlement in terms of high-level points. It is fair to say, Sir, that the regime continues to find its feet in some ways in the sense that there have only been a small handful of these kinds of applications and approved settlements and what we see in the process is what I would call incremental improvement and evolution. Just to give two examples which I will come back to. In Merricks there wasn't even a written opinion from the Class Representatives' trial counsel and it is clear that that would no longer be acceptable practice in the context of these applications and you have, Sir, I think two -- or at least one very detailed opinion I know of. I apprehend a second opinion that is no less detailed. And equally, Sir, it is clear from one of the McLaren settlements that the Tribunal will expect more detailed and concrete information on distribution in particular and that general assertions or aspirations on expected uptake will not generally suffice. We say in this case Professor Rodger has met this fair challenge, as I will develop under my second topic.

Sir, in terms of the five tectonic plates of settlement, before turning to the points, can I just tee-up what I respectfully submit is the exam question for the Tribunal. The Tribunal is essentially balancing two cardinals or things; first as a general matter, settlements are to be encouraged in the public interest. Litigation is expensive, uncertain, it takes time and there is a strong public interest in the courts not being overburdened with a case that could otherwise have been settled. A settlement will of course involve give and take. It would be a rare case indeed where the parties' respective assessments on the merits add up to 100 per cent. A settlement bridges that gap and of course provides finality.

On the other hand, the Tribunal has an important supervisory role in relation to these settlements. It must be approved by the Tribunal, unlike in the case of opt in, and the Tribunal can only approve a settlement if it considers the terms are just and reasonable within the meaning of the rules. Now, there are important -- forgive me Sir.

JUDGE WOLFFE: That is essentially because the effect of the settlement is to compromise claims by parties who are by and large not here.

MR O'DONOGHUE: Absolutely, Sir. That is a paramount consideration. Of course the individual represented persons are not themselves before the court save perhaps with one exception today. There is nothing stopping them becoming involved if they felt they wanted to. Of course on distribution, which is the crux of the matter, the Tribunal will want to understand what will happen in practice, because the litigation is ultimately being run for the benefit of the class members and as you say, Sir, it is their claims which are being compromised. Then finally of course the solicitors and counsel, as officers of the court, must of course promote the interests of the class members. The Tribunal cannot lose sight of the fact that in some cases, this is one of them, their fee arrangements may give them a financial interest in the outcome of settlement or some of its components. Sir, that is the balance that needs to be struck today.

Turning to my handful of points. First, the message which I hope comes out loud and clear from Rodger 3 and the other documents, is that Professor Rodger wanted to ensure that a substantial and clearly identified part of the settlement sum should be made available to the represented persons. We see that almost 70 per cent net of costs incurred on the settlement sum is made available to the class pot.

Second, and relatedly, it is the obverse of this point, this priority for represented persons sought by Professor Rodger has led to a mechanism where a material proportion of stakeholders' entitlements under contract, something like a third, roughly £30 to £40 million, would only be considered as a second stage after actual uptake is known. At that stage it would be a matter for the Tribunal to decide how much, if any, of the stakeholder sums ought to be paid as a second stage.

As the Tribunal will be well aware from other cases, there have been recent hearings where stakeholders have advocated hard for immediate payment of all of their entitlements in priority. This is not such a case. The key decisions on distribution entitlements are all back ended and the Tribunal will have a much fuller and more concrete picture of uptake and so on.

I am certainly not saying the approach Professor Rodger has taken ought to be the norm or a general future expectation. I am simply saying it is a feature and considered from the class members' perspective, at least, a commendable one. Of course the stakeholders may have a somewhat different view.

Third, this is a case where there are strong and certainly good grounds to expect the stakeholder uptake be high, if not very high. One of the features of most of the past approved settlements is that you have a very, very large class, tens of millions in some cases, who have made very small purchases of physical goods a long time ago, where understandably there are little or no records. I am thinking of a person who purchased a certain type of train ticket many years ago, the Gutmann case, or bought something from a retail outlet somewhere in the UK at some point since 1992. Very few among us keep such ancient records or have such elephantine memories. The present case is in many ways the polar opposite of this admittedly small sample and I will come back to this under my second topic, but the headline points for now are we have Google's own developer transaction data that records all developer transactions in full from the start of the claim period up to and including the end of March 2025.

The developers are Google's customers and they have comprehensive electronic records of all developer transactions. A very high proportion of the claim value, as the Tribunal is well aware, is vested in a small percentage of the represented persons. I will come back to this. If we can quickly go to bundle A, please, of the application. It is at A/23. That is at 48.1. The figures are confidential. You will see the top five developers account for X million, Y percentage. Top 25: A million, the percentage. Top 100 -- you see the figures there.

There are a number of ways this cookie can be cut but they all lead to the same conclusion, which is there is a high concentration by valuing smaller people and an extremely long tail of (Inaudible).

The Tribunal I think has my point that there has been for some months now detailed negotiations with the largest developers, including through disclosure, many of whom already have City law firms acting on their behalf. Then of course for the smaller developers, Professor Rodger put forward the option of a flat simplified payment, which, all else equal, ought to facilitate uptake. But as I will show you under my second topic, there are also empirical reasons to consider that the uptake, even among smaller developers, would be higher than average than what we see from statistics in other recent settlements.

Fourthly, Professor Rodger wishes to emphasise the good governance arrangements he put in place in deciding to settle the case and determine class member and stakeholder splits. Whilst Professor Rodger was of course advised by his law firm and trial counsel in relation to settlement, the final sign off was made by his consultative panel, in interactions to which neither his law firm nor his trial counsel team were privy. Equally, when it came to determining the settlement structure, in terms of stakeholder and class member splits, Professor Rodger also engaged with his consultative panel and Mr Bacon KC, neither of whom had any financial interest in the outcome or the terms of settlement, and again Professor Rodger's law firm and trial counsel were kept outside of this decision-making structure.

So that is on the governance side.

Then finally, as I will come back to in my fourth topic, Professor Rodger has shown a clear willingness to inject further objectivity into the entitlement and distribution process, where appropriate and proportionate. The Tribunal will have seen on Friday the small amendments we proposed to the draft Distribution Plan, as set out in our skeleton, the independent King's Counsel mechanism, which would advise in relation to novel or complex issues on entitlement or distribution. I will obviously come back to that.

So, Sir, that is the first topic.

Turning now to distribution, can I just tee-up the core legal principles? There is obviously a section in our skeleton setting out the case law such as it is to date but can I just tee-up quickly the terrain before I come on to distribution in this case? I want to emphasise three points. The first is a composite point. If we could start with one of the McLaren settlements, the K-Line, and it is in Tab 12 of the Authorities on page 747. I can read it out, it is a pretty trite point:

"Collective proceedings should be brought for the benefit of class members and not predominantly for the benefit of stakeholders. The Tribunal will wish to avoid outcomes where little goes to the class members and the primary beneficiaries of the proceedings are stakeholders."

Now, the other side of that coin we can pick up in Tab 10, please. It is of course funding. It is at paragraph 21 and a third of the way down.

JUDGE WOLFFE: Page number?

MR O'DONOGHUE: It is 413, Sir, Tab 10. It says around the middle:

"The Tribunal would endeavour to act fairly for all those concerned, mindful of the incentives and the need for a funding market for collective proceedings. Funding will dry up if funders are unable to recover their costs, disbursements and make a profit even on cases where there is a successful outcome. The importance of funders to ...(Reading to the words)... viable has been repeatedly remarked upon in the authorities."

Sir, there is a balance between the primary beneficiaries of settlement and of course the commercial reality of funding. There is no collective regime certainly in relation to opt out.

The second point goes to distribution, which is that distribution is driven by fairness and proportionality and not compensatory principles, grounded in individual loss. That, Sir, comes from the Merricks judgment which is in the Supplemental bundle, Tab 1. So, it is Supplemental bundle Tab 1, page 37 and this is the majority with Lord Briggs. He said:

"The Act radically alters the established common law compensatory principle by removing the requirement to assess individual loss in an aggregate damages case."

And then, Sir, over the page at 77:

"A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss. While there may be many cases in which some approximation towards individual loss may be achieved by a proposed distribution method, there will be some where the mechanics will be likely to be so difficult and disproportionate."

Modest amounts and so on:

"Some other method may be more reasonable, fair and therefore more just. For that purpose the statutory scheme provides scope for members within the class to be heard about the proposed distribution method. In many cases the selection of the fairest method will best be left until the size of the class and the amount of the aggregate damages are known."

The same point, Sir, is made at 149, this time by the minority, but I think this was one of the points they both agreed on. It is on page 58:

"There is no necessity at that stage [i.e. distribution] to try to estimate loss: only to adopt a method of distribution which is fair."

Then the next but one sentence:

"It may be impractical or disproportionate to adopt such a method of distribution, particularly where the size of the class is large and the amount of damages awarded small, considered on a per capita basis."

So, fairness and proportionality, and not strict compensation, guide distribution.

In Merricks itself, Mr Merricks proposed that any award should be distributed broadly equally among the class members on a per capita basis, each separate year of the infringement on the basis that any other mechanism would be disproportionate.

And the final point, which would really be an adjunct to the second, is that distribution may call for a degree of rough and readiness. The wielding of the famous broad axe and the exercise of sound imagination. You can pick this up in one of the McLaren settlements. It is at Authorities Tab 25, page 1887, paragraph 35. About halfway down the paragraph, it starts "When both quantifying and distributing":

"When both quantifying and distributing aggregate damages [so both quantification at trial and distribution following settlement or trial] the CAT might, wielding its broad axe, work with new techniques or principles to achieve practical justice. In Lloyds, the Supreme Court accepted ...(Reading to the words)... leading to an equal division among all class members and a person or category of persons might therefore require an entitlement to compensation even if there was no proof of loss."

So that goes to my fairness, pragmatism and proportionality point.

Turning then, Sir, to distribution in this case. As the Tribunal is well aware, the relatively low uptake in approved settlements to date has been much lamented, with Gutmann Trains being a particularly low point, an uptake rating between of 0.073, to 0.73 per cent depending on the number of class members. But the sample size of course is small. Less than a handful of cases have thus far reached the distribution stage and as I adverted to earlier, they had in my submission a distinctly unpromising backdrop on context. In Gutmann, they concerned someone who had, since 2015, purchased a rail fare that was not a boundary fare and unsurprisingly, very few people can remember ten years ago whether they did not purchase a boundary fare or some other form of ticket. Equally in Merricks the claim period started in 1992 and concerned essentially all UK retail, 48 million people, and again that seems to me unpromising as a context. We don't actually know the outturn in Merricks because of the disputes with the funder and equally I understand there is, on Thursday, a further distribution hearing in McLaren, where we may know a bit more about distribution in that case. So we have a very small statistical sample to work with, one; and, two, the context of the two cases I mentioned is a particular one.

In my submission, the present settlement is unusual and in some respects may be even unique in three key respects that ought to drive high levels of uptake. First, there are comprehensive Google digital records, or developer transactions, available to Professor Rodger for virtually the entirety of a period until the end of March 2025.

Second, as I adverted to earlier, most of the claim value is vested in a relatively small number of represented persons. So a high level of engagement in terms of claim value uptake can be achieved by engagement with a relatively small number of representative persons. It might be convenient if I handed up at this stage a table which looks at the distribution of claim value across different metrics.

(Handed)

Again Sir, the figures are confidential but we can -- Sir, I mean if one takes the top five, that is already a very substantial portion. So ample. The top 24, close to a large majority. Then as we saw in the application the top 100 itself was a working figure.

Then, because of Annex 8 of the Settlement Agreement it is obviously useful to look at the top 24 in particular. You see, Sir, in the fifth column there is also a very substantial value. Then, Sir, terms of the tail, in the fifth column you will see that it is long and thin.

This is an unusual settlement and I think to date unique in that a small number of people need to be engaged to have a potentially very, very high level of uptake.

Thirdly, it is not simply the case that a lot of claim value is concentrated in a small number of represented persons, it is also the case that for the last several months there has been quite detailed interaction between Professor Rodger and the represented persons, the larger developers and indeed between these represented persons and the Tribunal and Google in relation to the proceedings over disclosure matters.

Now, the disclosure requests, they had the unfortunate consequence that a major developer opted out of proceedings at a late stage, and four other developers applied to do so. But it has meant that Professor Rodger has had extensive discussions with the larger class members, including in relation to settlement, many of them as I noted earlier have instructed City law firms to act on their behalf. As of today because of the

Annex A list of 24 developers, Professor Rodger's legal team has been in direct contact with all 24 of the largest developers listed in Annex A of the Settlement Agreement.

Because of these iterative and direct interactions with developers, covering a very large proportion of the claim by value, there are strong grounds to expect the take-up by value will be very high.

The other data point that Professor Rodger relies on in this context is the experience of its claims administrator, Angeion, in two US developer class actions. The take-up in those cases was materially higher at the higher levels of developer turn over. If we can quickly look at that, it is in bundle A, Tab 6, the Distribution Plan. As you will have picked up I think from the documents, there were two class actions in the United States at the developer level, one involving Apple, Cameron and the other involving -- I think the data comes from Cameron. You will see, Sir, paragraph 4, page 124, it concerned a 100 million settlement and then you will see in the middle, 32.1 per cent, with participation increasing materially with developer revenues.

Then, Sir, you will see at 6, Cameron in some ways is not a good comparator for the entirety of the present settlement because you can see in 6 it was confined to smaller developers. So we do make the point that if one sees higher uptake levels at the higher tiers, even within a small developer class action, the position must be a fortiori in relation to much larger claims.

Sir, we can pick up the same point again at paragraph 46 on page 132. They make the point again, higher uptake with the higher tiers. Then over the page, there are some interesting comparative figures and so, again, smaller developers capped at 1 million and then highest payment tiers produced estimated individual recoveries, and you see the figures. So the highest individual recovery was $124,000. They then go on to make the point, the financial incentives for developers accounting for most of the value in proceedings are materially greater. Where there is modelling developers ranked 26 to 50, an average settlement entitlement of approximately X. Those ranked 6 to 25, approximately Y, top five, approximately Z each.

If one compares the large developer potential entitlements in Rodger with relatively high uptake by comparison in Cameron for the higher ends of the tiers, that in my submission is a further data point which supports an expectation that uptake by value in the present case is likely to be very high indeed.

One is bound to ask rhetorically in what world would a developer refuse a substantial six, seven, even eight figure entitlement?

Now I am acutely conscious that Professor Rodger doesn't just represent the largest developers, he represents a relatively large class of developers, numbering in excess of -- substantially in excess of 10,000. But the directly analogous experience in the Cameron case does provide grounds for optimism. The level of uptake even for the lower sized claims would also be relatively effective. I showed you the range of 9 to 28 per cent, even in the lower tiers of Angeion's report in relation to the Cameron case and that compares very favourably to the public data on class settlements and uptake figures we have seen in the admittedly small data set relating to settlements to date.

The Tribunal will also have seen from the Distribution Plan that there is the option for smaller developers to take a fixed sum of £200 and it is hoped that the simplicity of that option will also drive uptake and the Tribunal may also have picked up from Gallagher 2, paragraph 56 that, Google has agreed, subject to appropriate legal and regulatory safeguards to provide developer email addresses where available to Google, and this will also facilitate targeted direct notice and outreach as part of the distribution plan.

The emails that Professor Rodger has used to date directed to contract developers, save of course for the larger developers, they come from public sources or general contact information and we would therefore suggest that it would be useful and more efficient to include in the Order, if settlement is approved, a provision that Google provides what it can provide, subject to the caveats it has given, within say four weeks of approval of settlement. That would expedite and make more efficient the distribution process.

JUDGE WOLFFE: That is not I think provided for at the moment in your draft, is that right?

MR O'DONOGHUE: That's right.

The final point, Sir, is unlike Gutmann and Merricks and in part McLaren, this settlement is dealing with businesses, not consumers and Angeion states in paragraph 51, and I quote:

"The fact that class members are businesses rather than consumers process and that the proposed claim process is a relatively low burden should assist participation. This is not a case of someone hoping to find a train ticket for 2015 or a receipt from 1992 down the back of the sofa. The developers are Google's customers. There are comprehensive digital records for each of the transactions for virtually all of the claim period."

Then finally Sir, before I move to my third topic, can I just quickly run through how the distribution process is intended to work and I hope that this will be of some assistance to Dream Games in particular because it seems to us that Dream Games' letter is based on a misunderstanding of how the Distribution Plan is intended to work. We can pick this up, Sir, in the Fideres document, at A/134.

It is Tab 7 for those like me working in hard copy. You will see, Members of the Tribunal, that they are the handful of steps. Step one is the aggregate damages number, which is the denominator for the purposes of calculating individual entitlements. You can see a reference to the Rodger UK transaction data.

Now, just to position the Rodger transaction data in the context of the litigation, I can quickly hand up -- it is in the supplemental bundle -- the Tribunal's Order from last year. It is in Tab 2 of the Supplemental bundle. So it is page 69, paragraph 4.5. The Tribunal will see that Google was ordered to disclose, and I quote:

"Available transaction data relating to purchases by users placed or from UK app developers of apps or in app content distributed to the Google Play Store."

And you can see the dates.

So, by Order of the Tribunal Google disclosed the transaction data in relation to UK app developers and the output of that Order is a full set of the actual transaction data of the start of the claim period until the end of the first quarter of 2025. This data set was the only data set being used by Professor Rodger for the purposes of trial and in particular the volume of commerce. So that is the starting point for the denominator.

Then step 2 is the developer identification. If we can then jump back to Tab 6, please, which is the Angeion document, page 129. Starting at paragraph 26, Sir. It says:

"For developers already matched to transactions in the Rodger transaction data, they will be given an individual notice containing the following information. A statement that the developer has been identified as eligible to claim a sum from the class pot."

And you will see developer IDs and so on and so forth.

I will come back to this but if a developer is in the Rodger transaction data they will be immediately notified that they are eligible to claim a sum from the class pot. So if you are in the Rodger transaction data, as indeed Dream Games is, you are in an advantageous position. You are already inside the tent as it were. I will come back to that.

Then if we go back to Fideres in Tab 7, you will see there is a step 3, which is extrapolation of the Rodger transaction data forward from 1 April 2025 until the end of July 2026. So there is a gap in the actual transaction data for this period. There is a need for some form of extrapolation and there are basically two buckets. There may be a developer who has sailed both before and after the first quarter of 2025, and in this case, for simplification purposes, developers' share will be calculated and projected forward to the end of July 2026 on a constant share basis, meaning that its share of damages for the class period is assumed to remain unchanged over the period of extrapolation.

Secondly, there may be developers who only made sales post, following the end of March 2025. For example, they had a brand-new app launched only during the extrapolation period and they will need to provide further information.

Step four, page 135. There are two potential scenarios. The first scenario is the option for developers with total Play Store revenues of 7,500 or less to have a lump sum payment of £200. Or they can elect for individual assessment. The second is where the 7,500 threshold is exceeded or the developer wants an individual assessment. The basic calculation will involve applying Professor Fletcher's preferred counterfactual commission rate against their actual transactions divided by the step one denominator, which will determine its share of the overall settlement sum with slice of the pie.

Now, I should emphasise, and again this may meet some of -- one of Dream Games' points, that the Rodger transaction data are a starting point. If a developer in the Rodger transaction data says, "Well, in my view, there are the following inaccuracies", then of course they are entitled to submit that additional information to be looked at in good faith. The Rodger transaction data are an important starting point but not necessarily the end point, if the developer wishes to make a particular point on inaccuracy. So at the end of step four, there will be a determination -- forgive me --

MR KELLY: Can I just ask one question on the calculation of damages.

MR O'DONOGHUE: Yes.

MR KELLY: Where the methodology says that Fletcher's counterfactual rate will be applied, my understanding is that developers with revenues of less than a million pounds paid a significantly lower commission rate to Google. So when the calculation of the damages at the counterfactual rate -- their actual commission rate was 15 per cent, not the higher 30 per cent, then calculating damages based on the counterfactual rate of say 11 per cent, their calculation of damages will be significantly lower. Is that the correct --

MR O'DONOGHUE: Yes, well, it is by assumption. It is a blended rate in effect and in the same way, Sir, as you will have picked up the issues of pass on and interest would not be subject to any individual adjustment.

MR KELLY: But does that not mean all of those developers with revenues of less than a million will actually end up with a significantly lower calculation of damages than the calculations you have put forward, which are based on an assumption of damages based on revenues? **(Pause)**

MR O'DONOGHUE: I may come back to you on that. As I understand it, it is based on their actual transactions and as near as one can get to what they actually pay for commission, but I will come back to you after the short adjournment.

MR KELLY: The key point is, is it a single counterfactual rate that is applied to all developers?

MR O'DONOGHUE: Yes. In the same way as I mentioned, as you will have picked up from Professor Fletcher's report, there are a category of developers who have subscription revenues and her expert report was based on a premise that there will have been some pass on by those developers who have subscription-related revenues. By contrast for non-subscription revenues there would not be pass on. But for simplification purposes she is not proposing to have a separate set of calculations for developers who might be subject to potential pass on. Likewise in relation to interest, if one is a developer going back to the start of the claim period, and a developer coming in later in the claim period, there may be some rough and readiness in terms of the figures not exactly corresponding to individual entitlements. So there are a number of simplifying assumptions nested within the calculations. As I indicated at the start of my submissions, that seems to us consistent with what the case law permits but I will get back to you,Ssir, on that particular question.

MR KELLY: Okay.

MR O'DONOGHUE: At the end of step four there would be an initial determination of the share of the overall settlement sum by developer. The developer would then have a specified period in which to accept that assessment or raise a query and provide supporting information if it considers that the underlying transaction data is incomplete or inaccurate. And if further information is provided, Fideres will make any necessary adjustments.

Then finally in step five you will see that for developers receiving --

JUDGE WOLFFE: Can I just clarify or ask for clarification on that point? You are describing, entirely understandably, certain simplifying assumptions are made for the purposes of a scheme. You are then telling us that a developer may accept or not and choose to provide further information or not. Does that mean that at that stage all the simplifying assumptions go out the window and the developer can seek to present a claim based on actual transaction data rather than the extrapolated Rodger UK transaction data, the actual commission rate rather than any assumptions that may be being made and so on?

MR O'DONOGHUE: Sir, that possibility is one possibility. It may be that for reasons of proportionality or otherwise, that there are some further questions in relation to the further information, or it may be that it is not particularly illuminating, for whatever reason. One option that is accepted in toto and other option may be, well, we are not quite sure that this is the information we need and it is quite difficult to make a determination. There may be a range of permutations, a combination, of course. Or there may be a very simple scenario where the data is manifestly inaccurate. You have complete or comprehensive information on the updated position and without wishing to tie Professor Rodger's hands in any way I would expect that would be accepted on its face. but there may be a spectrum of possibilities depending on the permutations that may arise. But one would have thought that if the developer has good actual data from its own sphere, that would be a good piece of information. It may be necessary to triangulate that with the Rodger transaction data. There was also, Sir, something you may have picked up from the footnotes, there is a platform called Google Console which is a platform made available to developers by Google whereby they can check financial performance for example of their apps within the Play Store, and that may be a further source of information.

But at this stage Professor Rodger would not wish to be prescriptive as to what would or would not be acceptable information. I think he wouldn't want to prejudge the outcomes of those determinations. But what I can say at the risk of sounding glib is that all options would remain on the table. So I think it would be an inclusive approach rather than a prescriptive one, I think.

MR KELLY: Just to follow up on that, is there not a risk of significant disputes between Class Representative and the developers around the actual amount of damages because I can imagine larger ones certainly would go away and do their own calculations and submit a large amount of calculations to the CR to wade through?

MR O'DONOGHUE: That ties in very neatly, Sir, with the next point I am going to make, which is ultimately the backstop on all of this is the Tribunal. So if we go to the Distribution Plan, that is at Tab 6. It starts at 130 and you see it starts at 33:

"Following the end of the claim period [and so on] Angeion and Fideres will complete a final reconciliation process,will identify approved claims, unresolved claims, any reserve required for open issues, any failed or invalid payment details in the amount of ... damages."

Then 34:

"Professor Rodger will then return to the Tribunal for approval ...(Reading to the words)...payments."

And then 35 I think, Sir, is the answer to your question, which is:

"Based on information provided by the Class Representative, no payments will be made for further orders of the Tribunal. To support the further Tribunal hearing, provide reporting on notice reach, repeated claims, verified claims, calculation queries, unresolved matters, approved payment value, payment readiness, expected failed payment risk and amount of monetary ...(Reading to the words)... reporting would enable the Tribunal to assess the outcome of the administration process before any payments are made."

So, there is a protocol in place whereby the Tribunal will have essentially a down-low of all the issues in relation to distribution, including disputes and so on. That would be available as a detailed report to the Tribunal and the Tribunal will have picked up from our skeleton on Friday, and the amendments proposed to the Distribution Plan, that a further layer which has been added is that Professor Rodger has the option of seeking independent legal advice from a King's Counsel on issues of a particular novelty or difficulty. So that is a further protection built into the system. But the short answer is that ultimately a large amount of the information of the kind, Sir, you have in mind will be reported to the Tribunal. The tribunal I am sure will be astute to request any further information it feels that it needs and it may be possible that as and when disputes of a particular sensitivity or magnitude arise, that there is the option for the developer concerned to say to the Tribunal, "I am not prepared to wait until the second hearing, I want something determined in advance of it". So, again, Professor Rodger does not wish to be prescriptive in terms of ruling anything in or out but he has put in place a process whereby the Tribunal will have available to it a very, very detailed record of all the minutiae of the distribution process and it can of course in that context request further information.

JUDGE WOLFFE: I have a number of questions that arise from that part of your submissions, Mr O'Donoghue. First of all, just looking at the KC process that has been introduced, two questions. One is it seems to be specific to questions relating to ownership or in effect directed to the intra group agency questions, as drafted. The way you presented it just now is it could be a more general option.

MR O'DONOGHUE: Sir, if one looks at the amendment, there are two parts. It relates to questions of novelty or complexity but there is then a second sentence which says Professor Rodger can seek such advice on --

JUDGE WOLFFE: Other cases. So it is meant to be a general facility.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: The second question which arises from the letter this morning, is it envisaged that that is privileged advice to Professor Rodger or is it envisaged that that is, as it were, a piece of advice that will be shared with the relevant developer?

MR O'DONOGHUE: Well, Sir, subject to confidentiality, Professor Rodger has no objection in principle to that being shared with the developer concerned. I apprehend that what Dream Games is perhaps more interested in, is can they see the advice in relation to other developers in respect of issues to do with their entitlement? Again, Professor Rodger doesn't wish to be prescriptive in that regard. There may be quite significant confidentiality issues as between developers. It may be that the Tribunal, as it does in other cases, can fashion an inner ring that is sufficiently tight, that that could be accommodated. All I can say at this stage is that Professor Rodger has no strong objection in principle to those recommendations being shared, but I suspect the confidential information of Developer A versus Developer B would be a very, very substantial concern, and indeed one of the things which prompted a raft of actual opt-outs and applications to opt out was the very concern that sensitive information on tax affairs would be ventilated in a public forum in which developers might not be present. So the confidentiality issues are real and it is not Professor Rodger's confidentiality, at least in that respect, to waive. But in principle, in relation to developers' own assessment, there cannot be any issue. In relation to any other developer's assessment that may be something on which the Tribunal's guidance would have to be sought depending on the strength of the objection of the developer concerned. But no objection in principle to that being contemplated.

JUDGE WOLFFE: That is helpful.

Then turning to the Tribunal's role. You have described -- what you have described is a process of reporting by the Class Representative to the Tribunal before the Tribunal ultimately approves in effect, payments to be made out. And that process, if the need for a Tribunal Order is provided for, is in the draft order you have given us.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: Do you envisage that at that point the Tribunal might in effect hear and determine disputed claims in the way that an insolvency judge might deal with disputed claims in an insolvency or in a Scottish process that Professor Rodger may be familiar with called a multiple pending, where there are multiple claims on a fund, the court has to adjudicate on multiple claims or do you envisage that Professor Rodger will have made in effect an adjudication on the scheme and will simply present the Tribunal with the outcome of that?

MR O'DONOGHUE: Yes, well, Sir, whatever the decision Professor Rodger makes is necessarily provisional in the sense that there is always the backstop of the Tribunal.

I can see there is an efficiency in coalescing these issues, if indeed any of them arise, into a single hearing. The other suggestion I would make, Sir, which has been done in the context of disclosure, that it seems to us it would be proportionate and efficient, sometimes can be dealt with on paper as well, so I think that sort of à la carte menu covers all possibilities. But I mean --

JUDGE WOLFFE: So in a sense, I absolutely see that one shouldn't be overly prescriptive at this stage but it is simply whether we approve the settlement with the draft Order you proposed and the reservation to the Tribunal of the ultimate approval of the payments, in effect, provides the vehicle through which any disputed issue that any represented person or the Class Representative or indeed Google might wish to bring for the Tribunal to do that.

MR O'DONOGHUE: Yes. Well, that seems to be the most efficient way to deal with this because then you have the panorama, if there is any, of issues before you, you take a sort of integrated or composite view. Dealing with these ad hoc, there are some potential issues in relation to that.

Sir, I should mention, in these proceedings and other proceedings, the opt-out dates have been sort of written in water. In fairness to the developers, they may feel that their decision on whether or not to opt out should be contingent on the position of the Tribunal at a second hearing, so there may be a need in some cases to extend the opt-out date to the date of the second hearing.

JUDGE WOLFFE: You are envisaging two opt-out dates. There is the opt-out under Rule 82, and there is the opt-out under Rule 94. But you are envisaging the opt-out under Rule 94 and you provided three months in the Order, but you are envisaging that it would at least be a possibility for either the Tribunal -- clearly we could fix that opt-out date at any date we considered appropriate.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: But developers, particular represented persons, might invite us to extend that.

MR O'DONOGHUE: Yes. We would have no objection to that.

JUDGE WOLFFE: Okay.

MR O'DONOGHUE: And frankly it seems fair. If there is a dispute, and it is material, it is fair that they know the outcome. It is just a question of what to do next (Inaudible).

JUDGE WOLFFE: You have also envisaged, in the course of this discussion, the potential for a represented person who wishes to bring an issue to the Tribunal in effect on an ad hoc basis by way of an application during the process of settlement, and --

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: Is that something we are required to make provision for in the order?

MR O'DONOGHUE: Well, Sir, there will I assume be a general liberty to apply.

JUDGE WOLFFE: Yes.

MR O'DONOGHUE: It is not for Professor Rodger to stand in the way of being -- I don't want to prejudge whether they could do that, it is really a matter for the Tribunal and the developers concerned. I mean there is a concern of course that with a very large number of developers, an ad hoc process becomes quite involved; but from Professor Rodger's perspective, once he has made his provisional determination, and with the possibility of a backstop, it seems to us at that stage Professor Rodger doesn't need to do anything more than say, "Well, here is what I have provisionally decided to do". I wouldn't see a need for him to play a certainly proactive role or perhaps even any role in issues raised by individual developers. Because of course what we are anxious to avoid as well is that having resolved the proceedings and the issues, the budget is eaten up by litigation through the back door on some of these issues. So the proportionality in questions of fairness and practicality, they loom very large on these issues. So, there is a difficult balance between the possibility of vindication and being back down the rabbit hole of the issues we have settled in resolving the claim.

JUDGE WOLFFE: Indeed. I should say from the Tribunal's perspective, it is not that we are seeking to encourage applications and disputes, indeed quite the reverse, but clearly we are here to determine any real issues that we need to determine. It does go back to the question you were asked earlier about the extent to which the methodology is a fixed methodology, which makes simplifying assumptions for the reasons you have already explained under reference to Merricks.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: And which is therefore, you know, a broadbrush, broad axe proportionate approach and the extent to which individual developers should be free to invite the Class Representative to in effect put that methodology to one side and assess loss in a more granular way.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: I think you have accepted developers will be free to invite that.

MR O'DONOGHUE: It is not for me to stand in their way or advise them. It is really a matter for them to put forward. The reason I took you of course to Merricks is that ultimately pragmatism is driving a lot of this. So, the distribution is emphatically not compensatory on an individual level. It has to be fair, if not more than fair. But these are abstract points that -- they are important, but I don't wish to preclude any individual from ventilating whatever they feel the need to ventilate to the Tribunal.

I see the time, so I will take a break now. Professor Rodger is very, very concerned that a distribution budget would be eaten up with all kinds of satellite issues and he would wish to emphasise that if a developer wishes to ventilate these concerns, that is their concern and be expected Professor Rodger would be an adversarial party bearing substantial costs in relation to that dispute. Ultimately there is a pot that is at the moment fixed. The trade-off is between litigating everything to the ends of the earth and pragmatism and fairness and it is not just fairness to the aggrieved developer, it is fairness to several thousand other people who have the same interest in the same pot.

JUDGE WOLFFE: Yes, that is very helpful. Just to close that point off. You have mentioned the costs of the exercise upon which Professor Rodger is about to embark. Am I right to understand the costs of that exercise are intended to come from the litigation budget and therefore from the stakeholder pot rather than the class pot? Or rather not -- yes.

MR O'DONOGHUE: It comes from the existing litigation budget.

JUDGE WOLFFE: It comes from the existing litigation budget and --

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: -- therefore it does not diminish the class pot, is the point.

MR O'DONOGHUE: Sir, yes. But with the caveat I have mentioned more than once --

JUDGE WOLFFE: Unless there are undistributed funds --

MR O'DONOGHUE: -- that if this gets out of control, then it is a horse of a different colour.

JUDGE WOLFFE: And if there are undistributed funds in the class pot, it may be that we have to assess --

MR O'DONOGHUE: That is what has been done in other cases and I think another case where the interest on the secure account was in part used to deal with additional distribution costs. At this stage my plea is that there is a tricky balance to be struck between going through every twist and turn and not blowing the budget.

JUDGE WOLFFE: That is very helpful. Shall we take a break? Thank you, 15-minutes.

(11.43 am)

(A short adjournment)

(12.00 pm)

JUDGE WOLFFE: Mr O'Donoghue.

MR O'DONOGHUE: I was about to move on to the Tribunal's questions of yesterday but can I just pick up on two short points raised before the short adjournment?

First, I think in response to Mr Kelly's question, I don't think I have quite sort of nailed what I need to nail.

Sir, as you will have picked up from the documents, the written advice, there is a single counterfactual commission proposed by Professor Fletcher. The figure is confidential, but it doesn't matter for those purposes. So, the counterfactual commission is a single blended number, and it is quite straightforward in terms of commission. If a developer paid more than their counterfactual rate for the actual, then they would be compensated. If they paid less, then they won't. Up or down, that is the touchstone of entitlements and to that extent no one gets under or overcompensated. As I should make clear, as is clear from the Distribution Plan, in terms of disputes, the counterfactual commission rate is, in terms of Professor Fletcher's figure, not up for debate. The other simplifying assumption she has applied is she will not differentiate based on pass-on. She has also said she will not differentiate based on interest entitlements and she has also made clear that she will not differentiate based on this so-called volume effect. Because you may recall from the papers that there is a subset of developers or developer revenue that may not have been transacted through the Play Store in the counterfactual, but there would have for example been direct distribution by the developer concerned on its website. So, it is a separate category of damages, albeit it is not large in the scheme of things. Again, the counterfactual commission rates and the entitlements, they are not going to be differentiated depending on that subset of damages. So, there are certain simplifying carve-outs from the entitlement and distribution phase. And again, that is for reasons of pragmatism. There is a thought experiment which, I cannot claim originality on, it comes from Gutmann, one of the counsel in that case. The thought experiment is as follows. If you spend 10 minutes per developer on any issue, with this class size, on a normal working day, there would be 286 days of work to consider those issues. So, there is a need for simplifying assumptions at the entitlement and distribution stage but on Mr Kelly's point specifically, there is not any rough justice on the counterfactual commission because people will get compensated or will get paid on the basis of the actual payments, versus the counterfactual rate. And as I said, which I hope is clear, it is open to any developer to say, well, we think the revenue you have calculated for us is inaccurate for whatever reason. So, the starting point is the Rodger transaction data. It is not necessarily the end point. But of course, they have to motivate any difference in their claim to revenues.

I hope, Sir, that helps in relation to your question.

MR KELLY: If you have a developer that consistently paid a lower commission than the average due to the tariff structure, then in the calculation of damages, they would end up getting a proportionately lower amount of damages than somebody who paid the higher commission. So there is an implicit assumption effectively that all developers paid the same commission rate?

MR O'DONOGHUE: Well, Sir, no -- one, a general point. The lower tiers of commission actually only kicked in relatively late in the claim period. So that is important. But in relation, Sir, to your question specifically, no, if they in fact paid less commission in the actual, then compared to the counterfactual blended rate, they are entitled to less. So it all washes out up or down, if that makes sense.

MR KELLY: It does in that respect, yes.

JUDGE WOLFFE: I suppose really where the question goes -- I appreciate with a counterfactual, there is always a counterfactual and therefore not realistic, not the real world but is it actually fair and proportionate to apply a single counterfactual commission rate when there are in fact variable commission rates being charged and does that systematically favour one group of the class members over others?

MR O'DONOGHUE: Certainly, that is the basis on which we would go to trial and I think I am right in saying that is the basis on which the Tribunal in Kent determined the counterfactual commission as well. The only differentiation in Kent is between payment services and distribution services.

So, there is a certain degree of simplification but an acceptable one, if I can put it like that.

JUDGE WOLFFE: Apologies, if the Tribunal can wield a broad axe in that way, then a Distribution Plan which does exactly the same must be acceptable.

MR O'DONOGHUE: One has to draw the line somewhere pragmatically.

JUDGE WOLFFE: Also, I pick up from what you have just said, the various points you have made which are not up for discussion, that the discussion we had before the short adjournment about developers coming forward in effect with their claims to be adjudicated on, the points where there may be room for discussion will be the actual revenues, the actual sales figures --

MR O'DONOGHUE: The data.

JUDGE WOLFFE: And you are prepared to contemplate a developer coming forward with actual data rather than the extrapolated data, if I understand it correctly?

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: But the key building blocks of the scheme that you outlined a moment ago remain fixed and are not up for debate?

MR O'DONOGHUE: Yes. It has to be tractable.

JUDGE WOLFFE: I appreciate that and I welcome that, because one of the things that was concerning the Tribunal, as we left for the short adjournment, was whether what we were contemplating was a scheme which at the end of the day was open to individual developers coming along and saying, actually, we just want, we calculate our loss in a different way, adjudicate on the claim, Professor Rodger, and then if disagreed with, we are facing some sort of massive multi-claim.

MR O'DONOGHUE: It is not a free-for-all.

JUDGE WOLFFE: Because that would have the scope to work unfairly to developers who are not coming forward in that way.

MR O'DONOGHUE: Well, indeed, and of course with any one of these issues, you can see for example that a developer who had a claim only at the tail end of the period, in terms of interest, is in a radically different position to someone who has a claim for the entire period or only for the early years. It may be in an individual case that is material but one has to approach this in a pragmatic way and, given the size of the class, and the costs of distribution having to be paid for, there is a balance and a balance in my submission to be struck in a certain way. But of course the Tribunal backstop always remains.

JUDGE WOLFFE: Yes. But the Tribunal having approved this Distribution Plan will also not be -- you know, any dispute will be within the framework of the Distribution Plan that the Tribunal on this hypothesis approved.

MR O'DONOGHUE: The parameters, yes.

JUDGE WOLFFE: That is helpful. Thank you.

MR HERGA: Can I just ask one clarification? You say no pass-on is going to be taken. Does that also cover the principal agent issue that was a complex issue as I understand it, that there was going to perhaps be a separate trial on?

MR O'DONOGHUE: No. That is not within the pass-on category. By pass-on, what we mean is pass-on of the inflated commission from developers to the device users.
MR HERGA: So that point is still up for grabs, is it, as it were?
MR O'DONOGHUE: Sir, I will come back to that, but the essential position is as follows. If, like Dream Games, you are already in the Rodger transaction data, that is not up for grabs. If you are not on the Rodger transaction data, there must be a good reason why you are missing and it is then up to the developer to motivate, with information, why they meet the class definition, domiciled definition, and it may be that if there is controversy about that that Professor Rodger has to make a decision, perhaps with legal advice, and that ends up in front of the Tribunal.
Now, on the people not in the Rodger transaction dataset, it is not my purpose or function today to be prescriptive as to what proof of class definition membership they would have to bring forward. That, Sir, may be one component. There may well be others. As you know, Sir, the issue of domicile under the Civil Jurisdiction and Judgments Act, that deals with the seat of the company, central management, there may be a range of factors that go into the analysis and they would have to prove that they are within the class definition in the claim form. I don't wish to be prescriptive in terms of what they would need to bring forward to make that good. But clearly someone in the Rodger transaction data -- because these are the data sets we are relying on for the purposes of trial, they are in a better position, because the premise of the disclosure, they are a UK developer on the basis of the order I showed you. So they would be in a better position. But I am not saying that someone who was not in the Rodger transaction data is necessarily in a worse position. It would depend on what they come forward with, the kinds of proof they bring to bear, if that helps, Sir.
JUDGE WOLFFE: But if you are a developer within the Rodger transaction data, but in relation to whom Google were taking a point about the principal agent point, are you

saying that Professor Rodger proceeds on the basis of the data --

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: -- that is already available, and, you know, is not otherwise going to be scrutinising the intragroup principal agent issues that Google were proposing to raise at trial?

MR O'DONOGHUE: Yes. Because they are in the dataset.

JUDGE WOLFFE: They are in the dataset already.

And is that also -- you know, does Clause 4.3 of the Settlement Agreement, is that related to this issue? That is the warranty that the top 24 developers had to give that they are entitled to the claim?

MR O'DONOGHUE: Yes. That was essentially a belt and braces, top five, because of the size of the claim, to verify -- that was not intended to be -- to go back down the intragroup rabbit hole. It was simply for them to say they are who they are.

JUDGE WOLFFE: Yes, and as long as the particular developer is prepared to give that warranty, which as I understand it is a condition of receiving payment.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: Do I understand from what you are saying that Professor Rodger, barring something unusual, then wouldn't be scrutinising any further as it were the underlying internal relationships of that developer with other group companies and so on?

MR O'DONOGHUE: Yes. I hope that meets Dream Games' primary concern. Based on the letter of this morning there seems to be a misunderstanding on that very point. We say it was always clear but evidently, from your question, Sir, it benefited from being put on the record and I am content to provide that assurance.

JUDGE WOLFFE: Thank you.

MR O'DONOGHUE: At the risk of stating the obvious, Professor Rodger has no

intellectual or other interest in all things intragroup and he would certainly be content if that simplifying assumption were applied more generally, that is something that he would also support. But at this stage, in response to the Tribunal's question, the pass-on simplifying assumption is dealing with something else, it is not dealing with that specific point. We have no objection to that parameter being applied more broadly.
Sir, on the Tribunal's three questions yesterday. The first question concerns the breadth of the definition of "Claim" in the Settlement Agreement. We understand the Tribunal's question to be related to a concern that the definition may be overly broad. That it captures claims wider than those brought in these collective proceedings. Of course, as a starting point, the only authority Professor Rodger had to settle these proceedings was the claims that he was bringing. The definition of "Claims" in the Settlement Agreement, we say, is at least consistent with that. It says, and I quote, "Arising from the facts, matters of conduct alleged in the Proceedings or otherwise arising in relation to issues and Proceedings." Certainly, the intention was not to go beyond the scope of the claims that Professor Rodger is pursuing.
I think it is fair to say that the clause was supposed to reflect risks that Google perceived since it would be the person on this hypothesis being sued, and it may make sense to hear from Ms Smith now on that but from Professor Rodger's perspective, if the Tribunal has concerns about the width of the definition of claims, we would be content for that to be amended by way of addendum to the settlement. I am in your hands, would it make sense to hear from Ms Smith now or --
JUDGE WOLFFE: Perhaps I can articulate the concern and then I am very happy to hear Ms Smith if that would be useful at this point.
MR O'DONOGHUE: Yes.
JUDGE WOLFFE: As you say, Mr O'Donoghue, at the level of principle, the claims that are being settled are the claims that are part of these collective proceedings, and

I think that is consistent with paragraph 12 of the joint application. So what one would be seeking to do is to encapsulate in the definition of claims those claims which are part of these proceedings and I suppose the first thing that strikes me is that if you take the various options, this could include any claim by a represented person which the represented person may have against the defendants arising from the facts alleged in the proceedings, whether or not it is anything to do with competition law.

Now I am not quite sure what other claims there might be but on the face of it that reads as an extraordinarily broad definition, which then of course gets picked up in the release and the waiver.

And you know, perhaps I can speculate but the level of principle, one might think that it could for example encompass other sorts of claims which have nothing to do with competition law, at least reading the words on the page. So that was question 1. And I notice that in the Consumers' Association v Qualcomm case, our restriction was added to confining the issue to antitrust and competition claims. So that is point 1.

Point 2 was I noticed that in that case, where the Tribunal likewise was concerned about the breadth of the release, the definition was time limited in the same way as these proceedings are time limited and whether that is correct or not is something -- or a necessary or not part of the definition is something I would welcome assistance on.

Then the third question I had was whether in this jurisdiction or any other, appreciating these claims encompass sales through store fronts elsewhere in the world, nevertheless can this Tribunal deal with claims other than claims brought under UK and, to the extent that it applies, EU competition law?

So those were my three questions, and I am just going, as I look at the definition again, I suppose I am reminded on my first one that we have any claims arising from the facts alleged in the proceedings, including without limitation, the policies, procedures, pricing or operation of Google's app store which are the subject of the proceedings.

Again, there is at least scope for that to be read in a way that potentially could catch claims of really quite a different nature.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: Potentially. So those were the questions that I had and that I would certainly welcome assistance from either counsel.

MR O'DONOGHUE: Yes. Sir, shall I hand over to Ms Smith?

JUDGE WOLFFE: It might be -- I can see that it is something that Google has a particular interest in, so I am certainly happy to hear from Ms Smith if she is happy to address me on those issues.

MS SMITH: Sir, thank you for the clarification.

I think we will need, with the Tribunal's approval, some time to address those, because they were not -- it is now that you have given the detail it is clear that we may be able to address some or all of those but I would like the opportunity if I may to take instructions.

JUDGE WOLFFE: Of course, Ms Smith.

MS SMITH: It may be that given my client as well is obviously, well, is in the States, seven hours behind us, over the lunchtime period may be, if possible, the best time in which I can get instructions.

JUDGE WOLFFE: That is absolutely sensible. Thanks very much.

MR O'DONOGHUE: We will park that temporarily.

On the second question, Sir, the interaction, or lack of interaction with Clause 9.1 and 2.4 in relation to the exclusion of represented persons who choose to opt out --

JUDGE WOLFFE: Yes. It is really simply that the impetus for that point was that an expectation that there should be a consistency and that -- again, I can't imagine that that is an issue. And on a view, if they opt out, they opt out with a knock down right anyway but it might be better --

MR O'DONOGHUE: We are grateful to the Tribunal for raising that, it is agreed, that.

MS SMITH: Yes.

JUDGE WOLFFE: Thank you.

MR O'DONOGHUE: Thank you.

Finally, Sir, question 3, the impact on the allocation of the settlement sum between stakeholders and class members should the settlement sum be adjusted in accordance with Clause 1.3. Professor Rodger's primary position on that is that the logic of the Distribution Plan is that each developer has a share or potential share of the pie and if they choose to opt out and not take that potential entitlement, take their own chances, we say that share of the pie travels with that opting out developer. So that would be our primary position.

But again, Sir, at the risk of over-egging the backstop, it may be the Tribunal feels that that issue is better dealt with in the second hearing, when the extent of these issues -- I mean my firm expectation is that there will be extremely high engagement and expect no opt out, but I may be wrong. But in any event, it is perhaps better to deal with that once the full extent of the facts are known, because for example the top five developers, they are very far from uniform in size. A couple of them are enormous in terms of entitlements, some of them are large, but at the small end of the scale within that cohort. I can see a world in which the largest developer opted out is one thing but for example if number 5 opted out, that might be a very different thing. So again, that is to say that this may be better dealt with once the facts are in full view. But in principle we say that the person who doesn't want free money, that their entitlement travels with them.

JUDGE WOLFFE: I suppose the -- am I not right in understanding that if one of the top five developers opts out, their share in effect reverts to Google because the 260 million is adjusted downwards and am I right or am I wrong that

Professor Rodger's intention is that the stakeholder pot remains at 100 million and therefore the class pot diminishes as a matter of the Settlement Agreement, and that is the intention of Professor Rodger?

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: I entirely see the point that the other individual developers' take from the pot will not be altered, because they get what they would have got.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: And I suppose the issue, if there is an issue, is that the relative proportion between the stakeholder pot and the class pot may look different depending on the number of opt-outs.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: That is the question that was in the Tribunal's mind as to whether you had any submission on the justice and reasonableness of that as a structure.

MR O'DONOGHUE: Yes. Well, Sir, my two answers are essentially the same, which is, well, with Professor Rodger's team having done all this work and secured -- it would be regarded as a very good outcome. If they want to look that gift horse in the mouth, it shouldn't cover the expense of the stakeholders who have worked hard to achieve that outcome.

And second, and alternatively, the scale of this issue, if indeed it is an issue at all, would only be known by the stage of the second hearing. That is my primary and fallback position.

JUDGE WOLFFE: And you also presumably are saying, are making the point that no other developer will be worse off at the individual level than he would have been --

MR O'DONOGHUE: Indeed, which is why it is fair. Their slice is reserved. It is not affected by the party opting out, the developer.

JUDGE WOLFFE: That is helpful.

MR O'DONOGHUE: Sir, that almost brings me to an end. In effect, I have covered my fourth topic, which is the reactions from the developer cohort.

So very quickly, Sir, the first developer, whose name remains confidential, you can see it on the cover of our skeleton for example, I will not read out the name. Three points. First of all, they are supportive of settlement; secondly, and significantly, they were a developer who were previously minded to opt out of the proceedings entirely and then I would say in view of the settlement, they would not wish to do so. That in my submission shows one of the substantial benefits of the settlement, that it achieves finality and a reversal on the part of that developer.

Finally, a small point, there are actually I think eight individual developers within the same corporate group because you will see it is nominally in the name of two of them but then on the second page of the letter they list a further six developers. So, it may not matter but we count that as eight votes of support rather than one, but I appreciate it is not a numbers game.

Sir, on Dream Games, I think I have addressed the substance of what they have put forward. If I can just quickly pick up their letter from this morning on page 2. Do you see (a), (b) and (c), and essentially, Sir, my submission is this is raking over ground we have covered on Friday. On undistributed damages, you have our position on that, that we deal with that in the second hearing, in the light of what is actually known. There may be a choice to be made at that stage, for the Tribunal. Being candid, there were a series of commercial interests that people were putting forward and they will have to make their case and the Tribunal will have to decide the issue and of course we may have charities who pop up and say look at all the good work we do, we should get a slice of the undistributed damages as well. But all that is open --

JUDGE WOLFFE: Dream Games' headline proposition is that the Tribunal should now say that since that is part of the class pot, it should go the class members that choose not to opt out and who make claims and there is a headline logic to that. But your point is that for ought yet seen, depending on the particular situation we face, there may be arguments that might be put forward on behalf of the game stakeholders and Google may wish to make arguments.

MR O'DONOGHUE: Charities.

JUDGE WOLFFE: And there may be charities. But on the headline point that if it is the class pot and should be ring-fenced to class members, do you have anything else you want to say?

MR O'DONOGHUE: Sir, a couple of things. First of all, it may of course be a matter of degree. If I am right that uptake is very high, then this becomes a bit of a non-point and then the stakeholders will suffer certain consequences. If by contrast there is a large undistributed sum, which I doubt, then Professor Rodger's proposal is that there would be payments to the stakeholders and a top up pro rata for the developers. So, it may be again depending on the outturn that there is some scope for developer top-up in any event. My point is that given the actual scale of that issue, and the raw numbers, it is much better to make the assessment with full visibility on that than approaching it essentially in the abstract today.

JUDGE WOLFFE: From your point of view, are you presenting it principally as a saving for the possibility that it might appear that the right thing to do is for the stakeholders to see that as an additional payment --

MR O'DONOGHUE: Potentially. And contracts. Not to be sniffed at.

JUDGE WOLFFE: Would that depend or would that be affected by the Tribunal's perception of the level of stakeholder costs? Simply start with the contractual entitlement at this stage, leaving everything open for the second hearing?

MR O'DONOGHUE: Sir, frankly you can do what you want. Because the fact is there is a data point.

JUDGE WOLFFE: Thank you.

MR O'DONOGHUE: Of course there is a certain awkwardness, I need to be very, very careful since --

JUDGE WOLFFE: I appreciate that, Mr O'Donoghue.

MR O'DONOGHUE: That is a pudding I don't want to over-egg, for reasons that will be obvious.

JUDGE WOLFFE: Indeed.

MR O'DONOGHUE: But again, the backstop exists and you may have four or five petitioners, and you can make an assessment in light of what is known and there is a possibility that this doesn't eventuate because it has all been effectively distributed. So that is (a).

Then (b), we have discussed.

Then (c), nothing has changed. We say on (c) candidly they have misunderstood what has been proposed, based on the protocol and reporting, which we raised with the Tribunal in advance of the second hearing. And the question of underestimation or overestimation can be dealt with then. We say, effectively, that this letter changes nothing and we would urge on the Tribunal, Ms Houghton is here today on behalf of Dream Games, she has rights of audience, and she can and would be able to respond to these points probably in the afternoon and it is in everybody's interests that there isn't a drift and we don't go into tomorrow for the sake of going into tomorrow. There is ample time today to deal with these quite narrow issues and in my submission what I have said effectively meets her concerns such as they are.

JUDGE WOLFFE: That is very helpful and I am assuming that representatives of Dream Games are in the courtroom and can liaise with the representatives during the break. It would certainly be very helpful to the Tribunal if Dream Games could indicate whether they require to make any submissions and if they were able to do so, to do so this afternoon.

MR O'DONOGHUE: Subject to any other questions, that is all I have to say.

JUDGE WOLFFE: Thank you. I should say there are some issues the Tribunal would like to raise about the stakeholder costs.

MR KELLY: Just in terms of the schedules that were put through yesterday, I think, on costs, it appears that the day rates charged are at least in some cases significantly higher than guideline rates.

MR O'DONOGHUE: Yes.

MR KELLY: I just wanted to confirm that that was the case.

And then, secondly, we haven't seen the Conditional Fee Agreements, but it appears that a large proportion of solicitors' fees were deferred and success fees were then charged in addition to that and those are in the proposed pay-outs of the stakeholder pot.

I just wanted to confirm, in writing or now, what the success fee amounts were, because the tables didn't break down the fees and success fees.

MR O'DONOGHUE: Yes.

MR KELLY: I think that was it.

MR O'DONOGHUE: So we will come back on -- I mean the success rates and CFAs, they are actually confidential to each. I don't know and shouldn't know what others are up to. So, we will come back to you on that separately.

On the guideline hourly rates, I think, Sir, you are right that the headline rates for the senior lawyers exceed the guideline rates but the blended rate as I understand it is quite substantially below the guideline rate and I know that there may be a degree of apples and pears in that comparison so I think it is perhaps a bit of a mixed bag, if I can put it that way. We can get back to you with more specifics on that if it would be useful.

MR KELLY: It would be useful to understand the difference between the deferred and success rates.

The other question we were mulling over was the -- on the funder's return, which was increasing through successive rounds of funding. Just understanding what the driver for that was and whether that reflected a perception that it was the increasing level of risk in the case.

MR O'DONOGHUE: Yes. Well, I wonder if Mr Bacon would be in a better position.

Submissions by MR BACON

MR BACON: I can certainly speak to that. You are right, there was a -- there were some increases, broadly speaking two principal increases, as matters got closer to trial, with less money available and the quid pro quo for Professor Rodger seeking further increases in funding was an increase in the level of return that the funders would be entitled to receive for costs drawn after the period for which the increased budget was provided. My understanding is that the demands that were sought by the funders reflected two things, probably two things, I am sure two things but principally the fact that the case was still being fought at trial and there is an increased risk generally accepted within the market that the closer you get to trial the more risk there appears to be, because parties are continuing to fight to trial.

And, secondly, obviously the additional exposure brought about by the increase in the budget meant that there was obviously an increased demand on the fund of the capital, which required reciprocal higher returns. The earlier you take your capital, the cheaper it is. So, they are the two fundamental drivers, as I understood it at the time, and as I understood it now, of the increase.

MR KELLY: From the Tribunal's perspective, we can take some comfort from the fact that the initial funding agreement was obtained in that open market and in subsequent rounds it is not really an open market.

MR BACON: It is a fascinating question which we could spend weeks or hours or minutes debating about that. Obviously, there is plenty of public material about the extent to which the funding market is, you know, requires further regulation and so on. I am certainly not going to go there but I can tell you that at every stage of these proceedings, certainly Professor Rodger has sought my input, as you know, from what you have heard and read about and the funders' demands have not simply been agreed without demur. You know, Professor Rodger has taken positive steps to do all he can to ensure that the best deal that he could secure was secured -- I am not going to waive privilege on the advice that I gave but that is the factual position.

Of course noting your points, in the final analysis, it comes out in the wash in many respects because the level of return that the funder is securing by virtue of this settlement was not a contractual entitlement. So, you know, the two additional increases that -- the two principal increases that are made actually get lost in the wash and on my calculations, I think the overall return for the funders is about twice the level of funding, which it would be difficult for any -- yes, it is about twice the committed -- the 27 million. The level of return that is payable if this settlement is approved is about 56 million.

And so discussion about four times return or three times return or even six times returns in the contractual material, as I say, get lost in the wash in the final analysis because the funder has agreed to accept the return that is set out in the table.

The table that I was going to take you to is the one in the bundle, which I have always found most helpful. It is at page 117 in bundle A. Page 117 of 148, which sets out the various entitlements. I think that is the right reference. Of course, it is -- bear with me, it is page 112 of 148. I answered this question against the wider submission that Mr O'Donoghue has made, it seems to me with real force, that these are matters I dare say can be and will be looked at at the second stage. But I understand it is important for the Tribunal to understand Professor Rodger's current thinking. So it is in that context that I am answering these questions, but you will see, assuming the £27.6 million full stakeholder drawdown was made, the sum, the return to the funder is £56 million. As I say, the contractual, more demanding terms, fall away.

As I say, you will all have your own experiences but the idea that a two-times return in a case where there are sufficient funds to discharge contractual liabilities, I struggle to see how that would be unreasonable. We have set out in the table in 117, there are comparisons -- sorry, it is 118 -- comparisons with other cases. Paragraph 112 of the witness statement, page 118 of 148, you will see that this case comes in lower than any other case that certainly appear to have been reported.

I get the point, the Tribunal will be effectively approving a settlement which may have an impact on other cases in the future and may set precedents. Obviously, we would say that each case has to be looked at on its own facts and I dare say the Tribunal would be keen to ensure that precedents are not set in that way but the market will be looking at this case undoubtedly, but a return of two times capital outlay we would submit is entirely fair and reasonable.

JUDGE WOLFFE: Looking to the 32 per cent estimated shortfall, that is making an assumption that the full litigation budget is drawn down.

MR BACON: Yes.

JUDGE WOLFFE: It compares with the 15 per cent odd as at, looking to the accrued entitlements at 31 July, I imagine entitlements have been accruing quite significantly since then.

MR BACON: Yes.

JUDGE WOLFFE: Is it a reasonable assumption that, allowing for the costs of distribution, the full litigation budget will be drawn down?

MR BACON: From what I have heard particularly this morning about the potential costs of the distribution exercise and possibly Professor Rodger being involved in further debate with others down the line, I would be surprised if that 27 million is not utilised pretty much in full.

JUDGE WOLFFE: Okay. On the figures we have, all we can say is it is somewhere between 15 per cent.

MR BACON: Indeed, it may be.

JUDGE WOLFFE: It may be as much as 30 per cent.

MR BACON: Certainly, I can see the real force in actually dotting the Ts and Is once we know the final position, but I hope the questions you have asked have been answered at least in a broad sense for present purposes.

JUDGE WOLFFE: Yes.

MR BACON: Thank you.

JUDGE WOLFFE: Thank you very much. That is very helpful.

Ms Smith.

Submissions by MS SMITH

MS SMITH: Sir, I have very few points to make in addition to those made already by Mr O'Donoghue extensively and explored with the members of the Tribunal. Just one or two general points. This settlement is of course reached with no admission of liability or wrongdoing by Google. My second point is just to stress what has already been said by Mr O'Donoghue, that this settlement and this case, in this particular case, is unusual in that the class is highly concentrated and a substantial majority of the claim settlement value lies with the small number of identifiable developers, who as you will have seen are large and sophisticated entities, able to look after their own interests. And Mr O'Donoghue has explained that Professor Rodger has already been in direct contact I think with all 24 of the top developers by claim value and in our submission, this has the following implications. First, none of those represented parties have objected in principle to the settlement, which in our submission is a good indicator that it fairly reflects the litigation risk in this case. And in this regard, of course, the interests of the large developers are aligned with those of the small developers as to the overall settlement sum.

The second implication is of course, as Mr O'Donoghue has also explained, the nature of the class makes our distribution potentially easier in this case than in other settlements. The class members, the representative parties -- the larger class members who account for the vast majority of the claim value and the settlement value can easily be identified and it is more likely that take-up in our submission will be high; which can be contrasted with other settlements before this Tribunal.

Turning then to the points in the Tribunal's letter of yesterday, insofar as I have any additional points to those made already. Clause 1.3, which is the five top developers' opt-out. We also submit that this should be approved by the Tribunal as a matter of principle. As I have said, the claim is highly concentrated. If one or more of the top five developers opt out, then the value of the claim that is being settled by Google may be reduced quite significantly and of course Google is then left facing a risk that those opting out developers may bring individual claims against Google. So, in those circumstances we say it is fair that the settlement sum should be reduced accordingly at least as regards those small number of particularly significant representative parties.

The third question that was raised in the Tribunal's letter of yesterday, which we understand to be a question relating more not to the -principle of clause 1.3 but the question of the allocation of such reduction, if there is an opt-out. And we say probably in the unlikely event that there this is an opt-out by one of the top five developers, how should the reduction be allocated between the class pot and the stakeholder pot? We submit that the question is best addressed at the second hearing. That it will take place before distribution actually happens because at that stage of course it will be clear to the Tribunal whether there are in fact any opt-outs that impact the settlement sum at all or which have led to the implication of Clause 1.3, and the Tribunal will also know the extent to which there has been take-up of the distributed sums and the extent of any undistributed damages at that stage.

Google's preference is for the monies to go to developers over stakeholders but it is not of course in our interests for the balance to tilt so far that the funders or stakeholders do not support the settlement. So, we say it is a question that should be addressed by the Tribunal in due course on the basis of the facts as they develop.

I will come back to you after the lunchtime adjournment on the definition of claim. I am grateful for the clarification of your concerns.

As for the issues raised by Dream Games in their letter, I think the only point for us to address is Dream Games' submission as to what should happen to the undistributed sums and again, we say that this should be addressed in the way in which it is currently addressed in the Settlement Agreement. This is a question again that should be considered by the Tribunal at the second hearing, when you will know the extent, if any, of the undistributed sums. We say it is likely that they are to be low by value, for all the reasons already rehearsed by Mr O'Donoghue. But we do submit that the best and most appropriate time to consider what should happen to those undistributed sums is at the second hearing. It may be for example, and the point has already been made by the Tribunal, that there are a number of other parties over and above the represented parties, , the developers, who might have a claim upon those undistributed sums. It is expressly envisaged for example under Rule 94.9(g) that the sums may revert to Google in this case and that is not considered unreasonable of itself and would be consistent with the public policy of encouraging settlement. And that is a question that we say can best be considered at that later stage, but it may be that that is a submission that we will wish to make at that stage.

Again, as to whether the undistributed sums should revert to those developers or those class members who have taken up their allocation of the settlement sum, again this is a question we say should be considered at that stage because it may be, for example, we say it is more likely -- it is more likely that it is the smaller developers who do not take up their claims than the larger, given the levels of their shares.

In those circumstances, if monies that on the face of the agreement have been allocated to smaller developers have not been collected, then it may be that the Tribunal takes a view that there is no principled reason why the other developers, effectively the larger developers, should be entitled to those sums and in effect arguably overcompensated beyond their allocated shares, when they have already been rewarded appropriately in line with their share of the settlement pot.

So these are the issues --

JUDGE WOLFFE: You say overcompensated, although the nature of it is --

MS SMITH: It is not a compensation, yes, Sir.

JUDGE WOLFFE: Each one is taking --

MS SMITH: And of course --

JUDGE WOLFFE: Depending on their view of the value of the claim, may be taking a discount for settlement.

MS SMITH: Sir, yes. That point is well taken.

Again, as you have already indicated, that there may be third parties such as charities who also have a case to make, a valid indication to make as to what should happen to the undistributed sums.

We say these are all issues that are most properly addressed or can be most properly addressed and considered by the Tribunal once you have an idea, not just of the extent of take-up but the nature of the take-up of the settlement sum, by whom it has been taken up, which class members have come forward and which have not.

So in those circumstances, we say that the best result would be to go with what is on the face of the settlement, not to make any assumptions or any exceptional circumstances ruling at this stage, as suggested by Dream Games.

I think those are all the points save for the definition of the claim that I wanted to raise with you, Sir. Unless I can assist the tribunal any further on any other points arising.

JUDGE WOLFFE: Thank you very much. There is one point that arose from Mr O'Donoghue's submission, on which I would welcome your submissions. I took him to be encouraging the Tribunal to provide in the Order for an extension of the opt-out from settlement period to the date of the second hearing. I think I took it as an active, in effect, invitation to do that. But Mr O'Donoghue -- correct me if he wasn't intending to put it quite so positively.

It does strike me that, well, I would certainly welcome any submissions you have on behalf of Google -- or if parties would like to discuss that over the lunchtime break and present a focused position after lunch, that would equally be satisfactory.

MS SMITH: Sir, there was also an indication, sorry, I should have picked up, that I think Mr O'Donoghue would be seeking provision in the Order for Google to provide the information on developer email addresses within four weeks, and that that --

JUDGE WOLFFE: You are absolutely right.

MS SMITH: -- could be added to the draft Order and I think we can indicate that we are happy for that to be added to the draft Order.

JUDGE WOLFFE: That is very helpful and, again, if parties can make some adjustment to the draft that would be helpful.

MR HERGA: I just have one point. I think it was mentioned that you think the lesser take-up may be with the small developer. This is probably more for Mr O'Donoghue this one but I wondered if Angeion had given any thought to whether, as you I think made the point these are businesses, they are not individuals -- whether a business is really interested in the fixed lump sum of £200 or whether maybe a £500 might be more attractive? Have they given any thought to that? It does seem to me businesses at £200, a lot of them, the smaller developers, will not want the hassle of proving their claim and would be interested by a fixed sum but are they really bothered in £200? Is that the right -- I understand there is a calculation as to how you got there but practically, is that really going to do the thing? Is it going to encourage take-up by the smaller developers?

MR O'DONOGHUE: Sir, I will take that away over lunch but it is of course an option, it is not particularly a deal on the table. If they want to have an individual assessment --

MR HERGA: But if they cannot be bothered to take up £200 --

MR O'DONOGHUE: Perhaps.

MR HERGA: Depending on where they are, obviously.

MR O'DONOGHUE: Perhaps, perhaps. Of course, in settlements that have been approved by this Tribunal there were sums substantially lower than £200 that were on the table.

MR HERGA: With very small take-up.

MR O'DONOGHUE: Well, indeed. But I think we have the digital records, and we hope we have the contact details and there is a simple attraction to £200 and no questions asked but I will take away your specific question.

But we are talking about someone with £7,500 of revenues, so there are tangible limits to what -- there is a balance to be struck here, obviously.

JUDGE WOLFFE: Perhaps Mr O'Donoghue, we will come back after 2.00 pm. Thank you very much.

(12.56 pm)

(The Luncheon Adjournment)

(2.00 pm)

JUDGE WOLFFE: Ms Smith, we were going to give Ms Houghton for Dream Games an opportunity to address us before we go further. Not least so that you and Mr O'Donoghue can have a chance to respond while Ms Houghton is still with us.

Ms Houghton, the Tribunal is very grateful to you for stepping into the front row to represent Dream Games' position at this point in the hearing.

Submissions by MS HOUGHTON

MS HOUGHTON: Thank you. And I and Dream Games are grateful for the opportunity to make submissions. I apologise in advance that I won't be as eloquent as counsel for the parties in that this is not my normal arena, but I will do my best.

I am also going to be unable to make reference to the hearing bundle, so apologies again for that but hopefully that will not be difficult.

Dream Games raised three issues which are summarised at paragraph 5 of our letter of 10 September. Taking these slightly out of order, the second of these relates to the treatment of intragroup pass-on. I am going to address this quickly first because I think it may be that there is -- that we reached a resolution on that this morning.

My client appreciated the Tribunal's questions on this point earlier and it appeared that Mr O'Donoghue's submissions may have answered the position. But I would be grateful to clarify this for my client, and I hope I do not misrepresent the position now.

I have understood that because Dream Games falls within what is described as the Rodger data, which I understand to be the data that was provided by Google or disclosed by Google to Mr Rodger and his advisers, that because Dream Games falls within that data, that all of the transactions that appear in that data will be acknowledged at their full value and there will be no further consideration of intragroup arrangements that will take place to potentially reduce that. It may be reduced for other reasons, i.e. other class members coming forward that are otherwise unidentified but if that is not to my understanding, we would be grateful for clarification of that in due course.

If this is the case, and intra group pass on will fall away as far as Dream Games is concerned, that would be a sufficient answer on this point for them, if not for other developers. This is important, because a condition of the settlement sought by Google is that the largest developers agree that other entities within their corporate groups will not bring claims in relation to transactions caught by the settlement. Now, obviously if a transaction fell outside the data, then other entities within Dream Games' group would potentially be able to bring claims in relation to that but if you have a transaction that falls technically within the data but there is an argument as to how much of that lies with the UK entity that is a class member and another entity, that is a problem as I understand it, but I may have misunderstood. That would obviously clearly disadvantage affected class members and so that is simply the point that we want some clarification on what the position would be taken. I understand it is put that it would be rather difficult to address those issues, but I think there may have been a little bit of looseness around what pass on will be addressed and not addressed.

I will keep going and maybe we can --

JUDGE WOLFFE: As I understand it, you are making two points but correct me if I am wrong. One is you are reflecting an understanding that Mr O'Donoghue will speak for himself but Mr O'Donoghue's position earlier today, as I picked him up, was that any entity, including Dream Games, which is within the Rodger data, he expects to simply count those as relevant claims, if I can put it that way, without needing to scrutinise, look below the bonnet of that, and again I am seeing nodding --

MS HOUGHTON: We would be very grateful. If that is the position and that clarification has been made, we are very grateful for it and it is clearer than we have had it.

JUDGE WOLFFE: The second point I think you may be making relates to Clause 4.3 and the requirement that any of the 24 largest developers require to give certain warranties and undertakings in relation to -- before they are entitled to any payment.

MS HOUGHTON: Yes.

JUDGE WOLFFE: As I am looking at 4.3 again, I think this basically comes back to the definition of claims, which I will hear Ms Smith on, because if that warranty is tied to the claims that are already in play, and so therefore covered by the transaction data. And assuming your clients are in a position to give that warranty and representation, everything should align. But if the definition of claims is broader, then I can see that there would be an issue. But that is, I think, a different issue from the one that you focused on with Mr O'Donoghue, although it is related to it.

MS HOUGHTON: Yes, I think that is right. We worry that they do intersect somewhat and there is a potential that there is a slightly grey area where a proportion of claims are unable to be claimed in either forum, i.e. it is reduced by way of the class pot but it is counted out for the purpose of any secondary claim, should a related entity of the class member wish to do so.

JUDGE WOLFFE: Okay, thank you.

MS HOUGHTON: Thank you.

Then I think assuming that is as that is, the primary concern that Dream Games has had and that it is trying to convey in the two letters that we sent through on 10 September and this morning, is a concern around the inequality and the risk more than the settlement. On the one hand, as explained in the first issue raised by my client, should the take up not be as asserted by Professor Rodger in his application and, in particular in the view of his solicitor, Mr Gallagher, whom I believe gives an estimate of 50 to 80 percent, at least of the class they anticipate coming through, Professor Rodger has indicated that his intention will be to propose to the Tribunal that this is first applied to any outstanding contractual entitlements on the part of the stakeholders. This estimate may amount to somewhere in the region of 130 to 140 million at that stage. If this is the case and before any consideration of the impact of any opt-outs, in excess of half of the settlement will have been allocated to the stakeholders rather than to the class and it starts to look rather different.

The stakeholders might, in theory, then have received all of their contractual entitlements with no compromise, to reflect the context of a settlement, in circumstances where individual class members, and I obviously speak only for Dream Games at this point, will receive 15 percent, 1-5 percent, of what Mr Rodger estimated to be the claim value.

The backdrop to this, which I will address briefly on my third point, is that the class will bear the risk that the settlement value does not accurately reflect all class members because the data does not identify all those that fall within the class. Now, it may be that this is not an issue and that -- we refer to it as the Google data -- the Rodger data, as I think it was described as this morning, may well identify all class members but there have been a number of acknowledgments both in the written submissions and the oral submissions today that that may not be the case. As acknowledged earlier, the stakeholders will always retain the 100 million of the 260 million regardless of opt out by any large developer which could reduce the class pot. And it is proposed, I believe, that this is not reopened at the second hearing. There is, in effect, a ring-fencing for stakeholders which is not mirrored for class members and that is a stark contrast. Professor Rodger and Google had both indicated this issue could be held over until a further hearing in due course. That is certainly to be preferred than a determination that undistributed amounts be paid out to stakeholders now but it does require class members to reengage in many months' time and it cannot then be considered in the context of the overall settlement value.

It is somewhat unclear to Dream Games why this issue cannot be more clearly put now. I do appreciate the point made earlier by Mr O'Donoghue regarding himself and Professor Rodger's other advisers being some of the stakeholders. I did note that Professor Rodger has sought in other ways to address a concern around objectivity through the recent introduction of the independent KC mechanism, although that is limited to questions of -- sort of intra group questions and whether class members fall within the class.

Also, I note that it is at Professor Rodger's election as to whether or not he takes up that independent KC mechanism. It is not binding and at least as drafted, as was discussed this morning, it is not intended necessarily that the developers see the outcome of that advice, which would I assume be privileged advice to Professor Rodger.

I think there was an acknowledgment that that might be subject to -- that Professor Rodger wouldn't necessarily object to being provided subject to protections for confidentiality. Obviously if what we were talking about was stakeholder entitlements, we are not then talking about different class members' confidentiality, albeit there are other issues.

Then the final issue is the other side of this inequality of risk, which is that the settlement value has been assessed and argued to be reasonable relative to an assessment of the total quantum and made by experts for Professor Rodger and Google, to which my client does not have access. These estimates rely on data provided by Google relating to developers holding, as I understand it, UK-based accounts into which payments are made by Google. It may be that this is an accurate representation of the class membership and individual claim transaction values -- excuse me -- however, it is acknowledged in the papers filed by Professor Rodger that there may be other developers that fall within the class definition who do not appear in the Google data or appear in an incomplete way. The Distribution Plan discusses the evidence which may be acceptable in proving entitlement in those circumstances. However, Dream Games has a concern that should other developers come forward, claiming that the harm they have suffered is in the UK because they are UK domiciled, notwithstanding the location of the merchant accounts, there is limited guidance as to the approach that will be taken. I believe Mr O'Donoghue described the process this morning as an inclusive approach. While this may be of comfort to developers that have limited data or who do not appear in the Google transaction data, it is a concern to Dream Games where these unquantified additional claims may have the impact of a reduction of its entitlement. Dream Games does not wish to see its own or any other developers' claims reduced further through a lack of recognition. Dream Games and other developers are in the dark on the materiality of this risk but note, for example, it is not uncommon for regulatory reasons for developers to operate through entities in jurisdictions such as Malta where in reality they may be headquartered in larger jurisdictions such as the UK or US.

Dream Games is acutely aware that the Tribunal will be looking for finality in the settlement and we are not raising it lightly. However, it does consider this needs to be raised. On this point, we note that obviously finality is desirable here. The avoidance of trial, Dream Games is not casual as to the desirability of this settlement. The Tribunal asked earlier whether the developers might request an extension of the opt-out date until a point after their claim entitlement is known. I think possibly after the second hearing. Dream Games had previously observed that a further opt-out right was an important protection. Dream Games agrees that the ability to opt out with certainty as to claim entitlement and the full picture as to payments between the class and other stakeholders would be preferable and at this juncture, I would respectfully invite the Tribunal to include this within any settlement approved order, i.e. --

JUDGE WOLFFE: Well, the parties, I think, may have been at one on the issue of deferral of the opt-out period, and I will hear from them. My immediate reaction to the idea of deferring until after the second hearing is the difficulty that could arise if the Tribunal at a second hearing is authorising payments to be made. Which is, as I understand it, what would be envisaged at the second hearing and a developer -- let's say it is a significant developer, then chooses to opt out. How one then as it were unwinds what the Tribunal will then have done, but I will hear what the parties have to say.

MS HOUGHTON: Could I ask one question, whether there is something halfway between, which is a date by which the parties would be required to lay out their positions again in relation to stakeholder entitlements? So, if there was an opt-out and this occurred before that final hearing, so that it could all be addressed in the hearing, but the parties, Professor Rodger and Google, had laid out their positions -- I mean obviously they would I assume have to in advance in any event.

JUDGE WOLFFE: Yes, it may be something along those lines can be identified but I will hear the parties. Thank you very much, Ms Houghton.

Mr O'Donoghue, anything you wish to say in response to these points?

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: To some extent you anticipated them but there may be additional points you wish to make.

Submissions in reply by MR O'DONOGHUE

MR O'DONOGHUE: Yes. Can I start with the Rodger transaction data. Can we just quickly turn to the A bundle at 127. Paragraph 16 of Angeion.

Sir, if you look at (a), (b) and (c), it has been clear since this Distribution Plan was published that if somebody was within the Rodger transaction data, that those transactions would be accepted.

And then under (c), someone who cannot be matched with the Rodger transaction data would have to establish their entitlement. So it has always been clear, if you are within the Rodger transaction data, then those transactions, and those revenues, would count towards entitlement.

So what I said this morning was not any great revelation of *volte face*. It has always been clear and anybody reading this Distribution Plan, with respect, couldn't possibly form a contrary view.

I have also said, again this is clear from (c), that if someone is not in the data set we were taking forward to trial, they will have to prove in the ordinary way that they meet the definition of being a class member, within the meaning of paragraphs 17 and 19 of the amended claim.

I have been very clear, it is entirely fair to say that on that assessment it is not for Professor Rodger today to prescribe or proscribe what should be provided by way of proof. For one thing the developers are of all shapes and sizes. Another thing of course is they (Inaudible) information. Professor Rodger is not a developer. It should be within the sphere of the developer to decide what is the best information, reasonably available within their sphere, to evidence class membership.

So that bifurcated approach to entitlements has been clear from Day 1. I don't understand frankly why Dream Games has wasted everybody's time dealing with this particular point. It is clear and it was always clear.

Then, Sir, I am not going to go back down the rabbit hole of undistributed damages. It is a very straightforward position. I mean in a sense Ms Houghton answered her own question. She used the word "proposal". Professor Rodger is proposing, not more, he is not deciding -- that in the second hearing the issues of stakeholder entitlement, 1, and pro rata class member top up, 2, would be decided by the Tribunal at that stage. And the only reason, of course, why it would be quite improper for me today to pre-empt any of that is there are a large number of stakeholders, none of whom are not certainly represented here today. You have two insurers, a funder, a law firm and a number of barristers, including barristers not in front of the Tribunal today. It would be quite wrong for me today to advocate for the position of any of them, including myself, and that is why we have suggested that the fairest solution is a proposal, not more, not less, that question gets revisited at a second hearing.

With respect, the idea of grappling with that today in the abstract, rather than waiting for concrete actual information outturn, in my respectful submission has nothing to commend it. It is a recipe for wild goose chases, tilting at windmills and so on. We will be much better informed in the weeks and months to come as to what is the actual position and one possible outcome is there is nothing left to argue over.

The other possible outcome is there is a meaningful sum left over and at that stage people can make submissions and commercial self interest, charity's case, in other self interests, to put forward their entitlements and top ups. So no one is being shut out today. No one is seeking a prioritised payment today.

Now, I should of course have made clear, to make sure there is nothing lost in translation between Mr Bacon and myself. No stakeholder has agreed to what is called a hair cut. What they have suggested is a two-phase process whereby the extent of any stakeholder entitlement under contract or otherwise is subject to the second hearing and the submissions made at that second hearing. In my respectful submission, that is, given the contractual position, a perfectly fair and indeed modest position to take at this stage.

A couple of final points. Ms Houghton is anxious to talk up the claimed value, 15 percent and so on, but with respect that is a completely meaningless comparator. As Ms Houghton will well know from cases like *Le Patourel*, there are scenarios in which these cases go disastrously wrong and the class ends up with nothing. In my respectful submission, the 15 percent is not a figure that should be credibly put forward as a stick to beat Professor Rodger with today.

Then, sir, on opt-outs. What I would suggest respectfully is the following. The current opt-out deadline appears in each and every settlement proposal, because the Tribunal and Professor Rodger and other Class Representatives were entitled to a degree of finality in respect of opt-out dates. So, we would suggest we keep that in the first instance. If an individual developer wants to apply to extend the deadline in their case, they are entitled to do so. I am happy to go on the record, Professor Rodger will not object to such an extension, it is obviously a matter for the Tribunal, and that has the benefit of providing finality for the most part and a degree of flexibility from what I apprehend will be a non-existent or at least a very small rump of developers who are apparently considering opt out.

So, on the timing, we respectfully fully endorse what you said, you cannot have the whole class being held hostage by a developer who is humming and hawing as to opt out. So, the long stop for the opt-out date should be the second hearing date and not later.

Then, Sir, finally on the point about, well, other people who might come forward and who knows, there might at some point be a risk of dilution, again there is a grave risk of tilting at windmills today and if that issue eventuates, the Tribunal will have full visibility and perfect hindsight at the second hearing and it has complete flexibility in terms of how that conundrum, which candidly is in some ways a happy conundrum from the perspective of the effectiveness of the system, will eventuate. Trying to crystal ball gaze on all permutations today in my respectful submission is a fool's errand.

Then finally, Sir, on the issue of related entities. We wholeheartedly agree it is wrapped up with the question of the claim period which Ms Smith will come back on.

Before I wrap up, can I just come back on Mr Herga's question on the £200.

JUDGE WOLFFE: Yes, before you do that, can I just pick up your suggestion that what we do with the opt out period is leave it at three months but allow for the potential for developers to apply for that to be extended. I am just looking at the rule, which states that the settlement binds all class members except a person who opts out by notifying the Class Representative in a manner and by a time specified in the collective settlement approval order.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: I think what would be necessary would be for our order expressly to reserve, probably expressly rather than simply leaving it on a liberty to apply. Expressly to reserve.

MR O'DONOGHUE: That makes perfect sense.

JUDGE WOLFFE: That is helpful. Thank you.

MR O'DONOGHUE: Sir, on the £200, if we could quickly go to the Fideres Supplemental tab 7/138. There is a confidential table, Mr Herga, in highlighted text. Supplemental bundle A, Tab 7, page 138.

Sir, if you see the column "Average Settlement Sum", and then the last five rows is a figure starting with £200. Do you see that, Sir?

So, if one looks at the entitlements based on counterfactual commissions, for virtually all that cohort, £200 would exceed, in many cases pretty substantially exceed, the entitlements they might have if they elect to go to the individual round. Sir, you make a perfectly fair point, which is does some guy in his garage, is he going to take the bait of £200? Well, maybe, maybe not. I mean all we can do is with Google's help contact these people directly, explain to them that, in fact, £200 for nearly all of them is a generous sum, and if they cock a snook at that free money, there are limits to human endeavours in the context of opt out collective action. That is all we can do. I perfectly take your point that some of these people may not get out of bed for £200 but there is not a lot I can do about that. It is a slightly glib answer. An attractive proposal has been made. They may or may not like it.

JUDGE WOLFFE: Ms Smith, anything you would like to say specifically on the issues that Ms Houghton has raised?

MS SMITH: No, I have nothing further to add on those three points. The agency intra group arrangements, the undistributed damages and the opt out. We are happy for it to be recorded and reflected in the order that if an individual developer wants to extend the deadline for opt out, then they have freedom to do that, and apply to the Tribunal for that.

JUDGE WOLFFE: And I suspect given the discussion I had with Ms Houghton about Clause 4.3 she has an interest, or may have an interest in the claims definition point too, so perhaps if you could address that and see where we go from there.

MS SMITH: Yes, if I can I will do that. We have, I hope, we will --

JUDGE WOLFFE: It is perhaps focused by thinking about 4.3 and the undertaking that is anticipated that related parties will not pursue claims and the potential that that could be binding people, entities in other jurisdictions not to pursue claims that they may be entitled to.

MS SMITH: Yes. Well, we start with the correct reservation on the part of the Tribunal that the Tribunal can only settle the claims that are in front of it and we obviously are fully aware of that and fully accept that.

JUDGE WOLFFE: I was very struck that in the Qualcomm case, the redefinition of claims, after the Tribunal raised issues, specifically tied the definition to claims made in the proceedings and also, and one can see why this would be the case, other claims which could have been pursued within the terms of the proceedings order, which looked to me like quite a sort of neat way of making sure that we didn't unwittingly perhaps purport to settle something else.

MS SMITH: Yes. There were three points that you raised, Sir, before lunch. The first -- well, the first point you raised about whether the settlement here is of claims as alleged in the proceedings, as Mr O'Donoghue indicated, our intention has always been that we settle simply the claims arising in these proceedings and that is why we have the reference in the claim definition to the claims that the Class Representative or any representative person may have against the defendants arising from the facts, matters or conduct alleged in the proceedings or otherwise arising in relation to the issues in those proceedings, including the policies, et cetera, that are the subject of the proceedings.

So, we tie the definition of claims in our submission back to these proceedings. Clearly, in those three ways.

You raised first --

JUDGE WOLFFE: It might depend but I can see this would be a matter of interpretation, what latitude is applied to "arising from and in relation to".

MS SMITH: Yes. The three points that you raised as to clarifying or tightening this was first of all to limit the claims to claims arising under competition or antitrust law. So, we take that on board and we would be happy to insert the words "In relation to any competition or antitrust law", after basically the words, it would be "claims means all and any claims, causes of action, counter claims, rights, demands et cetera, interest and remedies in relation to any competition or antitrust law". So, we insert those words to make it clear that it is limited to claims that fall within the jurisdiction of this Tribunal, and the jurisdiction of this Tribunal being limited to competition law.

JUDGE WOLFFE: And indeed limited to UK competition law.

MS SMITH: Yes. But the next question you raised was about time limits and you drew attention to the fact that in Qualcomm it was specifically set out with dates at the start and finish of time limits about claims as defined in that case.

As I understand it, in Qualcomm the claims were time limited on the face of -- I don't know, I can't go that far but what our proposal is in respect of that second point is to add words to the end of the definition of claims, the following words after "that are the subject of the proceedings", "arising at any time during the period covered by the proceedings."

I will explain why I don't give you an explicit end date in a moment. But the words are "arising at any time during the period covered by the proceedings", and the reason why I don't --

JUDGE WOLFFE: Sorry, that is to appear right at the end?

MS SMITH: Right at the very end of the definition, yes.

Why I haven't given you a date, a specific date, is because the claims that we are facing – that we were facing from Professor Rodger, are not limited to a specific date. So if I take the end date, if I take you in that regard to bundle B, Tab 2, which is Professor Rodger's claim form, we have page 635 and at the bottom of page 635 is the definition clause at paragraph 19 and we have the definition at the bottom of page 635 of the relevant period. The relevant period is defined as the period starting six years before the date of the claim form and ending on 31 July 2026. But in the brackets, you will see that the Class Representative seeks to combine claims which accrued during the time relevant period but each of those underlying claims will be in respect of all corresponding losses whenever suffered, including after the end of the relevant period.

JUDGE WOLFFE: I wondered if that was going to be problematic --

MR O'DONOGHUE: Yes. So in light of that, we have proposed the wording I have just set out.

JUDGE WOLFFE: So the claim has to arise within the relevant period but it is no objection that it includes losses that may have been --

MS SMITH: That may come after the end of the relevant period.

JUDGE WOLFFE: I mean that would make sense, so yes. Thank you.

MS SMITH: The third point that you raised was whether the inclusion of the words in the definition of claims, "whether in this jurisdiction or any other", we have included that for the following reasons. Effectively, what we are seeking to do by defining the claims in this way is to exclude claims that arise from the same matters, in these proceedings, that arise from these proceedings but are brought in different jurisdictions. And so, for example, in the present claim, Professor Rodger claims for, as you I think have indicated, Sir, are fully aware. This is a claim by UK developers for sales through store fronts not just in the UK but also outside the UK. So, one could see the situation where a developer seeks to bring a claim outside this jurisdiction in another jurisdiction, another country, but in relation to exactly the same transactions which appear in the Rodger transaction data and as regards which this claim has already been settled.

So, it is in order to avoid that sort of situation that we are not seeking to settle any claims other than those currently before the Tribunal. But what we are seeking to do is to ensure that a developer cannot go outside this jurisdiction and seek to basically make the same claims again in a different jurisdiction as regards the same transactions.

JUDGE WOLFFE: Just to try to put some content on that. You, let's say there were proceedings under the antitrust law of other jurisdiction and one of the UK developers in this class had made transactions through a store front in that jurisdiction, one might potentially contemplate in collective proceedings in that jurisdiction where the class definition related to the, let's say, transaction through store fronts in that jurisdiction and the very same transactions that have been part of these claims are also part of that collective proceeding.

MS SMITH: That is exactly it, yes.

JUDGE WOLFFE: That is the issue you are trying to address.

MS SMITH: Yes.

JUDGE WOLFFE: Is your submission that even though those would be claims being brought under the competition laws of another jurisdiction, that nevertheless we can -- the compromise and settlement of these claims in these proceedings, that those would be barred by virtue of the compromise, notwithstanding that they are brought under as it were a different regime in another jurisdiction. You say that goes beyond the simple point that Google would be entitled to say your loss has already been compensated and therefore we can set off the loss. You would say it goes to the extinctive effect of the compromise on the underlying rights.

MS SMITH: Yes. And in order to provide some reassurance to the Tribunal, my second point is that I can show you if necessary that the words "in this jurisdiction or other" have appeared in the settlements in each of Gutmann, Qualcomm and McLaren. The same words are there.

JUDGE WOLFFE: I noticed it in Qualcomm.

MS SMITH: I am assuming -- I don't know, I am not going to assume anything. But they are there in those other settlements.

MR HERGA: Yes. And Gutmann, Qualcomm and McLaren.

MR KELLY: I can hand up copies of those documents if it would assist.

JUDGE WOLFFE: They may be in the bundle.

MS SMITH: I am not sure where they are. They may be but I have copies.

JUDGE WOLFFE: As far as you can tell the point has not been explicitly addressed.
MS SMITH: Not as far as I am aware, no.
JUDGE WOLFFE: But one can assume that the tribunals in those cases --
MS SMITH: We don't say that the -- what my submission is, is this wording does not mean that you are going outside the bounds of your ability to settle these claims in front of you.
JUDGE WOLFFE: I suppose ultimately, if kind of hypothetical, what I postulated were to arise, it would be a matter for the relevant court or Tribunal in the other jurisdiction to determine what if any effect it gave to the order under their own competition regime.
MS SMITH: Yes.
JUDGE WOLFFE: Thank you.
Thank you very much.
Ms Houghton, I think before I ask Mr O'Donoghue to stand up again, I should ask you is there anything you have heard from either party that calls for a response, and you can take it that we have got the issues that you want to us consider well before us. In a sense, the points have been joined by Mr O'Donoghue's response, and you have heard what Ms Smith has to say on the question of claims definition. Is there anything additional that you haven't already said that you would like to say?
MS HOUGHTON: No, I don't think so. I think the issue that we had is really quite a specific one on the intra group or agency pass on point and I think we had a concern that it falls in a slightly grey area between the particular transactions that may fall, actually genuinely, in another jurisdiction and transactions that may fall because they are in the Rodger data in the UK. But there may be some form of deduction made at some point.
I am not entirely sure that it was put quite as starkly as I put it when I started my submissions, by Mr O'Donoghue, but I think we are at a point where it is not going to

cause a reduction, so I think on this particular point we are fine.

JUDGE WOLFFE: Thank you very much, Ms Houghton.

MS HOUGHTON: Thank you.

JUDGE WOLFFE: Mr O'Donoghue.

MR O'DONOGHUE: The claims definition?

JUDGE WOLFFE: Yes.

MR O'DONOGHUE: Obviously from the Class Representative's perspective, all else equal, allowing good things, we endorse the inclusion of the claims limited to UK competition law.

The only point I wanted to raise, Sir, as you picked up, Sir, in Qualcomm there was both a start date and an end date in the sense of there being a calendar date. The point Ms Smith makes is well, there may be existing losses that are enduring beyond a cut-off point after 31 July and that is my, I accept, apostille.

But in my position, one, that is looking at the wrong end of the telescope. The correct way in my submission is the Qualcomm approach, which is that you have a start and end date and you carve out of that any existing losses that endure beyond the cut-off date. The concern Professor Rodger has is that suppose Google next month comes up with a brand new commission scheme that is utterly disconnected from what we have been litigating about today, that is monstrously anti-competitive and that does not arise out of the facts of this claim and we don't see why class members in relation to a future transaction that is temporally utterly disconnected from the start point and end point should be bound by a definition of claims to that extent. I think we get to the same end point but importantly by a different route.

JUDGE WOLFFE: Is that concern not dealt with which -- arising from the facts, matters or conduct alleged in the proceedings?

MR O'DONOGHUE: There is an ambiguity and we would suggest we grasp the nettle now and make it as clear as is humanly possible.

JUDGE WOLFFE: Yes. Do you have a suggested wording? Have you had an opportunity discuss this with Ms Smith?

MR O'DONOGHUE: I have not had a chance to do the drafting.

JUDGE WOLFFE: Would it be helpful if we rose for a brief period and allowed you to have a discussion --

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: -- to see whether you can find a form of words which on the one hand accommodates -- I think what must be analytically correct, that if you have a breach of statutory duty today, there could be losses that flow beyond although given the nature of the claim it seems relatively unlikely and limited.

And equally, what certainly strikes me as a legitimate point, namely the one that you have raised, is what we would not want to do is unwittingly, particularly in the context of the warranty in 4.3 and the waiver in 2.4, preclude a represented person from raising any claim relating to statutory duty and the future, which is not one of the issues in these proceedings.

MR O'DONOGHUE: In a nutshell the start and end date and then a bracket which would care out --

JUDGE WOLFFE: I think -- I don't know whether that comment is enough of a steer from the Tribunal to give the parties a sense of what we think parties should be trying to achieve on that and I think the right way to approach it would be to give the parties an opportunity to do some drafting.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: I am conscious this is an agreement already signed between the parties, and I am assuming there are people here or available who can authorise the provision.

MR O'DONOGHUE: One would hope so. This has happened at every --

JUDGE WOLFFE: Ms Houghton, I am conscious you have to leave and we are grateful for your assistance.

(2.48 pm)

(A short adjournment)

(3.30 pm)

JUDGE WOLFFE: Ms Smith.

MS SMITH: Apologies for the delay and thank you for the opportunity to take further instructions.

JUDGE WOLFFE: Yes, not at all. I should say that the Tribunal asked parties to reconvene because there are two other matters I am afraid that we are going to want to raise with Mr O'Donoghue, and we anticipate that it may well be that we will -- he may well have an answer immediately. He may want to take it away and think about it but in any event that we will come back tomorrow morning in order, if we are able to, to give you an answer on the applications. So, if you needed more time on the claims issue, then, you know, that could be dealt with overnight. I don't want people to feel that they are rushed into something, if it would be better for that to be taken at slightly more leisure.

MS SMITH: It might assist, I don't know if the points you want to raise with Mr O'Donoghue are related in any way --

JUDGE WOLFFE: No, they are to do with the distribution scheme.

MS SMITH: Then in that case we are happy to make a proposal on the definition of claims to ensure that the claims are limited to those covered by the proceedings. To add additional words to those previously proposed at the end of the definition of claims, we would add "Arising at any time during the period covered by the proceedings up to the date of the CSAO". So that takes us up to the date at which you make the order settling these proceedings.

JUDGE WOLFFE: Yes. Is that an approach which is agreed on both sides?

MS SMITH: I am getting nods from those behind me.

MR O'DONOGHUE: Yes. My concern is that there is an existing but straddling claim on the one hand and a purely future claim on the other, and I think this form of words is a guillotine on the former.

JUDGE WOLFFE: That is very helpful. If you could communicate that form of words to the Tribunal so that we can look at it overnight, as I say bearing in mind we anticipate coming back in the morning.

Thank you very much indeed.

Mr O'Donoghue, I am afraid there are two points that we would like to pursue further with you, if we may.

The first is the £200, which I think is presented as an automatic payment for those with revenues of under £7,500.

MR HOLMES: An option.

JUDGE WOLFFE: It is an option. They can choose to have their claims assessed.

Does the £200 remain a floor to which -- you know, if a developer chooses to have their claim assessed on an individual basis, do they lose the £200 or does the £200 remain? In other words, is it a minimum?

MR O'DONOGHUE: I think it is a floor.

JUDGE WOLFFE: It is a floor. So they have the £200 and if they wish to try to persuade or show that they are entitled to more, then they can do that?

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: That is helpful.

Then, related point on the £200, if you have a developer who is -- is the £200 a floor that extends above the £7,500? The scenario that has occurred to the Tribunal is, looking to the gradient, that you could have a developer with revenues of say £7,600, who wouldn't be entitled to the £200 but who might on an individual assessment end up being able to show a loss of something less than £200.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: That would seem a particularly rough form of rough and ready justice, that someone with a larger revenue should end up with a lower amount simply because they are not entitled to the 200 minimum.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: I don't know whether you have instructions on how that should be approached.

MR O'DONOGHUE: So we would be content for it to be a hard floor in all cases.

JUDGE WOLFFE: That is very helpful.

The other matter on which we would welcome further assistance, I am afraid, is to return to the issue of the single counterfactual.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: When we discussed it earlier, you pointed us to *Kent v Apple* as an example where the Tribunal has applied a single counterfactual. Of course, that is in the context of assessing the aggregate damages of collective proceedings, rather than just looking at the distribution.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: The issue which is concerning the Tribunal is whether the application of a single counterfactual has the potential to distort when one is looking at claims on an individual basis -- and it may be better if I let Mr Kelly pursue the point?

MR KELLY: It may be that this boils down to nothing but, looking at the published sort of commissions of 13 percent and 15 percent, and the 15 percent applying to developers with revenues of $1 million or less. If you could just turn to, if you could, core bundle SBA/138, which is the illustrative distribution of damages (Inaudible) the developers by revenue bands.

MR O'DONOGHUE: 138?

MR KELLY: 138.

So, my understanding is that that is sort of done on an average basis and doesn't take account of the actual commissions paid by the developers; is that right?

MR O'DONOGHUE: Sir, this is the extrapolation -- so if you look at the heading, it says "Extrapolated developer revenue ranges".

MR KELLY: But it also has average settlement sums and average claims values and those claim values have been calculated using an average counterfactual.

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: So just to ask the question, does that take account of the actual commission?

MR O'DONOGHUE: Yes.

MR KELLY: It does.

MR O'DONOGHUE: Yes.

That was the point I was trying but failed to make earlier, which is whether you were above or below the blended rate, your actual transactions, subject to a small bit of extrapolation in the short period between March and July, would be reflected in any entitlement. If you are, in fact, paid in the actual less than the blended rate, you don't get an entitlement; if, in fact, you are paid above the blended rate, then the delta would be the principal entitlement.

That is why I said whether you were above or below, it washes out in the end, because you will only have an entitlement on the basis of the actual commission you paid on your actual transactions; if that makes sense?

MR KELLY: I understand that. We were worried really about following the distribution process and the calculation based on actual commissions paid, the distribution proposals that came back to us showed actually there were a band of developers if you like in that middle ground that didn't get very much because their actual effective commission rates were significantly lower than the assumed counterfactual and therefore their level of damages proportionately was significantly lower than everyone else. So that was the concern.

MR O'DONOGHUE: That would be a function of the fact that they suffered less loss than someone who was (Inaudible)~--

MR KELLY: Yes.

MR O'DONOGHUE: It is clear and logical.

MR KELLY: Yes, but I suppose the concern was there was going to be this band of developers within a certain revenue set of criteria that really suffered because of this averaging out.

MR O'DONOGHUE: Well, they would only suffer in the sense that their average commission was below the blended rate, and to that extent it is a function of the fact they were adversely affected more than someone who was above the blended rate. I accept, Sir, of course, the blended commission rate is an average of the output of different methodologies to come up with the counterfactual commission. This essentially adds up to three methodologies that applies (Inaudible) above the blended rate. There is no intrinsic bias in that blended rate that favours or disfavours a smaller or larger developer as such. It is simply the simple average of three figures.

JUDGE WOLFFE: I suppose is it or is it not the case that the larger developers are paying a higher commission rate?

MR O'DONOGHUE: All that is equal, yes, was that there is the important point I mentioned earlier, which is the reduced commission rate kicks in at a later stage during the claim period. So, I think there will be an earlier period where there is parity;

there will be a later period where there is a bifurcation above a million and below, but, again, if in fact in the factual the developer is paying a lower commission, then on the counterfactual commission rate, it is below the average, then they are also entitled to less by way of compensation.

So, in other words, the blended rate for better or for worse is the competitive rate in the market for transactions of that kind.

JUDGE WOLFFE: Your position is that in a competitive market, there would be a single rate applied to all developers, regardless of revenue; is that --

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: That is the assumption? It is an assumption that has been made?

MR O'DONOGHUE: It is more than that: it is our pleaded case on which we were going to trial. So we put our money where our mouth is on that and, again, one could come up with N number of counterfactual commissions, and I accept that Kent hasn't yet got to the stage of distribution, and I accept that it was an aggregate figure, but the clear sentiment of the Tribunal is that there has to be a degree of simplicity or contiguity within a particular type of commission, because when one is in the realms of thousands, tens of thousands of people, there are sort of limits to what extent one can reverse engineer bespoke counterfactual commissions. We do think that this should wash out in a way that isn't a priori favouring or disfavouring of any particular category of development.

I accept, Sir, of course one could, say, have tiers of counterfactual commissions and one could come up with something much more complicated, but the single blended rate we put forward wasn't really for the sake of a quiet life. We didn't have any clear economic evidence that there was an objective way to determine a series of counterfactual commissions by some other method. So it was both a simplifying assumption and the absence of any evidence, candidly, that there would be a counterfactual in tiers of material difference.

MR KELLY: I suppose one will see the impact of that when we get the results of the process of the distribution --

MR O'DONOGHUE: Yes.

MR KELLY: -- and the different revenue tiers.

MR O'DONOGHUE: Yes.

MR KELLY: As you say, these numbers already take account of the different commission rates.

MR O'DONOGHUE: Yes.

MR KELLY: It is not as bad as it might -- as I was worried that it might be.

MR O'DONOGHUE: Yes, or if thousands of people are happy with 200 quid, then to some extent that resolves itself. So, there are different possibilities.

JUDGE WOLFFE: Yes, I think the concern that was troubling us was whether there was a band which is not the largest claim developers, and other ones that, you know, qualify for minimum payment --

MR O'DONOGHUE: Yes.

JUDGE WOLFFE: -- who maybe have quite significant revenues but, by virtue of the application of the hypothetical commission rate to their actual commission rate, end up getting nothing or next to nothing, which might in the context of the kind of exercise that you enjoined on us at the start of your submission, per Merricks, might seem a slightly surprising outcome if there were, and it may be that you have done, you know, and those around you, have done the exercise of assessment and it may be that it is enough to point us to this table as an answer, or your expected answer, to that possibility.

MR O'DONOGHUE: Yes.

So I mean I get the pragmatic point and in an ideal world, it would be like the Saturday night quiz show -- there should be one for everyone in the audience -- but the blended rate is the only rate we were going to trial on. It is, as best as we can determine, the correct counterfactual competitive commission level. It is a level that is, as far as we have apprehended, there is no good basis for disaggregating into different tiers and, to that extent, a developer who for whatever reason ends up below the blended rate, we would say that they have paid a fair bit, paid more above the blended rate, or they have been a delta, is an overcharge. So in the rather technocratic language of competition, there has been a fair commission paid by the developer, when in fact there is not a delta, and the person who has been short changed has been overcharged, but I can see there is maybe sort of now a bit of a rum deal to some of this but there was no intrinsic or bias of principle in the way that that is calculated. It is entirely faithful to what would happen at trial based on our economic evidence, that this is a competitive rate and you are either above or below it, and if you are above it, you will be in the money and if you are below it, then you may feel you have been overcharged but in fact you have been charged either a competitive rate or, on this hypothesis, actually less than a competitive rate.

JUDGE WOLFFE: And you would say then that -- because one could postulate a much simpler distribution which simply applied in distribution pro rata to revenue -- but you would say that that departs too far from the compensatory principle on the basis that it is not taking account of the (Inaudible) counterfactual commission and the real commission --

MR O'DONOGHUE: Yes, on some level, if in fact there is an identifiable call made appreciably above the effective rate, that has to be reflected. It may not be pounds, shillings and pence, for example. We (Inaudible) pass on interest and volume effects. Well, there has to be some rough approximation with this level of transaction value and this delta between the blended rate and the actual rate, there is an entitlement.

I mean one could theoretically, I suppose, take the Merricks approach: well, it is a flat rate for everyone and we are not going to bother with any other complications. That, it seems to me, would be grossly unfair but that is a type of settlement which has at least, admittedly in the consumer context, been approved.

I am certainly not saying it is the least worst method you could envisage; I am saying it is very much within the realms of reasonable and proportionate ways of approaching this issue and, again, with more than 10,000 people, a degree of simplification is required and, as I said, it is faithful to the way we approached this at trial and, to that extent, it was a validation in that it is not a new method we have dreamt up for the purposes of settlement distribution. It is where we started, where we ended, on the journey to trial.

Indeed to Mr Kelly's point, if it is the case that a larger developer, in fact for whatever reason, made some sweetheart deal that ended up paying less than the blended rate, that would also wash out in terms of their transaction data. That is why I say it all washes out one way or another. I mean the categorisation into small, medium and large is not the point. The point is you have a revenue, a blended commission, and you can decide whether you are above or below the blended rate.

So, I think it is done consistently. There is certainly no a priori bias or unprincipled approach hardwired into the calculation.

JUDGE WOLFFE: Is there anything you wish to say in relation to that?

MS SMITH: No. Thank you, Sir.

JUDGE WOLFFE: Thank you.

Mr O'Donoghue, you will be pleased to hear we have no further questions for you, but we are going to rise now and I am afraid ask the parties to come back in the morning and we will give you an answer in the morning.

We are very grateful to all counsel, including Mr Bacon, and indeed Ms Houghton, who stepped in at short notice, and indeed to all those who are sitting behind you and who have no doubt contributed to the --

MR O'DONOGHUE: Could Mr Bacon be excused?

MR BACON: If you wouldn't mind -- no discourtesy is intended. It is just --

JUDGE WOLFFE: Absolutely.

MR O'DONOGHUE: Shall we say 10.30?

JUDGE WOLFFE: Yes, 10.30. Yes.

(3.49 pm)

(The hearing adjourned until 10.30 am the following day)

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?