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5 **IN THE COMPETITION** Case No. : 1378/5/7/20
6 **APPEAL TRIBUNAL**
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9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP
12 (Remote Hearing)
13 Monday 6 December 2021
14
15 Before:
16 The Honourable Mr Justice Marcus Smith
17 Andrew Young QC
18 Dr Catherine Bell CB
19 (Sitting as a Tribunal in England and Wales)
20
21
22 BETWEEN:
23
24 Epic Games, Inc. and Others
25 **Applicant**
26 v
27
28 Alphabet Inc., Google LLC and Others
29 **Respondent**
30 _________
31
32
33
34 **A P P E A R AN C E S**
35
36 Mark Brealey QC and Daisy Mackersie (On behalf of the claimants, Epic Games)
37 Josh Holmes QC and Jack Williams (On behalf of the defendants, Google)
38 Ben Lask (On behalf of the CMA)
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1 **Monday, 6 December 2021**

2 **Case Management Hearing**

3 **(10.30 am)**

4 THE CHAIRMAN: Mr Brealey, good morning. Before you begin, just a couple of
5 housekeeping matters. These proceedings are being live streamed. I think at
6 the moment, the persons listening in can only get the visual and not the audio,
7 so this warning is not a particularly helpful one but these proceedings are in
8 open court and whilst everyone is welcome to watch and listen in, a recording
9 of the live stream is strictly prohibited and that applies not just to recording but
10 transmission and photographing.

11 More helpfully, Mr Brealey, we are very grateful for your respective written
12 submissions, which we have read and we have also seen the orders and the
13 successive iterations of the orders and perhaps we can hand over to you to
14 tell us exactly where the parties are at. We have a couple of queries about
15 process but I think we will leave those until you have explained to us where
16 the parties are at.

17 MR BREALEY: I am obliged, sir.

18 Yes, the parties have really tried to agree everything. I think there is only one point
19 of disagreement, and that relates to the confidential order, and the list of
20 people who are named in annex A. I don't know whether you have the draft
21 order? I think it was sent by RPC over the weekend. The parties have been
22 liaising over the weekend.

23 THE CHAIRMAN: Yes, we do have that, thank you.

24 MR BREALEY: So there are three points but two are essentially agreed and if
25 I could go to annex A, which is I think, at page 14.

26 THE CHAIRMAN: Yes.

1 MR BREALEY: Part A, "Relevant UK advisers", one sees there in red the Google
2 proposals, which I am going to persuade the tribunal should not be there.
3 I don't know whether the tribunal has just had a chance to look at the order.
4 I mean --
5 THE CHAIRMAN: We have gone through very quickly. Just so that we are clear,
6 the Google insertions in red are simply identifying in the abstract, in-house
7 counsel, experts and officers, directors and employees, without focusing on
8 specific names.
9 MR HOLMES: Sir, they are categories which can be filled in by a party, so it's the
10 usual way of list of named individuals who are within the scope of the
11 confidentiality ring.
12 MR BREALEY: So maybe we should quickly have a look at the confidentiality order.
13 We have the definitions on page 2 and 3, and one sees "Confidential material",
14 which are designated as confidential under the US proceedings, or likely to be
15 accorded confidential treatment pursuant to rule 101 or rule 102, for example,
16 collateral use.
17 Then over the page on page 3, we have the highly confidential material. Again,
18 reference to the SAPO, the US protective order. Then, if we go to
19 paragraph 4, basically the purpose of paragraph 4 is that the parties can
20 discuss and share the information -- that is the key purpose of this order, as
21 you have probably picked up.
22 MR HOLMES: I hesitate to interrupt. That paragraph applies only to disclosure first
23 produced in these proceedings, so it doesn't cover collateral use of material
24 coming from the US discovery.
25 MR BREALEY: That's right, as it specifically says.
26 Then if one goes to 8 and 9, this is the provision relating to highly confidential

1 material and one sees there, for example, 9(b), "the designated in-house
2 counsel named in part A, who have signed an undertaking in accordance with
3 part B", and then (c):
4 "The experts of the receiving party to whom disclosure is reasonably necessary, who
5 have signed an undertaking in accordance with part B of annex A or are
6 bound by the US protective orders ..."
7 Then we come to -- I am taking this as quickly as I can. There are some other points
8 but then we go to annex A and so this part contains the names for each party
9 of relevant UK advisers.
10 The question, and I am going to take you to the US order in a minute but the
11 question is, how prescriptive should annex A be? The key question is, should
12 it, as Google require, name everybody, and so everybody will sign
13 an undertaking, that is a given but does it have to name everybody? And then
14 it would be then subject, if one goes back to paragraph 48 -- if there is
15 a dispute about an amendment, they have to agree and then the tribunal may
16 get involved -- so does it have to name everybody or does it just have to
17 name designated in-house counsel, which is for the highly confidential, and
18 we have agreed external counsel.
19 Now the reason -- can I then take you to the US SAPO, and to do that, I want to first
20 go to the witness statement of David Cran, and that is at the CMC bundle. It
21 is marked "C-G". It is page 866, but actually -- sorry, 864 of the bundle.
22 THE CHAIRMAN: Yes.
23 MR BREALEY: I don't know if you have the witness statement --
24 THE CHAIRMAN: Thank you.
25 MR BREALEY: This is Mr Cran explaining how the parties have reached agreement
26 on disclosure and confidentiality, because this is actually quite a -- not strange

1 but it is different to the normal course of events. Paragraph 21 recognises:

2 "Given the wider release sought in the US proceedings and the approach to

3 discovery adopted in the US proceedings, the US discovery documents will

4 include a considerable amount of material that is not relevant to the issues in

5 the UK proceedings. However, Google does recognise that there would be

6 benefits."

7 That is why we will see that there is an agreement that the UK order should

8 essentially mirror the US order.

9 MR HOLMES: I am sorry, sir, there isn't any agreement that the UK order should

10 mirror the US order. The agreement is that the US discovery should serve as

11 the mainstay of disclosure and that doesn't relate to the confidentiality

12 arrangements. Our position is that it is appropriate that there should, on this

13 point, be a difference between the UK and US order, for reasons that I shall

14 address you on.

15 MR BREALEY: If I could make my submissions, Mr Holmes doesn't keep on

16 interrupting, we might get a bit faster but if one goes immediately to

17 paragraph 32 of Mr Cran's statement, which actually does refer to

18 confidentiality, I was going to go to the agreement, and we will go back, but

19 confidentiality:

20 "The parties are agreed that a confidentiality order on essentially the same terms as

21 the US protective orders in the US proceedings, should be made in these

22 proceedings to ensure appropriate protection for the parties and third parties'

23 confidential information. Adopting the same approach as the US protective

24 orders is the most efficient and proportionate approach."

25 So Mr Holmes has got to recognise that that is the basis upon which we work,

26 pursuing the agreement.

1 THE CHAIRMAN: Presumably the US court will have an interest in ensuring that its
2 confidentiality regime isn't wholly distorted by whatever regime we adopt
3 here?
4 MR BREALEY: Correct, and that is why the parties, we thought, the parties had
5 agreed -- I was going to go first of all to paragraph 25 and 26, which sets out
6 the procedural steps. 25:
7 "Materials disclosed in US proceedings which are subject to the US protective orders
8 may only be used for the purposes of that litigation."
9 That is standard practice:
10 "The US protective orders also states the protective materials may only be disclosed
11 to certain categories of persons."
12 That depends on whether they are confidential or highly confidential.
13 So paragraph 27, we have A, B -- A concerns confidential and B highly confidential:
14 27:
15 "The US protective orders therefore limit the extent to which the parties' respective
16 US and UK legal representatives can discuss the US discovery documents.
17 Based on conversations with Google and Google's US advisers, I am
18 informed that a significant proportion of US discovery documents are subject
19 to the US protective orders."
20 So there are a lot of documents, according to Mr Cran, that are subject to the US
21 order.
22 Then, 29, "Collateral use", and then as I say, paragraph 32, which Mr Holmes has
23 got to, I think, unless he is going to backtrack from that -- I am not quite
24 sure -- where he says -- I don't think Mr Holmes has to get up for the
25 moment -- a confidentiality order be on essentially the same terms.
26 Could I then go to the US order to see how that is played out?

1 THE CHAIRMAN: Yes, of course.
2 MR BREALEY: This is at bundle A-C and it is an exhibit to Ms Morony's witness
3 statement, and it starts at the -- the bundle is 786. 786.
4 This is what the parties thought would be on essentially the same terms.
5 THE CHAIRMAN: Yes.
6 MR BREALEY: So 786. I don't know if everybody has it up?
7 THE CHAIRMAN: Yes, thank you.
8 MR BREALEY: That is the United States District Court, Northern District of
9 California, and then on 787, "Purposes and limitations, disclosure", this is at
10 the top of 787:
11 "Disclosure and discovery activity in this action are likely to involve production of
12 confidential proprietary private information for which special protection for
13 public disclosure may be warranted. The court entered a stipulated protective
14 order."
15 What I want to do is -- we see over the page at 788, the meaning of confidential
16 information, which is information which qualifies for protection under the
17 federal rule, civil procedure 26(c), which concerns in particular, collateral use.
18 And then over the page on 789 paragraph 2.8, we see highly confidential
19 information, which would create a substantial risk of serious harm. Then I just
20 wanted to jump on, because this is the key. If one goes to 796 and 797. It is
21 paragraphs 7.2 and 7.3, and this is how the US order protects confidential
22 information and highly confidential information.
23 So 7.2, this is on 796:
24 "Disclosure of confidential information, unless otherwise ordered by the court, or
25 permitted in writing, the receiving party may disclose any information or item
26 designated confidential only to the receiving party's outside counsel, to whom

1 it is reasonably necessary to disclose ..."

2 And this is important:

3 "... who have signed the acknowledgment and agreement to be bound."

4 That is exhibit A.

5 THE CHAIRMAN: Yes.

6 MR BREALEY: In the UK proceedings, our proceedings, everyone agrees to sign
7 such an undertaking. That is the receiving party's outside counsel. Then B,
8 "AGO attorneys", and then C:

9 "The officers, directors and employees, including house counsel [in-house counsel]."

10 Again, who have signed the acknowledgment and agreement to be bound: the
11 experts will sign the acknowledgment. So we see that is confidential
12 information.

13 There is no provision for anyone to be named. They sign the undertaking and it
14 goes to the US lawyers and they make sure that the person has signed the
15 relevant undertaking. Then at 7.3, "Disclosure of highly confidential
16 information." This is the way that the US order deals with highly confidential
17 information, "unless otherwise ordered by the court", et cetera.

18 Again, we have the list of people who can see it, the receiving party's outside
19 counsel of record. Again, who have signed the agreement to be bound -- they
20 don't have to be named. Then C is the category of person who has to be
21 named:

22 "Designated in-house counsel who has no involvement in competitive decision
23 making, to whom disclosure is reasonably necessary, who has signed the
24 acknowledgment."

25 And at (iv):

26 "As to whom, at least 14 days prior to disclosure of any highly confidential attorney's

1 eyes only information, the party that seeks to disclose to the in-house counsel, the full name, et cetera."

3 Then we see a little bit at line 19:

4 "If a party objects to the designated in-house counsel, the party must do so in writing."

6 THE CHAIRMAN: Yes.

7 MR BREALEY: That reflects paragraph 48 of our present order, but our present order, because it extends beyond external counsel or designated in-house counsel, to all other people.

10 So what the issue is between the parties is if one then goes back to annex A of our order --

12 THE CHAIRMAN: Yes.

13 MR BREALEY: -- if, as Mr Cran says, the UK order should be on essentially the same terms, as far as confidentiality is concerned, on essentially the same terms as the US protective order, those words in red would not appear. That was the basis, we thought, of the agreement, particularly in the light of the statement.

18 That is our side, which is that it is the UK proceedings are mirroring the US proceedings. What Google say is: no, if one goes to paragraph 7.37 of the tribunal's guide, the need for disclosure in the interests of fairness -- I think Mr Holmes gave me this a short while ago but, obviously, the tribunal will know --

23 MR HOLMES: Sir, we have copies to hand up, if that would be useful but I guess you probably have a set --

25 THE CHAIRMAN: I think we have, yes.

26 MR BREALEY: It is paragraph 7.37 of the guide.

1 THE CHAIRMAN: Thank you.

2 MR BREALEY: Page 105.

3 THE CHAIRMAN: Yes.

4 MR BREALEY: This concerns information of a commercially sensitive nature,
5 subject to a confidentiality ring, and under the terms of the order, the
6 confidential information will be only disclosed to named individuals forming the
7 ring, who have given appropriate protective undertakings.

8 THE CHAIRMAN: Yes.

9 MR BREALEY: So what Google say is, notwithstanding the extent of the disclosure
10 in the US proceedings, although there is a lot of disclosure, notwithstanding
11 that, all persons, including any trainee of the firms of solicitors, have got to be
12 named in annex A, which does not mirror the US proceedings, in addition to
13 giving the appropriate protective undertakings. The purpose of the US order
14 was obviously to prevent in-house counsel gaining access to highly
15 confidential information which was going to have a competitive advantage
16 issue. But the purpose of the US order was never to impose an administrative
17 burden on the parties of naming every single conceivable person and then
18 having to amend, almost on a daily basis, as people drop in and drop out.
19 And if there is a disagreement, trouble the tribunal with it.

20 That is essentially, in a nutshell, our concern. Does one mirror the US -- the
21 protective order or as Google says, one has to name every single individual.

22 THE CHAIRMAN: Mr Brealey, if you go back to 796, and this is of the bundle, where
23 we have clause 7.2(a) of the US confidential order, as far as it relates to
24 confidential information only --

25 MR BREALEY: Yes.

26 THE CHAIRMAN: -- doesn't 7.2(a) have two barrels, in that you have got persons to

1 whom it is reasonably necessary to disclose the information for this litigation
2 and who have signed the acknowledgment and agreement to be bound?
3 MR BREALEY: Yes.
4 THE CHAIRMAN: So isn't the American order tilting at a situation where you can
5 actually sign the acknowledgment and agreement to be bound but still,
6 actually, not fall within the intent of the confidential ring here articulated,
7 because actually, it is not reasonably necessary to disclose the information to
8 that person, even if they have signed the acknowledgment and agreement?
9 MR BREALEY: I think ...
10 Certainly that is how the American system works. As you quite rightly say, sir, there
11 are the two conditions. It has to be reasonable necessary for the conduct of
12 the litigation and you sign the agreement. But I don't believe that the annex A
13 picks up that first condition.
14 THE CHAIRMAN: Well, I suppose my question is, should it?
15 MR BREALEY: It does, does it?
16 Yes, it does. It does -- certainly for the expert's point of view. So that is highly
17 confidential.
18 THE CHAIRMAN: Mr Brealey, speaking entirely for myself, it seems to me that
19 having a list of persons who are able to access, because they have signed the
20 relevant undertakings, and to whom it is reasonably necessary to disclose that
21 information, it is helpful to have a list, just so that everyone knows where they
22 stand.
23 Now, I do appreciate the point you are making, that it is an annoying and
24 administrative burden to have orders shuttling backwards and forwards, so
25 that one can keep up with what is likely to be a very large group of people, but
26 I would have thought in these electronic days, that that would be containable,

1 as a problem and what I am keen to ensure is that one has a regime that is
2 sufficiently clear, so that you can say, when you look at annex A, instead of all
3 the individual agreements, "Hang on, why is this particular person on the list --
4 we looked at it and whilst they have signed it, we really are not happy that
5 they are in."
6 So first of all, it has a helpful safeguarding effect, but secondly, it brings home, I think
7 to the persons who have signed the undertakings, that actually, you can see
8 who is subject to certain obligations just by looking at annex A.
9 Now, that is a minor benefit, but again, it does I think, assist the court if, heaven
10 forbid, there were a breach of the undertakings, and you can go to annex A
11 and say "right, these are the people on the list." Ideally, I think one would
12 have a brief description of what information they could look at, in other words,
13 what their ambit of information was.
14 I say that not in any desire to mirror the US approach but really just to have
15 something that works best here.
16 So I suppose what I think would assist us is if you could articulate a little further, the
17 administrative problems that you have got. I think that is really what your
18 main objection is.
19 MR BREALEY: Maybe I could do that by reference to paragraph 48.
20 THE CHAIRMAN: Yes, of course.
21 MR BREALEY: Clearly, experts have assistance and the external legal advisers
22 have lots of trainees and so when one looks at paragraph 48, there is a 14 -- if
23 one wants to amend it, there is a 14 day notice period and then there has to
24 be a reasoned objection.
25 THE CHAIRMAN: Yes.
26 MR BREALEY: It strikes us that if annex A is going to be as prescriptive as named

1 individuals, there has to be a degree of flexibility in 48.
2 So before the court started, it was floated between the parties that, as far as for
3 example, the legal advisers, so RPC and Clifford Chance, there would be
4 a provision in 48 which allowed, for example, Clifford Chance to say "this
5 person has dropped out, this person has been added", and is not subject to
6 the 14 day period, because it is obviously assumed that the relevant people
7 are not going to be concerned with the strategic operation of any company.
8 That was a way of at least making the prescriptive nature of annex A more flexible,
9 as far as the external legal advisers were concerned.
10 THE CHAIRMAN: That is an entirely fair point and I am sure Mr Holmes will come to
11 it but I would be minded to have something which is almost the opposite of at
12 least 14 days, which is something like "as soon as practically possible" to
13 agree. Because 14 days, when you have someone coming out and someone
14 coming in, you will need to have that happen in 24 hours or so.
15 MR BREALEY: Yes.
16 THE CHAIRMAN: So, again, I will obviously want to hear Mr Holmes on that but if
17 we were to recast the notice provisions to make them a little bit more agile --
18 I mean the fact is we are all sensible parties here, we know this is really going
19 to be fluid, but what I am concerned about is that one has got a definitive
20 statement. I mean I have well in mind it is a different matter but, actually,
21 quite pertinent here: you will all, no doubt, have read Mr Justice Meade's
22 decision on the circulation of judgments in draft and the dangers of exploding
23 email addresses, where you have an email which appears to be to
24 an individual but the moment you ping something to it, behold, it is passed on
25 to a further 20 people and suddenly you have a universe of hundreds who are
26 in the confidentiality zone of judgment, which is no one's intention but that is

1 the way it works.

2 This, as it seems to me, is a good way of keeping people clear about the very
3 serious obligations that they are assuming. Because I mean, we all want this
4 regime to work, that is the key thing, that material that is confidential remains
5 so, and it seems to me that the critical question there is that the persons, the
6 subject of the obligations of confidence, know, and that the parties know that
7 they know, and that, it seems to me, is a more desirable outcome.

8 But I absolutely take your point that 14 days is not an acceptable --

9 MR BREALEY: We didn't necessarily agree but I did write down a form of words that
10 seemed sensible. I have written them down but I think Mr Holmes has
11 something in written form --

12 THE CHAIRMAN: Perhaps he could share with us and we will see how far
13 Mr Holmes doesn't like them.

14 MR BREALEY: There is one last point --

15 THE CHAIRMAN: Of course.

16 MR BREALEY: So, as I say, there were three main points. One was on the list of
17 persons, second was 48 -- that is the notice provision, so we have done those
18 two. Then you will have seen the additions in red in various places, for
19 example, paragraph 5, for the US proceedings.

20 This is agreed, so I am just -- so material can be shared -- paragraph 4 -- access is
21 paragraph 5, but for example, as regards the UK specific information, the
22 parties can discuss it but it was the way it was drafted. It looked as if this
23 Tribunal was ordering what should be disclosed in the California proceedings,
24 and we thought that was inappropriate.

25 THE CHAIRMAN: Yes.

26 MR BREALEY: For obvious reasons.

1 So we had agreed -- where one sees "all the US proceedings", we were going to
2 insert "or for discussing the US proceedings". So in other words, the parties
3 can discuss the UK-specific disclosure in the context of the US proceedings
4 but we are not usurping any jurisdiction of the Californian court which is
5 sensible.
6 THE CHAIRMAN: That seems very sensible.
7 Before --
8 MR BREALEY: Subject to -- I don't know where it is going to go on those, on the list
9 of persons. Clearly it is not mirroring the US protective order but we see --
10 THE CHAIRMAN: What I wouldn't want to do is -- I would want to have something
11 that was consistent or not riding across the US regime, but subject to that,
12 was one that we felt most comfortable with in this jurisdiction. If those two
13 interests were to collide, then we would have a debate, but if one can create
14 a regime that is perhaps more in line with how we do things here, whilst
15 completely respecting the integrity of the US process, that, for my part, would
16 work, subject to it being a workable process. And I think we will see what
17 Mr Holmes has to say about this, but 14 days, to my mind, is not a workable
18 process.
19 MR BREALEY: There will be a form of words that Mr Holmes will suggest.
20 THE CHAIRMAN: I am very grateful.
21 Before, Mr Holmes, you rise, I will just check I am not riding solo on this point and
22 see that we are actually ad idem.
23 Good.
24 Mr Holmes.
25 MR HOLMES: Thank you, sir. If I could start with the last point you made. Our
26 hope also, and our intention, is to find a solution which is, at once, consistent

1 with the way in which things are usually done in this Tribunal and the
2 approach that is taken in the US order. In my submission, looking at the text
3 of the draft order, that is achieved by the way in which the order works. If
4 I could show you a couple of points in connection with that, beginning with the
5 definitions which set out the different classes of person and the different
6 categories of information that are covered. You see that at (b), designated
7 in-house counsel are defined. For each party, there are to be two named in
8 part A of annex A, and these are people who are to have no involvement or
9 reasonably foreseeable involvement in competitive decision making. You see
10 at (d) that there are experts defined, and they are also to be, on Google's
11 approach, to be named in part A of annex A. At (e), you have external
12 counsel to be named in part A of annex A and at (g), in-house counsel, on
13 Google's approach, to be named in part A of annex A.
14 Now, this arrangement doesn't, in my submission, cut across the arrangements in
15 the US. Those are individuals who receive disclosure, pursuant to the UK
16 order and there is a specific carve out, as we will see, in relation to those who
17 receive disclosure under the US order. So, for example, if you look at
18 paragraph 6, where the protections for confidential information are dealt with,
19 you see that at 6:
20 "Unless otherwise ordered by the tribunal to put it in writing by the designating party,
21 a receiving party may disclose any confidential material only to (a) the
22 receiving party's external counsel who have signed an undertaking to this
23 order or are bound by the US protective orders and their support staff."
24 So people who take disclosure of the US discovery under the US protective order,
25 are not within the definitions in this order, they are not subject to any
26 requirement for listing under annex A and they are left for protection, as one

1 would expect, under the arrangements that the US court has thought proper
2 to provide. So the only protections contained in this order apply to those who
3 take the materials under the UK regime, and are subject to the protections of
4 the UK regime.
5 The same is true -- we can follow it through, if it would be helpful -- in relation to the
6 other categories of person as well. We do say that for those people who take
7 disclosure under the UK regime, it is appropriate to list them, essentially for
8 the reasons you gave, sir. It serves two purposes. First, by listing the
9 individuals who are in the ring, and have given the associated undertakings,
10 everyone knows who they can and cannot share materials with. We say that
11 is important and it also, of course, enables the tribunal to keep track of who is
12 in and outside.
13 Secondly, in the extreme case, it would allow the tribunal to know who has given
14 undertakings for the purposes of enforcement.
15 That is why we say, sir, that in the tribunal's guide to proceedings, at paragraph 7.37,
16 it does pithily explain that a confidentiality ring, the order will normally provide
17 that the confidential information will only be disclosed to named individuals
18 forming the ring who have given appropriate protective undertakings. So in
19 my submission, that won't cut across the US arrangements but it is
20 an appropriate protection that serves a useful purpose.
21 Coming to practicability, we are alive to this concern and we have sought to suggest
22 text in paragraph 48 to make it more workable and to avoid lengthy delays.
23 Of course, in the ordinary course, when people are being added to or taken
24 out of the ring, the parties can agree that by phone call or email, very rapidly.
25 It will not take 14 days at all, and to make that clear, we proposed inserting at
26 the end of paragraph 48, a brief, one sentence text along these lines:

1 "If all other parties provide their consent to the admission of the relevant person
2 during the notice period, that person shall immediately be admitted, once they
3 have provided the relevant undertaking."
4 That would mean, in effect, that for the run of the mill case, the additional associate
5 being added or an additional support economist as an expert being added, it
6 could be done more or less instantly through an exchange of emails between
7 our instructing solicitors.
8 It is only in those rare cases where, for example, one of the parties is aware of
9 a conflict or is concerned that there may be a conflict, as a result of previous
10 instruction, or is concerned in relation to in-house counsel, that material is
11 passing to somebody in a strategic decision making role that objection would
12 ever need to be taken. But in that case, sir, in my submission, this failsafe
13 mechanism is required and a reasonable notice period is required to allow for
14 proper investigations to be made and to avoid parties becoming trigger happy.
15 Just to explain the concrete context here, I understand that at present, there is
16 discussion between the parties to the US litigation about changing one of the
17 in-house counsel of record -- that is the equivalent of the designated in-house
18 counsel in this order. So Epic has just signalled this by way of a notification
19 under the provisions that provide for a notice and objection period, and
20 Google is obviously considering that, considering what it knows about the
21 individual concerned and whether any concern arises. But what we wouldn't
22 want is for this order to undercut or to risk any kind of circumvention of that
23 US protocol by removing the notice period and preventing those kinds of
24 investigation from taking place, to ensure there isn't any risk of material
25 passing to somebody who is either conflicted or in a strategic position in
26 relation to Epic's business.

1 Because of course, as the tribunal will appreciate, some of the material here is highly
2 confidential and much of it is confidential because it relates to recent business
3 dealings and it therefore does require careful handling, particularly with
4 in-house people.
5 Unless the tribunal has any further questions, those are my submissions on the
6 annex A point.
7 THE CHAIRMAN: Thank you. I mean I wondered whether one could incorporate
8 an additional safeguard --
9 MR HOLMES: Yes.
10 THE CHAIRMAN: -- in terms of flexibility, which would be to amend the first red
11 sentence in paragraph 48, commencing "During the notice period." And what
12 I understand this is aiming to do is to enable persons who have objections to
13 raise those objections during the course of 14 days, but I wonder whether one
14 could also say that in a case of particular urgency, the party seeking to amend
15 the list could actually move the tribunal, in the event that consent was not
16 forthcoming, so that the tribunal could grasp the nettle more quickly, in order
17 to resolve the matter within the 14 day period.
18 Now, one would hope that that would not often be required but I wouldn't want either
19 side to be caught between, as it were, the hard place of needing consent and
20 the rock of 14 days. So you all know that the tribunal would rather not be
21 bothered with this sort of thing, and I suspect that will inform the parties'
22 conduct on this approach anyway, but if we were to insert that, I think that
23 might further assuage Mr Brealey's concerns about flexibility of process.
24 MR HOLMES: I see my instructing solicitor nodding, sir. We would be very happy to
25 have that amendment inserted.
26 THE CHAIRMAN: I am very grateful, Mr Holmes.

1 Mr Brealey, are you happy?
2 MR BREALEY: Yes, sir.
3 THE CHAIRMAN: That is probably putting it too highly. Do you have anything to
4 say, I suppose is probably the more appropriate thing to ask you?
5 MR BREALEY: No.
6 THE CHAIRMAN: I am very grateful.
7 We had one point, which I think we should raise now, because I was initially thrown
8 by the typo in one of the skeleton arguments which referred to the US trial as
9 2023, and for a significant period of my reading, I thought the parties were
10 being awfully clever here, they have the idea of trials running in parallel, which
11 seemed to me to be slightly odd, and of course, it is a typo for 2022. So first
12 of all, I just want to check that I got that right -- I see the nodding.
13 MR HOLMES: You have, sir. I can show you the procedural timetable if that
14 assists?
15 THE CHAIRMAN: No, I am more than happy to take your statement that it is
16 a mistake.
17 So what we will have is effectively the US proceedings, last quarter of 2022, and the
18 UK proceedings, if they are effective, the last quarter of 2023. The question
19 that I had arising out of that is, have the parties given any thought, and do
20 they need to, to the question of issue estoppels arising out of the US
21 proceedings in the UK, or is that simply something that we will deal with if the
22 matter comes to trial in the UK?
23 MR BREALEY: I think, marginally, we have given some consideration to it but I think
24 we take the view that that would be an issue for the trial judge
25 in October 2023. As you know, sir, you are not necessarily bound by
26 a judgment of another jurisdiction with different evidence? It is going to be

1 similar evidence, clearly, but a different regime, legal principles. It is not,
2 obviously, section 18 or section 2, so that does raise fairly complex issues as
3 to whether there would be an issue estoppel. But at the moment, I don't think
4 it should worry the tribunal.
5 THE CHAIRMAN: No. I can see that this sort of question is likely to be (a) pretty
6 complicated and (b) very much coloured by what the US judge decides and
7 what the issue is before us.
8 MR BREALEY: Yes.
9 THE CHAIRMAN: I do wonder whether we ought not to have -- it may be for the
10 next CMC, so I raise it so the parties can think about it -- whether we ought to
11 have a process, such that post US judgment, both parties say: this particular
12 point or: these particular points are out of bounds, in the sense that they have
13 been decided by the US court and there is an estoppel, so that those points
14 can be flushed out. Because I imagine one would only ever be raising this
15 point if you were the winning party and the losing party, I suspect, will be
16 saying: no, it is a completely different issue, there is no estoppel at all, and
17 I think it would be helpful to have that sorted out well before the trial in this
18 jurisdiction started.
19 MR BREALEY: Certainly we can make provision for it in the order, that there would
20 be a CMC to deal with it after judgment in the US is given.
21 THE CHAIRMAN: That might be worth just putting into the order, so that we are
22 alive to the issue.
23 It may be a storm in a tea cup and the jurisdictions and the approach taken will be so
24 different that it doesn't matter, but I sense that it might raise more difficult
25 issues than one would like, and therefore, it is probably wise to get it on the
26 agenda now. That is very helpful, Mr Brealey and I see Mr Holmes is

1 nodding --

2 MR HOLMES: Yes, sir, I was going to say this is a matter we should keep under
3 review because as you say, it will depend in part, or it may depend in part, on
4 the outcome of the US proceedings and what exactly is decided in those
5 proceedings.

6 Your suggestion of revisiting the point after the judgment seems thoroughly sensible,
7 if we may say so. We propose that a two day provisional listing be inserted,
8 because there could be quite knotty issues to consider.

9 THE CHAIRMAN: I think that makes good sense. Obviously, we can't diarise that
10 now, because we don't know how long that will take for the US judgment to be
11 handed down but let's provisionally indicate two days, and if it is not
12 necessary, then obviously we won't list it but I think it is better for the parties
13 to be aware that it is something that would certainly assist the tribunal, if it is
14 a knotty issue.

15 Thank you, that was rather by way of an interpretation. Mr Brealey, did you have
16 anything else on your shopping list?

17 MR BREALEY: No.

18 THE CHAIRMAN: Well, in that case, it simply remains for me to say how grateful we
19 are to the parties for the efficiency they have handled what are not
20 straightforward issues. So we are very grateful.

21 If you could send to the tribunal a final version of the orders you want us to make, we
22 will make them.

23 MR HOLMES: I am grateful. Can I just confirm though, for the avoidance of any
24 doubt -- I am sure I am just being (Inaudible) -- the agreement, I think has
25 been reached, that the individuals can be named in annex A in accordance
26 with the tribunal's indication, subject to the amendments to paragraph 48, so

1 that the point doesn't need to be determined. But can I just get --
2 THE CHAIRMAN: Would it help if I made a short ruling on the point, so you know
3 exactly where you stand?
4 MR HOLMES: It may be that Mr Brealey can give confirmation.
5 THE CHAIRMAN: Before Mr Brealey gives confirmation, what I had in mind is you
6 had a list of names and against each name, you had -- it would almost, to be
7 clear, that you had an explicit designation as to what they were. So I mean,
8 I don't care how the list is framed, but you have in annex A a list of names and
9 certain names are designated in-house counsel, certain names are experts,
10 certain names are external counsel, so there is just no room for doubt. That is
11 what I had in mind, Mr Brealey.
12 MR BREALEY: There is going to be a list of names.
13 THE CHAIRMAN: And designation of who they are, in other words --
14 MR BREALEY: Yes, whether they are an employee of Clifford Chance or --
15 THE CHAIRMAN: Exactly. That was my understanding. I am very grateful to you
16 both.
17 Yes, I am helpfully reminded that we do have Mr Lask here and I had a note but
18 I had forgotten about you, Mr Lask, I am so sorry. But I have been helpfully
19 reminded.
20 My understanding is that the CMA is here, helpfully, to declare its interest but without
21 wanting to say anything more at this stage about what the nature of its
22 intervention would be, but I think just to ask you if you have anything to say by
23 way of further elucidation, it would be helpful to hear.
24 MR LASK: Of course, in terms of practical issues, there is an outstanding issue as
25 to whether provision is made for the CMA's involvement now. A proposal was
26 put forward in correspondence as to how the CMA may fit into the timetable

1 being discussed by the parties. The claimants, I think, are content with that
2 proposal. The defendants have suggested that it be deferred until -- the
3 defendants have agreed it, so it may be that, actually, that can now be
4 incorporated into the draft order.
5 In summary, it is provision for the CMA to make its written submissions. Firstly, to be
6 provided with the factual and expert evidence supplied by the parties and then
7 to make its written submissions in June 2023, and to have liberty to apply to
8 make oral submissions, probably at the next CMC, which I believe will be
9 in May 2022. That does also, sir, give rise to confidentiality issues, if the CMA
10 are going to be provided with the factual and expert evidence, certain
11 representatives will need to be admitted to the confidentiality ring and it may
12 be in the first instance at least, that can be dealt with in correspondence
13 between the parties.
14 THE CHAIRMAN: Yes, I mean, again, the reason I am so concerned about names
15 being identified is because it is as important for the protection of the persons
16 named, that they know their obligations. One doesn't want to have any kind of
17 grey area, where one person is alleging you are subject and another person
18 saying, "Oh no, I wasn't." That is what we want to avoid. For our part, I think
19 we are happy to follow the parties' lead on this. We would be equally happy
20 to say we are minded to accede to an intervention by the CMA on terms to be
21 fleshed out but I think your course, Mr Lask, if I may say so, is preferable,
22 because we grasp the nettle of confidentiality right away and then we will deal
23 with the extent of the intervention, to the extent it goes beyond written
24 submissions later on.
25 Can I suggest though, that we deal with it in a separate order. I think that probably
26 makes sense in terms of both the confidentiality regime that is applicable to

1 the CMA, because the CMA is in a materially different position to the parties,
2 and equally, we can then have, clearly in a separate order, the extent of the
3 CMA's proposed intervention. And absolutely there should be liberty to apply,
4 because I do understand that you are at an early stage -- or these
5 proceedings are at an early stage, and so we would obviously listen with
6 attention if the CMA wanted to extend its intervention at some point in the
7 future.
8 MR LASK: Thank you, sir. So a separate order dealing with both the practical side
9 of the CMA's intervention and the confidentiality interventions?
10 THE CHAIRMAN: The latter, I think is probably more important than the former
11 because you are going to want to see the documents sooner rather than later
12 because that will inform the nature of your intervention. And the reason
13 I suggest it go separately is because I think the order between the parties is
14 pretty much there or thereabouts, whereas the CMA will obviously want to
15 consider how that order should be framed, in order to provide the parties with
16 the protection they obviously want, but to ensure that the CMA has the
17 flexibility it needs to examine confidential materials and reach a view.
18 MR LASK: Indeed, that sounds very sensible, sir, thank you.
19 THE CHAIRMAN: Thank you for the reminder and thank you, Mr Lask, as ever, for
20 your intervention.
21 Unless there is anything more, I will end the hearing with my thanks.
22 Thank you very much.
23 **(11.29 am)**
24 **(The hearing concluded)**
25
26

**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? |