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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1403/7/7/21

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8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Monday 27th February 2023

13
14 Before:
15 Ben Tidswell

16
17 (Sitting as a Tribunal in England and Wales)

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20 BETWEEN:
21 Dr. Rachael Kent
22 **Class Representative**

23
24 v

25
26 Apple Inc. and Apple Distribution International Ltd
27 **Defendants**

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29
30 **A P P E A R A N C E S**

31
32 Ronit Kreisberger KC, Michael Armitage, and Matthew Kennedy (On behalf of Dr. Rachael
33 Kent)
34 Brian Kennelly KC and Hugo Leith (On behalf of Apple Inc. and Apple Distribution
35 International Ltd)
36 Nicholas Gibson (On behalf of the Competition and Markets Authority 'CMA')

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Monday, 27 February 2023

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(10.30 am)

THE CHAIRMAN: Good morning, everybody. I think we need to read the customary warning which you will all be familiar with but someone might be listening who has not heard it before.

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

Thank you.

Ms Kreisberger.

Application by MS KREISBERGER

MS KREISBERGER: Good morning, Sir.

Sir, in terms of appearances, I appear for Dr Kent with Mr Armitage and Mr Kennedy. Mr Kennelly appears with Mr Leith for Apple, and Mr Gibson joins us today for the CMA.

Sir, just some housekeeping before I begin submissions. I am going to be giving references to the hard copy bundles. Does that suit you, Sir?

THE CHAIRMAN: Yes, actually I have the transcript I think here; at least I should have. It's not actually doing anything yet but will do no doubt, and I do have the hard copy bundles.

MS KREISBERGER: I'm grateful. Can I just ask if the latest version of the draft order has been handed up? Now, this is updated as of this morning, I think. I think it's just being handed up now, Sir.

1 **THE CHAIRMAN:** Yes, I was told the bundles were updated just before we came in
2 but that doesn't necessarily mean that that's --

3 **MS KREISBERGER:** I think this is a late addition.

4 **THE CHAIRMAN:** Yes, fine.

5 **(Handed)**

6 Thank you.

7 **MS KREISBERGER:** Now, Sir, there is some controversy about this draft order. I will
8 be addressing you on that in the course of my submissions. We understand based on
9 the letter received last night or yesterday afternoon that Apple contends that parts of
10 the draft that are marked as agreed are not agreed. I will do my best to take you
11 through it, Sir, as we go along so that the position is clear.

12 Just so you have it, Sir, this is Dr Kent's best representation of where matters stand.
13 Blue text is Dr Kent's proposals where there is disagreement, so you see for instance
14 on page 2, blue text. So if you turn the page you see red text. That is Apple's proposed
15 version and black text is agreed. Or at least it is Dr Kent's best understanding of what's
16 agreed but, as I have said, we will go through that.

17 **THE CHAIRMAN:** Yes.

18 **MS KREISBERGER:** Sir, if I could ask you to keep the draft order open, we were very
19 grateful for the Tribunal's indication that all disclosure matters are to be raised at this
20 hearing, so Dr Kent has approached this hearing in that spirit. And on that basis
21 Dr Kent seeks the following orders on disclosure today. If I might just list them.

22 The first topic which I will address, Sir, is an explanation of the privilege claims
23 asserted by Apple over around half of the CMA documents which Apple has identified
24 as relevant. Those are the documents submitted to the CMA.

25 **THE CHAIRMAN:** Yes.

26 **MS KREISBERGER:** That's paragraph 2 of the draft order and we will turn to that.

1 The second topic is Dr Kent's application that Apple provide a disclosure report and
2 an electronic documents questionnaire which is compliant with the Tribunal's order
3 and rule 60. That's paragraph 1 of the draft order.

4 The third area is Dr Kent's application for second tranche disclosure in relation to
5 documents which were provided in the context of these other proceedings. These are
6 the five other repositories.

7 **THE CHAIRMAN:** Yes.

8 **MS KREISBERGER:** That's paragraph 6.2 of the draft order and then there are
9 a number of other matters on disclosure that I will take you through, Sir, at the end,
10 many of which are agreed.

11 There is a discrete point on confidentiality. Mr Armitage is going to address you on
12 that and then finally timetable but that I understand is agreed, happily.

13 **THE CHAIRMAN:** Yes.

14 **MS KREISBERGER:** So that's the list for today. Sir, if I might make just --

15 **MR KENNELLY:** I hesitate to interrupt but when my learned friend says "agreed"
16 I'm afraid you must assume "not agreed". The timetable is not agreed.

17 **MS KREISBERGER:** The amendments timetable is not agreed -- they are agreed.
18 Sir, I was referring to the timetable which is agreed.

19 **MR KENNELLY:** I'm afraid not. My learned friend can make her submissions but she
20 should steer clear of saying things are agreed because I'm afraid there's some --

21 **THE CHAIRMAN:** It might be helpful so that I am clear because I am a bit confused.
22 There is a section in the order about amendments to the trial timetable and then of
23 course there's --

24 **MS KREISBERGER:** The timetable to trial is agreed, we understand. This is certainly
25 news to us.

26 **THE CHAIRMAN:** Let's see if we can get to the bottom of it.

1 **MR KENNELLY:** If Ms Kreisberger is referring to the amended trial timetable from
2 paragraph 11, maybe that's what she is referring to, then those are agreed.

3 **MS KREISBERGER:** That's correct.

4 **MR KENNELLY:** Earlier amendments to steps which are in black in her draft order
5 are not agreed and I will address those --

6 **THE CHAIRMAN:** Various steps, so you're talking about --

7 **MR KENNELLY:** Paragraph 6.

8 **THE CHAIRMAN:** Yes.

9 **MR KENNELLY:** And I understand 7, as well.

10 **THE CHAIRMAN:** So you're saying there is a whole bunch of things about the
11 timetable for what -- otherwise agreed items, which are still --

12 **MR KENNELLY:** Not least because a major issue before the Tribunal is the extent of
13 the searches and disclosure exercises that are going to be ordered by you either today
14 or on 20 March, and they will have impact on some of these steps which is why they're
15 not agreed.

16 **THE CHAIRMAN:** Yes, but we are at least agreed on 11 --

17 **MS KREISBERGER:** I was only referring to 11, Sir.

18 **THE CHAIRMAN:** Thank you, that's helpful.

19 **MS KREISBERGER:** With that, I will begin. So I just have a prefatory remark before
20 I go through the disclosure issues.

21 The Class Representative is concerned about breaches by Apple of the Tribunal's
22 orders and of the rules which apply. Now, I will pick these breaches up as I go along.
23 It's not a submission I make lightly but I just want to draw your attention, Sir, at the
24 outset to rule 4(2)(f) of the governing principles. I imagine it's well familiar to you, Sir,
25 but it's at authorities tab 3, page 14 and it's governing principle 4(2)(f) which says that:
26 "Dealing with a case justly and at proportionate cost includes...

1 enforcing compliance with these Rules, any practice direction issued under rule 115,
2 and any order or direction of the Tribunal."

3 Now, in broad terms that's what we're asking for from the Tribunal today. And, Sir, as
4 I go through I am also going to show you these are not merely technical breaches;
5 they are breaches which are holding back the efficient progression of these
6 proceedings.

7 We say Apple is taking what is really a cavalier approach and so the Class
8 Representative is applying for stringent disclosure orders which will progress
9 disclosure. Now, Apple is the most valuable company in the world, so we say there is
10 no reason for latitude here.

11 Sir, so with that I'm going to move on to the first topic I set out and that is Apple's
12 defective privilege claims in respect of CMA documents.

13 Now, the issue in a nutshell is this: as matters stand today Apple has asserted privilege
14 over a large number of documents which it had provided to the CMA in the context of
15 its investigation into the App Store and which Apple has identified as relevant to the
16 disclosure categories, Sir, which you ordered back in September last year.

17 Now, contrary to the Tribunal's rules, and I will take to you the rules, Sir, Apple hasn't
18 given any reasons why the documents are privileged. What Apple has done, and I will
19 show you their document privilege log, Apple's just asserted a blanket claim of
20 privilege over the whole set of documents in entirely vanilla language. It's just
21 a generic assertion of privilege.

22 Now, that blanket assertion of privilege does not comply with the Tribunal's rules. Sir,
23 I'm going to develop my submissions on this in four parts.

24 First of all I'm going to set out the factual context for this blanket assertion of privilege.

25 I will also cover what Apple is offering to do now. There has been a change in
26 approach, not a sufficient one, I should say.

1 Secondly, I will show you the legal obligations which bite on Apple under rule 64 of the
2 Tribunal Rules and a relevant authority on that.

3 Fourthly, I will explain why Dr Kent now seeks an order providing for meaningful
4 explanations in respect of the documents, why that's called for, and, lastly, I will
5 address Apple's various objections to this course.

6 So moving to my first part, how the blanket claim to privilege came about. Sir, you
7 may recall the Tribunal ordered Apple to disclose the documents which it provided to
8 the CMA by reference to categories articulated by the CMA.

9 **THE CHAIRMAN:** Yes.

10 **MS KREISBERGER:** That was to take place by 4 pm on Friday 20 January this year,
11 that's in the CMC order. And, Sir, you provided in the ruling that Dr Kent could revisit
12 the approach for determining relevance in the light of that disclosure, quite sensibly.

13 Sir, the deadline on Friday 20 January passed and Dr Kent heard nothing. And that
14 night, almost four hours after the deadline passed, Dr Kent's team received an email
15 saying Apple had encountered technical issues and disclosure would follow on
16 Monday by 4 pm. 4 pm on Monday passed. The documents were eventually
17 disclosed around 11 o'clock that day.

18 Now, Dr Kent anticipated that this would be a very valuable source of disclosure given
19 the overlap between the CMA investigation and the infringement issues in these
20 proceedings. So it was thought that, look, this would be an efficient point of departure
21 for staged disclosure, and in the light of those documents Dr Kent could make specific
22 targeted disclosure requests.

23 Now, what happened is that the document production such as it was disappointing for
24 a couple of reasons. The first is there were less than 2,000 documents in this tranche,
25 1,980 to be precise, but of those documents, 935 have been withheld from inspection
26 as privileged. That's almost half, and as I said in the outset those are documents

1 | which Apple accepts are relevant but they withhold them on grounds of privilege.
2 | Now, this raises a red flag for two reasons. First of all, the overall number is lower
3 | than expected. Now, to put it into context, the disclosure report tells us that 6 million
4 | documents were disclosed in the US.
5 | Dr Kent has asked Apple in correspondence how many documents were provided to
6 | the CMA in total. I'm going to come back to this when I address you, Sir, on the
7 | disclosure report. It looks like it may be that these documents were drawn from
8 | exhibits in the US proceedings but the position isn't clear as far as Dr Kent's
9 | concerned.
10 | I hope that Mr Kennelly could enlighten us on that today. It's a simple question: how
11 | many documents were given to the CMA?
12 | The second red flag is that one wouldn't ordinarily expect half of all the relevant
13 | documents provided to the regulator to be privileged, and the reason why one wouldn't
14 | expect that is because the CMA is prohibited from demanding privileged documents.
15 | We have set that out in the skeleton. You will be familiar with that, Sir. So now,
16 | Dr Kent raised this technical issue that the CMA has no jurisdiction to compel the
17 | production of privileged documents. We raised that issue two days after the CMA
18 | disclosure. That was on 25 January.
19 | One month later, today, Apple has still not explained why it voluntarily offered up
20 | hundreds of privileged documents which they had no power to compel, and the
21 | skeleton, Sir, before you today is conspicuously silent on that.
22 | So where we are is that the CMA disclosure begs more questions than it answers.
23 | Now, as I said, I'm going to take you to the Tribunal Rules and show you what's
24 | required but, in brief, to introduce the point and it's hardly surprising what the rules
25 | require of Apple is that it give a meaningful explanation of why privilege is being
26 | claimed over almost a thousand documents, and the reason Apple has to give

1 a meaningful explanation is so that Dr Kent can work out whether any of these
2 privilege claims should be challenged.

3 So I want to first show you what Apple has said about its privilege claims. If I could
4 ask you to turn up the correspondence bundle, tab 73, page 149. This is the letter
5 enclosing the documents. You see the cover letter there, 23 January, and then over
6 the page you see a document called "Privilege Log". So this is the claim to privilege:

7 "The Defendants wish to withhold production of the following documents ...

8 Description of document or class of documents...

9 935 documents from January 2008 to February 2022 are withheld -- these were
10 documents and/or communications for the purposes of seeking and receiving legal
11 advice, or communications for the sole or dominant purpose of litigation."

12 So that doesn't tell us anything. That's just a generic description of the two categories
13 of privilege. It doesn't tell us anything at all about the documents themselves.

14 **THE CHAIRMAN:** Did you say a minute ago that there was a view that these
15 documents might have come from the exhibits to the --

16 **MS KREISBERGER:** That's in the disclosure report, Sir.

17 **THE CHAIRMAN:** So that's odd in itself, isn't it? That means they have been
18 deployed in proceedings elsewhere, if that is right.

19 **MS KREISBERGER:** Yes, that is right. So, yes, Sir, you're quite right, that also raises
20 a further question about these privilege claims. There is a certain amount of reading
21 between the lines but I will show you that paragraph of the disclosure report but that's
22 our understanding.

23 **THE CHAIRMAN:** Yes.

24 **MS KREISBERGER:** So as I said, Dr Kent asked for an explanation two days later.
25 That was on 25 January. Apple replied on 10 February. That's two and a half weeks
26 later and they said this, Sir, and I should have asked you to keep open the

1 | correspondence bundle.

2 | **THE CHAIRMAN:** Yes, I still have it.

3 | **MS KREISBERGER:** It's at tab 89.

4 | **THE CHAIRMAN:** Yes.

5 | **MS KREISBERGER:** Page 190 so over the page. 7.1 Apple say this:

6 | "... Apple disclosed documents to the CMA on a confidential basis. Accordingly,
7 | Apple's right to assert privilege over those documents is retained. Our clients are not
8 | obliged to provide your client with any further information in respect of its disclosure to
9 | the CMA."

10 | In other words, that's your lot. It's just a refusal to engage.

11 | Now, Dr Kent has continued to press the point in correspondence. On 20 February,
12 | so a week ago, with this hearing looming, Apple performed something of a climbdown
13 | but it doesn't go anywhere near what Apple is required to do under the rules, but I want
14 | to put it before you now so you have the full picture. That's at tab 101, page 241.

15 | **THE CHAIRMAN:** Yes.

16 | **MS KREISBERGER:** So you see there that's 20 February, so I think that's the latest
17 | statement of the position. Paragraph 3 and 4:

18 | "As made clear in our 10 February Letter, we do not accept the premise of your client's
19 | assertions. Apple provided documents to the CMA as part of the CMA Investigation
20 | and Market Study subject to confidentiality protections and solely for the limited
21 | purpose of those procedures. Apple is entitled to assert privilege in respect of
22 | documents provided to the CMA as part of the CMA Investigation and Market Study
23 | against all other parties, including in these proceedings. There is no basis for your
24 | client's purported 'reservation of right'."

25 | They then say this:

26 | "Without prejudice to the above points, in order to be constructive in the face of your

1 client's purported concern we are undertaking a further check of the documents
2 withheld for privilege. If we identify as part of this process any responsive documents
3 that should not be withheld ..., we will disclose [them] to your client. To further address
4 your client's concerns, we propose to provide a disclosure statement/certificate ...
5 identifying the basis for the assertion of privilege ... We trust these measures will be
6 of satisfaction to your client and as such will conclude your queries .."

7 They didn't want this matter raised at this hearing.

8 Now, that is confirmed by Apple's skeleton which was served the next day. If I can
9 ask you to turn up the skeleton. I'm afraid I'm not using the version in the bundle. It's
10 tab 2 of volume 1, core 1, at paragraph 45a. It's internal numbering page 16.

11 Now, so this is what Apple is now offering to do. They say:

12 "Apple has already indicated that it is only privilege under English law that has been
13 asserted ..."

14 Well, we assume that to be the case.

15 "The disclosure statement/certificate will in any event give particulars ..."

16 And here is the critical wording:

17 "(for the set of documents for which privilege is asserted, overall) of the types of
18 communication and the reasons why they are privileged, including by reference to
19 categories of privilege ... (... legal advice ... or litigation ...)"

20 So that sounds like they're proposing to give another blanket statement for
21 the -- overall for the documents overall.

22 **THE CHAIRMAN:** Well, I think they're saying that they would break it down so at least
23 you would know what category of privilege applied to what volume of documents.

24 **MS KREISBERGER:** Yes.

25 **THE CHAIRMAN:** I think that's what they're saying.

26 **MS KREISBERGER:** Although it's not quite clear how they will do that if they're

1 addressing the documents overall but no doubt Mr Kennelly will enlighten us on that.

2 **THE CHAIRMAN:** Yes.

3 **MS KREISBERGER:** The wording is a little difficult.

4 Sir, again, just so you have it, on Friday, so the last working day before this hearing,
5 Apple wrote -- this is again in the correspondence bundle. Actually, I don't think I have
6 the -- yes, it's 104, tab 104 which is obviously a recent update because it came on
7 Friday and Apple said this:

8 "... Paragraph 4 of our 20 February Letter confirmed our clients are undertaking
9 a further check of the documents withheld from the CMA Investigation Documents
10 Disclosure on grounds of privilege. If we identify as part of this process any responsive
11 documents that should not be withheld on grounds of privilege, we will disclose those
12 documents to your client .. As you and your client are also aware, our clients propose
13 to provide a disclosure statement/certificate (verified with a statement of truth)
14 identifying the basis for the assertion of privilege in respect of the ... Disclosure."

15 So, again, they haven't engaged with our request which is for detailed explanations by
16 reference to the documents themselves.

17 Now, I'm going to come back to this 11th hour offer but so you have it, Sir, my
18 submission is it doesn't cure the defects that I am now going to take you through. Also,
19 just so it is clear, I'm not applying to you today, Sir, for inspection of the documents.
20 Dr Kent needs the explanations as a prior step and then we can take it forward.

21 **THE CHAIRMAN:** There are three steps, aren't there. There's the question of
22 an understanding of the basis of the claim which I think is what you're addressing.
23 There's also a question of waiver, isn't there.

24 **MS KREISBERGER:** There is.

25 **THE CHAIRMAN:** And whether there has been anything other than a limited waiver
26 in which case the documents would still retain their privilege character, and then any

1 application you might want to make for perhaps which is wrapped up in the first two,
2 but that intermediate step, are we going to deal with that today?

3 **MS KREISBERGER:** Yes.

4 **THE CHAIRMAN:** It would be quite difficult to deal with that without the explanation
5 of the basis on which the documents are being withheld so it's tied up in the first bit,
6 isn't it?

7 **MS KREISBERGER:** Quite. We have provided for all of those aspects to be covered
8 by the draft order, and I will take to you the draft order, Sir, but I hope that's
9 satisfactorily set out. We need to know what's in the documents without waiving
10 privilege but we need to understand what's in the documents, and also the terms on
11 which they have been provided to the CMA. We have asked that question. Apple has
12 told us nothing about the terms under which they have been provided, so Dr Kent can't
13 begin to understand (a) whether the claim is valid for each document and (b) whether
14 Apple waived privilege or not.

15 **THE CHAIRMAN:** Yes, and so I suspect that much of the discussion today is going
16 to be about bearing in mind -- and I know you're going to take me to the authorities but
17 bearing in mind that the dividing line between requiring so much disclosure that it
18 impinges on the privilege, but sufficient disclosure so that there is a proper
19 understanding -- probably shouldn't use the word "disclosure" -- so for explanation,
20 there is a proper understanding of what's actually happened here so that -- well, really
21 that the Defendants can satisfy the court it has done this properly and that then creates
22 quite a difficult situation I think for you, doesn't it, if it is done properly to go behind that
23 witness statement if it's properly explained?

24 **MS KREISBERGER:** That's precisely the issue, Sir. Of course once we have the
25 explanations we can begin to form a meaningful view but at the moment Dr Kent has
26 no visibility on this at all because we have just been told: no, you're not entitled to it.

1 **THE CHAIRMAN:** Yes, and I'm sure we will hear from Mr Kennelly in due course, but
2 the question really is going to be how much of your wish list is accepted and is
3 committed to now for the purposes of providing this what's effectively a witness
4 statement.

5 **MS KREISBERGER:** Yes, and I hope, I will take you, Sir, to the Astex authority and
6 I hope that will provide a useful blueprint as to how the Tribunal might go about
7 requiring a sufficient level of detail. It's not the first time this has arisen.

8 **THE CHAIRMAN:** Of course.

9 **MS KREISBERGER:** It's always an issue that one is not asking for waiver of privilege
10 but the explanation has to be meaningful.

11 **THE CHAIRMAN:** Yes.

12 **MS KREISBERGER:** So it's a matter of degree.

13 Sir, as I said, this is covered in paragraph 2 of the draft order. I suggest -- you may
14 want to cast your eye over it now, Sir, but I'm going to come back to it and go through
15 each of the provisions. I am in your hands. If you would like to just have a read of
16 that but I will take you through it once I have set out the legal principles.

17 **THE CHAIRMAN:** Yes.

18 One of the things that I wondered about was how much we might be told about the
19 process by which this has been carried out as well, and so the nature of the review
20 and I'm sure we will ask Mr Kennelly if he is able to tell us anything about that, about
21 how the documents are stored.

22 **MS KREISBERGER:** Yes.

23 **THE CHAIRMAN:** What the nature of the review has been. That does go to some of
24 these questions as well.

25 **MS KREISBERGER:** It does, yes.

26 **THE CHAIRMAN:** Mr Kennelly will come to that.

1 **MS KREISBERGER:** I'm grateful, Sir, and I will come back to that. So, Sir, if I could
2 just set out the law so we have -- the obligations are clear. There are two aspects.
3 There is rule 64. That's the Tribunal rule and then High Court authority which I will
4 take you to, Sir.
5 Rule 64 is at tab 3 of the authorities bundle, page 17. The relevant passages are (3)
6 and (4). So:
7 "A person who wishes to claim a right or a duty to withhold inspection of a document,
8 or part of a document, shall state in writing --
9 ... that that person is claiming such a right or duty; and
10 ... the grounds on which that person claims that right or duty."
11 And:
12 "... The statement referred to in paragraph (3) shall be made --
13 ... in the list [if there is a disclosure list] in which the document is disclosed; or
14 (b) If there is no list, to the person wishing to inspect the document."
15 Sir, if I could also just show you subparagraph (5) there:
16 "A party may apply to the Tribunal to decide whether a claim made under
17 paragraph (3) should be upheld."
18 That would obviously be a subsequent step. And also 64(6)(c) over the page:
19 "... the Tribunal may...
20 ... give any directions it considers appropriate."
21 **THE CHAIRMAN:** Yes.
22 **MS KREISBERGER:** Sir, I make five points in the light of the rule itself. The position
23 is as follows: parties can claim privilege over a document or part of a document, of
24 course. If a party claims privilege it has to do that in writing. That's clear on the face
25 of the rule, and the written statement must set out the grounds on which privilege is
26 claimed. Where there is no disclosure list the written statement of grounds must be

1 made to the other side. It may sound like I am labouring the point but actually these
2 are points Apple doesn't accept which is why I am stating the obvious.

3 So written statement of grounds must be sent to the other side and they have to be
4 sufficiently detailed to enable a party to decide whether to challenge the claim to
5 privilege under 64(5).

6 Now, other than that --

7 **THE CHAIRMAN:** Sorry to interrupt, that's the critical point, isn't it, I would have
8 thought.

9 **MS KREISBERGER:** It is --

10 **THE CHAIRMAN:** That Apple would agree with pretty much everything up to that
11 point because isn't the real dispute -- and, again, we will hear what Mr Kennelly has to
12 say about it, but isn't the real dispute, as I understand it, going to be at what level of
13 granularity they need to address this, and if they're saying there are 935 documents,
14 we're not going to list them all out individually that's one end -- I presume they're
15 saying they're not happy to -- I don't think we do know what the alternative is to bridge
16 the gap between where they are now and where you say they should be.

17 Are you saying they should be listing every single document out and giving
18 an explanation in relation to it?

19 **MS KREISBERGER:** Yes, I will. My principal submission, my primary position is
20 given we're actually dealing with quite a small number of documents and given their
21 conduct thus far, and that is a part of the test, as I will show you, we're now in a world
22 where they just have to tell us what the documents say; but if they don't want to do
23 that they're going to have to tell us what their alternative proposal is. We don't see
24 that in the skeleton or in the correspondence. If it's something not quite as granular
25 as individual documents well we better hear it, but I do not have anything to respond
26 to at the moment because they haven't offered that.

1 **THE CHAIRMAN:** So there might be a basis for grouping it which you would accept,
2 but you don't know what that is because you don't know what the documents are.

3 **MS KREISBERGER:** And it's not for me to speculate.

4 **THE CHAIRMAN:** Yes.

5 **MS KREISBERGER:** As I said, it may sound like I am labouring some of these points,
6 but one of the points that Apple -- reading Apple's skeleton, the debate isn't just on the
7 level of granularity which would be a much more sensible debate to have, they take
8 a whole range of points some of which are rather surprising.

9 One of the points Apple takes, which I hope I can dispense with now, is that there is
10 some material difference between whether disclosure is made in a list or otherwise,
11 and they read that into rule 64. That can't be right. That's just process. It's very clear
12 there has to be a written statement of grounds. There's no material difference as to
13 whether that's done in a list or in writing to the other side which is what should happen
14 here. So I'm just dealing with that point that's made against me.

15 **THE CHAIRMAN:** We will hear what Mr Kennelly has to say about those sort of points
16 but certainly so far as I am concerned I am interested in getting to the substance of
17 this rather than the process.

18 **MS KREISBERGER:** I'm grateful.

19 **THE CHAIRMAN:** At some stage it seems to me it's accepted we're going to have to
20 have a better explanation of the privilege. One of course has to be sensitive to the
21 nature of the privilege and the importance of protecting it, but I am quite keen to get to
22 the debate about what is the compromise there rather than worrying about how the
23 courts work.

24 **MS KREISBERGER:** I am very grateful for that indication. I am very happy to cut
25 through to that point, subject to if Apple take different points --

26 **THE CHAIRMAN:** Yes, of course.

1 **MS KREISBERGER:** I'm grateful, Sir. In terms of the High Court, bearing in mind
2 your indication, Sir, so I will try and keep to the fundamental question, Apple say the
3 CPR provision is completely different. I don't think I need to take you there, Sir, but
4 I can tell you that the CPR rule, which is 31.19, is absolutely identical, substantively
5 identical. The only difference is the Tribunal's version is gender neutral, so the
6 CPR refers to "he", "he has a right", and the Tribunal, sensibly, in my view, doesn't do
7 that.

8 So there's nothing in any way different, so I put that before you because I'm going to
9 take you to a High Court authority and it's equally applicable here.

10 Now, I do want to show you Matthews and Malek. That's in the bundle. I don't have
11 the reference. I'm just getting the reference in the authorities. Tab 14, which I don't
12 have.

13 So it's tab 14.

14 **THE CHAIRMAN:** It is indeed Matthews and Malek.

15 **MS KREISBERGER:** I am engaging with the issue at hand, Sir, it's 6.16.

16 **THE CHAIRMAN:** Yes.

17 **MS KREISBERGER:** And the editors say this and this really summarises the position.

18 I will read it out, Sir, unless you prefer to read it to yourself:

19 "There are three main requirements in relation to documents in respect of which it is
20 claimed that they are privileged from production. First, the documents for which
21 privilege is claimed must be listed in part two of the list. ... this is to identify the
22 documents; it is not necessary to specify the provenance, makers or the date ... N265
23 provides that documents should be listed and numbered. It is not the usual practice
24 to individually number every document ..."

25 And then I would like to emphasise this wording:

26 "... although in certain cases this may be the appropriate course, particularly where

1 | there is an issue as to whether privilege is being properly claimed."

2 | That is our case.

3 | "Secondly, the nature of the documents must be stated and, in the case of classes of
4 | documents, the class must be clearly defined so that it's possible to identify documents
5 | which fall within the class."

6 | So that's classes.

7 | "Thirdly, the ground of privilege and the grounds giving rise to the claim for privilege
8 | must be clearly stated. In particular ..."

9 | And here we have some more concrete guidance:

10 | "... the wording must not be so wide that it is impossible to be sure it contains no
11 | description of documents which came into existence in circumstances not attracting
12 | privilege. It is not enough to state the documents are privileged; the factual basis of
13 | the grounds giving rise to that claim must be set out. It is not necessary to describe
14 | the documents so fully as to enable the opposing party to discover the contents of the
15 | privileged documents. Where there is a challenge to a claim to privilege, it is open to
16 | the court to direct that a party verify and explain the basis for the claim by way of
17 | affidavit or witness statement. Such affidavit or witness statement should be specific
18 | enough to show something of the deponent's analysis of the documents or, in the case
19 | of a claim to litigation privilege, the purpose for which they were created ..."

20 | And then the final wording:

21 | "... such as would enable the other party to determine whether or not the claim for
22 | privilege should, or can, be challenged."

23 | So, Sir, there you have a very useful summary of the position on granularity. In other
24 | words, sensibly, the other party must be given enough information to work out whether
25 | the claim can be challenged, and that's obviously right; it's obviously a sensible
26 | purposive interpretation.

1 Now, Sir, to drill down a bit further and in order to address the question of what could
2 be ordered here, one of the cases which Matthews and Malek cites is Astex, and there
3 is an interplay. Astex then cites this very passage from Matthews and Malek; in an
4 earlier version, this version now refers to Astex. Now, Astex is at authorities, tab 8.1,
5 page 131.1. And to introduce it, Sir, and I'm going to take you through the judgment,
6 Astex stands as authority for the proposition that if an inadequate explanation of the
7 grounds on which privilege is claimed is given at the outset, the court can order the
8 party to provide a detailed explanation of those grounds and descriptions of the
9 documents, including on a document-by-document basis.

10 Now, if I could ask you to turn up the judgment and go to paragraph 10.

11 **THE CHAIRMAN:** Yes.

12 **MS KREISBERGER:** Now, AstraZeneca was the party here withholding certain
13 documents on grounds of privilege and they gave the explanation that you see at
14 paragraph 10, indented: "Part B", defendant has control over these documents but
15 objects to inspection because they're by their nature privileged from production.

16 And then we get this explanation:

17 "Confidential letters and other communications passing between the defendant and its
18 legal advisers and patent attorneys for the purposes of giving or obtaining legal advice
19 and assistance, together with drafts and internal memoranda and notes thereof
20 prepared for the purposes of giving or obtaining legal advice, and any other documents
21 which are by their nature privileged and excluded from inspection."

22 It's again -- it's essentially a generic assertion of privilege as we have here with just
23 a touch more colour than Apple gave us. So it's a good authority for us.

24 Sir, if we move to paragraph 12, you see that Astex objected to the claims for privilege
25 and it applied for -- it asked AstraZeneca's solicitors to provide a list of all documents
26 in which it claims privilege "in order to facilitate a determination of whether these

1 documents should be disclosed". So that's what Dr Kent has done.

2 And then paragraph 13, AstraZeneca pushed back and, again, it closely echoes

3 Apple's response. They said this:

4 "Our client has complied with its standard disclosure obligations and does not need to

5 provide any list of privileged documents for your client's consideration. Our client

6 understands the rules of privilege and it can assess this without your client's

7 assistance .. Our client has used standard wording to address privileged documents

8 which is similar to your client's wording ..."

9 And then moving forward:

10 "Your client is suggesting that our client should now go beyond its existing ...

11 disclosure obligations, as ordered by the court. ... This conduct is another example of

12 your client taking an unnecessary tactical point ... to distract our client ..."

13 Now, paragraph 15, sorry, you see at the end of paragraph 14 AstraZeneca "rejected

14 the claim for an itemised list", so they refused to do it.

15 Then paragraph 15, during the course of hearing the application AstraZeneca

16 described their claim for privilege as "conventional":

17 "I accept that the claim for legal advice privilege is described adequately. However,

18 although it may have been conventional at one time to state that other documents are

19 'by their nature privileged', such a statement has no place in modern litigation, let alone

20 litigation of very real complexity. It is clearly unhelpful, without describing the

21 documents said to be privileged, to say that 'their nature' explains why they are

22 privileged because the recipient of the list of documents has no way of knowing which

23 documents, or classes of documents, are being referred to."

24 Then paragraph 16, Sir, I don't need to read out. That is the passage of Hodge and

25 Malek which I took you -- sorry, Matthews and Malek which I took you to, Sir. It's a

26 slightly briefer version because it pre-dates Astex; it's now been updated to reflect this

1 judgment.

2 Then paragraph 17, the court says that the disclosure statement was inadequate.

3 "The disclosure statement includes the 'by their nature' rubric not once but twice. On
4 the first occasion it is part of the 'headline' claim to withhold inspection and would
5 therefore apply to all the documents withheld ... it is then repeated ..."

6 And they say the initial claim was "poorly drafted", et cetera.

7 So the initial claim to privilege does not work and it was understandable that the other
8 side would have interrogated AstraZeneca's claim to privilege, but then we see what
9 actually happened is that for this hearing, this application, AstraZeneca put in
10 a witness statement and that's a witness statement from a partner at Marks & Clerk
11 Solicitors.

12 Sir, could I just ask to you cast your eye over the remainder of 17. What you see there
13 is the solicitor saying, and I quote, it's all "obviously privileged", towards the end of the
14 first indent. They are obviously privileged, so the solicitor is assuring the court that the
15 privileged documents are definitely privileged but then he gives some, a bit more
16 flavour, a bit more colour, so if I could ask you to read (a) and (b) to yourself, Sir.

17 **(Pause)**

18 **THE CHAIRMAN:** Yes.

19 **MS KREISBERGER:** So that's some more colour coming from AstraZeneca. The
20 application, in this case you see in the first sentence of paragraph 21:

21 "The application notice seeks an order requiring [AstraZeneca] ... to make a list of
22 each document identified in, or arising from, their internal review in respect of which
23 [AstraZeneca] asserts privilege."

24 So that was the application, a list of individual documents.

25 Then we can move forward to paragraphs 54 and 55 to see what was ordered and,
26 Sir, I'm going to take you through this because this is really grappling with the question

1 of what should Apple have to do here. It's a really valuable authority.

2 So the judge says at -- Chief Master Marsh:

3 "I consider this is a case, exceptionally, in which further evidence about the claim to
4 privilege is essential. This is despite [AstraZeneca's] efforts to cure the obvious
5 defects in its initial claim to privilege ..."

6 In the witness statement which I showed you the relevant passage earlier.

7 "My reasons in summary are:

8 [AstraZeneca's] . approach to claiming privilege has been unsatisfactory and its
9 attempt to clarify the original unsatisfactory claim has not provided clarity."

10 And then there is some more detailed points:

11 "The basis for the claim to legal advice privilege in relation to attendance notes ... with
12 employees ..."

13 It was incorrect. They made an incorrect claim. Even on legal advice privilege the
14 scope of the claim for a certain period is uncertain. It's unclear who the employees
15 were who were interviewed. So this is about really the level of granularity here.

16 Subparagraph iv):

17 "On the law as to legal advice privilege as it applies in this case, [AstraZeneca] has no
18 basis for claiming legal advice privilege over interviews with employees and
19 ex-employees. There might ... be an exception for current employees ..."

20 He concludes:

21 "It is essential that the persons in question are identified."

22 So again, a point of granularity:

23 "... The date from which and the type of work undertaken over which litigation privilege
24 can be claimed cannot be made out ..."

25 AstraZeneca didn't disclose dates. So they need dates to work out whether litigation
26 privilege applied.

1 Subparagraph vi):

2 "The volume of documents ... is not 'particularly large' and so an order to provide
3 further details is not disproportionate in the context of this claim."

4 Sir, I make the same submission here.

5 "With regard to the date [this is number vii] From which litigation privilege is claimed
6 to apply, I am satisfied it is possible for [AstraZeneca] to provide further evidence
7 about both limbs of the test without revealing the content ..."

8 So they can do more without waiving privilege.

9 "... In the same way ... a disclosure statement must be signed by the party giving
10 disclosure, [AstraZeneca's] evidence about the scope of its claim to privilege, as
11 expanded and explained, must be given by a proper officer of [AstraZeneca], not by
12 it[s] solicitors."

13 Therefore he proposed to make the order, "the detail ... to be agreed between the
14 parties, or subject to further submissions". There needs to be a witness statement
15 from AstraZeneca "which supports and explains in more detail the claim to privilege ...
16 [and] should include the following elements:

17 A list of the documents over which privilege is now claimed, taking account of the
18 limited nature of legal advice privilege ... the date when each document was created.

19 In the unlikely event that this description or date ... [reveals] privileged information, in
20 the first instance such a document must be described in general terms or included
21 within a class of similar documents."

22 Sir, that really comes back to your point. At this stage the judge is leaving it open
23 somewhat because we just don't know at this stage. It's very difficult to say individual
24 summaries will cause some problems for Apple. We don't know, so it may be
25 appropriate to say, well, you should give individual descriptions but if you can't you
26 have to explain why not and then we need to look at whether a description of a tightly

1 defined class might satisfy the point, but we're in the dark.

2 And then there are particular points:

3 Each employee must be identified; dates of the interview specified; documents listed
4 "must be marked showing whether legal advice privilege [or] litigation ... or both is
5 claimed."

6 Apple seem to agree to that:

7 "Further evidence about how the claim to litigation privilege arises ...

8 To the extent that it may be necessary [AstraZeneca] must confirm that it does not
9 claim privilege [for a particular date] ..."

10 So you see that's a good precedent in terms of the order that we're asking for here.

11 **THE CHAIRMAN:** We're at a stage earlier in the process, aren't we, because there
12 there was a witness statement from Mr Gilbert which had got halfway.

13 **MS KREISBERGER:** Absolutely.

14 **THE CHAIRMAN:** And the Master is saying, well Chief Master is saying "We will go
15 further". It's largely on the basis of what was in that witness statement, I expect, that
16 justified the extension, so -- part of the difficulty here is I don't really know -- it's not yet
17 clear to me what Mr Kennelly is going to give us. Of course it would be helpful to have
18 some colour around that. Maybe that will make it a little easier to understand how far
19 we need to go. I think what you're inviting me to do is to go to all the way to the end
20 of this process, essentially.

21 **MS KREISBERGER:** I will take to you the draft order because I don't think it's quite
22 right to say we're doing that, but we need to move matters along, obviously.

23 **THE CHAIRMAN:** We do need to move matters along and I think the question is just
24 what's been offered and where does it fall short of a reasonable attempt to
25 an explanation at this stage.

26 **MS KREISBERGER:** Yes. I think the draft order is -- is Dr Kent's proposed order is

1 drafted in a way which will allow for a sensible response from Apple. We will look at
2 that and it may be, as you say, Sir, one might find oneself in an AstraZeneca position
3 where that isn't enough and we need to go back, but what is not sufficient is, at least
4 my reading of what Apple has said so far, is that they want to provide something which
5 applies to documents overall.

6 Dr Kent has pressed and said we want individual explanations. What we don't see
7 from Apple is a response that said that just goes too far but we will give you classes.
8 They could have said that; they haven't said that.

9 So with that, what I would like to do is set out the reasons why the draft order that
10 Dr Kent proposes is a sensible way forward and then I will go to the order itself. So
11 I have five reasons. I will deal with them crisply.

12 I already made the point that the CMA can't demand the provision of privileged
13 documents, so that's our red flag here. That's a bit different from Astex. Dr Kent needs
14 an explanation and, as you said, Sir, as to both why so much privileged material was
15 voluntarily offered up to the CMA but also under what terms.

16 It's right that the documents which Dr Kent has seen are contemporaneous, ordinary
17 course of business documents which is the kind of material you would expect the CMA
18 to be interested in, and as you said, Sir, which has been exhibited in other proceedings
19 in the US, so it's quite surprising. We need explanations, one can't speculate.

20 Second reason is that point that we don't know if Apple waived privilege or not. We
21 simply don't know. We need to understand. Apple has been silent on this throughout.
22 We have raised it in correspondence. We haven't had a response.

23 The third reason is, again, the numbers are unexpected. So we know from the
24 disclosure report that 6 million documents were identified as relevant in the US
25 proceedings. 2,000 seems like a very small number compared to 6 million. It may be
26 because it was drawn from exhibits but we need to understand given this substantial

1 overlap between the US and the CMA proceedings. So we have this small number
2 but then we have this disproportionately high number of privileged documents and the
3 consequence of that is that all Dr Kent has been given thus far is about a thousand
4 documents.

5 Now, Dr Kent doesn't know whether the review for relevance was too narrow, too much
6 was excluded or whether it's the designation of privilege that's been over zealous or
7 both.

8 **THE CHAIRMAN:** If the total population was 2,000 then you know how many of those
9 were treated as being privileged so it really is a question of relevance, isn't it? That
10 must be a question of -- we don't know how many were given to the CMA but if we had
11 that number we would be able to determine what the proportion was.

12 **MS KREISBERGER:** That's the key. We would like to know the number because
13 then we can understand whether it is a surprisingly small subset that was identified for
14 relevance but, again, we're speculating. We don't know.

15 **THE CHAIRMAN:** Yes, and it's a separate question, isn't it, whether the review for
16 relevance has been conducted properly as against the document population list that
17 was subject to my order but that's not a subject for today, presumably?

18 **MS KREISBERGER:** No. I will come back to broader questions purely in relation to
19 the disclosure report on that. So I will come back to that.

20 **THE CHAIRMAN:** Yes.

21 **MS KREISBERGER:** The fourth reason as to why this should be ordered is it's not
22 an onerous exercise because, again, I'm having to speculate to a degree because we
23 don't know the terms on which these documents were provided to the CMA but one
24 would imagine that Apple would have done the work to identify the privileged material
25 when they disclosed privileged material to the CMA, so there should actually be
26 a record, so it's hard to understand why this would be an onerous exercise, unless no

1 mention was made of privilege to the CMA. We don't know.

2 The last and fifth reason is really Apple's conduct in claiming privilege. It is a cavalier
3 disregard for the rules, Sir, and it does mean that Apple should now be ordered to give
4 a detailed explanation. I just want to summarise the relevant circumstances that I rely
5 on to make this submission.

6 First of all, the CMA disclosure was itself three days late. That is in breach of
7 the September CMC order.

8 We then get the bare assertion in the privilege log which is itself a clear breach of
9 rule 64. Apple then refuse to engage, two and a half weeks to reply in
10 correspondence, but when they did respond it was simply to tell the class rep that she
11 wasn't entitled to any more, which is wrong under the law.

12 Now, as I said earlier, as the hearing approached Apple changed its tune and said it
13 would like a chance to mark its own homework on privilege. So Apple wants to have
14 another look to see if it's improperly claimed privilege over documents which are not
15 in fact privileged.

16 That in itself rings alarm bells and it raises the question: did Apple take the privilege
17 review seriously first time around? It seems implicit that they didn't.

18 Why hasn't Apple already done this rechecking in good time for today's hearing so that
19 the Tribunal would have a better view of where matters stand? And it's right that if
20 Dr Kent hadn't brought this challenge, these over-expansive claims to privilege, seems
21 to be the suggestion, would have stood; we would be none the wiser. But, again,
22 Dr Kent has no visibility on this rechecking exercise because of this steadfast refusal
23 to give explanations.

24 Dr Kent can't take these matters on trust against that background. It's a litany of
25 deficiencies from a very sophisticated litigant.

26 In my submission that shows an unacceptable lack of regard for the rules.

1 Sir, I am conscious I keep promising to take you to the draft order. Just before I do
2 that I do want to respond to points made by Apple in its skeleton but I think I can do
3 this quickly. I have dealt with the point that they say part 31 is drafted differently from
4 rule 64. That's not right. I have dealt with the point that they say -- no, sorry, I haven't,
5 Sir. What Apple says in the skeleton is that a literal reading of part 31.19 calls for
6 privileged documents to be listed individually, but what Apple says is the practice of
7 the High Court is to ignore that CPR requirement. Well that's not right. I have shown
8 you the law now.

9 And then Apple makes a strangely tautologous statement. It's at paragraph 42. They
10 say rule 64(4) provides that "where disclosure is not made by a list, it is not necessary
11 to set out the basis of the claim to privilege in such a list."

12 I don't really understand that statement but you have my submission there. They also
13 say that these explanations would be excessively onerous and I have set out why
14 I can't believe that can be right. The record should exist and Apple has sufficiently
15 deep pockets to cope with this. We're asking for a brief description of a limited pool of
16 documents.

17 Now, I will, with that, Sir, take you to the draft order.

18 **THE CHAIRMAN:** Yes.

19 **MS KREISBERGER:** And as I said, it is paragraph 2 on page 3. Taking the
20 categories in turn, so, we have proposed the date of 13 March for the provision of
21 these explanations which we think is generous particularly given the suspicion that
22 there is a pre-existing record of this material.

23 So first of all Apple has to give us the documents which privilege has been improperly
24 claimed over and they're doing -- they say they're doing this. 2.2, we ask that Apple
25 file and serve a statement verified by a statement of truth which provides the following
26 information in relation to each document, the category of privilege. Secondly,

1 a description of the nature and contents of the document sufficient to allow the Class
2 Representative to understand the basis on which privilege is claimed. That's a key
3 point, Sir.

4 Now it is going to be a matter for Apple as to how they comply with that but we don't
5 think any other order is feasible in these circumstances. If they tell us they can't do it
6 document-by-document well we better have an explanation of why that is. I should
7 add, Sir, that I think 2.2.2, if it's not clear on its face that includes date, which, as you
8 saw in Astex, is particularly relevant for litigation privilege.

9 2.2.3, the identity and role of the author and sender or recipient. That, Sir, is necessary
10 to work out whether legal advice privilege is properly claimed in particular.

11 Apple says revealing this information may reveal aspects of privileged
12 communications. Now, it's just difficult to see why that's the case, but Dr Kent has
13 made very clear in correspondence that she's not seeking privileged material, and of
14 course the Tribunal can order Apple to provide privileged information. But none of that
15 prevented an equivalent order in the Astex case.

16 And then 2.2.4, Sir, that is your point: we need to understand the terms on which these
17 documents were supplied to the CMA in order to work out whether privilege has been
18 waived or not.

19 Sir, I'm sorry, I am just being reminded -- yes, also on -- if it's not -- it should be clear
20 that these categories of information cover who did the privilege review at Apple and
21 when. This is relevant information to understand what was done, and was that done
22 before providing the information to the CMA or only at this stage? We just don't know.

23 **THE CHAIRMAN:** Yes.

24 **MS KREISBERGER:** And as I said, Sir, we ask for that information by 13 March. It
25 needs to be provided promptly because as you observed, Sir, we need the
26 explanations in order to decide whether any challenges are to be made and Dr Kent

1 | wants to get on with this and have this resolved as expeditiously as possible.

2 | Sir, so those are my submissions on this issue.

3 | **THE CHAIRMAN:** Should we deal with them separately? I think while we all have it
4 | in mind it might be quite helpful, if that's convenient.

5 | **MS KREISBERGER:** I'm grateful.

6 | **THE CHAIRMAN:** Mr Kennelly.

7 |

8 | **Submissions by MR KENNELLY**

9 | **MR KENNELLY:** I will begin, if I may, with my learned friend's scene setting, because
10 | she is asking you to make an exceptional order and I will explain why it is
11 | an exceptional order. She says it is justified because of what she says is Apple's
12 | cavalier disregard for the Tribunal's rules. And she says that by reference to four
13 | points and I will take them in turn.

14 | First, she says that in complying with the order in relation to CMA documents we were
15 | three days late. It was actually the next working day, as her own chronology described.
16 | That's what she describes as a serious and cavalier breach of the rules.

17 | The second point she makes is that our privilege log involved a clear breach of rule 64.
18 | As I will show you, Sir, by reference to the authorities, that's just simply wrong. The
19 | authorities demonstrate there is no need for documents to be addressed individually
20 | and I will come back to that.

21 | Thirdly, she says Apple refused to engage. She describes our conduct as somehow
22 | obstructive when in fact, as she was forced to acknowledge, we have offered to do
23 | a re-review of the documents and file and serve a statement verified by a statement
24 | of truth setting out the types of communication in respect of which privilege is claimed
25 | and, critically, the reasons why they're privileged, bearing in mind our duty to give
26 | comprehensible and adequate reasons. We have that well in mind in the task we are

1 currently undertaking.

2 The last point she makes is: why is it not done now, this re-review verified by
3 a statement of truth? I just don't understand that point. Her own draft order expects
4 that to be done by 13 March and we are committed. We agree to do it by 13 March.

5 Those are her four points which she describes as a "cavalier disregard of the rules"
6 and we reject them.

7 In fairness, for these proceedings to advance, the tone that the parties use and the
8 way we approach one another in relation to disclosure must be more cooperative, and
9 language like that shouldn't be bandied about when it's completely unsubstantiated.

10 **THE CHAIRMAN:** Certainly on the last point I would agree, Mr Kennelly, and it is -- it's
11 always no doubt a matter of some dismay to see the correspondence and the speed
12 at which it travels and the points that are taken, so I will pick up that point and
13 emphasise that I think there could be more cooperation here.

14 I think -- I don't want to get into the history of why or what has happened when. I will
15 say the Tribunal orders are to be complied with in accordance with the order and
16 I understand that sometimes that might not be possible, in which case obviously notice
17 of that should be given in advance rather than subsequently, and maybe that isn't
18 always possible but mostly it should be.

19 I will also say that it is clear that there is material that is going to be provided in relation
20 to this and should be provided in relation to this that could have been provided earlier,
21 and equally I think there are probably questions that could have been asked earlier,
22 and I don't want to get into the who said what when but there is no doubt that, as it
23 appears to me, there is more contention than cooperation going on in some of these
24 issues, and it applies to some of the other things we're going to talk about as well.

25 So while we're on the subject there are really two ways of dealing with that. One is
26 there needs to be a change of approach and the parties need to sort it out themselves

1 and more efficiently. The second is we're going to have to have some form of
2 mechanism involving my time which is going to be expensive and unpleasant I expect
3 for all of us and it's one or the other really, and I think I would certainly encourage you
4 to the former, but if necessary we will have to do the latter.

5 Just so that everybody has that in mind and I'm not making a particular point about
6 any incident or any particular party. Actually, it seems to me that you both could be
7 doing quite a lot better to move things along, so maybe we park all that and come back
8 to it later if it's relevant for other purposes.

9 **MR KENNELLY:** It's important, Sir, because -- and we took your December
10 disclosure order very much to heart, and you urged the parties to cooperate further
11 and so, for example, by offering this re-review of the privileged documents that's
12 an example of us anticipating the concerns, addressing it proactively, agreeing to the
13 timetable proposed by the Class Representative, and then Ms Kreisberger says "Well,
14 oh, that's them marking their own homework," but that's the completely conventional
15 way that one addresses a challenge, the initial challenge to a claim of privilege.
16 There's nothing improper or unusual -- that is the only way and the conventional way
17 which it's done, so we are trying. And the reason why it's important, Sir, is because
18 my learned friend's suggestion is that somehow we have acted improperly and that
19 should then prompt the Tribunal to make an order which is absolutely exceptional and
20 I will explain why that is.

21 The other point she made is red flags. She said there are too few documents in the
22 CMA disclosure. I am instructed that of the documents we disclosed they came from
23 a set of about 9,000 documents.

24 **THE CHAIRMAN:** Sorry, 9,000 documents went to the CMA.

25 **MR KENNELLY:** Indeed. Ms Kreisberger says well that's -- she will say that's a small
26 number in view of the millions that were given in the other proceedings, but, again,

1 I don't understand where that's going. There has never been a suggestion that we
2 failed to comply with the CMA document requests. There's never been any contested
3 hearing about the adequacy of our document production for the CMA.

4 **THE CHAIRMAN:** I think the question is put against that, why are there only 2,000
5 that have passed the relevance review, but that's a question, I think, for later. Let's
6 not deal with it now. I think that's the point that's been (inaudible) about, but
7 Mr Kennelly, there is a point there, isn't there, and if your instructing solicitors say that
8 information is going to be provided, the earlier it's provided the more constructive it is.
9 That's a simple point, isn't it, and there is quite a bit of other things I suspect that we're
10 going to end up with Apple disclosing to the Class Representative for the purposes of
11 making a proper clear statement about what the privilege position is and, again, the
12 earlier that material is disclosed, the less likelihood there is that we need to be having
13 these arguments.

14 **MR KENNELLY:** The second point on the red flag was she said it's suspicious that
15 there are so many that are claimed to be privileged from the set.
16 Now, there was a suggestion by my learned friend that that's odd because they are
17 exhibits, the documents in other proceedings. She said she would take you to the
18 disclosure report to make that point good. She didn't do that. I need to do it now. It's
19 in the core volume. The disclosure report is behind tab 8 and you will see that the
20 CMA document set is not limited to exhibits produced in other proceedings. And if you
21 could turn, please, to C83. It's page C83, paragraph 20.

22 **THE CHAIRMAN:** Yes.

23 **MR KENNELLY:** So part of the documents that were responses to the CMA request
24 did come from exhibits produced in the US Epic proceedings but then, (b), we also
25 produced documents on the basis of "targeted searches across other Apple document
26 productions".

1 And that's where the privilege documents come from. They don't come from public
2 exhibits produced in the US Epic proceedings.

3 Similarly documents responsive "to specific, narrow requests" such as, without
4 limitation, surveys or internal financial reports within the Apple business, so the set is
5 broader than the exhibits to the US Epic proceedings.

6 But again, the nature of the documents and the reasons for claiming them to be
7 privileged is precisely what we propose to address in the report, the statement, verified
8 by a statement of truth, that you will have on 13 March.

9 So far from being red flags, these are completely normal aspects and to the extent
10 there is any concern we have that well in mind in the document we are seeking to
11 produce -- which we will produce by 13 March.

12 **THE CHAIRMAN:** It is a slightly odd situation isn't it, Mr Kennelly, and I'm not drawing
13 any conclusions from it because the whole point of this is to get an explanation of it,
14 but it is a bit odd that in the course of disclosing 9,000 documents to the CMA nearly
15 10 per cent of those turn out to be privileged for some reason, which is far from clear
16 from the way they're described; and I'm not making any suggestion about whether they
17 are or are not but it does seem to me entirely understandable from the Class
18 Representative's position that they would think that curious. It is curious, isn't it? And
19 you have done probably more lists than I have and I pretend to be no expert on
20 documents disclosed to the CMA, but it doesn't strike me as being a usual thing that
21 in the course of providing your documents, as requested by the CMA, you would give
22 them such a large proposition of confidential and privileged documents.

23 Now, I'm not suggesting for a moment there may not be a perfectly good reason for
24 that and it may be we never know the answer to that, but at least -- one can foresee
25 that that is going to be a subject of some curiosity from the Class Representative and
26 indeed from the Tribunal.

1 I guess the question really is how do we get to answering that in a proper way in
2 accordance with the rules and the authorities as quickly as possible so we can see
3 whether there is anything further that needs to be dug into?

4 **MR KENNELLY:** Indeed, Sir. On that first point, contrary to what my learned friend
5 said about never being explained, we have explained in correspondence and I can
6 show you a letter although it's very -- it's a brief point so I can address it orally. We
7 said that the documents were provided to the CMA for the limited purpose of the CMA
8 investigation and market study. The privilege was waived as regards the CMA for that
9 purpose only. It's a limited waiver, and they were produced in circumstances of
10 confidentiality, but it (inaudible) because these were requests made, and it's common
11 ground, by the CMA under section 26 of the Competition Act and therefore their
12 confidentiality is guaranteed and the restrictions under part 9 of the Enterprise Act
13 apply. So they have the enhanced protection of confidentiality and the -- there are
14 criminal offences which attach under the Enterprise Act if that confidentiality is
15 breached.

16 **THE CHAIRMAN:** In a sense you don't need to go there, do you, because I think if
17 you establish that the documents are privileged then that's the end of it, isn't it?
18 Subject to the waiver point. I understand the waiver point has to be dealt with but
19 certainly no one is suggesting that the question of section 26 and confidentiality is
20 going to -- it's going to play a part in this. What it's really going to be about is, isn't it,
21 whether they're privileged in the first place and what the basis of the waiver is.

22 **MR KENNELLY:** On the question of waiver, the Class Representative has asked
23 questions, which is perfectly fair, but what the Class Representative has not done yet
24 is directly claimed that we in fact waived privilege in those documents. Far from them
25 claiming we have in fact waived privilege in those documents and therefore they're
26 entitled to them and privilege has fallen away.

1 If that's the point they're trying to make they need to say so expressly and we can
2 address it, but it's not clear even now if that's the point they're making.

3 **THE CHAIRMAN:** I think logically the first step is understanding the nature. It's quite
4 difficult to make a concession, I suspect, of waiver without understanding the nature
5 of the documents a little bit better, and if one is presented with a thousand documents
6 which are said to be either litigation privileged or legal advice privileged with no
7 indication of the dates or the provenance or the circumstances they came to be in, it's
8 quite hard to deal with that point, isn't it?

9 **MR KENNELLY:** Which is why it is premature, in my submission, for them to make
10 suggestions about a failure of retaining privilege or challenging the limited waiver point
11 until they see the statement produced by the solicitor at Gibson Dunn, verified with
12 a statement of truth. It's at that point -- directly to the point you have made, Sir, it's at
13 that point that they can say: okay now we understand and perhaps the concerns about
14 limited waiver fall away. But really it's premature now for Ms Kreisberger to complain
15 about something she has yet to see.

16 **THE CHAIRMAN:** Yes, I think I made the same point to Ms Kreisberger that we need
17 to get -- whatever it is we're going to get from you we need to get and have a look at
18 it and then see what happens next.

19 **MR KENNELLY:** Sir, with those introductory remarks, I will need to address you,
20 though, on how far from the normal practice Ms Kreisberger's current order is. It's
21 quite inappropriate, in my submission, for Ms Kreisberger to ask you to make an order
22 along the lines you have seen in circumstances where you've yet to see the statement
23 from Gibson Dunn.

24 **THE CHAIRMAN:** Would it be inconvenient for you to just let me have a clear
25 understanding of where the difference between you is, because I understand the point
26 you're making about not wanting to list out individual documents. That's obviously one

1 point. I'm not clear -- I don't know whether you're able to say anything about what
2 would be in this statement. I assume we're talking about a witness statement in
3 effect --

4 **MR KENNELLY:** Yes.

5 **THE CHAIRMAN:** -- being provided by somebody with knowledge of the background,
6 and I would find it quite helpful to understand what the difference is between what's in
7 paragraph 2 and what you're actually planning to say in the witness statement.

8 I don't want to take you out of turn. If it's unhelpful to do that but I think it would be
9 quite helpful for me -- I think it's probably more helpful to do it that way than to have
10 an abstract discussion about what might be or might not be appropriate to order.

11 **MR KENNELLY:** Sir, I am more than happy to do it that way. Shall we look at
12 Dr Kent's draft order then, because that was the document that you were taken to.

13 **THE CHAIRMAN:** Yes.

14 **MR KENNELLY:** And paragraph 2.2. Here we see the differences between what
15 Dr Kent is seeking to have ordered and what we say is appropriate.

16 First and foremost at 2.2, she says that the statement which you will receive must
17 address each and every allegedly privileged document separately.

18 **THE CHAIRMAN:** So that's the document-by-document.

19 **MR KENNELLY:** Document-by-document which we say is completely exceptional.
20 It's ordered only in cases where there is genuine evidence that there has been
21 a problem with the disclosure production in dealing with the claim of privilege.

22 **THE CHAIRMAN:** Is the objection to that a practical one or is it one of principle or
23 both?

24 **MR KENNELLY:** Both.

25 **THE CHAIRMAN:** Because I think, as I understand it, someone is actually going to
26 go through all these documents, somebody of presumably some seniority or

1 qualification at Gibson Dunn or someone else is going to go through them. So actually
2 we're going to have, presumably, some schedule drawn up by somebody saying, "I've
3 been through them all and they are all right or not". So in terms of practicality that's
4 sort of been done, hasn't it?

5 **MR KENNELLY:** It's a question of degree. I can take instructions but it is more
6 onerous. It's hard to say this in the abstract but it may be more onerous than it needs
7 to be for the purposes of addressing the concerns raised by Dr Kent. But what we
8 should not be ordered to do, in my submission, in advance is commit to addressing
9 each and every document individually. That's wrong in principle as I shall show you.

10 **THE CHAIRMAN:** Yes, of course.

11 **MR KENNELLY:** And potentially disproportionate.

12 **THE CHAIRMAN:** Yes, I don't want to take you away from dealing with the point
13 properly. I just want to understand the landscape --

14 **MR KENNELLY:** There is a proportionality concern as well. It's really unnecessary.
15 It's gratuitous, really, in circumstances where they have not yet seen the statement.
16 They're anticipating problems that may not arise.

17 The next point is the category of privilege which is said to apply. Again, I have no
18 objection to that if we're allowed to deal with it compendiously, and by "compendiously"
19 I don't mean at such a high level that it's impossible to work out how privilege is being
20 claimed. We fully accept the need to give reasons which is exactly what -- I think Mr
21 Doris of Gibson Dunn who will be producing a statement will do, but it should not be
22 done by reference to each and every separate and individual document.

23 **THE CHAIRMAN:** 2.2.1 is not really in contention. You're going to have to tell us,
24 aren't you -- Mr Doris is going to have to tell us whether it's litigation privilege or legal
25 advice privilege --

26 **MR KENNELLY:** Indeed.

1 **THE CHAIRMAN:** -- or indeed something else and that's going to have to be by
2 reference -- wherever we end up on, it could either be by reference to individual
3 documents or some class, but that is not really in contention, is it, at that point, subject
4 to the point about individually.

5 **MR KENNELLY:** And then this, though:

6 "a description of the nature and content of the documents sufficient to allow the Class
7 Representative to understand the basis on which the privilege is claimed."

8 That is covered, in my submission, by our offer to address in evidence the reasons
9 why the documents are claimed to be privileged, and that types of communication
10 which is you see -- you see in red at 2.2.5, that's what we're proposing.

11 So by dealing with the types of communications in sufficient detail and the reasons
12 why they're claiming to be privileged, again in sufficient detail, we address the concern
13 that the Class Representative must understand the basis upon which the privilege is
14 claimed.

15 **THE CHAIRMAN:** So in a way you don't object to 2.2.2 other than the tying it back to
16 the nature and content of the document. You accept there needs to be something
17 which provides sufficient information for the Class Representative to understand the
18 basis on which --

19 **MR KENNELLY:** Yes, but nature and contents of the document is too detailed. That
20 is -- there is no precedent in circumstances such as this for that kind of detail.

21 **THE CHAIRMAN:** That's the document-by-document point.

22 **MR KENNELLY:** Exactly, but also -- indeed, it lends itself to
23 a document-by-document analysis which is why I object to it, and there was a further
24 point my learned friend made that she says we must be ordered to give the date of
25 each and every individual document under this heading of 2.2.2. That is obviously not
26 in the draft order but she added it on her feet, and again, completely wrong in principle

1 to require that and I will show you that by reference to the authorities.

2 **THE CHAIRMAN:** I think -- I'm sure you're going to show me something on this as
3 well, but surely it would be helpful, if not necessary, for there at least to be a date
4 range? One assumes that in order to explain with sufficiency what the position was
5 with litigation privilege you would need to say what the litigation was and when the
6 document, or broadly when the document was created by reference to the litigation,
7 because obviously if it's in contemplation of litigation you would need to know that it
8 was proximate, for example.

9 **MR KENNELLY:** Indeed, and Mr Doris is dealing with the reasons why they're
10 privileged, provision of a date range might well be a useful way of showing that. But
11 at this stage we shouldn't be ordered in advance to specify the date of each and every
12 document over which privilege is claimed.

13 **THE CHAIRMAN:** Again I think it probably comes back to this point about single
14 versus some grouping, doesn't it? The reason -- I appreciate this is probably a little
15 painful, but it does seem to me that a lot of this does fall out of that difference of opinion
16 rather than anything else.

17 **MR KENNELLY:** Absolutely. There's a further point, though, 2.2.3, the order asks for
18 the identity and roles of the authors and/or sender and/or recipients of the document
19 in question. That is highly unusual and contrary to normal practice, as I will show you.
20 Ms Kreisberger skipped over this in her reading of Matthews and Malek, but in
21 Matthews and Malek it says in terms this is not normally ordered. It was ordered in
22 Astex because in Astex as, Sir, you observed in my respectful submission correctly,
23 they were at the end of the process where they had effectively reviewed Mr Gilbert's
24 statement, found it to be inadequate and then required the provision of more
25 information.

26 We're not at that stage yet.

1 **THE CHAIRMAN:** Again, you would expect, wouldn't you, the statement to -- in
2 relation to, for example, legal advice privilege to identify that it was between a legal
3 adviser --

4 **MR KENNELLY:** But not a name --

5 **THE CHAIRMAN:** Not necessarily a name, and I suppose that -- well, I suppose that
6 comes back a little bit to the question of just how varied these documents are. Do you
7 have a whole lot of documents which are very, very different or do you have a set of
8 documents which can be well described as a class and to which this information can,
9 perhaps generically but nonetheless accurately, have been applied, so from in-house
10 counsel to operating unit or whatever it happens to be.

11 **MR KENNELLY:** And we have the Tribunal's indication well in mind as we do this
12 task but it should not be done by reference to the identity and roles of the particular
13 authors, senders and recipients in question.

14 And then an explanation of why the Defendants consider the circumstances in which
15 the documents provided do not give rise to a loss or waiver of privilege. There is no
16 need for an order to that effect. If we are minded to resist an argument from the Class
17 Representative, if one is ultimately made that we have in fact waived privilege, well
18 then we will need to deal with those arguments that they make. But it's again
19 premature at this stage to set out, in the context of this detail, separately why we didn't
20 waive privilege in providing documents to the CMA. That's a separate issue.

21 **THE CHAIRMAN:** Yes, and maybe a good example of another situation where
22 leaving it isn't going to make it any easier and so you might as well tell us now. But
23 anyway we will see. I'm sure Ms Kreisberger will have something to say about that.

24 **MR KENNELLY:** Really that's a separate issue which is likely logically to be
25 addressed after they review Mr Doris' statement.

26 **THE CHAIRMAN:** It's the next obvious issue.

1 **MR KENNELLY:** Exactly, and so to order us now to deal with it, if it's in our interests
2 to do it we don't need an order to do it, and if there is a genuine attack -- if the argument
3 is these documents in fact have lost their privilege, well that's something we will need
4 to address. We don't need an order to force us to do that. That's something that we'll
5 have to do anyway.

6 **THE CHAIRMAN:** I am conscious of the transcript providers. I wonder if we should
7 take a short break. Is that a convenient point?

8 **MR KENNELLY:** Yes, indeed, thank you, Sir.

9 **THE CHAIRMAN:** We might make that ten minutes. We will come back at 5 past
10 midday.

11 **(11.58 am)**

12 **(A short break)**

13 **(12.05 pm)**

14

15 **THE CHAIRMAN:** Mr Kennelly.

16 **MR KENNELLY:** Thank you, Sir. We were discussing questions of practicality. I am
17 now going to address questions of principle.

18 **THE CHAIRMAN:** Yes.

19 **MR KENNELLY:** If you go to the legal authorities, please, tab 13. I am going to
20 begin -- sorry, actually it's -- it has a new tab number, A/181. It's Matthews and Malek
21 that was added this morning so it may be 13.1.

22 **THE CHAIRMAN:** Tab 14, yes.

23 **MR KENNELLY:** Tab 14, I am told.

24 **THE CHAIRMAN:** Yes.

25 **MR KENNELLY:** And page A/184, paragraph 6.16.

26 **THE CHAIRMAN:** Yes.

1 **MR KENNELLY:** So, Sir, you will have well in mind the draft order from Dr Kent that
2 we have just been through and I want to show you how exceptional that draft order is.
3 It is not a normal order. And you see at 6.16, this also goes to the question of whether
4 what we did was such an egregious breach of the Tribunal's rules as is claimed.
5 The three main requirements in relation to documents in respect of which it is
6 claimed --

7 **THE CHAIRMAN:** Sorry, Mr Kennelly to interrupt you.
8 Ms Kreisberger took me right through this so you can pick anything --

9 **MR KENNELLY:** I'm sorry. The first and most important thing is identifying the
10 documents, four lines down: "it is not necessary to specify the provenance, makers or
11 the date of such documents."

12 **THE CHAIRMAN:** Yes, and I don't think it is being said that -- there may be lots of
13 criticisms about the way that Apple approach their initial disclosure of this, but I don't
14 think it's said it should have been done at the time. I think what's being said now is,
15 because of the circumstances, I should take the further step of ordering that.

16 **MR KENNELLY:** Yes indeed, but the circumstances she says justify this exceptional
17 order, which is a deviation from the norm, is that we have somehow breached the rules
18 and what we have done, and the point -- the short point I am making is the order she
19 is seeking is an unusual order, it is not the normal order, and it arises only when there
20 is a proper challenge to privilege where there is an issue about whether privilege is
21 properly claimed.

22 So first the provenance, makers or date is not normally given, and then this, and this
23 goes to the question of whether we in fact breached the rules of the Tribunal in dealing
24 with privilege compendiously. She said -- here it is said: "it is not the usual practice to
25 individually number every document covered by legal professional privilege ..."

26 And because at points in my learned friend's submissions she suggested that was in

1 fact the requirement, and that's just not right. It is not the usual practice individually to
2 number every document covered by legal professional privilege. It may be appropriate
3 where there is -- particularly where there is an issue as to whether privilege is properly
4 claimed, and we will see that in Astex to which I will return, but rule 64 of the Tribunal's
5 rules does not require the documents be addressed for the privileges claimed on
6 an individual basis, there was no breach in our failure -- or our approach in not doing
7 that.

8 Moving back, if I may then, to the second authority, the extract in Hollander which
9 summarises the other cases. That's in tab 13 and page A/173. This is, again, a very
10 recent edition of the book on privilege. It's from 2021, and if you go to page A/172,
11 just very briefly you will see the point that was made, just to give you some background
12 to the point that was made in the skeletons. One sees at the top of A/172 the fact that
13 in the High Court under the CPR it's mandatory to give documents numbered by list.
14 So it may be said in the High Court because it's mandatory to have documents
15 disclosed by list and numbered, it appears there to be a requirement that each
16 document be addressed individually, including where privilege is claimed.

17 The short point is that requirement for a list does not exist in the Tribunal, so if there
18 is a difference it points towards the possibility for a more broad-brush approach but
19 that's really background. What really matters is what we see later.

20 If you turn over the page, please, A/173, "Individual Listing of Privileged Documents?",
21 and pausing here, none of us should be surprised by this. All of us and, Sir, you
22 mentioned a moment ago, have been through hundreds of lists of documents where
23 privilege is claimed and it is completely normal for privilege to be claimed
24 compendiously.

25 Now, the author in Hollander makes the point that taken literally the effect of the rule
26 in CPR 31, at 15-06, says that documents over which privilege is claimed should be

1 listed individually, but that's not the practice.

2 If you turn over the page, A/174, and paragraph 15-07:

3 "... the change in the rule under the CPR [from the old RSC] has not altered the
4 invariable practice of solicitors of listing privileged documents compendiously."

5 **THE CHAIRMAN:** Mr Kennelly, it may be that you're right that Ms Kreisberger is
6 taking a point about the original listing, but I'm not really very interested in that. I think
7 the question for me is -- whether or not that is right; it seems to me that the question
8 is whether there is any basis for an enquiry to be more specific now. So I don't think
9 we need to get into all of this. I can save you the trouble.

10 **MR KENNELLY:** I'm grateful. This is well known to you anyway, I'm sure. The Astex
11 case is important and I'll take you to that --

12 **THE CHAIRMAN:** And I don't want to distract you from that point which is, is there
13 any reason why I should or should not order you to deal with them
14 document-by-document now and indeed to identify dates and names, as is suggested
15 by the Class Representative. So that is still a live point that you do need to deal with.

16 **MR KENNELLY:** Indeed, but it's important because Ms Kreisberger's submission to
17 you was that we were in breach of the Tribunal's rule and her suggestion was that by
18 not dealing with the documents individually, by not giving that kind of information,
19 already we are in breach of the Tribunal's --

20 **THE CHAIRMAN:** I understand why you made the point --

21 **MR KENNELLY:** -- that's plainly wrong.

22 **THE CHAIRMAN:** -- I am indicating to you that that is not a point which exercises me,
23 so you can move on.

24 **MR KENNELLY:** On Astex, she prays in aid of this case because she says this is
25 a case where privilege was challenged, so it was an issue where an unusual order
26 had to be made, and she draws an analogy between Astex and our case, which she

1 says justifies the order she seeks because her order, we now see, is based on the
2 order that the court made in Astex.

3 Let's look at the Astex case and go, if we may, to the same paragraph that my learned
4 friend took you to: paragraph 10 in the judgment of Chief Master Marsh, A/131.4. One
5 sees straightaway that the objection, the concern that the Chief Master had in Astex
6 is very different from the issue in our case, because in Astex the objectionable claim
7 was the one that's underlined in the indented extract from the list. It was the claim for
8 privilege on the basis that there were other documents which are, by their very nature,
9 privileged and excluded from inspection.

10 That language was what the Chief Master said was objectionable, but let's look at what
11 the Chief Master said was not objectionable by way of a description of the privilege
12 claim. It's immediately above the underlined passage; this is the claim for legal advice
13 privilege, and the summary is:

14 "Confidential letters and other communications passing between the Defendant and
15 its legal advisors and patent attorneys for the purposes of giving or obtaining legal
16 advice and assistance, together with drafts and internal memoranda and notes thereof
17 prepared for the purposes of giving or obtaining legal advice ..."

18 And pausing there, that level of detail and that compendious approach to the legal
19 advice privilege claim was said by the Chief Master to be adequate and to -- and in its
20 adequacy to be contrasted with the reference to any other documents which are by
21 their nature privileged and excluded from inspection, and we get that from
22 paragraph 15.

23 Paragraph 15, over the page:

24 "During the course of the hearing of Astex ..."

25 **THE CHAIRMAN:** Ms Kreisberger read this one too.

26 **MR KENNELLY:** Yes, sorry but the bit that I rely on is the second sentence:

1 "I accept that the claim for legal advice privilege is described adequately."

2 So I have just read to you, that five line passage and the compendious approach to
3 those documents, was said by the Chief Master in this very judgment said to be
4 adequate. It's the next bit that he doesn't like.

5 **THE CHAIRMAN:** It's quite interesting, isn't it. I absolutely take your point. What's
6 quite interesting though is when Mr Gilbert gives his witness statement it seems to
7 open up any number of different issues about legal advice and litigation privilege that
8 then are the spur for the final order.

9 Now, I'm not sure where that takes us in the present context because we don't -- as
10 I observed we're still not at stage 2 which is having Mr Doris' statement, or whoever it
11 is, explaining -- but I suppose if nothing else it serves as something of a cautionary
12 tale, doesn't it, as to how quite an oblique claim to privilege has then opened up
13 a whole raft of other issues that appear to have come out of Mr Gilbert's statement
14 rather than actually out of this.

15 **MR KENNELLY:** It turns on facts as these cases always do, but secondly I think the
16 concern was this legal advice privilege was being claimed for documents that were
17 outside normal documents one would see for that, such as attendance notes and so
18 forth.

19 **THE CHAIRMAN:** Once that was apparent from Mr Gilbert's statement that that's
20 what was going on. I suppose in a way you can see this as being -- there is, isn't
21 there, a fairly clear line of authority which I think is summarised quite well, certainly
22 I was looking at Hollander and it seemed to summarise quite well the different stages,
23 that's where there is something like this which may open up further investigation, and
24 then there is the question of the statement that's then given to support the position and
25 there is quite a lot of authority about the circumstances of which it is appropriate to go
26 behind that statement, and then of course you then get into a situation where if that

1 does what is the appropriate order to pursue the matter further, which is what we then
2 see I think happening in Astex.

3 So in that light there is actually just -- it's a repetition of a fairly well worn path, isn't it?

4 **MR KENNELLY:** It is in the sense that it tells you the route one normally has to take,
5 but you can see why I am relying on it because the reference to the legal advice
6 privilege is expressly said to be sufficient. He doesn't say that this summary was
7 inadequate, it was revealed to be inadequate by the later revelations from the evidence
8 from the solicitor. His point here is about the level of detail given in the list.

9 **THE CHAIRMAN:** Yes.

10 **MR KENNELLY:** And in the list --

11 **THE CHAIRMAN:** Yes, I'm sorry, exactly, yes.

12 **MR KENNELLY:** And this -- and this is what's sufficient.

13 **THE CHAIRMAN:** It's what starts the process and at least in Mr Gilbert's statement,
14 in fact actually he doesn't have to order Mr Gilbert to say it because he does it
15 voluntarily, but here, and it is correct, I think, Ms Kreisberger is inviting me to
16 accelerate somewhat down the path on the basis that there are other circumstances,
17 apart from the way this has been just generally described in the disclosure of it, and
18 those largely concern the nature of the exercise of disclosure to the CMA and the
19 number of documents and so on, the list of things that were given, as well as some of
20 the conduct points in particular, things like the refusal to engage and so on.

21 So there are a whole bunch of things here that Ms Kreisberger invites me to accelerate
22 this process and jump further down the line. I agree with you that Astex doesn't
23 actually help us very much with that because it does turn on its facts and what has
24 emerged from Mr Gilbert's statement. I guess the question I'm asking you is what's
25 your answer to the points that Ms Kreisberger is making about -- to the extent you
26 haven't dealt with them -- why I shouldn't jump further down the line now and be more

1 specific about what it is that goes into the statement.

2 **MR KENNELLY:** Because it would be completely contrary to principle and
3 proportionality to assume now that we are -- to assume now that what Mr Doris is
4 going to give you will be insufficient. That kind of assumption would be -- might be
5 appropriate if we had committed the kinds of cavalier breaches that Ms Kreisberger
6 mentioned, but what I am showing you here is that we haven't committed those kinds
7 of breaches at all, and to do this in the ordered way that we see in the authorities is
8 not to make any order against Apple today, to wait to see Mr Doris' report and then to
9 address its adequacy at that stage.

10 **THE CHAIRMAN:** You say principle, because the principle could just be if I have
11 sufficient reason to do it I can do it, which is actually what emerges from Astex because
12 the intermediate step wasn't ever ordered there, it just happened. So I think what
13 you're saying is that I don't yet have enough material to justify that response, and
14 what's being said against you is that it's a very curious situation you've not described
15 very well, the arrangement with the CMA and the way in which it's been described is
16 curious and does raise questions, which I think one has to accept it does. There may
17 be perfectly good reasons for it but it hasn't been described in any great detail at all,
18 and then I think -- and I characterise it perhaps somewhat crudely, but there's been
19 quite a lot of foot dragging is what's been said against you and you've made it quite
20 difficult to get to any point of greater understanding.

21 So those are the two things that are being said as to why I should push harder and be
22 more specific about what Mr Doris now says -- poor Mr Doris I don't know whether he
23 is going to make the statement, he's probably thinking now that he won't, but those
24 are the points that have been made and I suppose I am asking to you to -- are you just
25 saying to me: trust us, we're going to get this right?

26 **MR KENNELLY:** I'm saying the case law tells that you should trust to us get it right

1 and give us that opportunity before you make that kind of order against us.

2 The foot dragging that the Tribunal mentions, the suggestion made by the Class
3 Representative, simply isn't fair in relation to privilege. The approach that we took,
4 that very short approach that we took, to the Class Representative, appears very brief
5 indeed. Why I have taken you to the authorities is to show that in reality, because
6 documents when privilege is claimed were addressed compendiously, that is the
7 normal approach. And I fully accept --

8 **THE CHAIRMAN:** I'm not sure about that because I think that at the very least the
9 statement that was made by, in this situation, was very brief and did elide the two
10 grounds of privilege, and certainly I would expect there to be a little bit more as
11 a matter of ordinary practice, but I don't think we need to get into that. That's not
12 a degree of difference, I think, that is going to determine the outcome here.

13 What I think is plain and, again, this is -- it's entirely a matter for your clients as to how
14 quickly they wish to deal with these issues and how upfront and transparent they want
15 to be about it, but it must have been plainly right from the beginning that this was going
16 to be an area of some contention.

17 Inevitably, when you give somebody 2,000 documents or you are going to give them
18 2,000 documents and you only give them 1,000, they're going to ask some questions.
19 So it almost comes down to a question of tactics, actually, Mr Kennelly. The tactics
20 so far seem to disclose that your client wants to not disclose the information. Of course
21 that is entirely its choice as to how it's going to do it. We're now at the point where
22 you're saying, "Trust me we are going to provide that," but the history doesn't suggest
23 that's been necessarily the approach.

24 The question is what assurance do I have that we're not going to find ourselves back
25 here on 20 March with you not having provided the level of information which I think
26 we all think would be the proper way now to explain what's happened here? And that

1 includes being clear about what's litigation privilege and what's legal advice prejudice,
2 some indication of the types of documents and the background to their creation, which
3 would lead one to accept that that might apply.

4 If I am not going to go into document-by-document, person-by-person, there is clearly
5 a baseline of material that one would expect, I think, to see now, and I suppose my
6 question for you is do you want me to lay that out for you and should we be agreeing
7 that, or are you really telling me that I can be assured that you're going to turn up and
8 we're not going to have to do all this again in three weeks' time?

9 **MR KENNELLY:** I fully understand and the Tribunal's comments will be well
10 understood by those behind me, but to be absolutely clear: we are not proposing and
11 we did not propose in (inaudible) our re-review to simply recycle what we had done
12 before.

13 We understand precisely what we mean when we say that in demonstrating the claim
14 for privilege we need to address the types of communication and the reasons why
15 these particular types of communication are privileged, and the category of privilege
16 which is said to apply. We hear very clearly what the Tribunal expects from us and
17 you expect a certain level of detail which we entirely understand; sufficient detail to
18 allow Dr Kent to comprehend and challenge, if necessary, the claim for privilege that
19 we're advancing.

20 So if the Tribunal is concerned we are not listening, we are listening, and not least
21 because we see from the authorities themselves the level of detail that is normally
22 required to allow the other side to challenge a claim of privilege if one is made.

23 So there is no need to make any order to that effect or to spell out what you require
24 us to produce. I think it is clear from the discussion we have been having, and indeed
25 from what Apple has already offered, what we intend to do. The fact that we're offering
26 to do the re-review itself shows that we want that opportunity to provide that detail to

1 | Dr Kent and to you.

2 | **THE CHAIRMAN:** Do you anticipate that the statement would explain anything about
3 | the review that's taken place and the review that is taking place, so at least we would
4 | understand what has happened in order -- for example, was the review carried out at
5 | the time of supply to the CMA or has it been carried out more recently, and what is the
6 | nature of that review and then the review that's now being carried out? Are those
7 | things that you would expect to be in the statement?

8 | **MR KENNELLY:** I will just quickly take instructions on that.

9 | **THE CHAIRMAN:** It may be unfair to ask for an answer to that now but they are the
10 | sorts of things that certainly I am quite interested in, I'm sure that Ms Kreisberger is,
11 | and I think you can see why.

12 | **MR KENNELLY:** Let me just quickly check, Sir.

13 | **(Pause)**

14 | To the extent -- just to be clear, to the extent that the Tribunal is interested in the
15 | approach that was taken towards the production of documents towards the CMA and
16 | whether privilege was waived --

17 | **THE CHAIRMAN:** No, I wasn't asking that question. I was simply asking about what
18 | information are we going to be given about the process that's been undertaken to
19 | determine whether or not documents are privileged?

20 | **MR KENNELLY:** That will be addressed.

21 | **THE CHAIRMAN:** Yes.

22 | **MR KENNELLY:** For the purpose of these proceedings, the review that's been done
23 | to understand whether or not these documents are properly privileged or not.

24 | **THE CHAIRMAN:** Yes.

25 | **MR KENNELLY:** Yes.

26 | **THE CHAIRMAN:** It may be that review was done in part at another time.

1 **MR KENNELLY:** It certainly was and we will say that too, we will address that as well,
2 but you want to see both.

3 **THE CHAIRMAN:** It's entirely a matter for you. This is really back to this question as
4 to how Apple wants to play this. There is a point at which I suspect these issues are
5 going to all become engaged. If you want to deal with the question of waiver in that
6 statement I think it would probably be efficient and would help all the parties, because
7 I think it is going to become plain that it's going to be a question that's going to be
8 asked if it hasn't already.

9 **MR KENNELLY:** Yes.

10 **THE CHAIRMAN:** I think it is right that it's difficult for me to -- well, we will see what
11 Ms Kreisberger has to say about it but there may well be a choice for your client as to
12 whether they just want to address that upfront and just explain to us all and give us
13 the information that's necessary to explain it properly. If they don't want to do that then
14 I think it's unlikely it's going to go away, and I think if Astex teaches you anything it
15 teaches you that maybe some transparency upfront may avoid some problems later.
16 I'm not sure it will necessarily help us for these things to be kept back because I think
17 sometimes you end up in a situation that Astex discusses in which you're asked to do
18 a lot more than you would if you had been transparent upfront.

19 **MR KENNELLY:** I entirely understand the point the Tribunal is putting to me. So one
20 last point from Astex, because really just to put to bed the idea that at this stage the
21 court should make an order against us requiring the level of detail that Ms Kreisberger
22 suggests, and it's at paragraph 27 of Astex. It says:

23 "The court has [the] power [and this is the point you put to me, Sir, a moment ago], in
24 an appropriate case, to make an order requiring a party claiming privilege to explain
25 in sufficient detail the basis upon which [the] privilege has been claimed."

26 Now, we're doing that, but whether the Tribunal should be making an order to that

1 effect.

2 “The court will not make such an order routinely and there must be a firm evidential
3 basis justifying it.”

4 And we’re just not at that stage. That is the stage where Mr Doris’ statement is
5 reviewed and there are inadequacies revealed in it, and then it might be the stage for
6 requiring that level of detail that Ms Kreisberger urges on you, but at this stage we just
7 aren’t at that point.

8 **THE CHAIRMAN:** I think if you weren’t offering to provide a witness statement to
9 explain this I think probably we would be at that stage, but the question is, is your offer
10 and the assurances you’re giving me about understanding what it needs to cover
11 sufficient to mean that we don’t take the next step? And to that extent I understand
12 the point you’re making.

13 **MR KENNELLY:** And you have the point that orders that were made in Astex at the
14 end, about dates, individuals, all that detail, again that was because the evidence that
15 was produced by the solicitor in question was found to be insufficient to reassure Chief
16 Master Marsh and, again, it’s just a time point. It’s a point that you made to
17 Ms Kreisberger that they’re getting ahead of themselves in looking for that level of
18 detail now before seeing the statement from Mr Doris.

19 And I hear what you say, Sir, about believing it necessary to make such an order at
20 this stage but Apple made that offer in all good faith and seriousness. It was not done
21 to avoid dealing with it at this hearing or to simply recycle what we did previously. We
22 genuinely want to advance the debate. We want the timetable to be adhered to and
23 the Tribunal should trust us to do it. When we are before you on 20 March, if we hadn’t
24 done it this exchange will not be forgotten and we have that well in mind.

25 **THE CHAIRMAN:** As far as the date goes, Mr Kennelly, what do you say about that?

26 **MR KENNELLY:** 13 March I said in my own opening. 13 March.

1 **THE CHAIRMAN:** You can do that both in terms of the review and the further
2 statement?

3 **MR KENNELLY:** Yes.

4 **THE CHAIRMAN:** So we would have that on the 20th.

5 **MR KENNELLY:** Yes.

6 **THE CHAIRMAN:** Good.

7 **MR KENNELLY:** Sir, I have nothing further on the privilege submissions.

8 **THE CHAIRMAN:** Thank you very much, Mr Kennelly.

9 Ms Kreisberger.

10

11 **Further submissions by MS KREISBERGER**

12 **MS KREISBERGER:** Thank you, Sir.

13 Sir, I would like to cut through and go straight to the question of the order that Dr Kent
14 is asking, inviting the Tribunal to make and the content of that order and my overriding
15 submission is that the Tribunal should make the order as set out in the draft. It should
16 make that order today and in fact there's no reason for the Tribunal not to make the
17 order.

18 Now, can I set out, I think four key reasons why my submission is now is the right time
19 to order Apple to give meaningful explanations, essentially the consequence of the
20 order.

21 There's no reason here, Sir – my first reason. There's no reason here to take some
22 sort of iterative approach with a number of interim steps, or one additional interim step,
23 which is obviously going to increase costs and absorb time and be unnecessary.

24 Now, the easiest way of me making this point good, Sir, is Astex. There was – as
25 you've observed, Sir, there was no interim step in Astex. What happened in Astex, as
26 you saw, Sir, is that AstraZeneca volunteered the Gilbert statement before the hearing.

1 Now, that hearing was this hearing. AstraZeneca had asserted a blanket claim to
2 privilege. Astex challenged it and AstraZeneca said: hang on a minute, let's give you
3 some more before we get to the hearing.

4 Now, it was perfectly within Apple's gift to do that. Why don't we have Mr Doris'
5 statement today? Do we really need to now hold on before making any order, see
6 what Mr Doris has to say and then have a further unnecessary step? It's not efficient,
7 it's not in line with the governing principles, it makes no sense. Apple should have
8 given us the Doris statement but we don't have it, so therefore Apple needs to be
9 ordered to do that now. That's the efficient way to go about remedying, curing the
10 defect.

11 Sir, that takes me to my second reason. When I say "curing the defect", Mr Kennelly
12 seemed to mischaracterise my argument. I don't want to dwell on this but just so it's
13 clear. The original breach as not providing any written grounds which is required by
14 rule 64. The original breach wasn't failing to give an individual list. That's not my –

15 **THE CHAIRMAN:** No, I understand that.

16 **MS KREISBERGER:** You have the point, Sir. So that's a second reason.

17 The third is a point, Sir, that you have remarked on so, again, I can take it crisply.
18 What they didn't have in Astex, and we do have here, is this rather curious set of
19 circumstances around the provision of privileged material to the CMA. So putting that
20 together with the fact that Apple didn't tell us why the material was privileged first time
21 round and has not offered up any evidence for today's hearing, putting those points
22 together we need the order now. We can't take a "trust us" approach any longer
23 because it's just going to waste costs and time, which we want to avoid.

24 Now, my last point on why it should be ordered now is that, as I said earlier, Sir, it's
25 not onerous because this material must exist. Now, I want to put a bit of flesh on to
26 that submission. Obviously Dr Kent doesn't know, but one would imagine that there

1 is a spreadsheet which exists. Apple have said they're going to rerun the review, so
2 we know they're going to do the work. One would expect it's a case of pushing
3 a button to have the spreadsheet that lists the documents, in particular tells you who
4 are the authors, what are the dates of the documents and so on.

5 Now, that information, it makes no sense whatsoever to provide that information on
6 the basis of classes of document. In fact, it would be more work to create classes of
7 documents if there exists, as we expect, a spreadsheet that just sets out these – this
8 is the author of the document, it was created on X date. Essentially, metadata must
9 be accessible.

10 If that is right, it's appropriate to order that now. Again, there's no reason to have
11 an interim step where we have some explanation created for the purposes of deciding
12 whether there needs to be a further application. It's just more work. What we want to
13 see is: what are the documents; we need to know the dates to work out if litigation
14 privilege is properly claimed which as you saw in Astex it transpired that it hadn't been;
15 we need to see the authors to see if legal advice privilege is properly claimed.

16 What I urge the Tribunal to do, in my respectful submission, is cut through, make the
17 order and then we can all see where we are in terms of having to make actual
18 applications to challenge claims of privilege rather than kicking the can down the road
19 to have a further step which is unnecessary.

20 So it is right that in these circumstances compendious explanations aren't sufficient.
21 We need to see what the documents are without waiving privilege, of course.

22 **THE CHAIRMAN:** And that's where I think – that's where the shallow point comes
23 because there is – I think that is, as I understand it, Mr Kennelly's point of principle
24 which is at some stage the reason why Astex talks about not making an order routinely
25 and requiring an evidential basis is because you do risk getting that balance wrong
26 between the protection of the privilege and transparency around the basis of the claim,

1 and we don't know whether there is any basis for that here because we don't know
2 anything about the documents, but it does rather suggest a step-by-step rather than
3 jumping to the final conclusion, because if you jump to the final conclusion you may in
4 some cases provide information which is helpful in understanding more than just the
5 basis of privilege, perhaps possibly the nature of the legal advice.

6 That's the sensitivity, I think, that Mr Kennelly has indicated in the skeleton and refers
7 to as the principle.

8 **MS KREISBERGER:** So –

9 **THE CHAIRMAN:** Sorry, and of course what you see in Astex and indeed in other
10 authorities as I understand them, is that you move your way towards that quite
11 cautiously but if you're left with evidential difficulty or inconsistency as a result of the
12 witness evidence that's put up in front of you then you would move forward again.

13 Now, we don't have any witness evidence at all here, and certainly my understanding
14 is that the conventional approach would be – that would be the first thing you ask for
15 in most of these cases and would expect. What you're asking me to do is actually to
16 go quite a long way beyond that in terms of that balance between transparency and
17 risk of damaging the privilege.

18 **MS KREISBERGER:** Sir, could I respond to that?

19 **THE CHAIRMAN:** Yes please, that's why I am putting it to you.

20 **MS KREISBERGER:** I'm grateful for that – with two key points and then I may just
21 take instructions to check I have covered the ground.

22 The first point is it's not right to say that we're skipping ahead and that Astex shows
23 that because, as I said, Apple could have put that evidence in and then you, Sir, would
24 have a much fuller picture of where we are if you had a witness statement from
25 Mr Doris.

26 Now, it speaks volumes that that wasn't done. Having not offered – having told us in

1 | correspondence “you’re not getting any more, that’s your lot”, and having not offered
2 | to put in evidence for today’s hearing, it’s very difficult for Apple to say, “Ah, but you’re
3 | running ahead, you’re racing ahead. Astex is authority. It’s cited in the textbooks.”
4 | And they could have taken that approach.
5 | Having chosen not to, having chosen to actually reveal exactly nothing at all. They
6 | haven’t put – they haven’t given you, Sir, or Dr Kent any further information. They
7 | have chosen to keep us all in the dark as of today’s hearing. Having chosen not to do
8 | that, Sir, my submission is it’s not appropriate – it’s not permissible for Apple to then
9 | say, “Oh well, you must give us a chance now.”
10 | They had their chance. This is the equivalent hearing in Astex. Having not had that
11 | information put before you, Sir, my submission is you have little option but to make the
12 | order because Apple shouldn’t be given this further indulgence. It’s their choice to
13 | have said nothing. As you said, we’re in their hands on this and this is the choice they
14 | made thus far.
15 | **THE CHAIRMAN:** There will be an order made. I don’t think there is any doubt about
16 | that and I don’t think there is any dispute about that, it’s just a question of the degree
17 | of granularity.
18 | **MS KREISBERGER:** Understood, Sir, and I’m grateful.
19 | **THE CHAIRMAN:** And you’re absolutely right, and I think I have made this
20 | observation to Mr Kennelly, there is perhaps a tactical choice that Apple has made
21 | here. There may be some consequences. The consequences may manifest
22 | themselves more in costs than in necessarily – well, let me put it this way, I think the
23 | court should be more cautious about risking the integrity of their claim to privilege
24 | than – and perhaps is able to deal with these issues in other ways to encourage
25 | a different approach, but I don’t think it follows that because they have chosen to
26 | approach it in a particular way, then we do jump straight to that point of granularity

1 when there are intermediate steps that might be followed and might cast some light
2 on that.

3 **MS KREISBERGER:** Sir, that's understood. Then in that case you have my
4 submission that it's going to be very difficult to understand the nature of privilege being
5 claimed in the absence of information like that set out at 2.2.3, who are the authors
6 and what are the dates of documents, and I'm afraid I don't understand how that sort
7 of information can be given by reference to classes which, as I said, one would imagine
8 would involve more, not less, work and without that information it will be very difficult
9 to meaningfully assess whether the claims to litigation privilege and legal advice
10 privilege are properly made.

11 So we would say as a minimum 2.2.3 needs to be given on an individual basis.

12 Now, 2.2.2, description of the nature and contents of the document. Well, you know,
13 if it's right that there are, let's say, a number of emails that cover precisely the same
14 ground between the same parties, perhaps that could be described, to use
15 Mr Kennelly's phrase, compendiously. I'm not saying you have to describe every
16 email. But one can't see that Apple can go much beyond that and give meaningful
17 information to assess the claims of privilege.

18 So, as I say, we need dates, we need author and recipient in order to assess whether
19 the claims to privilege are properly made, otherwise, as you saw in Astex, without that
20 information the claims can't be assessed.

21 So we say it is – given that, it is right to ask for individual description of the documents
22 and Apple will need to tell us if there is some obvious efficiency in relation to a class.

23 Well, they would need to persuade us of that given that we need author, recipient and
24 date by document. And as I say, Sir, that should be a simple question of
25 a spreadsheet.

26 If I might just take instructions on the point.

1 **THE CHAIRMAN:** Yes, of course.

2 **(Pause)**

3 **MS KREISBERGER:** Sir, that's all I was proposing to say.

4 **THE CHAIRMAN:** Yes, thank you.

5

6

RULING

7 **THE CHAIRMAN:** The application made by the Class Representative is for an order
8 that the Defendants set out details of a claim for privilege which was asserted in
9 a letter of 23 January 2023 from the Defendants' solicitors to the Class
10 Representative's solicitors. That letter described some 935 documents, which are part
11 of a document population supplied by the Defendants to the CMA in the course of
12 an investigation by the CMA, as being withheld on the basis of both legal advice and
13 litigation privilege.

14 The Class Representative has asserted that it is necessary to identify with some
15 granularity the claims for privilege made in relation to each document, including
16 a description of the nature and contents of each document and the identity and roles
17 of the authors and/or sender, and/or recipients of the document in question.

18 That is the only dispute between the parties in this application, as the Defendants have
19 agreed that they will provide a witness statement which will describe the
20 circumstances in which the privilege came into being, which would be sufficient to
21 allow the Class Representative to understand the basis of the privilege claimed, albeit
22 that that might be at a more general level than document by document. The
23 Defendants resist disclosure at this stage, at least, of the identity and roles of the
24 authors and senders and/or recipients and the document by document identification,
25 on the basis that such an intrusive step is premature at the moment and they should
26 first be given the opportunity to explain the claim to privilege.

1 I was taken to a case, *Astex Therapeutics Ltd v AstraZeneca AB* [2016] EWHC 2759
2 (Ch), a decision of Chief Master Marsh which both parties relied on. In that case
3 a general statement of privilege led to the Defendants providing a witness statement
4 immediately prior to the hearing. There were matters in the witness statement which
5 gave rise to further questions and the Chief Master made an order requiring a witness
6 statement from the Defendants including, in some detail, dates and identities of
7 individuals.

8 It seems to me that that case turns very much on its facts. The basic principle here is
9 that the Defendants should provide sufficient information for the Class Representative
10 and indeed the Tribunal to understand the basis on which privilege is claimed and
11 should do so in a witness statement. At this stage, I am not going to order that that be
12 done by reference to individual documents or individual senders and recipients.

13 It seems to me that there is a balance to be struck between the transparency required
14 of the Defendants in asserting their claim to privilege and the interests of the
15 Defendants in maintaining that privilege. The step of requiring greater granularity of
16 the documents and the individuals is an exceptional one which could have the
17 consequence of undermining a legitimate claim to privilege. That potential step should
18 await the provision of a witness statement explaining the basis on which the privilege
19 is claimed.

20 I do, however, urge the Defendants to adopt as transparent an approach as they feel
21 able, given that balance. If they do not then there is likely to be further contention
22 between the parties; indeed it may be so even if they do, but it does not seem to me
23 to be helpful for that information to be less than complete, having regard to the need
24 to take care to maintain the privilege.

25 The Defendants have also agreed that they will reinspect the population for which
26 privilege has been claimed and will report to the Class Representative in the witness

1 statement on the outcome of that. That explanation is, I hope, going to include
2 an explanation of the basis of the original document reviews and any further review so
3 that the Class Representative and the Tribunal can understand what work has been
4 done by the Defendants to satisfy themselves about the claim for privilege.

5 The Defendants have agreed to provide that witness statement by 13 March and if
6 necessary we can address the question of its adequacy at a further case management
7 conference which is scheduled for 20 March.

8 There is a further point which arises from the provision of the documents. That is the
9 question of waiver of privilege or whether there has been a limited waiver which
10 protects the privilege of the Defendants despite provision of the documents to the
11 CMA. That, it seems to me, is likely to be an issue in these proceedings and it might
12 be helpful if the Defendants were to address that sooner rather than later - but that is
13 a matter for them at this stage.

14
15 **THE CHAIRMAN:** Now, I might leave it to you to look at that paragraph 2 over the
16 lunch break and if you can't agree what it should look like as a result of that order then
17 we can discuss it immediately after lunch.

18 **MS KREISBERGER:** I'm grateful for that, Sir. Would it be a convenient time then to
19 break now and after lunch begin on the disclosure report?

20 **THE CHAIRMAN:** Yes, what do you think the timing is for that? There is still a bit to
21 do, isn't there?

22 **MS KREISBERGER:** There is still a bit to do, I'm afraid. If I just look at where I have
23 got to in terms of my submissions, I think it will take the afternoon, Sir. I hope that
24 there will no be overrun.

25 **THE CHAIRMAN: (Overspeaking)** That's fine, as long as it doesn't take more than
26 that. That's my concern. I am certainly available for the whole afternoon but I just

1 don't want to find we have unfinished business at the end of the day, so perhaps if you
2 could bear that in mind when you're planning –

3 **MS KREISBERGER:** Sir, perhaps we can revisit at 5 to 2.

4 **THE CHAIRMAN:** Let's start again at 5 to 2 – and make best use of the time.

5 **MS KREISBERGER:** Progress update.

6 **MR GIBSON:** Sir, sorry to interrupt. I hoped not to say much if anything at all today.

7 It's in that vein that I stand up. You will hopefully have received a short letter from the
8 CMA explaining our change of opinion on the decision to appear today.

9 **THE CHAIRMAN:** Yes.

10 **MR GIBSON:** The question that particularly exercises us potentially is around the
11 waiver question but I apprehend from the discussion today and the order just made
12 that it's unlikely that's going to be touched upon any further today. In fact it seems
13 overwhelmingly unlikely. So on that basis I would respectfully ask, while it's always
14 a pleasure to appear before the Tribunal and the company of my esteemed learned
15 friends and other colleagues, for permission to be excused from the remainder of
16 today's hearing.

17 **THE CHAIRMAN:** Yes, of course, Mr Gibson. Thank you for coming along. Sorry we
18 couldn't give you any more (inaudible). You may be back on the subject.

19 **MR GIBSON:** I was going to say, we may well have an interest in appearing at the
20 next exciting instalment of this discussion but for this afternoon I think we can tear
21 ourselves away.

22 **THE CHAIRMAN:** That's entirely acceptable. Thank you.

23 **(12.56 pm)**

24 **(The luncheon adjournment)**

25 **(1.55 pm)**

26 **MS KREISBERGER:** Thank you, Sir. On the wording of the draft order on the

1 | privilege documents, the parties are liaising and they're still communicating on the
2 | precise wording. So, Sir, I suggest I come back to that at the end of the afternoon
3 | where I will take you through all the provisions of the draft order.

4 | **THE CHAIRMAN:** Yes, good, thank you.

5 | **MS KREISBERGER:** I hope we will have agreement by then.

6 | **THE CHAIRMAN:** Good, thank you.

7 |

8 | Application by MS KREISBERGER

9 | **MS KREISBERGER:** Sir, so with that, then, I turn to my second application, which is
10 | the application to remedy the defects in the disclosure report and also the EDQ but
11 | I will be focusing on the disclosure report.

12 | Sir, just by way of preliminary remark in relation to this application, Apple was ordered
13 | in September last year to provide a disclosure report and EDQ under rule 60 of the
14 | Tribunal Rules. That was the terms of the order: compliant with rule 60.

15 | Now, those documents, the disclosure report and EDQ which have been prepared by
16 | Apple we say are not compliant. The disclosure report ignores a number of elements
17 | of rule 60. I will take you through each of them but to introduce the point: the principal
18 | defect is that the disclosure report doesn't include any description at all of the
19 | documents contained in the five repositories, nor of additional documents.

20 | So my overriding submission is the disclosure report at the moment isn't fit for purpose.

21 | Now, Apple has also refrained in the disclosure report from making any sensible
22 | disclosure requests which is another element of rule 60. What it does is it simply
23 | passes the buck to Dr Kent. I will take you through it, but to introduce the point: without
24 | a compliant disclosure report, Dr Kent isn't in an informed position to make sensible
25 | requests for disclosure. That's the whole purpose of a disclosure report. Nonetheless
26 | she has done her best. I am about to turn to that.

1 Obviously, the issues are compounded by the withholding of the CMA documents
2 which we hoped to have a full set of at this stage, but in an attempt to keep disclosure
3 moving forward Dr Kent has made what is purely an interim proposal at this stage and
4 that's what we have referred to as a second tranche of disclosure, and that's my third
5 application today, so in short, Dr Kent is asking for disclosure of the documents
6 disclosed in these other proceedings by reference to the existing CMA categories in
7 line with the order which you've already made, Sir.

8 I will come back to second tranche disclosure after this application but I just did want
9 to make clear at the outset, that's an interim proposal. It's not a substitute for
10 a disclosure report; it doesn't do away with the need for a disclosure report which has
11 been ordered.

12 Now, Apple were ordered to produce a compliant disclosure report but I raise it not
13 merely in the spirit of it being a technical breach but actually a breach that is hindering
14 the progression in a sensible way of disclosure.

15 **THE CHAIRMAN:** The two – I think you've identified the two areas. One is that the
16 repositories and the other proceedings and investigations and so on, and actually
17 that's linked to your second – the second or third application, and then there is
18 a question of effectively supplemental disclosure around each of those.

19 **MS KREISBERGER:** Yes.

20 **THE CHAIRMAN:** And I guess the question is how do we take this conversation and
21 make as clear a critical path for both of those things as possible? So obviously I want
22 to ensure there is proper compliance with the rules but I am more focused on making
23 sure we can get from here –

24 **MS KREISBERGER:** I understand.

25 **THE CHAIRMAN:** -- to your client getting as much of the documents as they possibly
26 can as quickly as possible. So that's very much my focus for today.

1 **MS KREISBERGER:** Yes, I understand and I will do my best to cut through to be
2 pragmatic rather than dwell on past failures.

3 The answer in short is that we have proposed draft provisions that will allow for that
4 and they're quite straightforward. They just mirror the provisions in rule 60, but that's
5 not simply to pay lip service to rule 60; it's because those categories are what need to
6 be provided in order for Dr Kent to understand what is in the universe of documents at
7 the moment so we can assess disclosure made by Apple, then, particularly whether
8 it's relevant disclosure and also to see where the lacuna lie in relation to these
9 proceedings aren't covered by those. So that's what we suggest, a draft order, it's in
10 conventional terms which reflect rule 60.

11 Sir, with that in mind and with the overriding goal of cutting through to the issue, taking
12 it forward, I was going to develop my submissions crisply in five parts. I will show you
13 the order and rule 60 and then, importantly, take you through the disclosure report so
14 you can see what we do have from Apple because that has to be the starting point.

15 Then I am going to explain why it's not enough and what more we need. I will also
16 address Apple's objections and take you through the draft order to show how we say
17 that remedies the problems in this disclosure report.

18 Sir, just so you have it in mind, the order at the last CMC is at core bundle 3, tab 29
19 and it's paragraph 5 of the order over the page.

20 So the Defendants were ordered to file a disclosure report as defined in rule 60(1)(b)
21 and an EDQ as defined in rule 60(1)(c) and that was by 18 November. So the order
22 is explicit, and I should just say there was no suggestion at that stage that rule 60
23 couldn't be complied with. That was the order which Apple invited, in fact.

24 So then if we turn to rule 60 itself in the authorities bundle, tab 3, it is important to have
25 these provisions in mind. They're there for a reason.

26 So 60(b) (sic) provides:

1 "a 'disclosure report' means a report verified by a statement of truth, which –
2 "[First] ... describes briefly what documents exist or may exist that are or may be
3 relevant to the matters in issue, [the pleaded issues]"
4 "[Second] ... describes where and with whom those documents are or may be located"
5 "... in the case of electronic documents, ... how [they're] ... stored"
6 "[Rule 60 provides for an estimate] ... of the broad range of costs ... involved in giving
7 disclosure ... including the costs of searching for and disclosing any electronically
8 stored documents; and
9 "... states which [and this is an important one] directions are to be sought regarding
10 disclosure".
11 And then (c) refers to the EDQ and Practice Direction 31B.
12 Sir, it may be worth keeping rule 60 open as we go through.
13 Sorry, Sir, I should just take to you the guide as well so you have it. It's cited in our
14 skeleton. That's at the next tab, page 20 to 21.
15 "In general, the Tribunal will consider ..."
16 Sorry, this is paragraph 5.87.
17 **THE CHAIRMAN:** Yes.
18 **MS KREISBERGER:** "In general, the Tribunal will consider at the first CMC whether
19 and when each party should file a disclosure report and, where appropriate, an [EDQ]
20 ... On consideration of these reports and questionnaires, at a further CMC the Tribunal
21 will determine what disclosure should be provided, having regard to the governing
22 principles ... the Tribunal will expect the parties to pay close attention to the
23 requirement of cooperation in Rule 4(7) and ... the need to devise a sensible and
24 practical approach to the conduct of the proceedings. [And of course] The purpose of
25 disclosure is to obtain documentary material that assists in determination of the issues
26 ..."

1 "...not to be used as weapon in a war of attrition."

2 So that's the approach. Now, the Tribunal will order a disclosure report therefore
3 where such a report will assist in working out what disclosure should be given, and
4 this is that case. And of course the touchstone for relevance, so the proceedings in
5 question not other proceedings.

6 Now, Dr Kent understood from the submissions made by my learned friend at the last
7 CMC that Apple agreed that a compliant rule 60 would be a touchstone for disclosure
8 in this case. Now, I would like to show you what Mr Kennelly said. That's in core
9 bundle 3, tab 28, page 1187. Mr Kennelly said this, it's halfway down the page,
10 line 12:

11 "We obviously are obliged to produce ..."

12 **THE CHAIRMAN:** Sorry, could you give that page --

13 **MS KREISBERGER:** Page 1187, behind tab 28.

14 **THE CHAIRMAN:** Yes, thank you.

15 **MS KREISBERGER:** I'm sorry, Sir, line 12.

16 **THE CHAIRMAN:** Yes.

17 **MS KREISBERGER:** I will start that section again:

18 "We obviously are obliged to produce relevant material and that's why we are using
19 the rule 60 process under the Tribunal's rules. We will produce a disclosure report.
20 We've agreed the date for that."

21 Then he said this:

22 "That's a very important document because it outlines the repositories where the
23 documents are contained, why the documents are relevant and why our document
24 discovery will be sufficiently comprehensive and relevant for the purposes of the
25 proceedings' unitary trial but that's obviously a major job which we will do by the date
26 agreed with Dr Kent.

1 That's a much more effective and appropriate approach, as opposed to giving the
2 other side irrelevant documents ..."

3 So there my learned friend made clear that Apple were going to filter for relevance and
4 the disclosure report would make plain, make apparent how that was proposed to be
5 done, why the documents are relevant. And that was said to be a major job.

6 **THE CHAIRMAN:** Yes, so the point you're making is that -- is the point you're making
7 that he is acknowledging that the repositories themselves should per se be relevant?

8 **MS KREISBERGER:** Yes, and that they contain relevant materials but that Apple
9 would assist Dr Kent and the Tribunal by preparing a disclosure report which would
10 explain how it would filter relevant from irrelevant within those repositories.

11 **THE CHAIRMAN:** Right, yes, I see, so not necessarily that everything in there would
12 be relevant.

13 **MS KREISBERGER:** Absolutely.

14 **THE CHAIRMAN:** But there would need to be some mechanism in order to -- which
15 is what we have seen with the CMA documents.

16 **MS KREISBERGER:** Exactly, yes. Exactly. So in order to understand how that
17 exercise would be conducted Apple said they were going to set it out in the disclosure
18 report, give us some proposals.

19 Then if I could ask you to move forward to page 1189.

20 **THE CHAIRMAN:** Yes.

21 **MS KREISBERGER:** At the bottom of the page Mr Kennelly said:

22 "Secondly, we can't be required to produce irrelevant documents to them. We have
23 to filter them which is what we do in our rule 60 process and the disclosure report
24 which is the right way to go."

25 So again they were going to explain how they were going to distinguish relevant from
26 irrelevant.

1 And then line 14:

2 "First of all, for the purpose of our disclosure report which will be in November, we
3 have to identify the repositories of relevant documents and explain what we propose
4 to give to them by way of our disclosure in the case."

5 I am pausing there, Sir. I'm going to come back to it, so our understanding was they
6 were going to tell Dr Kent what they were going to give by way of disclosure and my
7 learned friend said:

8 "... and that will involve us doing that work, working out where the documents are that
9 can be filtered for the purpose of giving adequate disclosure, sufficient disclosure to
10 Dr Kent."

11 He said this:

12 "When they get that they will immediately see what our approach is, if they have
13 concerns about that. It crystallises the problem. They immediately see any
14 inadequacies or problems they identify and they can obviously complain about that at
15 that stage. We are also agreeing, seeking to agree the categories of documents and
16 data to be disclosed for the purposes of that CMC. The CMC in January. So we will
17 not be idle between November and December, we will be discussing with Dr Kent,
18 based on the disclosure report, what categories and data needs to be disclosed."

19 And so the reference to a hearing in January, that's today's hearing --

20 **THE CHAIRMAN:** Yes.

21 **MS KREISBERGER:** -- somewhat later. And then, yes, so moving forward, 1191 and
22 then I conclude this section. At line 17, I'm sorry Sir:

23 "... in order to do the filtering exercise which the Chairman has in mind, it's not
24 straightforward. It does require analysis with the assistance of the legal teams, not
25 just involved in these proceedings but in the proceedings before the Commission."

26 So there was going to be analysis, we understood, of this filtering exercise. And, sir,

1 | you said:

2 | "Before you do so, just so I understand the point because I thought you were telling
3 | us that you would by the 18th have worked out what was and wasn't relevant. Are you
4 | saying that's not the case? And maybe you need to check that but it seems to me that
5 | if in your disclosure report you need to have filleted those bundles so that we know
6 | what you believe is not relevant -- and there may be a dispute about that but at least
7 | you've reached your view on it ..."

8 | And Mr Kennelly said:

9 | "The disclosure report tells you where the [I think that should be repositories] of
10 | documents are and how we propose to approach disclosure, how we propose to
11 | identify relevant documents and filter them out from irrelevant documents."

12 | So, Sir, to conclude on that, Dr Kent had high hopes as to the utility of the disclosure
13 | report in the light of those submissions, which Apple said would involve an awful lot of
14 | work in relation to filtering, identifying relevant documents, what disclosure would be
15 | relevant and so on.

16 | So with that in mind I then ask you to turn up the disclosure report itself, which is in
17 | core bundle 1, tab 8, page -- starts at page 76. Now, I'm afraid my submission, as you
18 | will have gathered, is that the document -- the disclosure report doesn't live up to the
19 | hype or indeed the legal obligations on Apple.

20 | **THE CHAIRMAN:** So what we seem to see from it is they say, "Here are the
21 | repositories," and then they say "We would like you to suggest ..."

22 | **MS KREISBERGER:** Precisely.

23 | **THE CHAIRMAN:** What they call document categories, I think.

24 | **MS KREISBERGER:** Yes.

25 | **THE CHAIRMAN:** Which I must confess I struggled a little bit with when I dealt with
26 | the application at Christmas. And maybe Mr Kennelly will probably be able to tell us

1 more about what they mean but I wasn't sure precisely what that term was meant to
2 mean. Maybe it's a term of art that I need to be educated on, but really what you're
3 saying is that you've actually just been told there are a whole lot of documents that
4 have come out of other litigation and you have been told to make some applications,
5 or make some submissions, effectively, on what it is that you think you -- how they
6 should be searched.

7 **MS KREISBERGER:** It's worse than that, sir. That's quite right but what the
8 disclosure report really does, and I will take you through the passages and, sir, you
9 can tell me if you've already seen them all.

10 **THE CHAIRMAN:** I have read it but by all means pick out the key bits.

11 **MS KREISBERGER:** I'm grateful, but what it really boils down to is ten or so pages
12 on this aspect of it which says "We have done an awful lot of work in relation to this
13 other -- these other proceedings, done a lot of work and a lot of documents were
14 looked at and those repositories exist," and then they say "and now it's over to you to
15 tell us what you want."

16 What they don't do is describe the documents, and they give us one nugget so I will
17 bring that out now so it's not said against me I am ignoring a key element. They have
18 appended the disclosure requests in the US, but that is not the same thing and that's
19 clear on the face of the report and I will take you to it; it's not the same thing as what
20 Apple provided in the US. They make clear it's the starting point request; it's not the
21 ultimate landing of document production. It's quite a big difference.

22 So I will show you the relevant paragraph but that doesn't address the problem.

23 **THE CHAIRMAN:** As a starting point, it's a perfectly sensible thing to do to start with
24 the repositories. There is no dispute about that as a starting point.

25 **MS KREISBERGER:** No dispute at all.

26 **THE CHAIRMAN:** And I absolutely take the point that you say there is an obligation

1 to consider what's not in there, and we will come to that no doubt, but as a starting
2 point you're just saying that it's actually very inaccessible -- if it is necessary to conduct
3 some exercise to distinguish between relevant and irrelevant documents in those
4 populations then it's quite difficult to do that with the information you have.

5 **MS KREISBERGER:** Yes.

6 **THE CHAIRMAN:** And you're not getting any assistance with that.

7 **MS KREISBERGER:** That's precisely it, sir. You have the point.

8 Sir, I will take you through the disclosure report but I will do it quite briefly because, as
9 I say, you have the point. So the relevant section starts at paragraph 3, which is at
10 page 76.

11 **THE CHAIRMAN:** Yes.

12 **MS KREISBERGER:** "Apple identifies the document repositories," it says. And then
13 at paragraph 6 it lists them and as you know we have the five repositories. The US,
14 that's the class actions and Epic, Australian Epic discovery, CMA investigation, CMA
15 mobile ecosystem market study and the Commission investigations.

16 Now, if we pick up at paragraph 8 on page 78, that's the US proceedings. So this is
17 what they say:

18 "In the [US], parties are required to conduct a reasonably diligent search ... Apple ...
19 engaged in [an] extensive discovery exercise ... over 12 months of substantial effort in
20 aggregate."

21 And then at paragraph 9 over the page they say and I am summarising in the interests
22 of time, at subparagraph (a) we're told there are 24 custodians and, sir, they're listed
23 in an appendix to this report.

24 In excess of 12 million documents were collected, we're told at (b), and (b) just then
25 refers to the technology assisted review and so on; nothing about those documents.

26 At (c) we're told there were just a lot of reviewers, 450 people reviewing, an aggregate

1 of over 120,000 hours, so we get the message here that, you know, a lot of work was
2 done.

3 Then at paragraph 10, this is where we have the 6 million documents figure. That's
4 the US document production, and Apple spent a lot of money, we're told, on that
5 process.

6 And then paragraph 11, Apple concludes -- this is quite important because this is really
7 where all this takes us, the second sentence:

8 "Apple considers that the document production from the US proceedings is likely to
9 contain a very substantial volume of documents potentially relevant to the issues
10 arising from the [Class Representative]'s claim."

11 It's something of the damp squib of a conclusion; we knew that:

12 "The requests for production from the US Proceedings are appended to this Disclosure
13 Report ... and show the extensive overlap between disclosure requests in the US ...
14 and the issues in these proceedings."

15 Sir -- and then one has the sense one might be getting somewhere there because the
16 issues are listed, but footnote 8 is illuminating. It says this:

17 "The requests for production made of Apple were extensive and, as is the usual
18 practice, were the subject of a process of correspondence and discussions, and in
19 some instances argument and judicial determination, leading to certain of the requests
20 being narrowed or amended."

21 So that's quite an important caveat. We don't know whether and how these broad
22 issues in fact correlated to the documents which were in fact produced. It's quite
23 a curious thing to have done to give us these original requests but not the landing.

24 Now, pausing there, that takes you through the US production. We don't see any of
25 what was promised by Mr Kennelly. The major job was meant to be identifying what
26 are the relevant documents, explaining why US discovery was sufficiently

1 comprehensive and so on. This is pretty cursory stuff. As I said, it boils down to
2 saying: "We did an awful lot of work. Here's what the other side asked for". Doesn't
3 tell us anything about what Apple actually provided in these other proceedings.

4 **THE CHAIRMAN:** So there may be a set of questions that allow you to test whether
5 this is adequate and therefore whether -- say for example whether the issues are
6 aligned between the cases, what the test was, so on, which would then give you some
7 guidance as to whether there might be grounds for supplemental disclosure.

8 **MS KREISBERGER:** Yes.

9 **THE CHAIRMAN:** But equally -- well, there is a further point, isn't there, just about
10 whether you know enough -- now you're being told here's this volume, you know
11 enough to be able to approach -- you're being asked to approach the exercise by
12 suggesting a way into it.

13 **MS KREISBERGER:** Yes, quite.

14 **THE CHAIRMAN:** What sort of information, when you're saying information about the
15 documents, what sort of information are you expecting to get? For example, are you
16 expecting to be told that there are, you know, 50,000 emails in there or 5,000 emails
17 or whatever it happens to be, and presumably a lot of this comes out of witness
18 statements and affidavits and so you could be given a schedule of all the heading
19 documents, if you like, that annex them, is that the sort of thing you're asking for?

20 **MS KREISBERGER:** Yes, it is. Would it help if I gave one example.

21 **THE CHAIRMAN:** Yes.

22 **MS KREISBERGER:** We're obviously in Apple's hands on this but doing the best
23 I can, just one example of the particular category of document and I think it is
24 important, sir, and I think you have the point in mind that we're not talking about issues,
25 we're talking about categories of documents. Let me illustrate that with an example.

26 **THE CHAIRMAN:** (Overspeaking) I have that on my list to ask you about as well.

1 **MS KREISBERGER:** I will do my best to pre-empt that and I just need to put my finger
2 on the correct letter. Now, there is some confidential information so I'm not going to
3 read it out and that's why I am going to point you, Sir, to a particular piece of
4 correspondence to avoid trespassing into confidential material.

5 **THE CHAIRMAN:** Yes, of course.

6 **MS KREISBERGER:** And it's tab -- yes, I have it, tab 92. Yes, it's page 196.

7 **THE CHAIRMAN:** Yes.

8 **MS KREISBERGER:** Under the heading "Specific disclosure", not even sure if the
9 words in the heading are okay but they're open. And you see there reference to
10 a particular email, sir.

11 **THE CHAIRMAN:** So that document reference --

12 **MS KREISBERGER:** This comes out of the CMA disclosure.

13 **THE CHAIRMAN:** That comes out of the CMA disclosure, fine. Yes.

14 **MS KREISBERGER:** It's in the thousand documents.

15 **THE CHAIRMAN:** Yes.

16 **MS KREISBERGER:** Now, you see there in this email which is confidential, I'm not
17 quite sure why, but he refers, to you see in the quotes, "We do a --"

18 **THE CHAIRMAN:** Yes.

19 **MS KREISBERGER:** -- which goes over the page.

20 **THE CHAIRMAN:** Yes.

21 **MS KREISBERGER:** Now, that analysis, we have asked, it seems to suggest there
22 are others. We have asked for those.

23 Now, there you have a really good illustration of a category of documents where if
24 Apple had said "These analyses exist, Apple performs these analyses," Dr Kent would
25 have said, "Well, that certainly looks relevant and we would like disclosure of this set
26 of documents, these analyses."

1 **THE CHAIRMAN:** Yes, that's -- we will see what -- Mr Kennelly may or may not take
2 this point but it seems to me that's a slightly different thing describing the documents
3 in terms of their characteristics as a witness statement, correspondence, whatever it
4 is. So it's one thing to give you a roadmap to objectively what they are, possibly
5 another thing to find and locate for you documents of a particular nature which might
6 be more subjective, or maybe that's the wrong way of putting it, but do you see what
7 I am saying?

8 **MS KREISBERGER:** I do, Sir. I think that's a question of degree. That's so obviously
9 going to be relevant that one could say there are these -- there is a category of
10 analyses and --

11 **THE CHAIRMAN:** So to take it -- classically you would find -- you might find, you
12 know, a standard list of documents; in a conventional case you might find a description
13 of board papers, strategy slides for board papers.

14 **MS KREISBERGER:** Yes, quite.

15 **THE CHAIRMAN:** So objectively everybody knows they exist and they would be in
16 a normal place you would expect to find those. None of us know quite how that fits
17 into what you have here but one assumes there is probably some category -- we know
18 there is -- one assumes there is probably some category of documents which are
19 strategy-type documents which are warehoused somewhere --

20 **MS KREISBERGER:** Exactly.

21 **THE CHAIRMAN:** -- and ordered in that way, so being told that there are 500
22 documents, they are responsive to that, but how much of that cuts back into the
23 question of -- all of this presumably has to be dealt with by way of electronic searching,
24 so how much of this actually cuts back into electronic searching? And then of course
25 you come back to the question of issues. I know you promised me to come back to
26 that but -- and I appreciate you want to have a broad picture of what the population

1 | looks like and there will be some triangulation they would like to see strategy
2 | documents that refer to issue X --

3 | **MS KREISBERGER:** Yes.

4 | **THE CHAIRMAN:** -- and therefore would you search on these following terms in order
5 | to identify them? Is that the exercise you envisage?

6 | **MS KREISBERGER:** That is precisely the exercise, and it's hard to see without that
7 | universe of documents, description of the universe, how Dr Kent can then sensibly
8 | engage.

9 | Sir, your example is obviously an excellent one. Dr Kent will be more interested in
10 | board papers than lower level analysis, for example, so one can then identify it, but at
11 | the moment Dr Kent is in the dark completely.

12 | **THE CHAIRMAN:** And if you just used your search term searching for strategy you're
13 | going to get millions of documents --

14 | **MS KREISBERGER:** Quite, so can be targeted. Yes, and that's why -- I wasn't at the
15 | last CMC but I assume that's why it was ordered because it makes the exercise
16 | tractable.

17 | **THE CHAIRMAN:** Precisely, yes.

18 | **MS KREISBERGER:** Sir, I think I can deal with the content in relation to the other
19 | repositories more briefly. The Australian discovery is addressed at paragraph 12
20 | onwards. Paragraph 15 is helpful. Well, if I start at 13:

21 | "... Apple was ordered to produce documents responsive to a number of disclosure
22 | categories that are also potentially relevant to these proceedings."

23 | So we understand there is relevant material here. And paragraph 15 is interesting:

24 | "The Supplemental Australian Discovery was in addition to the reproduction by Apple
25 | in the Australian Epic Proceedings of all documents produced by Apple in the US Epic
26 | Proceedings. In so far as Supplemental Australian Discovery related to Apple Inc.

1 | custodians, the documents sought in the Supplemental Australian Discovery
2 | categories concerned the same, or similar, issues to those documents produced in the
3 | US Epic Proceedings."

4 | And then we're told:

5 | "The remaining discovery categories were relevant only to Australia ..."

6 | So what we took from this is that the Australian -- there was Australian discovery which
7 | was supplemental, additional to the US discovery and it didn't duplicate it. Dr Kent
8 | raised this in correspondence and Gibson Dunn confirmed that is right. Just so you
9 | have it, that's in their letter of 16 February, paragraph 30, and of course the Australian
10 | proceedings go to a later end point than the US.

11 | **THE CHAIRMAN:** Yes.

12 | **MS KREISBERGER:** So that is useful to bear in mind because a similar approach
13 | may need to be taken here.

14 | **THE CHAIRMAN:** I mean, I think and obviously subject to anything Mr Kennelly might
15 | say but I think that's exactly what we need to do here, as I understand. In a sense we
16 | are starting with a presumption that a sensible place to start is the document
17 | repositories.

18 | **MS KREISBERGER:** Absolutely.

19 | **THE CHAIRMAN:** As in the Australian case you turn up what you have done before,
20 | and this whole question we have just been debating about how one accesses that and
21 | makes best use of it, and then absolutely what is the mechanism by which one
22 | identifies anything else that might need to be disclosed. And that might be because
23 | of a difference in the issues; might be because of a temporal difference; might be
24 | because of a geographical difference.

25 | **MS KREISBERGER:** Yes, exactly.

26 | **THE CHAIRMAN:** I don't know. Those are no doubt things that will come out, and

1 I suspect those are going to be things that go on for a little bit of time as well because
2 presumably one is going to encounter requests from experts for information and so on
3 as we get further into the process. So that supplemental activity may well be
4 an ongoing process with a bit of a lag on it.

5 **MS KREISBERGER:** Yes, and I will take you, Sir, in a moment to what was done in
6 the Epic v Google case in this Tribunal which I think is a quite helpful template.

7 Sir, I will just deal with one point made by Apple now so that I don't have to deal with
8 it later because you have the point, Sir. Apple say in their skeleton that Dr Kent is
9 asking them to do all the work from scratch. Obviously that's not the case. We're all
10 agreed these repositories are a really excellent starting point but they're not the end
11 point and we need to know what's in them. In a nutshell that's my submission.

12 **THE CHAIRMAN:** Yes.

13 **MS KREISBERGER:** The CMA investigation, that's addressed at paragraph 18
14 onwards. I was criticised by Mr Kennelly for not taking you to this earlier but I had it in
15 mind for this part of my submissions. What the disclosure report tells us at
16 paragraph 20 is that:

17 "Apple identified documents as responsive to the CMA requests by ...

18 "... reviewing exhibits ..."

19 So you heard something about that this morning, that's the exhibits in Epic:

20 "... Carrying out various targeted searches across other Apple document productions;
21 and ...

22 "... Locating documents responsive to specific, narrow requests ..."

23 So I just want to observe there, at (b) we aren't told what the various targeted searches
24 were, nor are we told which Apple document productions were searched. It's very
25 vague. And then at (c) these particular requests haven't been identified except this
26 comment "such as those for particular surveys or internal financial reports".

1 Again, it's very vague. So it's not terribly illuminating as to what was done in relation
2 to these CMA documents which were the subject of this morning's submissions.

3 Then the CMA market study is at paragraphs 22 and 23. I can paraphrase. What
4 Apple says here is if the documents were requested by the CMA only in relation to the
5 market study and not the App Store investigation they're probably not relevant, but
6 Apple says they will search them anyway and that's all they say. No indication at all
7 about what documents are in the repository, what might be relevant, irrelevant, how
8 those might be filleted.

9 **THE CHAIRMAN:** And the basis for searching -- is the same, so against agreed
10 document categories, whatever those are.

11 **MS KREISBERGER:** Yes.

12 And then at 24, the European Commission investigations.

13 Sir, if you turn the page to paragraph 29, we're told that this repository comprises
14 400,000 documents responsive to four search strings which were provided by Apple
15 to the Commission. If I could ask you to read paragraph 29 and 30.

16 **THE CHAIRMAN:** Yes.

17 **(Pause)**

18 So they're saying you're already getting all of string 1, provided it's relevant. You're
19 not getting 2 or 3 unless they pop up elsewhere and they're going to look at string 4
20 basically, in the --

21 **MS KREISBERGER:** Yes. And they set out their proposal at paragraph 31. Yes,
22 string 4. 2 and 3 not relevant and so on.

23 **THE CHAIRMAN:** Yes. And just in terms of -- I mean, is there any principled objection
24 to that approach?

25 **MS KREISBERGER:** No. We just want to understand how Apple is going to conduct
26 this relevance review --

1 **THE CHAIRMAN:** Yes, so there is a question about what's come into this, so the
2 strings which we haven't seen.

3 **MS KREISBERGER:** No.

4 **THE CHAIRMAN:** And then there is a question about what the basis is for reviewing
5 that pool of documents, back to the question of document categories or whatever they
6 are.

7 **MS KREISBERGER:** Yes, precisely.

8 Sir, if I could ask you to keep the disclosure report open and I will come back to it, but
9 what I want to do now is move on to the breaches of rule 60. I appreciate you will not
10 want me to dwell on them but I do need to just take you through so that we can
11 pragmatically take forward what a compliant report would look like.

12 **THE CHAIRMAN:** Yes.

13 **MS KREISBERGER:** So I'm going to start with rule 60(b)(i). If I could ask you to have
14 that open.

15 **THE CHAIRMAN:** Yes.

16 **MS KREISBERGER:** That's page 15, again, of the authorities bundle. So I'm going
17 to begin with (b)(i):

18 "describes briefly what documents exist or may exist that are or may be relevant to the
19 ..." pleaded issues.

20 And so I have shown you, we don't have any descriptions. Dr Kent is not much wiser
21 than she was before she received this report and, as I say, when you ask me, well
22 what descriptions are you asking for, it's a little difficult to be prescriptive but they have
23 to be sufficiently meaningful to allow the parties to engage on disclosure.

24 **THE CHAIRMAN:** Yes, you have to argue that they have been described briefly but
25 not so briefly that it provides no assistance.

26 **MS KREISBERGER:** It provides no assistance. I'm not going to quibble about the

1 language.

2 **THE CHAIRMAN:** I suppose I make the point that really this is really -- and ultimately
3 this all comes back to a degree of cooperation and compliance with the spirit of this
4 rather than the -- I'm not dissuading you from going to the rule but at the end of the
5 day either there needs to be volunteered or has to be forced some degree of
6 cooperation to make it work.

7 **MS KREISBERGER:** Yes and, Sir, what I say to you today is there's been very
8 extensive correspondence, Dr Kent has written a series of letters through her
9 solicitors, and it's been entirely unsatisfactory, so the right course is now to order
10 a compliant disclosure report and that's not an overly formalistic approach. That is to
11 allow us to really move forward to the next stage. It can't be left to correspondence.

12 **THE CHAIRMAN:** What I am concerned to do, if I do make an order like that and
13 that's obviously subject to hearing Mr Kennelly, I am concerned it gets us somewhere.
14 We're not just going to be arguing again in three weeks' time about how compliant it
15 is. We need to be clear that it's going to deliver something which is going to enable
16 the practical work to continue.

17 **MS KREISBERGER:** Yes. What we have done, and we will turn to it in a moment, is
18 spell out the various components of what we need. With the best will in the world, Sir,
19 I don't think Dr Kent can take the language that we have proposed in the draft order
20 any further because ultimately Apple have to tell us what's there. We don't know.

21 **THE CHAIRMAN:** That is the challenge, isn't it, and I don't want to jump too far ahead
22 but if the order, the draft order talks about providing briefly, or the draft order talks
23 about what rule 60(b)(i) talks about. So in a way if Mr Kennelly's position is well he
24 complied with it then he may well say the same in relation to that. He clearly can't if
25 we made an order that he has to do something else, but I suppose my invitation to you
26 is how are we going to be clear about what the expectation is? If I am to make an order

1 like this, how can we be clear about whether or not it has been complied with to
2 a satisfactory level?

3 **MS KREISBERGER:** Yes, I will turn back to that but of course rule 60 is a well advised
4 rule. It does its best to be very clear as to what's required. It hasn't been complied
5 with so that now has to be ordered and, you know, it's very difficult to take it further
6 than that language until Apple engage which they haven't done thus far.

7 Sir, so that is the question of description of the universe of documents.

8 **THE CHAIRMAN:** Yes.

9 **MS KREISBERGER:** And you have my submission that the US document request,
10 even as far as the US repository is concerned, it obviously doesn't help at all on the
11 other repositories, but even on the US repository it's not satisfactory; it's just
12 a document that they have appended that doesn't reflect what was actually produced
13 by Apple's own admission on the face of this report.

14 Sir, I will take the other points on rule 60 more quickly. So subparagraph (ii) is
15 "describes where and with whom these documents are ... located."

16 Just so you have it paragraph 32 just says the documents are located with lawyers.
17 That's not a particularly helpful indication because they're obviously not the original
18 custodians, but Apple does list 24 US custodians in appendix 1 to the disclosure
19 report. Sir, that's on page 91 and they did in subsequent correspondence give their
20 roles, as well, although it's not included in the report itself.

21 And my principal submission on this point on custodians is the disclosure report is
22 silent on UK custodians, so that's the second Defendant in these proceedings, so
23 there's no mention of any employees of the second Defendant, so Apple does need to
24 address its mind to who might be the relevant UK custodians and let us have that
25 information.

26 **THE CHAIRMAN:** Yes, so this point, this is a supplemental disclosure point more

1 than anything else.

2 **MS KREISBERGER:** It is.

3 **THE CHAIRMAN:** It doesn't help you very much with the document searching. Well,
4 I suppose it might help you a little bit because actually with some clarity about who the
5 original custodians were, you could target your searches, your suggested searches
6 more, I suppose. But mainly you're advancing this as a supplemental disclosure point.

7 **MS KREISBERGER:** I am focusing on what really concerns us. As you say, that's
8 a supplemental point.

9 **THE CHAIRMAN:** Yes. Exactly.

10 **MS KREISBERGER:** I should be clear that the second Defendant is the Irish entity,
11 but, Sir, you have the point.

12 **THE CHAIRMAN:** Yes.

13 **MS KREISBERGER:** Moving, then, to rule 60(b)(iii). That refers to the question of
14 how electronic documents are stored. We don't have anything on that in the disclosure
15 report. We would like to know, we would like that information. Now, rule 60(b)(iv)
16 requires a cost estimate. That's addressed at 41 and 42. I'm going to come back to
17 39 and 40 because that's critically important. We have already ventilated the issue.

18 But on 41 and 42 it's really symptomatic of Apple's approach again:

19 "Apple cannot accurately estimate the time and cost of the disclosure exercise.

20 However, Apple estimates that the costs are likely to be significant."

21 Basil Fawcjt's statement of the obvious. And:

22 "Apple will provide a more specific estimate of time and costs in view of the document
23 categories and subjects that are proposed."

24 Again, it's entirely unenlightening. It doesn't engage with the duty incumbent on Apple
25 to give a ballpark costs estimate. They're a sophisticated litigant. They're highly
26 experienced in these proceedings around the globe. It's not good enough to kick the

1 can down the road.

2 **THE CHAIRMAN:** Again, in terms of how that helps you. Why -- I appreciate they
3 needed to do it and you can well say they haven't done it. I'm sure Mr Kennelly will
4 have things to say about it, but where does it get you to know about how much things
5 cost.

6 **MS KREISBERGER:** Sir, I'm just going to take instructions to make sure I don't
7 misspeak. **(Pause)**

8 Sir, there are two points. First is proportionality. We need to be able to assess the
9 proportionality of the exercise. Of course this is a class action. It's funded and that's
10 very important.

11 Secondly, it should be read together with the next point, subparagraph (v) which I am
12 coming on to because we need -- they should have been proposing directions and we
13 want to understand the costs involved.

14 **THE CHAIRMAN:** Because you could take the view that if you had broken out into
15 greater cooperation and you had worked out what your search terms were, you know,
16 that presumably is not a particularly expensive exercise, but what might be expensive
17 is their reviewing documents individually if they want to satisfy themselves as to
18 relevance.

19 **MS KREISBERGER:** Quite.

20 **THE CHAIRMAN:** There is a question as to whether that is in fact proportionate given
21 these are documents which have been disclosed already to another party outside of
22 Apple, and there is another question for Mr Kennelly I'm sure to think about as to what
23 the value of that relevance filter is. On the other hand it may be to your benefit to have
24 it carried out by somebody because it reduces the amount of documents that you may
25 need to look at. But then all those things can't be discussed unless those mechanics
26 are put on the table and then of course one can see -- I understand the point.

1 **MS KREISBERGER:** That's the point, Sir, and as I said we understood from the last
2 CMC that that in itself was going to be a big job, explaining how that filleting for
3 relevance would be conducted and we're keen to know. Sounds sensible but we're
4 keen to understand, as you say, the mechanics of that exercise.

5 Sir, and then I lastly come to that subparagraph (v). That's the point you picked up
6 immediately, Sir, it's the critical point. When you look at what they say, they say:

7 "... the repositories ... are extensive and ... very likely to provide a universe of
8 documents ..."

9 This is paragraph 39 on the same page:

10 "... a universe of documents from which ... comprehensive disclosure can be given in
11 a proportionate manner ..."

12 Well, one doesn't see any of the big jobs that Mr Kennelly promised in terms of
13 explaining how the filleting for relevance would be conducted and then they say:

14 "Accordingly Apple proposes that [Dr Kent] ... now make[s] specific requests for
15 disclosure, for example by reference to categories of documents, or documents that
16 relate to particular subjects ... or pleaded issues. [And] Apple will consider [Dr Kent's]
17 ... requests ..."

18 It's just not good enough, Sir.

19 **THE CHAIRMAN:** It's not, and it is said against you at various places that you're
20 adopting a standard disclosure approach and everything has to be disclosed. Is that
21 correct?

22 **MS KREISBERGER:** No, that's not correct, and I come back again to the point that
23 we understood that Apple were going to explain how they were going to filter for
24 relevance and explain what's in the repositories, how the irrelevant would be filtered
25 out, and once Dr Kent is given a proper understanding of the categories of documents,
26 as you said, whether they be board papers, analyses, so on, Dr Kent can then engage

1 with that universe and say "Well, these are the points that are particularly relevant,"
2 and then you can assess proportionality.

3 **THE CHAIRMAN:** Yes. Well, exactly, if there are five board papers you might look at
4 all of them; if there are 500,000 then you are going apply a search term to them.

5 **MS KREISBERGER:** Quite, yes. At the moment we're not able to do that. So, Sir, it
6 is a breach of rule 60 but it's the one that needs to be remedied so that we can move
7 forward and a really important lacuna is that Apple says nothing about how it will
8 engage with disclosure outside the repositories. We know that was ordered in
9 Australia. It must be right that there's UK-specific disclosure. As you say, temporal,
10 jurisdictional and so on.

11 So this report is not reflective of conduct which will advance the litigation. Now, just
12 to summarise what I say are the three principal reasons why this work does need to
13 be done, the first is the point I have now pressed on you, Sir, which is we need to
14 understand the universe to assess the relevance mechanisms that will be applied.
15 Dr Kent needs line of sight on Apple's relevance review. And particularly in light of
16 Apple's conduct thus far. It can't be taken on trust.

17 Secondly, obviously and importantly, to inform disclosure requests and engagement
18 between the parties on how disclosure should be framed and, thirdly, the supplemental
19 disclosure issue, and that might refer to disclosure concerning the UK version of the
20 App Store and also developments post the end date of these other repositories.

21 Now, it's a little surprising to see in Apple's skeleton at paragraph 30a, it seems to say
22 that there are no UK-specific issues and matters just concern the App Store in general,
23 so no further disclosure is needed. I don't think we need to turn it up but that's what
24 Apple says at 30a.

25 Now, that is a surprising claim for two reasons. This is a class action that relates to
26 users of the UK shopfront so it is right that it is a jurisdictionally defined claim; it's not

1 about the App Store in general. And, secondly, it's contrary, as I have already
2 mentioned, to the approach already taken elsewhere. I have showed you what was
3 done in Australia as we're informed by Apple in the report.

4 If I could also just show you, Sir, in the authorities bundle what was done in this
5 Tribunal in the Epic v Google proceedings. That's at tab 10 of the authorities bundle.
6 It's page 158, it's over the page, paragraph 4. You see there the order that "The US
7 Documents shall be supplemented ... by supplemental disclosure in respect of ...
8 UK-specific custodians and/or issues ..."

9 It's precisely what we're looking for here, and then, Sir, if you turn to the following tab,
10 tab 11, you see how that played out. That's paragraph 1. Could I ask you, Sir, to cast
11 your eye over the way in which supplemental UK disclosure was defined here.

12 **THE CHAIRMAN:** As I understand it they have offered you UK transaction data.

13 **MS KREISBERGER:** Yes, and that's agreed.

14 **THE CHAIRMAN:** Quite a lot of this might actually be within that?

15 **MS KREISBERGER:** Well, we don't know. They have to tell us.

16 **THE CHAIRMAN:** Again, it's difficult to speculate, isn't it, but it wouldn't be surprising
17 if they ran the App Store on a global basis without much differentiation by location, but
18 you would say despite that there must be some local characteristics, if only data,
19 possibly other things, that need to be addressed separately and dealt with in the
20 disclosure report. That's the position.

21 **MS KREISBERGER:** Yes, and that's apt, Sir. It is, of course, Dr Kent's understanding
22 based on public domain information that strategy is largely dictated at that higher level
23 in the States, but nonetheless we understand that there are matters that are likely to
24 be domestic, and particularly just to give one example following Brexit, there may be
25 particular issues in relation to the UK, UK-specific issues that won't be collected
26 elsewhere. The pricing tiers are set at the local currency level so there may be some

1 analysis there or particular employees looking at UK pricing tiers. I am in the realms
2 of speculating.

3 **THE CHAIRMAN:** Did I understand you correctly to say the disclosure report doesn't
4 deal with this?

5 **MS KREISBERGER:** No.

6 **THE CHAIRMAN:** But the skeleton did refer to it. The skeleton did refer to it?

7 **MS KREISBERGER:** Their skeleton simply says -- it just dismisses the point, 30a.
8 They say we're not buying it.

9 **THE CHAIRMAN:** Can we just turn that up and have a look at it?

10 **MS KREISBERGER:** Yes, of course, Sir. So that's paragraph 30a.

11 **THE CHAIRMAN:** Yes.

12 **MS KREISBERGER:** I am working outside of the bundle. It's a quite strange part of
13 the skeleton. "The issues" -- so this is at "a".

14 **THE CHAIRMAN:** Yes.

15 **MS KREISBERGER:** "The issues ... concern the App Store in general. Dr Kent does
16 not suggest that the issues in her case are UK-specific ... [Her] case is that there are
17 no differences."

18 And you see there the point is made.

19 **THE CHAIRMAN:** Yes.

20 **MS KREISBERGER:** Very odd.

21 **THE CHAIRMAN:** They're saying you're seeking to leverage the international position
22 so you should be shut out from investigating the local, is how I read that.

23 **MS KREISBERGER:** It's very strange, though, because of course to the extent there
24 is relevant material at the local level we need to be told what it is. It's certainly not
25 Dr Kent's -- Dr Kent couldn't possibly advance a case that says there is no relevant
26 UK factual context. We just don't know, but Dr Kent brings these proceedings on

1 | behalf of a UK class of users.

2 | **THE CHAIRMAN:** Yes.

3 | **MS KREISBERGER:** Now, if Apple is really saying -- I do find that section of the
4 | skeleton quite difficult to understand, but if Apple's position actually is -- you don't need
5 | to follow the Epic v Google approach or the Australia approach and you don't need to
6 | go outside of the repositories, then we better understand why they say that is and
7 | actually that makes a description of the material in the repositories even more
8 | important, if we're being told you can't go outside that, which at first blush is
9 | a surprising position for Apple to take.

10 | Sir, I was going to deal with some objections by Apple before I turn to the draft order.
11 | I dealt with the first one. We're not asking Apple to do the work from scratch but,
12 | again, much like my submission in relation to privileged material, Apple has evidently
13 | done much of the work of identifying the original sources of documents in the
14 | custodians, in the context of these other exercises, so really we're just asking to see
15 | the work that one must assume has been done.

16 | Apple also makes this submission in its skeleton. It says there must be a "high bar for
17 | what further disclosure efforts would be proportionate". Well, I don't accept that, Sir.
18 | Apple has to be prepared to do what further work is required by turning its mind to the
19 | pleaded issues, just as it did in Australia, just as Google did in Epic, but if Apple's
20 | position continues to be no further work is required we need to understand why that is
21 | right.

22 | Finally, it was Apple's positive submission at the last hearing that the disclosure report
23 | would be this critical document, and rule 60 was the right way to go, so it's very odd to
24 | see Apple now rejecting the strictures of rule 60, playing fast and loose with the rules.
25 | Now, Sir, with that I turn to the draft order.

26 | **THE CHAIRMAN:** Yes.

1 **MS KREISBERGER:** Now, I would like to take you through it. I have in mind that
2 a letter was received and Mr Kennelly has already made clear there's much he doesn't
3 accept. I will try and pick the points up as I go along.

4 So, Sir, if I could ask you to turn to paragraph 1, so Dr Kent proposes that the
5 disclosure report be filed by 6 March and that it complies with rule 60(1)(b) along with
6 the EDQ, and what we have done, Sir, in these subparagraphs is do our best to spell
7 out the requirements of rule 60 in a way that applies in the case. So 1.1:

8 "describe briefly what documents exist or may exist that are or may be relevant to the
9 matters in issue ..."

10 And that includes a brief description of the documents or categories of documents
11 produced in these other proceedings, and the total number of documents produced in
12 each case. So that will assist in understanding the relevance filtering.

13 And 1.1.2:

14 "any documents, or categories of documents, which were not produced in [those other
15 contexts] ..."

16 So these are the -- that's the supplemental point. And then 1.1.3:

17 "the nature and extent of the searches conducted to locate the documents [in these
18 other contexts] ..."

19 Now, Sir, you will immediately see 1.1.3 is in black text. We understand that's agreed.

20 That is based on paragraph 53 of Apple's skeleton. If we could just turn that up. Now,

21 53, Sir, you see there Apple is willing to provide this statement, they say, by 30 March,

22 and they refer to US, Australia, the "CMA Market Study and the European Commission

23 investigations". They leave out the CMA investigation. I'm not sure whether that was

24 a deliberate omission but we think that should be included there.

25 **MR KENNELLY:** That is meant to be included.

26 **THE CHAIRMAN:** It should be included.

1 **MS KREISBERGER:** I'm grateful. That's very helpful. So 1.1.3 is agreed in full,
2 happily, but the other parts of 1.1 are not agreed.

3 Now, Sir, I have in mind your question: well, how far can we take this? We haven't
4 been able to think of any other wording beyond the wording proposed. If this is ordered
5 it really makes it very clear that Apple has to do its best to describe what's in this
6 universe of documents and what exists outside the repository universe in the ordinary
7 way as indicated by, as required by rule 60 and that's really I think, you know, the best
8 one can do in terms of the language of the order and one hopes that Apple, when
9 subject to that order -- and let me be clear, they were already subject to these points
10 because it simply reflects rule 60 which was ordered back in -- back in September they
11 were ordered to provide a compliant rule 60 report.

12 **THE CHAIRMAN:** That's what bothers me. We're just making the same order again.

13 **MS KREISBERGER:** Yes, but that's why when I began today, Sir, I took you to the
14 governing principle which says compliance has to be ensured. It's beyond us as to
15 what more can be done to get Apple to comply with the order, and simply -- and that's
16 why Apple -- incidentally Apple complain, I will take you through 1.2 to 1.5. They
17 complain that this order is more prescriptive than the one that went with our skeleton.
18 Well, this is the best we could do on granularity by splitting out the components of
19 rule 60. The previous version didn't split out 1.4, for instance and 1.5, I think, 1.3, but
20 it did say compliant with rule 60, but, on reflection, the logic is we better set out the
21 granular components of rule 60 in the hope that Apple will comply this time around.

22 **THE CHAIRMAN:** And your expectation is that the answer to 1.5 would also deal with
23 the -- your third application which is 6.2, so -- or at least get you on the path there. Is
24 that right? If we end up making an order about 6.2, which is largely agreed other than
25 what's the basis for working out how to fillet the documents, that's for compliance by
26 2 May. What's the basis on what that's done? The answer will come out of 1.5 in the

1 discussion with you about that.

2 **MS KREISBERGER:** So 6.2 is really this interim proposal that we want something
3 now; we don't want this delayed, and have a knock-on effect for the remainder.

4 **THE CHAIRMAN:** But isn't it tied up with the same point? Because having got the
5 same problem that, what's the basis on which the documents are going to be
6 assessed, if there is one, and it can't be done until we understand more about the
7 documents and so we need the document reports. That's circular, isn't it?

8 **MS KREISBERGER:** The logic was that given that this is precisely the same exercise
9 that's been done for the CMA documents --

10 **THE CHAIRMAN:** You've used the same template for that.

11 **MS KREISBERGER:** -- Apple could simply pull out the documents in relation to those
12 categories because --

13 **THE CHAIRMAN:** Well, yes.

14 **MS KREISBERGER:** -- it's an existing template.

15 **THE CHAIRMAN:** That's certainly practical. There is a slight oddity that you're
16 applying a template from one regulator to -- or from a competition authority to a whole
17 lot of litigation and other things by other authorities but perhaps the question may be
18 whether that is practical because if the volume of the documents is greater, I suspect
19 it might well be said it's just not a feasible thing to do to go through against what's
20 effectively a list of issues in the case. So we're back to the same problem about
21 whether it's proportionate.

22 **MS KREISBERGER:** Sir it was made in the spirit of a concrete proposal to get some
23 disclosure.

24 **THE CHAIRMAN:** I understand that.

25 **MS KREISBERGER:** If it works it works but it's certainly not a substitute for 1.5.

26 **THE CHAIRMAN:** I wonder, I suppose I am wondering whether it's better to let 1.5

1 take its course --

2 **MS KREISBERGER:** Yes.

3 **THE CHAIRMAN:** -- assuming proper compliance with any order that's made, if
4 an order is made, then it's better to let that take its course, but then one of course has
5 to hope that it can still be done on 2 May, although that rather depends on what's
6 agreed. I suppose we just don't know, and maybe Mr Kennelly will be able to tell us
7 later but we just don't know how many documents are involved in these things, but
8 one assumes -- we do know, actually, don't we? It's a big population, isn't it.

9 **MS KREISBERGER:** Yes, it is.

10 **THE CHAIRMAN:** So whereas they can sit down and look at 9,000 CMA documents
11 and work out whether they did hit the list of issues, they're not going to be able to do
12 that with these, are they? It's just not feasible, is it?

13 **MS KREISBERGER:** Sir, can I just take instructions?

14 **THE CHAIRMAN:** Yes.

15 **(Pause)**

16 **MS KREISBERGER:** I think, Sir, the concern is still delay given where we are, so --

17 **THE CHAIRMAN:** I understand that.

18 **MS KREISBERGER:** It's 1.5 that is critically important. They need to tell us what they
19 think should be done both in terms of repositories and, importantly, supplementary
20 disclosure. I think we need to hear from Mr Kennelly on 6.2 and perhaps I can come
21 back to you, Sir, in reply. Ideally we would like those documents and we would like
22 them rather than pushing everything down the road.

23 **THE CHAIRMAN:** Okay, shall we see what Mr Kennelly --

24 **MS KREISBERGER:** I think that would be helpful, Sir.

25 Sir, so you have there then the other standard parts of rule 60 that I have taken you
26 through, cost estimate, custodians and directions.

1 Now, Sir, I don't want to make too much of a meal of this but I am conscious that we
2 had this letter on Friday about what was and wasn't agreed -- sorry, on Sunday,
3 yesterday. It's all a blur at this stage.

4 **THE CHAIRMAN:** I'm not sure, have I seen that?

5 **MS KREISBERGER:** I think perhaps I can leave it for now and if Mr Kennelly wants
6 to press any points I will come back in reply.

7 **THE CHAIRMAN:** There may well be a point. I'm not terribly interested in things like
8 that at the moment. I am more interested in getting disclosure done but if we need to
9 we will come back to it.

10 **MS KREISBERGER:** I will be very happy not to have to address you on those points.
11 We don't think there is anything in them but certainly this draft order is intended to
12 reflect what we understand to be the position on agreed and not agreed points.

13 Sir, so that concludes my submissions on the disclosure report and EDQ so I am in
14 your hands, Sir, I am very happy to sit down --

15 **THE CHAIRMAN:** I think we might do that partly because I think, because of the
16 exchange we have just had I don't think we can do number 3 until we have readily
17 sorted out number 2. I think that's the right way forward, so let's hear from
18 Mr Kennelly.

19 **MS KREISBERGER:** Thank you.

20 **THE CHAIRMAN:** Mr Kennelly, we will need to take a break quite shortly but do you
21 want to get going, and why don't you keep going for 10, 15 minutes and we will give
22 the transcript writers a break, if that's all right with you.

23 **MR KENNELLY:** I am in your hands, Sir, and in fact you just shut me down whenever
24 you want. I'm not looking at the clock.

25 **THE CHAIRMAN:** I will do that.

26

1 **Submissions by MR KENNELLY**

2 **MR KENNELLY:** In broad terms Dr Kent has I think three main complaints, and I will
3 address them in turn.

4 The first is that in producing the disclosure report we haven't described the documents.
5 We haven't actually told her the nature of the documents that we're offering in the
6 repositories. They don't know what's in the universe of documents. That's her first
7 complaint.

8 The second is that what we offered is insufficient in any event because there isn't
9 a UK-specific element.

10 And, finally, that we should be the ones proposing how to filter the documents that we
11 are offering to produce; a proportionate document production, since it's supposed to
12 be common ground since tens of millions of documents are actually contained in these
13 repositories a filtering exercise will definitely be necessary.

14 **THE CHAIRMAN:** I think there is a linkage, isn't there, between point 1 and point 3
15 because I think what they're saying is you've told them a little bit about a lot of
16 documents and you've suggested they should then take the next step of suggesting
17 what to do with them.

18 **MR KENNELLY:** Yes.

19 **THE CHAIRMAN:** And they're unable to do that because you haven't told them
20 enough, and you haven't actually made any suggestions they could constructively
21 work with.

22 I'm not terribly interested in the toing and froing of that. I would quite like to know what
23 the answer to it is, so I don't want to take you off course but I am very keen to get to
24 what it is you think you can agree to give us by way of further clarif -- maybe to step
25 back a bit, it's pretty clear, isn't it, that that is right. At the moment if you're sitting in
26 their shoes it's nigh impossible to come up with a suggestion as to how you should

1 filter these documents, isn't it?

2 **MR KENNELLY:** No.

3 **THE CHAIRMAN:** Okay. How would they do that, then?

4 **MR KENNELLY:** Because first of all, as I will show you, Sir, we have explained in
5 detail what the repositories contain. With their experts they should do what -- and
6 I understood them to be agreeing to do at the previous CMC which is with their experts
7 formulate requests, formulate parameters whereby those repositories could be
8 searched for documents that are of particular interest to them.

9 Sorry, Sir, we were expecting them, in view of the vast amount of information and
10 detail that we have provided them, and I will take you to it, showing them precisely
11 what these repositories do in fact contain, with their experts then they would say: by
12 reference to all that detail you've given us, we want you to search for these things, for
13 these particular categories, for these parameters in a focused way to produce
14 proportionate, documentary production and not simply a relevance review by
15 reference to the issues in the case.

16 **THE CHAIRMAN:** Yes, and so everybody has what the issues in the case are, so
17 none of that's controversial and no one needs any help with that, and that's why, with
18 some frustration, I thought that was the only sensible way to deal with the CMA
19 documents at Christmas, and given the size of the population that didn't seem to be
20 a silly way to deal with it. I understand the point about there being millions of
21 documents, but clearly in order for them to get to the point where their experts could
22 suggest some search terms they need to know a reasonable amount about what the
23 document population looks like then. You're not expecting them just to do that on the
24 basis of knowing that had been used in other proceedings.

25 **MR KENNELLY:** Not at all.

26 **THE CHAIRMAN:** Perhaps I should let you show me. Please do.

1 **MR KENNELLY:** Because it's really important because Ms Kreisberger didn't show
2 you this, and she made the point several times, and if it were true it would be a good
3 point, which is they have no idea what's in these repositories. They're told there are
4 tens of millions of documents and they've no idea what they contain.

5 But she did refer to the fact that these documents were produced pursuant to requests;
6 requests made by regulators and in courts; requests backed up by close judicial
7 scrutiny and, although those requests in some respects were then narrowed, Apple
8 has agreed in short order to provide that extra detail that Dr Kent wants in relation to
9 that narrowing exercise, and I will come back to that.

10 But in particular the requests are -- and actually I will go back to the disclosure report
11 itself on page C/80, and we can see where we have dealt with it, because recalling,
12 as we must, that the requirement is for the disclosure report to state briefly what
13 documents exist or may exist that may be relevant to the matters that are at issue in
14 the case. At paragraph 11 we say:

15 "... documents relating to the central issues in these proceedings have already been
16 produced ..."

17 So we're talking about these proceedings and, having reviewed what we have in the
18 US proceedings, we are convinced that they are the documents that go to the central
19 issues in Dr Kent's proceedings. They are very substantial in volume and they are
20 relevant to the issues arising from her claim; I will come back to the actual pleading.

21 The requests for production from the US proceedings are appended into the report as
22 appendix 2 and, when one looks at the requests for production, we see the extensive
23 overlap between the disclosure requests in the US proceedings and the issues in
24 these proceedings. The requests tell you what the repositories contain and to those
25 requests now I would ask the Tribunal to go.

26 The requests begin at appendix 2 on C/92 and this is the index to the requests. You

1 see four separate sets of requests: the consumer plaintiffs' requests, the developer
2 plaintiffs' requests, there is a second set of requests from the consumer plaintiffs, and
3 then the Epic requests, and I would ask you to go to those.

4 **THE CHAIRMAN:** This is just the US, isn't it; you haven't done this for the Australian
5 proceedings, have you?

6 **MR KENNELLY:** No, but again, in the spirit of cooperation, if that particular document
7 were requested we could produce that, I'm sure, in very short order, but we will focus
8 here only on the US and the comprehensive nature of what we have provided because
9 the US is the main repository of documents and the Australian documents are taken
10 in large order from that.

11 The Australian documents -- and I will come back to the disclosure report -- ultimately
12 amounted to a small pool of actually relevant documents despite the large amount that
13 were gathered because, as I will explain to the Tribunal, the idea of supplementary
14 disclosure might be superficially attractive but what we have learned from Australia is
15 it produces diminishing returns.

16 **THE CHAIRMAN:** Let's come back to supplemental. What I am keen to focus on for
17 the moment is how we get into this (inaudible).

18 **MR KENNELLY:** This goes to the question of what can Dr Kent's advisers do with
19 what they have been given now. So we're looking at the first request, C/93. We see
20 that it's made by Judge Gonzalez Rogers in the iPhone anti-trust litigation. It's backed
21 up by a court order and it's made in October 2019. We see at C/98 that the relevant
22 time period is January 1, 2006, up to the date of the order, which is 10 October 2019.
23 Then one sees what's requested and because these requests are extremely lengthy
24 I will take it at a fairly rapid pace, but one has then organisation charts, internal
25 documents and the Tribunal will see the level of detail in the various requests for
26 production on C/99.

1 If you go to C/100 you will see that all presentations to the board of directors
2 concerning the App Store for the iPhone and, by the way, Sir, just pausing there, the
3 definition section, if you go back to definitions which I think is in C/97, these definitions
4 are not limited to the United States. That doesn't matter for the purposes of the claim
5 because the claim isn't limited to the UK. The claim, as I will explain to you, relies in
6 fact on Apple operating in a global way, but just for the avoidance of doubt this order
7 is catching documents globally.

8 **THE CHAIRMAN:** If we're looking at this, there's a number 11, let's just play that
9 through. So the request was for presentations to the board of directors concerning the
10 App Store for the iPhone. That presumably has produced -- you probably don't know
11 the answer -- but one assumes a volume of documents.

12 **MR KENNELLY:** Yes.

13 **THE CHAIRMAN:** Those documents could, would probably be in some -- some
14 degree of homogeneity about those because they are probably slide backs or
15 whatever they are, but who knows; there may well be all sorts of other things in there.
16 But at the moment the Class Representative has no idea whether there are 50 of those
17 or 500,000 of them, so that's an indication of the problem, isn't it?

18 So what's the answer to that if you're the Defendants? What is -- so are you
19 encouraging -- is your request for when you talk about document categories, is it
20 simply for them to come back and say: we would like to see all the board papers?

21 **MR KENNELLY:** Or: could you search the board papers for any references to these
22 particular matters.

23 **THE CHAIRMAN:** Okay, fair enough, so they might say in relation to commission, in
24 position of commission. So that's what you're proposing. Why won't you tell them how
25 many documents there are in that category?

26 **MR KENNELLY:** If they ask specific questions like that we probably would answer

1 | them.

2 | **THE CHAIRMAN:** Would you not have a report that tells you the answer to that
3 | broadly; is that not in existence?

4 | **MR KENNELLY:** Rule 60, in my respectful submission, doesn't require us in respect
5 | of each and every one of these several hundred requests to say precisely how many
6 | of these documents.

7 | **THE CHAIRMAN:** Maybe it does and maybe it doesn't, but we're trying to work out
8 | between us how we're going to take this forward and what I don't want to do is find
9 | we're in a situation where the Class Representative asks you a question, you have to
10 | search, and gets back a return of, you know, a million documents. And maybe this
11 | isn't the best example. If we go down the page a little bit, take number 15:

12 | "All documents concerning your policy and ... decision to impose a 30 per cent
13 | commission on purchases of iPhone apps."

14 | One can anticipate there might be an awful lot of documents in that category. They
15 | might comprise emails, letters, spreadsheets, there might be board presentations,
16 | there might be some faxes in there, so if you're the Class Representative how do you
17 | get into that? If you're the expert for the Class Representative and you're looking at
18 | the motivation for the commission and you might well have some search terms but the
19 | chances are that anything you attach to those search terms is going to produce a huge
20 | number of documents, and so it's quite difficult, isn't it, for them to come up with
21 | a sensible answer as to how to approach that and you multiply that through, as you
22 | say, there are -- I don't know how many of these requests there are, but clearly enough
23 | of them to lead to millions and millions of documents. It doesn't feel to me like a very
24 | easy exercise to follow.

25 | **MR KENNELLY:** It's not an easy exercise for anyone. The problem is the repositories
26 | are vast. The point I am dealing with now is whether we have told Dr Kent what's in

1 | them in sufficient detail and that is definitely a point I am making.

2 | **THE CHAIRMAN:** That may well be right but, equally, I hope you would accept that if
3 | I ordered you to provide it in more detail you would have to do it, so we may as well
4 | have both arguments at the same time. I don't want to order you to do something
5 | which is disproportionate and not helpful to the cause, but I am certainly minded to ask
6 | you to provide more information, because at the moment it appears to me that the
7 | Class Representative just has not enough to go on in order to make suggestions.
8 | You've sort of said to them, "over to you", a bit early in the game when in fact there is
9 | quite a lot more you could do to help them make this a much more sensible and
10 | efficient process.

11 | **MR KENNELLY:** There are two separate issues. One is do they know in sufficient
12 | detail what we are offering them, and I am speaking to that point now. There is
13 | an additional point which is very important and we discussed that too, which is how is
14 | this to be filtered, how is this to be searched in a way that produces sufficiently
15 | proportionate production for the Tribunal.

16 | **THE CHAIRMAN:** And they're connected, but we're not going to answer the second
17 | one today of course. But what I am concerned to do is to make sure that the first one,
18 | whether or not it's been done correctly in the past, you may argue that it has been, but
19 | I have to say for the purposes of what needs to be done it strikes me that we're not in
20 | a position for the second question to be properly engaged on between the parties.
21 | That's my working hypothesis at the moment, subject to anything else you might say,
22 | and what I am keen to do is get to the point where it does work.

23 | **MR KENNELLY:** Stepping back and asking realistically how do we move this forward
24 | without blaming anybody, there is a huge amount of detail in these requests that does
25 | tell everybody what's in the repositories.

26 | **THE CHAIRMAN:** Sorry, I'm not sure there is, though, that's the trouble. What it

1 does -- actually all it really does, you know how these things are done, someone will
2 have sat down with a list of proceedings in the US proceedings and all they have done
3 is thought of the different issues that they can attach document requests to and they
4 have put those in, so all this really is, is a reflection of an issues-based approach to
5 disclosure.

6 **MR KENNELLY:** We're on the first page of the requests, Sir. When you go through
7 all of the requests you see there is greater granularity than you see on this page and,
8 read together, one has a much more granular picture of what's in the repositories.
9 This is not it.

10 **THE CHAIRMAN:** I'm sure that is right but just conceptually I am taking issue with the
11 idea that somebody else's requests for the documents is as good a roadmap as you
12 can provide to what you actually have. And I suppose the challenge here, Mr Kennelly,
13 is you could come and tell me what you think is the best way into this or I can try and
14 make you tell us what is the best way, which may not be the best way at all, and at the
15 moment we sort of seem to be in the second rather than the first.

16 What I would really like to be doing is for you to be saying -- which you could have
17 done at the disclosure report stage but have chosen not to -- actually this is the
18 architecture of all this and here is the best way in. I don't know what that is and you
19 may continue to choose not to do that and maybe you're not able to do it, but that is
20 the problem we have at the moment.

21 **MR KENNELLY:** Sir, I am trying to move on to the second of my two points. The first
22 point is what's in the repositories and how much granularity has already been provided.
23 The rule refers to a brief description of what's in the repositories, in effect. Reading
24 paragraph 11 with these in my submission amounts to more than simply a brief
25 description.

26 In my submission the real issue isn't how much more granularity we can provide as to

1 | what are in the subcategories once they were ultimately provided in the production
2 | sets, although we are doing that although Apple has committed to producing more
3 | detail about how the ultimate production was done, so that will be done.

4 | **THE CHAIRMAN:** What will that include, though; will that include more description of
5 | the actual documents?

6 | **MR KENNELLY:** Remember the point that my learned friend made is: oh, you can
7 | ignore these requests because in our disclosure report we said that some of these
8 | requests were ultimately narrowed by agreement or by further order. Our further work
9 | that we will give on 30 March will address that point, so they will have certainty as to
10 | precisely how one links these requests to the documents in the repositories.

11 | But the real solution is not, in my submission, to provide a hundred-page disclosure
12 | report describing in greater detail what's in these categories that were produced in the
13 | various foreign proceedings; it is to agree with Dr Kent how we can best search
14 | through these repositories. It will be done electronically and therefore how -- bearing
15 | in mind what's available -- how can we most effectively produce a proportionate
16 | production from this set of over 20 million documents.

17 | And we had understood -- and in really simplistic terms we understood that they, with
18 | the benefit of their experts -- it's their case -- would come forward with proposals. They
19 | say they expected us to do that. It really doesn't matter at the end of the day. What
20 | matters is that we cooperate based on our respective experts.

21 | **THE CHAIRMAN:** It does matter to the extent that it's very difficult for there to be
22 | cooperation if there is a knowledge imbalance and there is a knowledge imbalance.
23 | You know an awful lot more about these documents than they do and, as far as I can
24 | tell, you're sharing less than you could share in order for that discussion to be
25 | constructive, and I can't see any reason why that's helpful to you or indeed helpful to
26 | them.

1 I must say I am becoming slightly impatient with that proposition. If you have materials
2 that explain in greater detail what you have I don't know why you wouldn't share them.
3 You're not giving anything away and I appreciate it is making it easier for them to
4 request disclosure, but that's going to happen some time.

5 **MR KENNELLY:** The problem is -- I suppose the problem is just understanding how
6 we move this forward because even their draft order asks us to describe briefly the
7 documents that exist or may exist that were produced in the US proceedings and then
8 the other foreign proceedings and any other documents. Even their order asks for
9 a brief description of what exists or may exist, and that's probably not going to give
10 them what the Tribunal is reaching for, which is even greater granularity and clarity as
11 to what these repositories actually contain.

12 **THE CHAIRMAN:** I'm not sure. I think -- frankly I think they would take anything they
13 could get that would help them more sensibly formulate search requests.

14 I wonder if it's a convenient time to take a break, but I wonder if I could ask you to take
15 instructions on something, which is you must have better analysis of what's in this
16 document population than we have here at the moment. And if you wouldn't mind, it
17 would be really helpful for you to take instructions on whether any of that can be
18 shared, whether it needs to be converted into something which is more suitable,
19 however it might be -- in its current presentation however it might be converted for use,
20 but I do think that this starting point here is that you're going to have to do better.

21 It's clear at the moment that the Class Representative is stuck and I think that's
22 an entirely valid position because of the lack of information that's been provided, and
23 I'm really giving you the opportunity to suggest a way to move that forward without any
24 reference to what's happened in the past; let's not get hung up on that. What is the
25 best way you can provide more information about these documents so that they can
26 access -- they can think about how to access them and then we can see whether we

1 can move forward.

2 The alternative is that I will end up making an order, which may be the wrong order,
3 because it's very difficult to understand what's really going on here and if you force me
4 to make an order effectively blind then I suspect it's not going to be helpful for anybody
5 and may actually be somewhat counterproductive.

6 So I'm trying to not do that. I would much rather this came from you with a suggestion
7 about: look, here is the way forward, and this is what we have and we're prepared to
8 share and we think it's the next logical step.

9 Do you mind if I leave you with that as a bit of homework?

10 **MR KENNELLY:** Not at all.

11 **THE CHAIRMAN:** Should we give you 15 minutes; is that sufficient, do you think to
12 deal with that?

13 **(3.25 pm)**

14 **(A short break)**

15 **(3.40 pm)**

16 **THE CHAIRMAN:** Mr Kennelly.

17 **MR KENNELLY:** Sir, I have taken instructions on how much more detail -- just to be
18 clear what I understood the Tribunal's concern to be was that Apple needs to provide
19 greater detail as to what is contained in the repositories referred to in the disclosure
20 report without which the parties, both sides, cannot properly engage in discussing
21 categories or search parameters to interrogate those repositories.

22 **THE CHAIRMAN:** Exactly.

23 **MR KENNELLY:** Because of the truly vast nature of those repositories and the level
24 of detail contained in them, I'm not in a position now to say anything concrete about
25 that further detail. Nor can I, in the short time available, commit to either a deadline
26 by which we can do it or the level of detail we can provide.

1 What I can do, of course, is -- and what we will do -- is consult with our client in the
2 United States overnight and produce as soon as possible to the Tribunal, hopefully
3 tomorrow, some proposal as to how we can provide that greater level of detail.

4 It is difficult to do so on the hoof. It is difficult to do so in the context of this hearing. It
5 will require consultation with those with greater knowledge of the detail of the
6 repositories in the United States. That's what, I'm afraid -- at the moment on that issue
7 that's all I can say.

8 **THE CHAIRMAN:** I understand. Those are fair points, Mr Kennelly; I understand that.
9 It does leave me with really the only obvious alternative being to make the order that's
10 been sought and obviously that actually, as you've heard me say, (inaudible) I think
11 that probably leaves you more latitude than I would be inclined to do if I could think of
12 a better way of doing it. And in fact that's what I would do, obviously subject to
13 anything else you have to say, then I'm sure the message is very clear about what
14 I think needs to be done in order to move things forward and I am most interested in
15 that, as you will appreciate.

16 **MR KENNELLY:** Yes. And then that's well understood and the Tribunal's comments
17 before the break were also well understood.

18 Just if you will indulge me just to make two short points --

19 **THE CHAIRMAN:** Yes, of course.

20 **MR KENNELLY:** -- about the Tribunal's concern that the Class Representative is truly
21 in the dark. You will have heard Dr Kent -- Ms Kreisberger referring to quantitative
22 disclosure requests which have been proposed and which we will respond to, and
23 that's a matter for the next hearing by agreement.

24 If you just turn those up, they're behind tab 10 in the core bundle, volume 1. These
25 are proposed disclosure categories. It gives you a flavour of what we envisaged
26 Dr Kent proposing in relation to the repositories which we have offered. These are

1 behind tab 10, C/186, proposed disclosure categories.
2 Definitions are given and then she set out -- and I appreciate these are quantitative
3 and in many respects refer to issues of quantification, but there are disclosure
4 categories here which do refer to the substance, that go to the substance, and Dr Kent
5 was able to propose at least these categories and in our respectful submission this is
6 exactly the right approach.
7 We're going to come back to them and make suggestions of our own, but the general
8 approach of producing focused individual categories like these, which will then be used
9 to interrogate the repositories was what we had in mind when we made our
10 disclosure --
11 **THE CHAIRMAN:** Yes, I can see that. The difficulty, and it probably applies to these
12 equally to the remainder of the repositories and the other questions that might be
13 asked, they're shooting in the dark a bit, aren't they? They just have so little
14 information about what the nature of these repositories are. They don't know whether
15 these are going to produce a hundred or a million documents. That's the problem with
16 all of this and if you have information that helps them understand that better they
17 should have that on the basis it really is cost free for you because it's nothing
18 confidential or privileged about it.
19 It may well be that this works perfectly well but it would be interesting to see whether
20 your response to this on any of these occasions is: well, actually that may be a good
21 question but it produces 5 million documents and we're not going to look at them,
22 which would not be an unreasonable thing to do but is a chain of enquiry that's entirely
23 provoked by them not having enough information to be able to tailor the request.
24 I'm not saying that will happen. I'm just -- that's the concern I have, that if we're going
25 to do this properly then to the extent there is a better sharing of information it's more
26 likely to be an efficient process.

1 **MR KENNELLY:** I understand, Sir. And, to be clear, the solution to the problem that
2 the Tribunal has identified is not to make the order Dr Kent seeks. A new disclosure
3 report doesn't move us forward for the reasons that the Tribunal I think understands
4 that, again, a brief description of where the documents are isn't what the Tribunal
5 needs or wants. What you need is actually -- what will likely be a far-from-brief
6 description of what's already been offered in the repositories so that search categories
7 can be agreed between the parties, and that's what we will seek to address overnight.

8 **THE CHAIRMAN:** I think it's difficult, Mr Kennelly. I don't see -- the timing is very tight
9 if this is all going to be disclosed, or some of this is going to be disclosed by 2 May.
10 I appreciate you haven't committed to that, but certainly I think we need to be getting
11 on with getting documents out of the repositories and into the hands of the Class
12 Representative. And actually I think we have run out of time, really. I think I am going
13 to have to make an order today of some sort in order to take this forward, and you're
14 not really giving me an alternative to the Class Representative's proposal and maybe
15 that's the best I can do. If I could think of a better way of doing it I would, as I say, but
16 I appreciate it's not ideal but I think I probably do need to put a marker down and get
17 some work going.

18 **MR KENNELLY:** The problem is, Sir, if you make the Class Representative's order
19 requiring to us produce a new disclosure report describing briefly what documents
20 exist or may exist, including documents or categories of documents in the US,
21 Australian, CMA proceedings, the CMA investigation, the EC investigations and any
22 documents that were not produced in any of those proceedings, that is an enormous
23 task which will be a distraction from the much more important job, which is to provide
24 the detail which the Tribunal wants in the repositories as provided, because those
25 repositories are -- should be the basis for disclosure in this case.

26 **THE CHAIRMAN:** Let's put aside the supplemental point because we haven't yet

1 come to that and I'm sure you have things to say on that and I would like to have some
2 discussion on that, but just before we get to that, in terms of the repositories, I read
3 1.1.1 as being the same thing as giving us -- if you had an index of these things, and
4 I appreciate that might be a privileged document and you wouldn't want to hand it over
5 for all sorts of reasons, but assuming there is somewhere some ability to put together
6 a description of what is in these repositories, that is what 1.1.1 is about, I think.

7 And if that exists then it would meet the -- and it may not exist in one place, and it may
8 require some extra work, but that would meet the requirement to give a brief
9 description and I think if that's possible that's what I would like to see happen.

10 **MR KENNELLY:** That's a really helpful indication, Sir, if I may say so. Because we
11 are engaged, if we look on this draft order and in red we are already engaged in
12 producing a statement describing the nature and extent of the searches conducted to
13 locate the documents that were ultimately produced in the US. It's on page 3 of
14 Dr Kent's draft order.

15 **THE CHAIRMAN:** And that's found its way in. I think that, as I read it, that is more or
16 less the same as 1.1.3.

17 **MR KENNELLY:** Indeed.

18 **THE CHAIRMAN:** Saying you want to do it as a separate exercise and you've got a
19 different date but broadly speaking it's the same thing, isn't it?

20 **MR KENNELLY:** Exactly, and part of that could involve describing in greater detail
21 what the documents actually say, what they consist of in greater detail, because we
22 are hopefully in this exercise dealing with the concern that the requests themselves
23 don't properly describe what's in the documents. We will need to go into greater detail.

24 **THE CHAIRMAN:** I think it's broader than that. I don't think we're just talking about
25 the point as to whether the ultimate production matched the requests. We're talking
26 about what is the character of the documents that are produced and some sense of

1 | how they're organised. That's what we're talking about.

2 | So are we talking about, you know, of the 12 million documents, are we talking about
3 | 5 million emails and, if so, how are they organised; are they all -- what's the balance
4 | between the different repositories, are we talking about, you know, witness statements
5 | with a whole lot of attachments to them, are we talking about spreadsheets, board
6 | presentations, some categorisation like that?

7 | I think that's really all I would have thought physically you can actually do. I don't think
8 | anyone is asking you to do anything other -- they may be asking you to do more than
9 | that but it seems to me if you want to get to the point where you can have a constructive
10 | conversation between the two parties about how you triangulate the issues in the case,
11 | and the search terms that you might apply, then it's very, very helpful as a third limb
12 | to talk about what sort of documents there are and how many there are so that you're
13 | not asking for board presentations if you know that there are actually 50 slide packs
14 | but there are a thousand spreadsheets or whatever. Probably not a very good
15 | example, but you see what I mean.

16 | **MR KENNELLY:** Indeed. The character of the documents -- the pre-existing
17 | documents, their character. The detail would assist both sides in understanding how
18 | best to formulate the search.

19 | **THE CHAIRMAN:** Because it's a practical point. This is all about practicality, isn't it;
20 | it's about finding some sensible mechanism to deal with a large volume of disclosure
21 | that needs to be searched electronically.

22 | **MR KENNELLY:** Yes, and I will -- again, obviously we will do everything we can to
23 | accommodate that and the indication the Tribunal is giving us are really helpful
24 | because it helps us to understand whether that's possible. And hopefully, if we can
25 | reassure the Tribunal as to how we will do that, it won't be necessary for you to make
26 | a more detailed order at this stage.

1 **THE CHAIRMAN:** Well, if I were to make the order that's been suggested by the Class
2 Representative then that's ideally what I would like to see, and if you come back and
3 tell me it's not possible someone's going to have to explain why not, but on any view
4 there has to be some compliance with that order if it's made.

5 **MR KENNELLY:** Of course, but I think that's probably as far as I can take that point.

6 **THE CHAIRMAN:** Of course.

7 **MR KENNELLY:** The second one I wanted to show you, again more to reassure you
8 again is in addition -- it's not just the requests and the document that you saw, the
9 documents you saw annexed to the disclosure report. We supplemented that in our
10 correspondence to provide greater detail and clarity to the Class Representative as to
11 what the repositories contained and could I just show you that too, because that's in
12 CR, the correspondence bundle, behind tab 97.

13 You will have to take it from me, Sir, because I haven't taken you to them, that the
14 requests are extremely detailed and give what I would submit to be a granular
15 breakdown of what was provided, but in addition --

16 **THE CHAIRMAN:** Sorry, I have just -- when you say the requests, which requests do
17 you mean?

18 **MR KENNELLY:** I mean, there was a point I was making earlier where you rather
19 stopped me in my tracks and said: that's not the answer. Those requests, I took you
20 to the first of the four requests; I'm not going to take to you the rest.

21 **THE CHAIRMAN:** I see. The requests in the other proceedings, I see, I'm sorry. I
22 understand.

23 **MR KENNELLY:** I stand by the submission that those requests, read together, do
24 provide much more granularity as to what the repositories contain than you may have
25 understood from the submissions from my learned friend.

26 **THE CHAIRMAN:** I understand that point, yes.

1 **MR KENNELLY:** Tab 97 in the correspondence bundle --

2 **THE CHAIRMAN:** Yes.

3 **MR KENNELLY:** -- was a detailed letter from us addressing concerns raised by the
4 Class Representative. And if you go to page CR/219 we then set out in more detail in
5 appendix 1, CR/219, the overlap between the proceedings in respect of which
6 disclosure had already been given and the issues in the present case. That's
7 appendix 1.

8 **THE CHAIRMAN:** Yes.

9 **MR KENNELLY:** And then at appendix 2 we gave much more detail as to the
10 custodians. We saw reference to the custodians in the original disclosure report. This
11 has greater particularity as to the roles of the individual custodians, to help the Class
12 Representative understand the documents in the disclosure report.

13 And appendix 3 contained the particular terms of the European Commission search
14 string, CR/226, and it is not surprising when one reads the European Commission
15 search string why it produced 400,000 documents, many of which we say are
16 irrelevant because it was very, very broad.

17 **THE CHAIRMAN:** Are you moving on to the question of supplemental -- what I call --

18 **MR KENNELLY:** Yes, I am. There the very last thing is at CR/228. It's the validation
19 protocol for the documents. It explains how the documents that were in the
20 repositories were produced, were collated and reviewed.

21 **THE CHAIRMAN:** Sorry, I wasn't trying to hurry you on; I was trying to understand if
22 this goes to the question of supplemental rather than the current adequacy or
23 (inaudible) you say both.

24 **MR KENNELLY:** It goes to the extent to which the Class Representative is genuinely
25 in the dark. I haven't got as much detail as the Tribunal would like me to have, but
26 they are not entirely in the dark.

1 **THE CHAIRMAN:** Sure, but the question, I think it comes back to this question that
2 the missing piece of the jigsaw is what have you actually got in these repositories;
3 what sort of documents are they?

4 **MR KENNELLY:** Indeed. It's a question of greater detail. I think a jigsaw -- I'm not
5 sure about the jigsaw analogy, but certainly the Tribunal is telling us that we need to
6 give the Class Representative greater detail as to what's in the repositories and that's
7 what we're committing --

8 **THE CHAIRMAN:** If you have the information. Again, just to be absolutely clear, the
9 point was made in the context of proportionality before and I'm very concerned -- one
10 of the things you will come on to, no doubt, is this question of giving a costs estimate,
11 and I can see it's quite difficult if you haven't worked out what you're going to do. But
12 the reason you haven't worked out what you're going to do is because there hasn't
13 been a proper dialogue about what the right answer is and one answer has to be
14 proportionate and that is very much dependent on what the population of documents
15 look like you're going to apply the search term to.

16 **MR KENNELLY:** And really, again, I'm not blaming anyone but that was one of the
17 weaker criticisms that my learned friend made. How can we put forward a cost
18 estimate when the actual searches themselves have to be negotiated between the
19 parties and ultimately resolved by the Tribunal. There was nothing wrong with us
20 saying we're not in a position now to say how much it's going to cost. That begs the
21 question, because for an exercise as enormous as this, the cost could vary massively
22 between one set of searches and another depending what the Tribunal ultimately
23 orders. But that's really for another day, that question about how much it's going to
24 cost.

25 Before I move on to supplemental disclosure and the extent to which any UK store
26 front is needed, I will just make sure I haven't missed ...

1 **(Pause)**

2 So the question of supplemental disclosure turns on the submission from Dr Kent that
3 the repositories that we're offering are not sufficiently comprehensive, that her case is
4 focused on the UK store front of the App Store, she says, and her case alleges a
5 continuing infringement up to judgment when what we're offering in the repositories is
6 disclosure ending around February 2022.

7 There is nothing to either of those points, Sir, because when you look at Dr Kent's
8 pleaded case there is nothing to suggest any material difference between the UK
9 storefront and Apple's approach to the App Store in general. The only UK-specific
10 thing about her case is the class which is defined by reference to purchases from the
11 UK storefront and for that we are producing the UK transaction data. The UK
12 transaction data plainly is relevant to the UK and that's relevant to showing the
13 individual class member's loss, but the case as pleaded makes no distinction between
14 the UK and how Apple behaves elsewhere.

15 **THE CHAIRMAN:** Was that different to Australia? You may not know the answer to
16 that question but you see this pattern, don't you, that emerges where I don't know if
17 you can call it a pattern but certainly at least in relation to Australia the approach is
18 that you provide the US disclosure and then there is some additional disclosure. Why
19 is it different here?

20 **MR KENNELLY:** I don't have the issues in the Australian case. I can't answer the
21 first part of your question with precision, but I can say that what the Australian
22 experience teaches us, and you will see this in the disclosure report, on this point, Sir,
23 could you go to the disclosure report.

24 **THE CHAIRMAN:** Yes, this is a point about you look at a lot of documents you don't
25 get much back and nobody uses them.

26 **MR KENNELLY:** That's the problem.

1 **THE CHAIRMAN:** That's disclosure in a nutshell, isn't it?

2 **MR KENNELLY:** Exactly, sure, but the problem is that we end up carrying the can
3 and there will be a vast amount of money and effort that's potentially wasted.

4 So at C/82, supplemental Australian discovery was ordered in addition to what we
5 produced by reference to the US Epic proceedings. So we were ordered to produce
6 it and, far from it showing that it was a useful exercise, if you look at paragraph 17,
7 although 1.2 million documents were reviewed by a third party review team in
8 Australia -- and one can only assume how much that cost, over nine months -- what
9 did it produce ultimately? 7,600 documents that were produced to Epic.

10 So what we see there very clearly is the law of diminishing returns. The case that was
11 pleaded in Australia, I certainly can say this in broad terms, was very similar to the
12 underlying allegations made against Apple in the US, which is very similar to the
13 allegations made against Apple by Dr Kent. They're not based on a new theory of
14 harm. It's the same theory of harm in many ways that we faced in the US and Australia.
15 It's hardly surprising that the vast majority of relevant documents came from the US
16 set and, when in Australia they tried to do something supplemental, a huge amount of
17 time and money was spent with very low returns. In my respectful submission, far
18 from showing the need or the proportionality of supplemental disclosure, the opposite
19 is the case. It's a fortiori here because Dr Kent will have not only the US disclosure
20 but also the Australian disclosure until February 2022.

21 **THE CHAIRMAN:** Yes. Of course what's said about all that is that may well be right
22 and we're certainly not going to resolve that here, but there's nothing in your disclosure
23 report that explains that. That's what is said about it and I think in that respect it is
24 probably defective. I'm not suggesting that, you know, you've concealed the point or
25 anything like that, but certainly it seems to me it could have been clearer and you have
26 clarified that since and I think it probably does need to be recorded in some form what

1 the position is in the UK and your proposals, or actually lack of, for them. That's the
2 complaint, I think, about it.

3 I'm not sure it takes us anywhere terribly much because the question will then be
4 whether the Class Representative accepts that or not and if she does then fine, but if
5 she doesn't there will no doubt be some application at some stage and I anticipate that
6 there may well be supplemental disclosure for all sorts of things that pop out of these
7 proceedings that turn out to be different from others. Maybe (inaudible) then there
8 won't, but I think what's important is there is a clear statement somewhere of what
9 your position is on that and it probably ought to be in this document and if we're doing
10 it again, which we may be, then that's probably the place to deal with it.

11 **MR KENNELLY:** This ship may have sailed, Sir, but my submission will be that in
12 paragraph 17 we're explaining why supplemental disclosure produces diminishing
13 returns.

14 **THE CHAIRMAN:** I think to be fair, Mr Kennelly, I don't think that is really what that's
15 doing. You can absolutely -- you're absolutely right, the logical foundation may be
16 there but you haven't got a section in your disclosure report that says: this is what
17 we're doing in the UK and if it's nothing other than transaction data these are the
18 reasons and it should do that, I think.

19 There is clearly going to be an argument about supplemental disclosure and that's
20 fine, we'll deal with it when that comes. I just think you need to set your stall out clearly,
21 as you have done in other -- I know there are now a number of places in which you've
22 made some observations about this. Let's put them all in one place and understand
23 exactly what your position on it is and then that can be tested if need be.

24 **MR KENNELLY:** I understand. To that point though, since there is absolutely no
25 doubt, the reference to the Epic v Google proceedings in England where UK disclosure
26 was provided, as I think the Tribunal observed that looked like transaction data. That

1 | looked like transaction data; much of it referred to transaction data which we are
2 | providing, so that doesn't help them at all.

3 | **THE CHAIRMAN:** Maybe there are some things in there that aren't, and as I say, I am
4 | certainly not seeking to forestall any discussion about this at some later stage but
5 | I think what I would like to see is in the disclosure report, or some amended version of
6 | it, a clear statement of what the position is in relation to the UK, both in terms -- well
7 | actually, in terms of geography and temporal considerations, if you're saying there is
8 | no difference -- it seems to me you're saying there is no additional documentation that
9 | comes from geography because that's not how it works, there is no additional time
10 | point because actually there is so much that's disclosed anything now is likely to be
11 | pretty meaningless, and actually our experience is that looking for the stuff didn't
12 | produce very much anyway, it's a disproportionate exercise. If that's your position let's
13 | have it out.

14 | **MR KENNELLY:** We said it, and the problem is probably we say in not enough detail
15 | but at footnote 7 at C/80, we said:

16 | "... Apple notes that the [Class Representative's] ... allegations are not specific to
17 | UK-based developers. In any event, to the extent elevated by the TAR process, [which
18 | is explained in detail in the document I showed you in correspondence] responsive,
19 | non-privileged documents relating to the UK would have been produced in the US
20 | Proceedings if they ... related [to those matters which are covered by Dr Kent's claim]
21 | ..."

22 | **THE CHAIRMAN:** Maybe if I hadn't said "defective" there would be less need to push
23 | back. All I'm saying is I would like to see a disclosure report that had this front and
24 | centre so there is no doubt about what you're saying. If we could get to that point.
25 | This is I think a little bit different from the discussion we were having before where it
26 | appears to me you could have been a lot more helpful. Let's not argue about the whys

1 and wherefores. I think the position is now clear. Let's have it properly recorded.

2 **MR KENNELLY:** To make that point good, I was proposing to take you through the
3 Class Representative's pleading. You may not want to do that or you may not think
4 it's necessary now.

5 **THE CHAIRMAN:** We're not going to resolve that issue now. At the end of the day
6 your position on this is your position and it just needs to be written down clearly
7 somewhere so it can be understood in one place and you can be held to account on
8 it. You may be right, you may be wrong, I don't know, and I'm not sure that going
9 through the Class Representative's pleading is, interesting as it is, going to help us
10 much.

11 **MR KENNELLY:** At least let me say this: that I can tell you there is nothing in it that
12 suggests that her claim is UK-specific or that there is -- there's nothing in the pleading
13 that suggests that anything post-2022 would make any difference.

14 **THE CHAIRMAN:** Yes, well if it turns out your opponent disagrees with it, and I'm
15 sure we will find out in due course, but hopefully not through argument, very well.

16 **MR KENNELLY:** I will not take you through their pleading then. Don't be surprised if
17 you see some of that in the document that you're going to order us to produce, the fact
18 that, as the case is currently pleaded, there is nothing to suggest that supplemental
19 disclosure from the UK would be necessary. That's an appropriate thing to do in
20 a disclosure report because one asks what is relevant, one asks about relevance by
21 reference to the pleadings. It's legitimate to go to their pleading and say --

22 **THE CHAIRMAN:** I think you should be setting those points out in the document, I
23 think that's absolutely right.

24 **MR KENNELLY:** Again I will move on, then, to the question of the proportionality --

25 **THE CHAIRMAN:** Yes.

26 **MR KENNELLY:** -- and the other part of their order, because we have been looking

1 at the disclosure report and what you ought to order in that respect, but of course
2 Dr Kent also said, as she said, as a first step she was asking for all of the repositories
3 to be searched by reference to the categories in your December disclosure order.

4 **THE CHAIRMAN:** Yes, we're at 6.2. The question is how do we get into these
5 documents?

6 **MS KREISBERGER:** Sir, I hesitate to interrupt but I haven't addressed you on 6.2.

7 **THE CHAIRMAN:** You're right.

8 **MS KREISBERGER:** I am content not to press 6.2 on the basis that as I understand,
9 Sir, you're going to be ordering that there be a compliant disclosure report, so I am
10 content and it may save Mr Kennelly the time not to press 6.2.

11 It was an interim proposal to attempt to move things forward.

12 **THE CHAIRMAN:** I think it's very helpful. Unless Mr Kennelly is telling me he thinks
13 he can do something sensible in relation to the repositories, I am concerned there may
14 not be an easy way into them, at least at the moment, but obviously that is -- and I think
15 it's very helpful, thank you and we can, you know, we have the luxury of another CMC
16 in three weeks' time.

17 **MS KREISBERGER:** Yes.

18 **THE CHAIRMAN:** So that does provide us with some facility to come back to it.
19 Mr Kennelly, if you are going to tell me this is too difficult and you can't do it, then I am
20 probably not going to need a lot of persuasion on that. I would like to hear from you if
21 it is possible to do anything in relation to these documents at the moment. If there is
22 any way in which you think you could be disclosing some of these documents, start to
23 review them or disclose them that would be very helpful.

24 I don't know whether that is the position. Again, I don't know for example how big the
25 CMA market study population is. Obviously you made some suggestions in other
26 places about reviewing, I think it's string 4 of the EC investigation. If those are things

1 you can get on with and commit to doing then you should be doing them, and I would
2 be somewhat unhappy to find later that you could have been doing them and actually
3 they were things that were agreed.

4 So whatever you can give us on 6.2 would be helpful. I'm not going to press you
5 for -- if I anticipate you're going to tell me that the proposal here is unworkable because
6 of the scale of the document population.

7 **MR KENNELLY:** The order at 6.2 as it stands is unworkable but we have said in
8 correspondence, unworkable because of the approach to categories, because those
9 categories, taken from the December disclosure order, amount effectively to standard
10 disclosure. Because when one asks about -- when one sees disclosure will be given
11 of any documents which are relevant to those categories that were in your December
12 order, that is down to disclosure, and in repositories of multiples of millions of
13 documents I just can't do it.

14 **THE CHAIRMAN:** Yes.

15 **MR KENNELLY:** We have commissioned correspondence to trying to formulate to
16 the best we can in the time available more sensible categories, and we invited Dr Kent
17 to do the same. We went back saying those December categories don't work for such
18 a massive document set but we have -- I can't offer you categories now but we have -
19 - commissioned correspondence to producing that, and as I said in the skeleton we
20 can see the sense in having that dispute ripe for resolution at the next CMC but
21 I haven't committed to a particular date for that --

22 **THE CHAIRMAN:** (Overspeaking) That's 20 March and, you know, what would be
23 unhelpful then would be to be told that, oh, 2 May or whatever date it is that we then
24 alight on is only six weeks away and we can't do it because of Easter and so on. That's
25 the trouble with all of this, it just slips all the time, doesn't it. So if there are things you
26 could be doing now, you should be doing them is the short point. I don't know whether

1 | there are or not, and to the extent you made offers in correspondence I don't think you
2 | should be waiting for further approval or discussion if you can get on with things.

3 | **MR KENNELLY:** We have said we are getting on with it. What we are getting on with
4 | does not depend on progress with Dr Kent or anything else.

5 | **THE CHAIRMAN:** Yes, good.

6 | **MR KENNELLY:** We are doing the best we can in the time available and we hear
7 | what you say about if things can be progressed more quickly then we will do that too.
8 | But it would not help anyone to order us to do a relevance review through all our
9 | documents set by reference to the categories. That would just be a massive
10 | time-wasting, money-wasting exercise.

11 | **THE CHAIRMAN:** That's not the right way to deal with it. That's the problem that
12 | we're trying to avoid.

13 | **MR KENNELLY:** Before I sit down, in view of the discussion we have been having,
14 | Sir, that may be all you need to hear from me. There was one point though, on the
15 | disclosure report that you're going to order -- or at least whatever we call it, the
16 | document that we have to produce that provides the greater detail, the order proposed
17 | by Dr Kent says 6 March.

18 | We have proposed 30 March and that was just to do the statement describing the
19 | nature and extent of the searches conducted to locate the documents that would
20 | address this question of the extent to which the requests were narrowed, so the Class
21 | Representative could see with more precision what's in the repositories. If we are to
22 | do this deeper dive that the Tribunal is urging us to do we could not do it by 6 March.

23 | **THE CHAIRMAN:** Deeper dive being?

24 | **MR KENNELLY:** Providing the greater granularity that you've asked us to produce to
25 | deal with the characters of the documents that we produced of the repositories.

26 | **THE CHAIRMAN:** The difficulty with this is I'm not -- I don't think I am asking you to

1 do anything that you shouldn't be able to do very quickly, because -- and I would be
2 reluctant to do that, but it just seems to me that you must have, your client must have
3 records of what's in these repositories, and there must be some way you can
4 manipulate those so you can provide useful information to the Class Representative.
5 This is the difficulty I have, Mr Kennelly, you're forcing upon me an order that may
6 actually be a very blunt instrument for what's a very simple point but you're not really
7 giving much assistance as to what the alternative is.

8 **MR KENNELLY:** If I could tell you that there was a single repository, some single
9 index which would make this, or single sets of spreadsheets that would make the
10 exercise straightforward, I would say so. The difficulty I have is that my instructions
11 are that it is a very complex task and the extent to which, how complex it is, I can't
12 even explain until I take instructions from the United States overnight. It certainly can't
13 be done by 6 March. That I have been told.

14 **THE CHAIRMAN:** Something will have to be done on 6 March, I think. What we are
15 going to have to do, I think, is going to have to be your best endeavours on this by
16 6 March, because I think on any view we're going to need to see whether this is going
17 in the right direction on the 20th, and if it's not going in the right direction on the 20th
18 we are going to have to do something quite different, and that may well be quite
19 controversial and dramatic, so I don't want to find that we lose the opportunity because
20 otherwise we're going to be in September before this is resolved.

21 So I think the answer is 6 March. You have to do the best you can. I think it should
22 be a re-amended disclosure report, I would suggest -- sorry, an amended disclosure
23 report. So you take what you have and you add to it, (inaudible) document, unless
24 you find that easier but, you know, I hope it is clear. I don't think you're being asked
25 to do very much. I think whatever information you have that better describes the
26 content of the repositories you should be giving to us, to the extent that it's not

1 privileged, or you feel unfairly gives away a litigation position, but I can't see why that
2 would do that and so you just need to give us what information you have, and that's
3 alongside a clear statement of what the position is in the UK and I can't see why you
4 can't do that by the 6th.

5 **MR KENNELLY:** On the basis of best endeavours -- even if you didn't say best
6 endeavours we can only do what's physically possible in the time.

7 **THE CHAIRMAN:** I understand the point. This is both the satisfactory and the
8 unsatisfactory nature of the formulation of the order. It actually doesn't really say
9 anything other than the order you've already been obliged to comply with, which you
10 say you've complied with, but I think I'm making it plain to you that we need something
11 better than that, and hopefully you have a clear idea of what that involves. If you don't
12 turn up with that on the 6th then I think it's going to be a very uncomfortable
13 conversation on the 20th. If, however, you're able to make some good progress with
14 that that will I think give us enough confidence that there is a way -- and hopefully
15 some further discussion between then and the 20th that allows us to be confident that
16 there is a way into these repositories that's proportionate and sensible.

17 **MR KENNELLY:** May I just quickly take instructions before I sit down?

18 **THE CHAIRMAN:** Yes, of course.

19 **(Pause)**

20 **MR KENNELLY:** Unless I am of any further assistance those are my submissions
21 and we have heard what the Tribunal has said to us loud and clear.

22 **THE CHAIRMAN:** Thank you, Mr Kennelly.

23

24 **Further discussion**

25 **MS KREISBERGER:** Sir, I don't know to what extent you need to hear from me on
26 paragraph 1 of the draft order.

1 **THE CHAIRMAN:** Not very much. What I am minded to do is to make an order, to
2 settle with 6 March. It can be an amended report or a new one if they want, and I don't
3 see much choice but to stick with the wording in paragraph 1.1.1, albeit that I'm not
4 really particularly happy with it because it's difficult to work out what a better alternative
5 is, as you have said, but hopefully it is very clear that to the extent they have material
6 that can be provided by 6 March they should provide it. That's the first bit.

7 As far as the supplemental disclosure goes, the position seems to be that they say
8 that there is nothing else and it seems to be that they should articulate that, and if you
9 don't like it you should do something about it. So 1.1.2 probably looks slightly different
10 but it comes to the same effect which is an explanation of their position in relation to
11 these.

12 **MS KREISBERGER:** Quite and, Sir, on that, just to reinforce the point really, Dr Kent
13 is in Apple's hands on this. Mr Kennelly's submission was there are no other
14 documents relevant to the pleaded issues that are UK-specific. Well, absolutely, if
15 that's the case they need to explain it but I think it is worth making clear that the answer
16 doesn't necessarily lie in the type of probing of the pleaded issues that Mr Kennelly
17 had wanted to do. The issue here is that these proceedings pursue losses to the UK
18 class. If Apple is generating documents that are relevant to the UK class of consumers
19 in relation to these issues they just need to tell us. If documents are only generated
20 at the US level that impact on the losses by the class as alleged in the claim, fine, they
21 just need to tell us that. Dr Kent doesn't know the answer, but the question is: to what
22 extent are the decisions made impacted at the domestic level or are they exclusively
23 higher up the chain? We just need to be told.

24 **THE CHAIRMAN:** Yes, I think he's saying the second, but I agree we need to be told.

25 **MS KREISBERGER:** I'm grateful.

26 **THE CHAIRMAN:** Then it seems to me that the only other point of contention is -- well,

1 | there is 1.4 in relation to costs and I do think we can't really do much about that
2 | and, can park that until we have a better sense of what's going on here.

3 | 1.5, it would undoubtedly be helpful to have those directions, but I am also mindful that
4 | I would rather we just had a very plain statement of what's going on here. What
5 | I would like to do is, is to find that by the time we got to the 20th that there would have
6 | been a discussion between you that had led to some progress. I can't order that,
7 | obviously. Express the fervent wish that it will happen and, I mean, it is right, isn't it,
8 | that the rules require --

9 | **MS KREISBERGER:** They do. It's in rule 60(1)(b) and we understood Mr Kennelly to
10 | be saying he would.

11 | **THE CHAIRMAN:** A statement of directions but in some ways, as I understand it,
12 | Mr Kennelly's directions are that he shouldn't be required to provide standard
13 | disclosure and the ball is in your court. That's sort of where you got to. Now, I don't
14 | really want to have an argument about whether that's sufficient. I would much rather
15 | have a discussion about what the right answer is, if that makes sense, which if we
16 | have to do on the 20th we will do.

17 | **MS KREISBERGER:** Sir, save for this point, and I won't press it but I will just raise it,
18 | which is that Mr Kennelly had said at the last CMC that they were going to propose
19 | a mechanism for filleting relevant from irrelevant, and certainly on my side of the court
20 | we were very interested to hear what the proposal was.

21 | **THE CHAIRMAN:** Well, I mean -- yes, Mr Kennelly.

22 | **MR KENNELLY:** That was rather (inaudible) of me. The reference to the transcript
23 | went beyond what we saw in the skeleton. Since my own good name was prayed in
24 | aid I feel I ought to step in.

25 | From my review of the transcript much of that related to the approach to the CMA
26 | documents. Perhaps I am being unfair to Ms Kreisberger but it wasn't clear to me that

1 I was speaking about providing a map to filleting for the whole of the repositories. It
2 was in particular relation to CMA documents that we were discussing I think at the
3 time.

4 In any event what I said and didn't say doesn't really matter at this stage. What matters
5 is the solution we are trying to develop between us.

6 **THE CHAIRMAN:** I think that's the point, isn't it, I think --

7 **MS KREISBERGER:** We are all ears.

8 **THE CHAIRMAN:** It's complicated and if you have the solution then no doubt you
9 would let us have it, and to the extent that you come up with one then no doubt it will
10 be shared.

11 So I think probably that is the answer and then as we discussed we park 6.2.

12 **MS KREISBERGER:** Sir, I'm sorry, just so I am clear, Sir, as to your direction in
13 relation to 1.5.

14 **THE CHAIRMAN:** Yes. So it seems to me -- I will make an order in a minute but this
15 is really just making sure that I'm not missing anything as far as you're concerned.
16 I think my suggestion is that, that actually is supplanted by a requirement for the
17 parties to discuss and provide proposals for discussion at the 20 March CMC. That's
18 what I would suggest. I don't think there is any better way of dealing with it.

19 **MS KREISBERGER:** Sir, may I just take instructions. I'm so sorry.

20 **THE CHAIRMAN:** Yes, of course.

21 **MR KENNELLY:** While Ms Kreisberger is doing that, one last thing from me.

22 Sir, I see that you're going to order 6 March for this important amended disclosure
23 report. Could we still have 30 March for the statement about the nature and extent of
24 the searches conducted to locate the documents. That was the date that we were
25 offering for that. They can be detached from the disclosure report. It's
26 a separate -- I think what the Tribunal envisages is that actually being a separate

1 question. If you don't need that by the 6th I would ask for the 30th.

2 **MS KREISBERGER:** Sir, we have been asking for this information since 1 December
3 last year. We need that now. It's an important part of the explanation as to what
4 underlies these repositories and how useful they are here, so I am surprised by the
5 request given that that's the part that was agreed. It should have been done by now,
6 Sir, it's agreed by Apple.

7 **THE CHAIRMAN:** Is there anything else you wanted to raise on that subject?
8 Conscious that we perhaps have other items to cover as well.

9 **MS KREISBERGER:** Sir, no, we do stand by 1..1.3 in the draft order.

10 **THE CHAIRMAN:** Yes, of course.

11 **MS KREISBERGER:** No, that was all from me.

12 **THE CHAIRMAN:** Yes, okay.

13

14

RULING 2

15 **THE CHAIRMAN:** There has been a discussion at some length about whether the
16 Defendants have complied with Rule 60(b) of the Tribunal's Rules involving
17 a disclosure report. It is not necessary to get into the details of the extent to which
18 that report was or was not defective. What is clear is that there is a roadblock in the
19 processing of disclosure in relation to what are called the "document repositories"
20 which are documents disclosed in other proceedings or to competition authorities and
21 regulators. The roadblock arises because the extent to which the documents have
22 been described leaves the Class Representative unable to make progress in
23 suggesting ways to search and access the documents.

24 The Class Representative invites me to make an order which essentially repeats the
25 order made originally on 29 September 2022, which was for the production of
26 a disclosure report requiring a brief description of the documents and categories of

1 document. In the absence of any better formulation I am going to make the order
2 requested, with the description to be provided either by way of an amended report, the
3 original report being dated 18 November 2022, or by supplemental report, whichever
4 is most convenient.

5 What is most important from my point of view is that the Defendants provide a better
6 explanation of the nature of the documents which comprise the repositories by
7 reference to the records that the Defendants already will have of those documents.

8 The time allowed for this exercise is not enormous and I appreciate there are
9 significant amounts of documents in the repositories, but I anticipate that the
10 Defendants will have indices or other records which will allow them to provide more
11 information about the nature of the documents and they should do so to the extent
12 they sensibly can by 6 March 2023.

13 I have also been invited to make an order requiring the Defendants to specify
14 documents or categories of documents which have not been produced in those other
15 proceedings or investigations, and are therefore supplemental to the documents
16 described in the disclosure report to date. The Defendants' position is, in particular in
17 relation to the UK and documents relating to UK App Store, that there are no such
18 documents or, to the extent there are, it would be disproportionate to be required to
19 disclose them. That information is not as clearly set out in the disclosure report as it
20 should be and the amended or supplemental report needs to deal with that position
21 clearly and in detail so it can be properly understood by the Class Representative. The
22 parties should seek to draft an appropriate order to that effect.

23 I will also make an order that the nature and extent of the searches conducted to locate
24 the documents that were produced in the various proceedings, including the CMA
25 investigation, be described. I will allow the Defendants an extra week to complete that
26 task. That is to be done by 4 pm on 13 March 2023.

1 Finally, I will require the parties, with the benefit of those documents to be produced
2 by the Defendants, to engage and cooperate to progress proposals for accessing
3 documents in the repositories so that those proposals and any issues surrounding
4 them can be discussed at the CMC scheduled for 20 March.

5 That is a tight timeframe and I appreciate that it may be only possible to make some
6 progress but it is certainly the Tribunal's expectation that there will be progress made
7 by that date, and we will want to understand not only what is proposed but when the
8 parties think that that can be done. There are a number of other issues relating to the
9 disclosure report and, in particular, production from the repositories, but we will put
10 those to one side. They can be revisited as necessary once we have the documents
11 I have ordered.

12
13 **MS KREISBERGER:** Thank you, Sir, I'm grateful.

14 **THE CHAIRMAN:** What else do we want to do today? I am conscious of the time.
15 I can do a little bit longer if people want to, if that's helpful.

16 **MS KREISBERGER:** If you are able to, Sir, I am very grateful for that. I realise we're
17 trespassing out of court hours.

18 **THE CHAIRMAN:** As long as the transcript team are happy to go on a little bit longer.

19 **(Pause)**

20 **MS KREISBERGER:** Sir, if I try and just move quickly because I think I can cut
21 through some of the provisions in the draft order which are for another day.

22 So if I just sweep up points from paragraph 3 to 6.8, I will come back to those because
23 what I can say that may be music to your ears is we will not pursue paragraphs 7 to
24 10 because they can await the next stage because they follow on from how we move
25 forward on disclosure in the light of the next CMC, so 7 to 10 can be struck.

26 The timetable in paragraph 11, Mr Kennelly confirmed this morning is agreed, so we

1 don't need to spend time on that unless you would like to, Sir.

2 So that just leaves 3 to 6. Now on 3, this addresses the quantitative disclosure
3 requests and the only area of disagreement is on the date, so I don't think I need to
4 address you on the substance of the quantitative request because --

5 **THE CHAIRMAN:** That's the document that Mr Kennelly showed me.

6 **MS KREISBERGER:** It is. Now, one is trying to avoid the he said/she said but Apple
7 now say that they don't agree to responding on that by 6 March. Well, I can show you
8 their letter but they said in terms in correspondence that was fine, and then they resiled
9 from that in the letter we received yesterday.

10 **THE CHAIRMAN:** And what is the proposal now?

11 **MS KREISBERGER:** The proposal now --

12 **MR KENNELLY:** It's 10 March. "Resile" is not right and if the Tribunal has time we
13 can go into the correspondence.

14 **THE CHAIRMAN:** Is it going to make any difference? We have given them quite a lot
15 to do so if we make it the 10th that presumably will ...

16 **MS KREISBERGER:** Yes, we can live with 10 March.

17 **THE CHAIRMAN:** So that then is agreed, the 10th.

18 **MR KENNELLY:** Yes.

19 **THE CHAIRMAN:** Yes, thank you.

20 **MS KREISBERGER:** We will reply seven days later.

21 The problem is we would like to do this in advance of 20 March.

22 I think we had better leave that.

23 **THE CHAIRMAN:** I anticipate some of these aspects may be a little bit messy at the
24 CMC. I understand that and I think what's important is we're just getting some material
25 out to tell us what's the problem and what isn't. That's what I would like to achieve.

26 **MS KREISBERGER:** I think we should just, Sir, if I could suggest that you order

1 paragraph 3 --

2 **THE CHAIRMAN:** Yes.

3 **MS KREISBERGER:** -- and we leave for now paragraph 4 and paragraph 5. We will
4 have to see if we're in a position to bring this forward at the next CMC.

5 **THE CHAIRMAN:** I would certainly like to hear where you have got to.

6 **MS KREISBERGER:** Understood.

7 **THE CHAIRMAN:** To the extent that you think that the response is not adequate you
8 need to be telling us.

9 **MS KREISBERGER:** And Dr Kent is keen for that.

10 Sir, that does raise another point about the 20 March CMC which was listed, you will
11 recall, to deal with expert applications, and as we see a day goes rather quickly, so
12 I don't know whether there is any scope, Sir, for --

13 **THE CHAIRMAN:** I seem to recall that, so we had a bit of difficulty here which is that
14 we need to convene as a full Tribunal to discuss the expert material, and so we have
15 Mr Bishop and Mr Frazer joining us. I expect their enthusiasm for disclosure is
16 perhaps more limited but they may wish to -- but we can't sit obviously as a part
17 Tribunal, so it is possible and indeed I think I may have floated with them that I could
18 sit by myself the next morning --

19 **MS KREISBERGER:** That would be very helpful.

20 **THE CHAIRMAN:** -- to conclude matters. So what we might then do is do the
21 expert -- the expert material first. I think what I would like to do is take advantage of
22 the full Tribunal being here for anything which, even if it is disclosure-related because
23 they obviously should be engaged in that, if it has a wider implication for the CAT. So
24 if we can try and -- as I'm sure you would do -- put the big stuff up front and we can
25 deal with any bits and pieces if we have to flow into the next morning, then I'm sure
26 we can manage that.

1 **MS KREISBERGER:** Sir, that's extremely helpful and we're very grateful.

2 On that basis in terms of what's left over, paragraph 6 is agreed, so the other -- so we

3 have struck through 6.2 for now. The other points are agreed. The date is not.

4 **THE CHAIRMAN:** The date is not.

5 **MS KREISBERGER:** And we're asking for 2 May.

6 **THE CHAIRMAN:** And Mr Kennelly is asking for?

7 **MR KENNELLY:** 2 May can't be ordered at the moment because, for example, for

8 the quantitative disclosure requests, until we know what progress the parties have

9 made in the search categories we can't know if the disclosure will be given by 2 May.

10 **THE CHAIRMAN:** Are there things in here you could commit to for 2 May, like, for

11 example, exhibits, transcripts, presumably all of that, transactional data. Is there any

12 of that? It seems the most obvious, 6.1 and 6.2 have now gone. I can understand

13 that but the rest of them are all things you know about, aren't they?

14 **MR KENNELLY:** Absolutely, so for example if one looks at exhibits, transcripts, so

15 6.3, 6.4, I will be stopped -- 6.5, 6.6 is a problem, but let's just do 6.3, 6.4 and 6.5,

16 unless I am told otherwise.

17 **THE CHAIRMAN:** 6.7 looks like a specific disclosure follow-up.

18 **MR KENNELLY:** You will see in the middle of 6.3:

19 "copies of all exhibits admitted in the US ... and Australian Epic Proceedings insofar

20 as they are relevant to the issues set out in paragraph 5 ..."

21 So there is going to be a relevance review by reference to the December order.

22 **THE CHAIRMAN:** There is a bit of a question, isn't there. I do understand the point

23 about relevance, Mr Kennelly but there comes a point at which actually is there any

24 use in doing that? If it's been deployed in proceedings somewhere else in the world it

25 just strikes me as being -- and we're not talking about presumably a massive volume

26 of documents so there is no disproportionality here, why not just give them to them?

1 **MR KENNELLY:** One second, Sir.

2 **(Pause)**

3 On 6.3, 6.4 and 6.5 we can do that by 2 May unless I am given a kick. We're not going
4 to do the relevance review. So you should take out the relevance review that's referred
5 to in 6.3 and in 6.5. Plainly those productions will be subject, though, to any foreign
6 protective orders. We can't produce things that are subject to a US protective order,
7 but there will be a relevance review.

8 On the transactional data at 6.6, we have agreed in principle to give this but they want
9 it until 2 May, and it is very costly to be constantly producing the transaction data on
10 a rolling basis.

11 **THE CHAIRMAN:** This is the top-up, isn't it.

12 **MR KENNELLY:** Exactly. We propose that we give them the transaction data up to
13 the present and then update it a month before the PTR. At that point give them the
14 top-up a month before the PTR.

15 **THE CHAIRMAN:** They probably want it for their experts, don't they? Isn't that the
16 point? Presumably it's the experts --

17 **MR KENNELLY:** I may have misspoken.

18 **(Pause)**

19 Sorry, I misspoke. We have given the UK transaction data and we propose that that's
20 it for the moment, and then the top-up they get in one go a month before the PTR.
21 And for the purposes of the experts, we understand that their experts don't need,
22 there's no incremental value in having the top-up any earlier. The transaction data
23 that they have is sufficient for all their possible purposes and the top-up will be given
24 (inaudible) of the PTR which will be sufficient for trial.

25 **THE CHAIRMAN:** What I suggest we do is why don't we park that. I suggest that we
26 park the date for 6.1 and we deal with that on the 20th when you have had a chance

1 to correspond about those things and we will know where we are, and we will park the
2 date for 6.6 and it may be actually something that Mr Bishop is interested in as well,
3 so if it goes to the experts and the preparation, so you can take instructions on whether
4 you care about that and how it should be done. It might be, I suspect, something you
5 can discuss beforehand as well.

6 Can we leave -- and so we leave those two out. We will take 6.3, 6.4 and 6.5 without
7 reference to the issues as you've indicated, and 6.7 is something you could do?

8 **MR KENNELLY:** 6.7 is --

9 **THE CHAIRMAN:** It's the follow-up of the specific disclosure.

10 **MR KENNELLY:** It is indeed, which we have agreed to provide: we have agreed to
11 do that search and we were going to do that as part of our broader review of the main
12 document repositories, so we're proposing that will be done by 2 May.

13 **THE CHAIRMAN:** Surely you can search the repositories now, can't you?

14 **MR KENNELLY:** Before committing to that I just want to quickly check ...

15 **(Pause)**

16 **MS KREISBERGER:** Sir, if it would -- I don't want to open up a hornet's nest but 6.3,
17 6.4 and 6.5 are now, they're unrelated to any relevance reviews so I understand it's
18 really pressing a button to access these documents, so I'm not sure why Apple would
19 need until 2 May to produce 6.3, 6.4, 6.5.

20 **THE CHAIRMAN:** I think Mr Kennelly said there might be some restrictions on how --

21 **MS KREISBERGER:** And on that we would need an explanation.

22 **THE CHAIRMAN:** Yes, of course.

23 **MS KREISBERGER:** We're in the dark on that as well.

24 **THE CHAIRMAN:** Yes.

25 **MS KREISBERGER:** So if we could have the explanation within seven days and
26 then --

1 **THE CHAIRMAN:** We can deal with it.

2 **MS KREISBERGER:** We can revisit the date for all this. That would be very helpful.

3 **MR KENNELLY:** Sorry, I missed that.

4 **THE CHAIRMAN:** I will fill you in.

5 **MR KENNELLY:** Thank you very much.

6 **THE CHAIRMAN:** If you just pick up 6.7.

7 **MR KENNELLY:** 6.7, again we can provide that by 2 May.

8 **THE CHAIRMAN:** Just I think the point that was being made by Ms Kreisberger about
9 6.3, 6.4 and 6.5 is if you're not going to do (inaudible) for me you can hand them over
10 now. I said I thought you had some issues about US proceedings. She suggested
11 you might tell us what those are if there are going to be any issues and we could
12 resolve -- we can deal with how they affect the order on the 20th. Is that something
13 you could do?

14 **MR KENNELLY:** I am reluctant to say. If Ms Kreisberger is suggesting that we
15 address the extent to which US protective orders are engaged on the 20th that -- it
16 sounds like the menu for the 20th is already very full.

17 **THE CHAIRMAN:** She's quite keen to know as soon as possible what that means in
18 practice, so maybe if we could ask you to confirm in a shorter timeframe what the
19 issues might be.

20 **MR KENNELLY:** If possible, because (inaudible) with US lawyers.

21 **THE CHAIRMAN:** Do you anticipate it might require a review of the documents as
22 opposed to -- is it a point of principle or is it --

23 **MR KENNELLY:** It's a point of principle.

24 **THE CHAIRMAN:** So you might end up saying there are some things you can't
25 provide, then the rest of it presumably once you work that out you can provide the rest
26 of it straightaway.

1 **MR KENNELLY:** Exactly.

2 **THE CHAIRMAN:** You could do this earlier, I would have thought, than 2 May, subject
3 to having resolved that issue.

4 **MR KENNELLY:** Subject to knowing which protective orders are in play. Because
5 I am speaking for people who are not in court I am hesitating to offer. It's a question
6 of principle. It could be done quickly if we have the relevant --

7 **THE CHAIRMAN:** Could we say that you will try to identify the question of principle.
8 Do you have any idea how long that would take? The extent of it? When do you think
9 you would be able to tell us what you wouldn't be giving us because of the --

10 **MR KENNELLY:** At this stage it would be identifying where protective orders are in
11 place and the extent to which they may apply to these categories.

12 **MS KREISBERGER:** If it's helpful, it would be helpful for Dr Kent's team to see the
13 protective orders for a start which may be an easy starting point.

14 **THE CHAIRMAN:** Are these public proceedings, do you know? Are they available?

15 **MS KREISBERGER:** We simply don't know.

16 **MR KENNELLY:** (Pause) I think we will have to take this away. There is great
17 sensitivity around the protective orders. Even the orders themselves in part are
18 protected by confidentiality, so we're going to have to --

19 **THE CHAIRMAN:** I don't want to get anybody into trouble so let's leave that with you.
20 I think it would be helpful to have an update on this on the 20th anyway. If you wouldn't
21 mind making a note, I would like to know where we got to with it.

22 **MR KENNELLY:** Of course.

23 **THE CHAIRMAN:** Let's leave the date of 2 May but if you were to come back and tell
24 us that actually you have sorted this out and know what the answer to this is, then we
25 might well ask you to do it sooner than that. If it is all just a question, once you know
26 what you can disclose, of handing that over, there is no reason to wait until 2 May.

1 **MR KENNELLY:** I think the problem is, and we had this in the FX case and the FIDIC
2 case where with US protective orders you need to get permission from the US court
3 to allow the documents to be produced even into a confidentiality ring, and that
4 generates delay.

5 **THE CHAIRMAN:** Clearly if that has to be done it has to be done and done properly,
6 so I understand that. But if you could give us an update on the 20th and I would be
7 keen to see those disclosed earlier if it is possible to get to that position.

8 **MR KENNELLY:** Of course.

9 **THE CHAIRMAN:** Good, thank you.

10 **MS KREISBERGER:** Sir, that is all from me, happily.

11 Mr Armitage does have one point on confidentiality.

12 **THE CHAIRMAN:** Yes. Thank you.

13

14 Submissions on confidentiality by MR ARMITAGE

15 **MR ARMITAGE:** I think we may be trying a lot of people's patience raising a further
16 issue, including the critical resources of the transcribers, so I will be extremely brief.
17 We're not seeking a particular order today but we will be mindful of the Tribunal's
18 request to raise any known issues in relation to disclosure, so shall I just summarise
19 the issue?

20 **THE CHAIRMAN:** Yes, please do.

21 **MR ARMITAGE:** And we will see if there is any point to be made. It arises as a result
22 of the confidentiality designation that Apple has applied to the documents from the
23 CMA's investigation that were disclosed on 23 January, but it raises an important point
24 of principle concerning the approach to confidentiality claims in this litigation going
25 forward towards trial.

26 The short point is that all of the CMA documents that Apple has disclosed have been

1 designated as 'outer confidentiality ring information'. It's been done on an entirely
2 blanket basis without any individual explanation, or any class-based explanation for
3 that matter as to why the documents are confidential. So it's very similar to the
4 approach that's been taken to privilege.

5 We say that's contrary to the rules, it's contrary to the existing confidentiality regime
6 that applies to this case, and it's got the potential to cause practical difficulties. I don't
7 know if it's necessary to show you any of the materials.

8 **THE CHAIRMAN:** I don't think it is. In terms of the outer confidentiality ring, it's gone
9 into the outer confidentiality ring.

10 **MR ARMITAGE:** Yes.

11 **THE CHAIRMAN:** Dr Kent is presumably in the outer confidentiality ring.

12 **MR ARMITAGE:** She is.

13 **THE CHAIRMAN:** In terms of the practical problem here, it's not stopping you getting
14 on with things but you can see there is going to be a problem later is the point.

15 **MR ARMITAGE:** It's something that needs to be sorted out at some stage, certainly
16 very well in advance of trial, and the Tribunal will be aware for example of the
17 president's remarks in the BGL case on exactly that point. It's a bit more immediate
18 than that. For a start those who are in the outer confidentiality ring have, in some
19 cases, quite onerous obligations in relation to their handling of the documents and so
20 on. There is also a question about bringing new people into the team, the need to get
21 these things sorted out. But we entirely accept it is not a matter that affects us
22 tomorrow, subject to the initial point I made, so that's why we're not seeking
23 a particular order, but we say the rules make clear that requests for confidentiality
24 require specific reasons. That's the language of rule 101, the Tribunal's confidentiality
25 ring order in this case understandably matches that. That hasn't been done. I will give
26 you one illustration of how this causes problems in relation to the particular disclosure

1 | so -- and we have actually included some examples. I don't need to turn them up but
2 | there is real reason to think that the claims that have been made are not proper
3 | confidentiality claims.

4 | For instance, I am instructed that very many documents indeed in the disclosure set
5 | were created more than five years before the date on which the disclosure was given.

6 | We don't have the authorities here today but the Chair will be aware of case law that
7 | refers to a presumption that documents of that age are very unlikely to be confidential.

8 | Here I think around 60 per cent of the total documents that we have been able to see,
9 | so the ones that are not withheld from inspection, were created more than five years
10 | prior to this case.

11 | So the simple point is we need explanations if those confidentiality designations are
12 | going to be maintained. If Apple has a different proposal -- it's suggested in
13 | correspondence a different approach, and what they have suggested is that actually
14 | the correct approach is for the Class Representative to say now, or at some
15 | unspecified point: these are the documents we're going to rely on and Apple will
16 | reconsider the position in relation to those. That would actually be a very substantial
17 | variation to the normal approach and indeed to the existing confidentiality regime. So
18 | there would need to be a properly reasoned application if that was the approach to be
19 | taken.

20 | So as I say at the moment we raise it as an issue. We don't seek a particular order
21 | but we're laying down a marker, if you like, that we don't think this is the way to go and
22 | it's something that clearly needs to be sorted out sooner rather than later and that's
23 | the short point.

24 | **THE CHAIRMAN:** It's helpful to identify these issues sooner rather than later. That's
25 | absolutely the right thing to do.

26 | Mr Kennelly, I don't think we need to get into how you're going to deal with them now.

1 Certainly we are finding that -- the Tribunal is finding that this is becoming a problem,
2 particularly as we get into some of these larger cases with huge populations of
3 documents, and I think our approach is tending towards firstly making sure we're
4 talking about it sooner rather than later, recognising I suspect the reason for this is
5 you've had to produce a lot of documents very quickly and it would have slowed them
6 down to have dealt with confidentiality in a different way, and I understand that and
7 that's certainly something that I think we would have sympathy with, but that probably
8 leads to an expectation that it's dealt with properly sooner rather than later.

9 So I don't know whether it's helpful to take it any further now, if there is anything else
10 you wanted to say about it.

11 **MR KENNELLY:** If no order is being sought then there is probably no point debating
12 it further. Obviously this needs to be resolved well in advance of trial but it really isn't
13 urgent now.

14 All of Dr Kent's advisers, all of them, economists and lawyers, are in the outer ring so
15 this isn't --

16 **THE CHAIRMAN:** (Overspeaking) I can see that, and I think the way in which we
17 have looked at it, as I say we have had quite a lot of discussion about it, and the way
18 in which we are looking at it is this that we need -- we do need to sort it out sooner
19 rather than later. I think I might have seen somewhere suggested by you that it could
20 be sorted out closer to the PTR. I think our default position will likely be that these
21 things have to be sorted out before witness statements are put to bed.

22 **MR KENNELLY:** What we envisage is that -- and I appreciate it's not the normal order
23 but if it's more proportionate -- when Dr Kent identifies documents that she plans on
24 using for witness evidence or anything else, to say to us: we don't think these
25 documents are confidential. And then it's for us then to explain why they are, and just
26 focus on documents that are actually being used rather than for us to go through

1 a thousand documents and examine whether in respect of each of them there is
2 a proper confidentiality claim or not to be within the ring.

3 **THE CHAIRMAN:** There is certainly some expedience in that but I don't think that can
4 be the default position, and it may well be that we look at these CMA documents and
5 the need to tick them urgently and so on. I think you need to think about how you're
6 going to deal with that in relation to those other document repositories where the point
7 is that much greater, and one would hope that it's not going to be just simply dumping
8 these all into the outer ring and anticipating what the position might be.

9 **MR KENNELLY:** The discussion we're having was just about the CMA documents.

10 **THE CHAIRMAN:** Yes.

11 **MR KENNELLY:** It's a much more narrow problem.

12 **THE CHAIRMAN:** Given that it's not a huge document population the sooner you can
13 get to it the better. No order is being sought and I'm not going to press you.

14 **MR ARMITAGE:** It arises because of the CMA documents. As you say, it's going to
15 be very important in relation to the wider disclosure that will happen later in the
16 proceedings and actually needs to be sorted out and thought about before then.

17 I think the marker we'd like to lay down is if Apple has an alternative proposal for
18 dealing with confidentiality in this litigation, it needs to make an appropriate detailed
19 proposal and potentially an application because there is a default position reflected in
20 the existing order. At the moment Apple has not complied with that --

21 **THE CHAIRMAN:** It's absolutely right. I am inviting that, Mr Kennelly, because the
22 sooner we can have a sensible conversation about the issue the better for everybody.
23 I appreciate it's difficult, so I'm not saying there is a magic answer to it.

24 **MR KENNELLY:** Just one more thing. So the Class Representative -- we're not
25 all-knowing and all-doing. It's a question of resources.

26 **THE CHAIRMAN:** Well it's a very asymmetric problem, I understand and I accept that,

1 and that's why I am certainly not pushing you any harder on it, but actually I think again
2 where we're getting to with this is I think we would like to be having this conversation
3 sooner rather than later. I would like to have a clear plan for how it's going to be dealt
4 with. That may involve -- that would involve a longstop date which is probably going
5 to be no longer than witness statements. What can be done before then and when is
6 obviously a matter for discussion in that plan, but I wouldn't want it to drift, and so if
7 you could add it to the list of things that needs to be thought about that would be very
8 helpful.

9 **MR KENNELLY:** I'm grateful.

10 **MS KREISBERGER:** Sir, I'm afraid I was remiss. I have been reminded by
11 Mr Kennedy we have not come back to you, Sir, on the wording of the order in relation
12 to paragraph 2 on the privilege claims.

13 The position at the moment is we are waiting for Mr Kennelly's team to come back to
14 us on some suggested wording. There has been constructive engagement over the
15 lunchtime adjournment but I'm not sure that we have yet had a response to our
16 suggestion.

17 **THE CHAIRMAN:** I suppose it's something I can deal with by --

18 **MS KREISBERGER:** Sir, the hope is it will be agreed.

19 **THE CHAIRMAN:** Yes.

20 **MS KREISBERGER:** I had promised to come back to you, Sir, on that.

21 **THE CHAIRMAN:** If there is any difficulty I can deal with it on the papers.

22 **MS KREISBERGER:** I'm grateful.

23 **THE CHAIRMAN:** And I think the most important thing is when you have a draft that
24 you're both happy with, even if it has disagreements in, if you could let the Tribunal
25 Registry have that and then we will deal with it.

26 **MS KREISBERGER:** I'm grateful, Sir.

1 **THE CHAIRMAN:** Good.

2 Is there anything else?

3 **MS KREISBERGER:** Not from my side, Sir.

4 **MR KENNELLY:** No.

5 **THE CHAIRMAN:** Good, thank you. Not always straightforward and I certainly
6 appreciate all the thought and effort you've put into it. So much so that I am even
7 looking forward to doing it all again in about three weeks' time.

8 **MS KREISBERGER:** Thank you, Sir, for sitting late. We're very grateful.

9 **MR KENNELLY:** And Tribunal staff.

10 **(4.55 pm)**

11 **(The hearing adjourned until Monday, 20 March 2023)**

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