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4 record.

5 **IN THE COMPETITION**

Case No: 1408/7/7/22, 1378/5/7/20

6 **APPEAL**

7 **TRIBUNAL**

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

12 Monday 7th October 2024

13
14 Before:

15
16 Bridget Lucas KC
17 Tim Frazer
18 Michael Waterson

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20 (Sitting as a Tribunal in England and Wales)

21
22 BETWEEN:

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25 Class Representative,
26 Claimants

27 **Elizabeth Coll**
28 **Epic Games, Inc. & Others**

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30 V

31
32 Defendants

33 **Alphabet Inc. & Others**
34 **Google LLC & Others**

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38 **A P P E A R A N C E S**

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41 Daniel Jowell KC & Jagoda Klimowicz (On behalf of Epic Games, Inc. & Others)

42
43 Josh Holmes KC & Kassie Smith (On behalf of Alphabet Inc. & Others)
44 Lesley Hannah (On behalf of Elizabeth Coll)

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Monday, 7 October 2024

(10.30 am)

Housekeeping

BRIDGET LUCAS KC: Good morning, everyone. I'll start by reading the usual warning: some of you are joining us on live stream on the website so I must start therefore, with a customary warning. An official recording is being made and an authorised transcript will be produced but it's strictly prohibited for anyone else to make an unauthorised recording whether audio or visual of the proceedings and breach of that provision is punishable as contempt of court.

I also wanted to start with some observations. Firstly, I would like to express personal appreciation and gratitude to the parties for the bundles. It has made matters far easier, at least for me, to have the bundles focused on the documents that we will be looking at and the issues in dispute. I could sensibly read them in the time available, so it is appreciated, and I know effort goes into doing that. We would also like to thank the parties for their digestible witness statements and skeleton arguments, which are undoubtedly on, and no offence is intended by this, some dry and complex issues. So, that effort too is appreciated. Again there will be a lot of effort involved in that and it is appreciated by the Panel.

A further point I wanted to raise, which I'm sorry you're on your feet, Mr Jowell, I'm going to address it to Mr Holmes, is to understand at the outset the scope of any dispute in relation to the amendments. As it quite often happens in these cases, the agreement to the amendments is qualified by / subject to certain directions being made. I just wanted to understand if we are against you on some of the directions you seek, and that is a hypothetical scenario, do you then want to revisit objections to the amendments or do I take it the amendments are agreed?

MR HOLMES: Madam, our main concern is to ensure that directions are in place to

1 ensure that the Tribunal is in a position to adjudicate fairly on the new issues which
2 we say are significant, that there are substantial changes here that will require
3 documents from Epic for them to be determined. There have obviously been some
4 offers, including some late offers from Epic, in an attempt to meet the gaps that we
5 have identified, to address the issues we've identified. We don't at present think that
6 those are sufficient. Now obviously, when you've heard from us on that, we will need
7 to see where we are. If the Tribunal concludes that proportionate disclosure cannot
8 be given but is necessary in order to allow these issues to be adjudicated upon fairly
9 at trial, then our position would be that the amendments should to that extent be
10 refused. But whether that is an obstacle to the amendments I think will depend on
11 where the Tribunal is on the various requests. Some of them are obviously more
12 significant than others but can I suggest we revisit that in the light of submissions on
13 the disclosure which has been provided. I don't know how the Tribunal would prefer
14 to proceed, obviously this is Mr Jowell's application for amendments, but on the other
15 hand the disclosure sought consists of requests by -- so, they're really requests made
16 by us. It may be that the Tribunal would prefer to hear what we have to say first
17 particularly if you have any doubts about the scope of what we're seeking and then,
18 Mr Jowell can address you on what we say.

19 BRIDGET LUCAS KC: Yes. Mr Jowell, were you proposing to take us through and
20 let us know where we've reached over the weekend?

21 MR JOWELL: I think it may be easier if I simply open on everything.

22 BRIDGET LUCAS KC: Yes.

23 MR JOWELL: And I think that what I take from what Mr Holmes is saying is that he
24 has no objections to the amendments at such. It's simply that he wants to see the
25 proportionate disclosure arising out of it.

26 BRIDGET LUCAS KC: Yes.

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Submissions by MR JOWELL

MR JOWELL: But I think it's helpful if I show you what the amendments are so one can see effectively, all of a piece, what is and what isn't the disclosure that arises out of that.

BRIDGET LUCAS KC: Yes. Certainly. We won't take you out of order then, Mr Jowell.

MR JOWELL: I'm grateful.

I should say that I appear with Ms Klimowicz for Epic Games and Mr Holmes KC and Ms Smith KC appear for Google. Ms Hannah appears for the Class Representative, Ms Coll. You'll have seen the agenda, for today.

BRIDGET LUCAS KC: Yes.

MR JOWELL: Which is on page 2 of the bundle. Having very kindly complimented the bundles, I'm afraid I have some slightly bad news. There is a supplemental bundle which is behind you. Each of you have a copy of that. That arises out of the flurry of recent correspondence in which the parties have sought to narrow the issues. There's also I think, it starts around about tab 12 of the supplemental bundle, around about page 37. You'll also see, I think quite usefully, a consolidated order in which we have sought to identify what are the points in dispute[;] [and] the remaining points in dispute. And you'll see on page 37 is where it starts, and the green is Epic and the blue is Google. And the good news is that in relation to issues 2 and 3 on the agenda, the parties have reached a good deal of agreement and I think the issues really are very narrow and shouldn't take very long for the Tribunal to resolve. The principal issue is the question of the scope of the disclosure. That will take a little longer but even on that, I think, there has been some progress over the weekend.

So, the amendments as I said, as you know and as you will have appreciated, are not opposed in themselves, not opposed either by Coll provided there is no disruption to

1 the trial timetable or the trial date. I should take you through those amendments. The
2 first of the amendments is an amendment to bring in a claim of excessive or unfair
3 pricing. You'll see that in tab 6 of bundle 1. If you go to page 100 where you see and
4 there are a large number of particulars of the plea of excessive pricing on the part of
5 Google. One which I should raise to your attention, because disclosure requests arise
6 out of it, is that a comparison is made in on page 101 at (b)(ii) between the commission
7 rate for the charge by PC Games distribution platforms, including the Epic Games
8 Store, which charges zero per cent commission on in-app purchases where the
9 developer uses an alternative payment service and a 12 per cent commission where
10 Epic's own payment service is used. So, we use that as one comparison among many
11 and various other points to say why the Google fees are excessive and unfair. It's
12 right to acknowledge that this plea of excessive and unfair pricing is a new claim in the
13 Epic proceedings. It is of course not a new claim at all in the Coll proceedings, with
14 whom we are factually as it were consolidated. And the particulars that are given in
15 support by Epic are very similar to those in the Coll proceedings.

16 Now, the second set of amendments are those that really update with regard to recent
17 developments since the original pleading and this arises in large part from information
18 that has come to light from the parallel US proceedings and Australian proceedings
19 and also from regulatory developments in Google -- developments in Europe in
20 relation to Google. To give you a flavour of this category, if you go to page 83, for
21 example, you see we refer to information about Project Hug and we refer to other
22 information there about Google reducing its fees to, above there, to 15 per cent on the
23 first US dollar one million revenue earned. And there are a number of other examples
24 over the page. If you go also to paragraphs 114A to 114D, further on, you'll see that
25 we -- on page 88 -- you see there that we refer to Google's offer of proposed
26 commitments to the Competition and Markets Authority in relation to their investigation

1 and the fact that they have untied the provision of their payments service and allowed
2 alternative payments services in other jurisdictions such as Korea. One particular
3 development I should show you because it is relevant to the disclosure that Google
4 seek. If you go back to page 62, please, you'll see in (b) on that page, we say:
5 "Due to more favourable conditions in the EEA, as a result of the recently adopted
6 Digital Markets Act, and Epic's success in the proceedings in the US against Google,
7 Epic is planning to launch the Epic Games Store on Android. However, Epic
8 anticipates that due to Google's continued anti-competitive conduct, as particularised
9 below, that attempt will face considerable challenges and may not ultimately succeed.
10 We reserve the right to plead further."
11 That is important to note that is a new development if you like that arises out of the
12 regulatory and judicial developments overseas.
13 If we turn to the third category of amendments. Those are effectively clarifications to
14 the nature of the existing claims in relation to clause 4.1 and 4.5 of the DDA
15 agreement. As you'll recall, these two main claims are one, that there has been an
16 unlawful tie of the payments service, by Google. And secondly, that clause 4.5 is
17 unlawful because Google refuses to distribute other play stores, other app stores, such
18 as the Epic Games Store on the Google Play Store. In connection with that, we've
19 always pleaded that as a result of the technical restrictions and Google's other
20 conduct, it is effectively impossible for a competing app store to reach the market and
21 to compete in a meaningful way with Google with its Play Store on Android. So to give
22 you an example of that if you go to page 86, paragraph 106, we plead there, and this
23 is the original pleading, we say:
24 "As a result of the technical restrictions, it is impracticable to distribute alternative
25 Android app stores and Android apps generally to any alternatively made consumers
26 through direct downloads from websites. This further restricts the ability of developers

1 like Epic to reach consumers otherwise than through the Google Play Store."
2 We've always pleaded that we are blocked effectively from reaching consumers other
3 than through the Google Play Store. What we do in our amendment in particular, is
4 we make that point abundantly perhaps clearer, and sharper, and we frame it in a
5 particular, more specific legal manner. So if you go forward to 144B. On page 98.
6 You'll see B to C, there we say that:
7 "On the grounds which Epic has already set out above, distribution by the Google Play
8 Store is the only practical means by which alternative app stores such as the Epic
9 Games Store are able to secure distribution on Android devices and thereby
10 subsequently distribute apps independently and in competition with the Google Play
11 Store."
12 And in 144C:
13 "As a result of the matters pleaded above, there is no effective competition to the
14 Google Play Store, and such alternative means don't constitute an actual or potential
15 substitute for distribution via the Google Play Store. By the same token, and to the
16 extent necessary so to aver distribution via the Google Play Store is indispensable in
17 order for a potential rival app store to gain access to Android devices and to introduce
18 effective competition to the Google Play Store."
19 So it's not really a new claim. It is a new framing of an existing plea of impediment to
20 access and a refusal to supply access.
21 And the fourth and final part of the amendment is just that we withdraw the allegation
22 of breach of Chapter 1 or Article 101, which you see in there, page 96. We do that
23 because we consider that it is obvious that Google is in a dominant position and
24 therefore we think this fifth wheel on the coach is unnecessary.
25 The Tribunal will be well familiar with the general principles relating to amendments.
26 You'll see that in our skeleton argument. We have cited the well-known dictum of Lord

1 Justice Peter Gibson who said they should be allowed provided that any prejudice to
2 the other parties caused by the amendment can be compensated for in costs and the
3 efficient administration of justice is not significantly harmed.

4 We say those conditions are comfortably met in the case of the present amendments.
5 The Coll proceedings are a year away from trial and the expert element of the Epic
6 trial really remains to be listed and one can expect that it will be at least two years
7 hence. So, there's ample time to allow for the introduction of the excessive pricing
8 claim before trial. This is not a late amendment of the type that threatens the trial date.
9 We come on then to disclosure and we for our part don't object in principle to further
10 disclosure provided it genuinely arises out of the amendments, is relevant to them and
11 can be proportionately provided. Now, Google in their skeleton argument make the
12 point that the fact that the allegations were not in the original claim but are introduced
13 by later amendment should not prejudice them when it comes to disclosure.

14 BRIDGET LUCAS KC: Yes.

15 MR JOWELL: We don't dispute that, that is a very fair point to make. But, it is also a
16 fair point to make, that the converse is also true. That the fact that these amendments
17 have been introduced by amendment should not mean that Google gets more
18 disclosure or extensive disclosure than it would pursuant to the application of the
19 Tribunal's ordinary approach to disclosure. In other words, had they been in the
20 original pleading, what disclosure would have been proportionate?

21 In other words there shouldn't be an opportunity for Google to hold these amendments
22 to ransom by seeking to punish us by asking for a very, very extensive and
23 unnecessary disclosure. And the Tribunal will be aware I'm sure of the principles on
24 which this Tribunal approaches disclosure. I may take you to one authority which is
25 relatively recent and quite helpfully summarises them. It's in the authorities bundle at
26 tab 5. I think you have those only electronically I'm told.

1 BRIDGET LUCAS KC: Yes.

2 MR JOWELL: And it's the ruling of Mr Justice Roth and Hodge Malek KC in the Ryder
3 / Dawsongroup proceedings. If I could ask you to turn, please, to paragraph 35, which
4 is at page 80. You'll see the Tribunal says:

5 "Even in cases where broad disclosure is required it is possible to lay down some
6 broad principles that are applied by the CAT. These are, one, orders for standard
7 disclosure will not in general be made. Two, disclosure will be confined to relevant
8 documents. Relevance is determined by the issues in the case, derived in general
9 by reference to the pleadings, although in appropriate cases disclosure can be in
10 relation to matters not specifically pleaded. A strong justification would be required to
11 make any order along the lines of the train of inquiry test in the classic formulation of
12 the test for disclosure enunciated by Lord Justice Brett in the Peruvian Guano case."

13 And then I think some paragraphs which we can skip over and sub-paragraph 6 you'll
14 see:

15 "Ordinarily disclosure will be by reference to specific pleaded issues and specific
16 categories of documents."

17 And 7:

18 "Disclosure will only be ordered and the order will be framed to ensure that it is limited
19 to what is reasonably necessary and proportionate, bearing in mind a number of
20 aspects, the most important of which are the nature of the proceedings, and the issues
21 at stake, the manner in which the party bearing the burden of proof is likely to advance
22 its case on those issues ...(Reading to the words)... the information sought can be
23 obtained by alternative means or be admitted, the specific factors listed in Rule 42C."

24 Then 36:

25 "The search required will be a reasonable and proportionate search and it will be for
26 the disclosing party to specify what search it has carried out and why it contends any

1 particular search would be unreasonable when it complies with the order."

2 And if one then goes further in the judgment, just to show you one other passage at
3 page 84, when applying those principles, on page 84 in paragraph 40(5), the Tribunal
4 observed this:

5 "It is not therefore simply a question of relevance, as some of the skeleton arguments
6 we received seemed to suggest. Disclosure will only be ordered in relation to a specific
7 category of documents if the Tribunal is satisfied that the documents sought are
8 relevant and that disclosure would be necessary and proportionate. The Tribunal will
9 not make an order merely because it determines that the documents are relevant to
10 the issues."

11 So necessity and proportionality is at the heart of the application in this Tribunal. You'll
12 have seen late in the day Google made these very wide requests for disclosure in the
13 witness statement of Mr Cran and you'll see -- perhaps if we take those up. It's in
14 volume 2 at tab 11. If we could go to paragraph 35. One can divide Mr Cran's requests
15 into -- as you see they come in three parts, 35(a), (b) and (c). It's important when
16 looking at this and also when looking at the proposed order that Google want you to
17 make, that they incorporate also by reference, not just the preamble, the chapeau, at
18 35(a) and 35(b) and 35(c), where the documents are described in general terms, but
19 also they want orders for all of these various subcategories and really the difficulty
20 comes in these very extensive subcategories. There are a few points one should just
21 bear in mind at the outset. First of all, Google didn't properly explain which parts of
22 the amendments related to which of these various aspects of the disclosure that they
23 sought. Even to this day some of these subcategories remain very mysterious to us
24 as to why they want them.

25 In addition it should be borne in mind that a lot of the information that they seek is
26 highly commercially sensitive, both to Epic and to its competitors. And it's the sort of

1 information that[, if it was] [if it was, if some of it was] provided outside of court
2 proceedings one would say well this is unlawful collusion to exchange this sort of
3 information. So, one really does need to be a bit cautious about ordering the exchange
4 of this sort of information even with the sort of protections that we have in court
5 proceedings.

6 BRIDGET LUCAS KC: When you say that, you mean the confidentiality ring order?

7 MR JOWELL: Yes I do. One should bear in mind that it's undesirable -- unless it really
8 is necessary for -- highly strategic information about a competitor, a direct competitor,
9 to be provided to their counterparty.

10 Now despite all of that we have been genuinely trying to agree to give disclosure that
11 is necessary and, against that background, if I could take you through the requests
12 and I will show you what we have proposed in response.

13 BRIDGET LUCAS KC: Yes.

14 MR JOWELL: Now, what we understand now is that 35(a) and 35(c) relate to the
15 excessive pricing claim and 35(b) relates to the essential facilities claim that I showed
16 you. And so what I would like to do I think, is go through (a) and (c) first and then
17 come back to (b).

18 BRIDGET LUCAS KC: Yes.

19 MR JOWELL: Now, I have shown you already that one of the points we make in our
20 excessive pricing claim is we make the comparison between Google's charges and
21 Epic's charges. And so Google says well, therefore you've put in play, indirectly, the
22 profitability if you like of the Epic Games Store because it's all very well to say you can
23 charge these amounts but can you do so and turn a profit, because if you can't then
24 that's not a fair comparison.

25 And we say we accept that reasonable and proportionate disclosure of material
26 relating to the profitability of the Epic Games Store is therefore disclosable albeit that

1 the main focus in these proceedings is on Google and its profitability. So what we
2 have proposed is as follows and it's quite an extensive set of documents. First, in the
3 Australian proceedings --

4 BRIDGET LUCAS KC: Are you doing this by reference to the order?

5 MR JOWELL: I think that would be helpful. Page 38 you'll see in the green 5(a). We
6 refer to all documents produced by Epic in response to the notice to produce dated 21
7 March 2024 in the Australian proceedings. In those proceedings we've been asked to
8 disclose financial information, management reporting documents, and profit and loss
9 accounts in the ordinary course of business. We also disclosed board decks for the
10 period November 2020 to March 2024 containing actual or forecasted Epic Games
11 Store financial performance information. And management reporting documents
12 containing information about the financial performance of Epic Games Store and
13 company-wide profit and loss information.

14 So that's already a good deal of information.

15 We have then given consideration to what else can reasonably be provided. And on
16 26 September we offered a further set of documents, which you'll see set out in (b) to
17 (e). So those are rates, presentations or memos prepared after 20 March 2024 until
18 31 August 2024. All reports, the presentations, memos prepared or provided to Epic's
19 board of directors which contain information about the actual or forecasted financial
20 performance of the Epic Games Store. Company-wide profits and loss statements up
21 to 31 August 2024. Management reporting documents, updated to 31 August 2024,
22 and that's -- it's (b) to (d), those are the additions. We say that gives an ample picture
23 of the Epic Games Store profitability. If I can show you how they want us to go further.
24 I can take you through the sub categories of paragraph 35(a).

25 So, 35(a)(i) asks for Epic's accounting policies and practices. Now, we say it's quite
26 unclear why that would be relevant particularly when we are supplying our financial

1 consolidated statements which themselves explain the accounting policies. 35(ii) and
2 (iii) we're effectively satisfying by the matters that we are providing already. 35(iv), on
3 page 815, asks for detailed cost and investment information for the development and
4 maintenance of the Epic Games Store. Again we simply don't see why that's needed
5 in circumstances where they're getting profit and loss account statements and
6 management reporting. That is of course, very sensitive commercial information and
7 it's not necessary to assess overall profitability.

8 35(v) asks for documents evidencing payments services and payment in costs. Then
9 they say "Including agreements with payment service providers and payment
10 processors."

11 Well, we've already provided them with information on payment processing costs as
12 part of our supplemental disclosure. We simply don't see why they need to see our
13 agreements with payment processors. 35(vi) asks us for details of all other assets or
14 services used. This is incredibly wide and quite unnecessary given the financial data
15 we're offering. 35(vii) is most remarkable because it says "Relevant financial data
16 extracted from Epic's financial systems underpinning the above", which again seems
17 to be a complete fishing expedition in which they would just have free rein effectively
18 over all of Epic's financial data that might underlie everything in its business or
19 everything in its business that might relate to the Epic Games Store.

20 So, we say on 35(a) the overall category is reasonable. What we provided is
21 reasonable and proportionate. If they need further specific information, they can
22 always ask for it and we will, of course, try to be cooperative as we can. But it's quite
23 unnecessary to order the disclosure of all these very detailed and prescriptive specific
24 categories.

25 And also, they would get this on the 20 November, which is a month earlier than they
26 were originally asking for it. There will be time to make further specific requests. So

1 that is (a).

2 C, category (c) --

3 BRIDGET LUCAS KC: Can I just ask for clarification? The words at the bottom of
4 35(a). The documents and data to include financial information related to ads on the
5 Epic Games Store. Is that all right with you, is it?

6 MR JOWELL: Well, the information on profitability will relate to, will encompass any
7 ad revenue. But we don't think that they should be able to look at the underlying
8 contracts, for example, agreements between us and ad providers. Again, these are
9 very sensitive commercial confidential rates and so on. To the extent that it's relevant
10 they will be reflected in those overall figures on profit and loss.

11 One further point is we're not proposing to provide the audited financial statements for
12 Epic because we are providing management reports and profit and loss accounts
13 which we believe will give them a better view than the audited statements.

14 If I then turn to 35(c) and if one looks at the general request, it says:

15 "Documents and data evidencing service fees, charges commissions for distribution
16 of apps or apps stores and pass on rates to consumers."

17 That is in itself far too broad a category to be said to be necessary and proportionate
18 to the amendments. But, we do accept that the commissions that we charge are
19 relevant and the commissions that are charged to us by other app stores are relevant
20 because we have put them in issue or in our pleading as you have seen. So what we
21 have proposed in relation to that is first, you'll have seen in our evidence that we have
22 clarified that it's already in evidence what our commissions are, what Epic's own
23 commissions are. You'll have seen that. We've put it in bold if you like in our appendix
24 to our skeleton argument. That's all in the public domain in any event. As regards
25 what other app stores charge Epic, that is also, something that they have already been
26 provided with, at least up to a certain point in time. So if I can show you that. This is

1 part of the supplemental bundle. If you look at -- it's tab 9.

2 The information already covered evidencing these proceedings and we attached a
3 data set, already provided, which sets out the commission to third party platforms, and
4 if you go to the next tab, tab 10, you'll see, how that is set out in that handy table.

5 What we have offered to do by way of further disclosure is to update that information
6 up to 2024. So we can see that that covers the third party commission.

7 The third area where they ask for information here, as we understand it, where we can
8 conceive it to be relevant, is in relation to the pass on rates of fees and charges to
9 consumers, either by Epic to consumers or by others to consumers. We have
10 something of an issue with this because first of all the allegation of pass on is not a
11 new allegation introduced by amendment. If I could ask you to go back please to the
12 pleading, at tab 6 page 102. You see at paragraph 151 we said this:

13 "These alternative channels would be likely to charge [I'm going to ignore the new text]
14 a substantially lower fee than the 30 per cent commission currently charged by Google
15 for the distribution of apps through the Google Play Store. For example Epic currently
16 charges a 12 per cent commission for games distributed to PC Mac users via the Epic
17 Games Store. This would bring costs savings for developers which would likely be
18 passed on at least in part to consumers."

19 Then we say again in 152:

20 "In relation to Epic specifically, the number of consumers, including consumers in the
21 UK, using the Epic Games App / Store to download apps developed by Epic and third-
22 party developers would, or would be likely to increase. As noted above, Epic currently
23 charges a substantially lower commission to third party developers than Google, and
24 those developers would likely pass on their costs savings to consumers in the form of
25 lower prices."

26 Then at the foot of the page, 156:

1 "This would benefit developers and ...(Reading to the words)... developers' costs
2 would likely be passed on at least in part to consumers. This is precisely what Epic
3 did when it introduced the Fortnite SDU. See paragraph 110 above."
4 So pass on was very firmly in issue. I think what is said is it's relevant to the excessive
5 pricing claim to consider if Google charged less would those reductions be passed on
6 to consumers and I think that is where it is said to be relevant. If that's right the party
7 that is going to have the (audio interference) useful data on pass on is going to be
8 Google. It's not going to be Epic. Google [has got the second largest app store after
9 Apple] [has the largest app store in the world, or the second largest after Apple],
10 depending on how you count it. It also charged differential rates of 15 per cent on the
11 first million. So it has the [information] [data] relevant to pass on. The most Epic would
12 be able to do is possibly supplement that to a degree. Now, I don't want to get into
13 a game of throwing mud and so on, I'm keen to avoid that. We have had a lot of
14 difficulty in getting the information in the Coll proceedings off Google and we haven't
15 had sight of the expert reports yet. And we -- at the moment, we don't know where we
16 are in relation to pass on. But we say that in relation to this issue of pass on, one
17 really can't just focus on Epic and say you give us all your information on pass on. It
18 really needs to be looked at of a piece with Google and what may or may not be
19 missing. So that's what we say in relation to that.

20 Then finally, in relation to category 35(b), this is again, widely framed in Mr Cran's
21 formulation. He says documents and data evidencing and explaining Epic's strategy
22 and commercial arrangements, in relation to the distribution of its apps and app store.
23 Now we puzzled for a long time to understand how this arose out of the amendments.
24 As I have shown you, we've always pleaded that Epic is impeded in getting its app
25 store to consumers other than via the Google Play Store. And what is now I think said
26 is that this isn't really something that arises out of the amendments as such, it's really

1 something that arises out of the fact that there's a factual development and that factual
2 development is that Epic has decided to launch the Epic Games Store on Android.
3 And that is what the first of Mr Cran's sub categories in 35 focuses on because he
4 asks for documents that evidence and explain the rationale for Epic's decision to
5 launch the Epic Games Store on Android. What we have proposed in response to that
6 is to provide the documents that have already been produced on just this issue in the
7 Australian proceedings. And one can see what was ordered, if you look in the
8 supplemental bundle, the first tab of that, you'll see on page 3 there is an annexure A.
9 And you see the categories that they ordered. Documents constituting or recording
10 any decision to launch the mobile Epic Games Store on Android. Documents
11 recording or discussing any one or more of the following: the applicant's reasons for
12 launching the mobile EGS on Android; consideration of whether and when they would
13 launch it, including any analyses, financial assessments or recommendations; and the
14 timing of the launch of the mobile EGS on Android. But limited to documents sent to
15 or received by Mr Timothy Sweeney or Mr Steven Allison or of which those individuals
16 are custodians. And those are the most senior persons in Epic responsible for this.
17 Now, as we've also explained in correspondence, the documents that have been
18 provided in response to that are quite extensive and the response to this that Google
19 has -- we were rather surprised by I should say Google's response to this; by rather
20 than saying, "Well that satisfies that category", they came back and they wrote to us
21 effectively saying "Well, that was all done in a great rush in the Australian proceedings.
22 It was all produced in only a week. What we want you to do is to do a much wider
23 exercise for these proceedings."
24 And we say that, with respect, that is a wholly wasteful and unnecessary step. And if
25 you go to the -- if I could invite you to go to the supplemental bundle, at page 34,
26 perhaps if I could just invite you to read to yourselves paragraphs 5 to 6.

1 (Pause)

2 BRIDGET LUCAS KC: Yes.

3 MR JOWELL: Now, on top of this we do recognise that it is relevant to the issues in
4 the proceedings that to consider the success or otherwise of Epic Games Store's
5 launch on Android by a means other than via the Epic Games Store. So what we
6 proposed in relation to that is as, you'll see again in the draft order, in paragraph 6 of
7 the draft order you'll see above the (f), we proposed to provide the Australian
8 proceedings material that I -- I've just showed you by the 20 November. What we're
9 proposing in 6 is to provide by 26 February 2025, which is the same time that they file
10 their expert report and factual evidence, two things. First of all, data showing the
11 number of users of the Epic Games Store on Android from the period between launch
12 on 16 August 2024 and the 31 December 2024. That's an update in the data. And
13 secondly, and this is very much an optional extra, we thought it would be helpful for
14 the Tribunal and everyone, a witness statement covering the outcome of the
15 Claimants' strategy to launch the Play Store on Android; a witness statement saying
16 how things are proceeding.

17 We think that that effectively should suffice to cover off this, what is really an updating
18 exercise, not something that arises out of the pleadings as such. Then if one comes
19 back to the other categories that Mr Cran identified, he says at 35(b)(ii), he says he
20 wants documents since the 13 August 2020, that evidence and explain Epic's strategy
21 of the distribution of Fortnite and its other apps or app stores. That's -- I mean that's
22 a huge, saying that we want documents evidencing the strategy for your whole
23 business since August 2020. We say that isn't necessary and it doesn't arise out of
24 the amendments. It's entirely disproportionate.

25 Then 35(b)(iii) they ask for recent agreements and related documents since 13 August
26 2020 between Epic and third parties relating to the distribution of its apps. So, again,

1 another vastly disproportionate and unnecessary and unreasonable request.

2 So, that I think, covers 35(b). We've also, I should say, in relation to Fortnite's
3 distribution on a platform called Luna, we have provided significant further disclosure
4 and there have been -- we've explained there's been correspondence, extensive
5 correspondence about that. We've explained why the disclosure that we have
6 provided in relation to Luna is complete and proportionate.

7 So, that's really what we say about these requests. We say we've bent over
8 backwards to be as cooperative as we can and we are somewhat puzzled as to why
9 Google keeps on maintaining rigidly its adherence to these very broad and
10 unnecessary categories. Unless I can be of further assistance those are my
11 submissions.

12 BRIDGET LUCAS KC: Thank you, Mr Jowell. Mr Holmes?

13

14 **Submissions by MR HOLMES**

15 MR HOLMES: Thank you, madam. So it doesn't come as a surprise there is a division
16 of labour on this side. I will be addressing you on disclosure and Ms Smith will address
17 you as necessary on the hearsay and collateral use points.

18 BRIDGET LUCAS KC: Thank you.

19 MR HOLMES: On the amendments, you'll have seen that we don't oppose them in
20 principle but we say that they will require careful case management if they are to be
21 admitted and as I observed earlier, if the Tribunal does not consider that proportionate
22 disclosure can be given in the time available, that would be a reason for refusing them.
23 They amount to a significant replead. There has been a new excessive pricing claim
24 to which Mr Jowell referred. There are some other substantial new issues which I shall
25 show you. It will be necessary I'm afraid to go back to the pleadings. Our focus is
26 therefore a practical one. What directions need to be given now for those issues to be

1 fairly adjudicated on and you'll have seen that we seek further issues-based disclosure
2 from Epic covering three categories of material.

3 The principles regarding disclosure are not in issue. Mr Jowell showed you what was
4 said in the Trucks judgment. We agree that those are the governing principles. We
5 say that the disclosure that we seek fits neatly within the category of issues-based
6 disclosure involving the identification of categories of documents. It is not standard
7 disclosure and it is the kind of disclosure in my submission that this Tribunal would
8 order if faced with the claim now being pursued from the outset. I will make that good
9 in submissions subsequently.

10 You see that the three categories relate, first, to the profitability of the Epic Games
11 Store. Secondly, to Epic's distribution arrangements for the Epic Games Store and its
12 apps. And third, to the prices paid and charged by Epic for app distribution and the
13 prices charged by Epic and its developer customers to consumers which is relevant to
14 assess pass on.

15 Now until 4 pm last Thursday, Epic's response was to offer limited disclosure going
16 only to the first of those three categories. This may not be apparent from the skeleton
17 argument as served but the only offer related to profitability. In its skeleton argument
18 for the hearing, it offered for the first time some limited disclosure going to the second
19 category in the form of a pre-existing collection of material concerning the launch of
20 the Epic Games Store from the Australian proceedings. Most recently, by a letter sent
21 at 9.45 pm on Friday night, just ahead of the weekend, it offered some very limited
22 disclosure going to the third category concerning the headline commission rates paid
23 by Epic to some but not all of its distributors.

24 Now despite this late engagement, we are very concerned that what is being offered
25 will fall short. It won't allow you to deal fairly with the issues arising at trial. The offer
26 is still opaque and it's hard for either Google or the Tribunal to assess from the outside

1 | what is being offered. The main source is some Australian disclosure. The
2 | circumstances surrounding that disclosure are stark and they show why it is not a
3 | promising basis to address the disclosure offered here. It was disclosure offered
4 | during the course of the Australian trial and assembled at breakneck speed over the
5 | course of a single week so that it could be available ahead of cross-examination of
6 | Epic's factual witnesses.

7 | We have not been able to see it because of the collateral use restrictions that are in
8 | place. The disclosure is for use in the Australian proceedings. So the Google team
9 | here, none of us have seen those materials. Epic has refused to provide any of it in
10 | advance of the CMC although their solicitors, Norton Rose have at least in respect of
11 | one tranche, they have the documents and they have reviewed them. We say that it
12 | does not come close to covering the requests and even for the requests it does cover,
13 | we doubt that it will be fit for purpose. In this connection, and just by way of illustration,
14 | Mr Jowell placed emphasis when he was addressing the financial documents, on the
15 | fact that profit and loss accounts would be forthcoming. One of the categories that
16 | was identified in the Australian disclosure. But that needs to be read in the light of the
17 | correspondence. If you could go please to hearing bundle volume 2 tab 37. You'll
18 | see that this is a letter from Epic's solicitors dated 26 September 2024. At paragraph
19 | 7 you'll see that some clarifications are provided as to the scope of disclosure
20 | proposed. [It] [At (a), it] revealed that in fact Epic does not produce profit and loss
21 | statements for Epic Games Store in the ordinary course of business. So the material
22 | will need to be derived from presentations and from company wide profit and loss
23 | statements. That illustrates the scale of the task that will confront Google and the
24 | Tribunal in trying to pick over the materials in order to discern whether what is offered
25 | provides a sufficient basis for assessing the profitability of the Epic Games Store. So
26 | we say just by way of overview that there is a real practical problem as to how to

1 proceed.

2 What we want to avoid is getting disclosure that is wide off the mark with very limited
3 and diminishing time and no process in place to rectify the situation. Now I therefore
4 propose to address you on three matters. The first is why further issues-based
5 disclosure is needed in principle going to each of the three categories. Now, I
6 appreciate that Epic through its late offers has acknowledged that at least some
7 disclosure is appropriate for each of the categories. But they resist the disclosure that
8 is requested on proportionality grounds. And so, in order to assess Google's requests,
9 it is necessary to see why they are necessary and important based on the pleaded
10 case that Epic now seeks to advance.

11 Secondly, I will consider what Epic is offering and why we say it does not do the job.

12 Third, I will address you on where we go from here: a practical path to dealing with
13 the situation we find ourselves in.

14 So starting then with the need for disclosure. For each of the categories I would like
15 to show you what Epic is now alleging and why we say you cannot hope to assess the
16 allegations without having access to a proper collection of Epic's internal documents.

17 So starting with category 1, documents concerning the profitability of the Epic Games
18 Store. Now, the Tribunal will recall that the Epic Games Store is Epic's app store and
19 until recently it operated on PCs but not Android. It's now launched on Android. It's a
20 small part of Epic's empire. Epic's main business is as a hugely successful game
21 developer. Its valuation is widely reported to exceed 30 billion US dollars. And it's 40
22 per cent owned by the Chinese developer Tencent, which has a market capitalisation
23 of 550 billion dollars and is one of the 15 largest corporations in the world. So this is
24 in any view a large and sophisticated operator and the Epic Games Store is its app
25 distribution business.

26 The profitability disclosure is needed now to test Epic's new unfair pricing claim and

1 its nought per cent counterfactual. If we could go back to the draft amendments.
2 They're in the hearing bundle, first volume section B tab 6. And I will pick it up at page
3 100.

4 Mr Jowell showed you this but there are some other points I want to make by reference
5 to it. The purple text is obviously all new and you see at the top of the page, paragraph
6 149, the allegation that Google is abusing its dominant position by charging excessive
7 and/or unfair commissions for the purchase of digital content. Moving on to page 101
8 you see in the middle of the page at paragraph 149B the allegation that the
9 commissions are unfair in themselves or by reference to relevant comparators. And
10 at (ii), the relevant comparators are identified. Commission rates on PC games
11 distribution in general. And then, the Epic Games Store in particular. The Epic Games
12 Store is said to charge nought per cent commission on in-app purchases where the
13 developer uses an alternative payment service, so no fee at all. And 12 per cent where
14 Epic's own payment service is used.

15 Mr Jowell suggested that that was one comparison among many. But we say it is
16 central to the amended case. Indeed it runs like a scene through the amendments as
17 I will show you. It is also different from the case that is advanced by Coll which the
18 Tribunal will be facing. In that case Coll has never suggested that the fee would be
19 zero for distribution of apps. Their expert proposes various fees but the central case
20 is 15 per cent. So this is a new allegation, a radical new allegation advanced in
21 reliance on Epic's own zero per cent service fee when an alternative payment service
22 is used.

23 Turning on a page to page 103, in paragraph 153, you see a new allegation pleaded
24 in relation to Google's rates in the counter-factual and Epic pleads that these too would
25 be lower in the counter-factual. In the third line from the bottom, you see that it is said
26 that they would be as low as nought per cent where Google in app billing is not

1 provided. So that is to say at the same level of commission charged by Epic where its
2 payment service is not used. So, this is why I say it runs through the case. Then just
3 to complete the picture you see how significant it is also to the relief that is now sought
4 by Epic. If you turn on to page 106, you see new pleaded relief at C and D. Previously
5 at C there was a request for an order requiring Google to begin distributing app stores
6 via the Google Play Store, that's the green text, but then a new pleading is added on
7 top of that:

8 "Google is not entitled [it's said in the fourth from the bottom] to charge any commission
9 on apps or in-app purchases within apps distributed via such rival app stores unless
10 Google in-app billing is used."

11 So an order is now sought mandating distribution at the same nought per cent charge
12 applied by the Epic Games Store. Again that's central to the case now being
13 advanced.

14 At D, you see that Epic also seeks a new injunction requiring Google not to charge
15 commission on in-app purchases of digital content in apps downloaded through the
16 Google Play Store. So a requirement also to match Epic's nought per cent commission
17 for apps distributed directly. That's the relief being sought.

18 So standing back, this is an entirely new case. It's fresh ground in these proceedings.
19 Epic relies on its own games store's nought per cent commission as a comparator to
20 show that Google's prices are unfair and a counterfactual of what is likely to happen
21 without the alleged infringing conduct and seeks an order requiring Google to distribute
22 at nought per cent where in-app billing isn't used.

23 The Tribunal will therefore need to determine based on Epic's case whether Epic's
24 commission rates are fair and feasible comparators. It will need to decide whether it
25 is a realistic counterfactual that Google would charge no commission at all to distribute
26 apps which monetise through in app purchases where Google Play billing is not used.

1 It will need to decide whether to require Google to distribute apps stores and apps,
2 including the Epic Games Store, for free via Google Play. That is the case being
3 advanced. All on the strength of a comparison with the Epic Games Store's own
4 business practices. We say that the Tribunal cannot hope to decide those questions
5 fairly without quite an in depth understanding of whether the Epic Games Store's
6 business model is a feasible or profitable one, whether this is a genuine business on
7 the road to profitability or not. As we noted in our skeleton argument this issue arose
8 in the Apple Epic litigation in the States. In that case, Epic challenged not Google but
9 Apple on similar grounds to the present litigation. It argued that Apple was a
10 monopolist and that its 30 per cent commission showed a lack of effective competition.
11 Epic's case was largely rejected in the judgment handed down in September 2021.
12 One of the matters considered by the judgment was whether anything could be gained
13 from a comparison between Apple's commission and the Epic rate. And the court's
14 findings about that were stark. This is in the authorities bundle -- I know you're working
15 electronically. The rolling page number is page 106. It's tab 6 if you're able to access
16 it on a tabulated basis. Page 16 of the internal numbering. Do you have that, my
17 Lady?

18 BRIDGET LUCAS KC: I don't. It's going the opposite way so I have to do some mirror
19 thinking. If I move it right it goes left.

20 MR HOLMES: A brain tease!

21 BRIDGET LUCAS KC: I'm struggling with this to be honest. Tell me which page it is.

22 MR HOLMES: So, it's page 106 of the rolling numbering and page 16 of the internal
23 numbering. If you are able to find. Those paragraphs annoyingly aren't numbered.

24 BRIDGET LUCAS KC: Yes got it.

25 MR HOLMES: You see in the first complete paragraph on the page:

26 "Like other platforms the Epic Games Store uses a commission model and markets

1 an 88/12 split of all revenues to developers from the sale of their games. The evidence
2 is also undisputed that this 88/12 commission is a below cost price and the store is
3 expected to operate at a loss for many years at this rate."

4 So, that's the 12 per cent commission that the emphasis is being placed on here.

5 I should say this in the finding of some fact section of the judgment. Turning over the
6 page to 107, you see towards the foot of the page, "Finances of the Epic Games
7 Store". And the court notes:

8 "The Epic Games Store is not yet profitable due to Epic Games' strategic plan to grow
9 the consumer base at the expense of near-term profits and revenue."

10 So upfront investment, as you would expect on a business of this kind, I will return to
11 that when we consider the category that was described as of no possible relevance,
12 the initial investment in the Epic Games Store which will need to be assessed to
13 determine profitability. By charging 12 per cent commission, the Epic Games Store
14 will not be profitable for at least several years, current estimate is indicating negative
15 overall earnings in the hundreds of millions of dollars through to at least 2027.

16 Then turning on to page 165 of the rolling numbering, page 75 of the internal
17 numbering:

18 In the PC gaming market, the court considers the varying commission rates that are
19 on offer. It notes that historically they have been 30 per cent. That 30 per cent was
20 cut because the Epic Games Store launched and then, as regards [Epic Games] [the
21 Epic Games Store], the Judge notes that it charges a 12 per cent commission for in-
22 app purchases when the developer choses to use [its] [Epic's] payment system. The
23 court then expresses some (audio interference) scepticism in relation to the 12 per
24 cent rate. Given that the 12 per cent commission rate results in an operating loss the
25 move could be viewed as merely a litigation tactic. Just for completeness, another
26 issue in the trial was whether Epic Games was really comparable to the iOS app store,

1 | which like Google Play carries apps of many different kinds, most of them for free.
2 | Very shortly before trial, the Epic Games Store announced that it would distribute
3 | non-gaming apps. On this the court was similarly sceptical. You see four lines from
4 | the bottom:

5 | "With respect to its extension to non-gaming apps, the move was likely litigation
6 | related."

7 | So the court will need to determine in relation to the Epic Games Store and its nought
8 | per cent counterfactual which is relied upon as the model that Google should be forced
9 | to adopt whether this is a profitable strategy or whether there is instead a litigation
10 | element involved.

11 | Of course, here it relies not on the 12 per cent commission considered in the Apple
12 | case but on the nought per cent rate payable where another payment system is used.

13 | We say that to assess whether this should be used to change fundamentally the
14 | business model of the Google Play Store the Tribunal will need to conduct a proper
15 | examination of whether the Epic Games Store is able to operate profitably at the level
16 | of charges it relies on. That will in turn require sufficient financial disclosure to
17 | interrogate properly the profitability of the Epic Games Store. The specific scope of
18 | the request can be seen from the witness statement of Mr Cran.

19 | BRIDGET LUCAS KC: I don't want to interrupt but I have one eye on the clock.

20 | MR HOLMES: This would be a convenient moment.

21 | BRIDGET LUCAS KC: We will rise for ten minutes. Thank you.

22 | **(11.45 am)**

23 | **(Short break)**

24 | **(11.55 am)**

25 |

26 | MR HOLMES: I was making the submission that Epic's 0% case is a root and branch

1 assault by a large and sophisticated operator on Google's current business model,
2 and that it will require proper and adequate financial disclosure to determine whether
3 the Epic Games Store is capable of profitability and within what time frame at the prices
4 proposed. The specific scope of the request that we have made can be seen from the
5 witness statement of Mr Cran. That is in volume of the hearing bundle, tab 11,
6 page 814.

7 BRIDGET LUCAS KC: Yes.

8 MR HOLMES: Mr Jowell showed you the categories under 35(a). He's perfectly
9 correct to say that it is those requests that we seek, in other words the little Roman
10 numerals underneath the letters.

11 The specific requests there may look familiar to the Tribunal. That is because they
12 are based on the disclosure that was ordered against Google for the purposes of
13 assessing Google's profitability in the Coll proceedings. They were granted on the
14 basis that materials of this sort should be readily available to a sophisticated operator.

15 And we say the same is true of Epic. They are the types of granular material that will
16 be needed to have any hope of arriving at a realistic assessment of the Epic Games
17 Store's profitability. Looking down the list, they consist of information about accounting
18 policies and practices. That is necessary to interrogate accounts. Audited financial
19 statements for the business accounting units consisting or relating to the Epic Games
20 Store, including profit and loss statements on a monthly, quarterly and annual basis.
21 We have the difficulty that we're informed there are no such profit and loss statements
22 which will require a process of interrogating the wider accounts. But, unfortunately,
23 that creates the need for some penumbral disclosure around the profit and loss
24 accounts to make sense of them.

25 Thirdly, copies of other regular financial reports management accounts and similar
26 documents for the business accounting units containing or related to the Epic Games

1 Store. Fourthly, detailed cost and investment information for the development and
2 maintenance of the Epic Games Store. You have my point that upfront investment is
3 a key feature of businesses of this kind. One doesn't expect them to recoup over time,
4 and one can't just look at turnover on a monthly basis to understand their business
5 position and marginal costs on a week by week or a month-by-month basis. You need
6 to look at what has been put in at the outset. That was of key importance as we saw
7 in the US court's assessment of the Epic Games Store's profitability. So we say that
8 yes, absolutely this is material that will be required if the Tribunal has any hope of
9 grappling with this 0% counterfactual.

10 BRIDGET LUCAS KC: Just pausing there, that wasn't something ordered in the Coll
11 proceedings was it; is this is a different category?

12 MR HOLMES: It was ordered.

13 BRIDGET LUCAS KC: It was ordered.

14 MR HOLMES: Yes. I should also say Mr Jowell placed emphasis on the confidentiality
15 of the materials in question. That has never been a basis for refusing disclosure in
16 this Tribunal. It's in the nature of proceedings in the Competition Appeal Tribunal that
17 often confidential material is in play, confidential business material, which needs to be
18 carefully handled. That is why we have a confidentiality ring in place. My submission
19 is that no significant weight should attach to that factor when you're considering what
20 disclosure should be granted in response to this request.

21 Fifth, documents, evidence on payments services and payment processing costs
22 associated with the Epic Games Store. It was suggested by Mr Jowell that disclosure
23 adequate to address this has already been given. We would be happy to discuss that
24 with Epic to see exactly what they have in mind. But in so far as that's the case, they
25 can simply refer to that disclosure in responding to this request. I'm afraid, it may be
26 my fault entirely, I hadn't apprehended that in the materials that are before the Tribunal

1 so far. The importance of payment processing costs is obvious because it's an
2 important cost per transaction cost that is faced by Epic Games Store in so far as it
3 provides the billing and payment services.

4 Sixthly, detailed other assets or services of Epic or other related entities which are
5 used by or provided to the Epic Games Store. Now, this may seem a bit intangible but
6 just to make it real for the Tribunal, you may have seen that there was reference to the
7 Unreal Engine which is a software product which is offered to developers by Epic to
8 develop games of their own. It's a piece of software that can be used to build games.
9 They pay commission to Epic in respect of that. One recent development is that in
10 relation to the Epic Games Store, Epic is offering a reduced commission to developers
11 if they distribute via all of the different platforms served by Epic Games Store, including
12 Android. So that's obviously an element of profit sacrifice in relation to another
13 business line and in a proper profitability accounting exercise, that would need to be
14 taken into account.

15 Then, seventhly, relevant financial data extracted from Epic's financial system
16 underpinning the matters set out above. Now it was suggested by Mr Jowell that this
17 was inappropriately vague. These are of course requests where we do not know how
18 records are held by Epic or what material may be available. The usual course for
19 issues-based disclosure of this kind is to formulate focused requests and, in my
20 submission, this list is focused which is why the Tribunal ordered it in the Coll
21 proceedings, and then for the experienced solicitors, at the other end of the Bar, to
22 formulate reasonable and proportionate searches based on those requests. What will
23 not do to is shrug shoulders in relation to this substantial multi-jurisdictional litigation
24 where a major new claim is introduced with profound implications for Google's
25 business if the relief is ordered as requested and so it's all too difficult. It is
26 disproportionate. If we were at the outset of these proceedings, and this claim were

1 | pleaded from the beginning, we would be looking at issues of both disclosure of this
2 | kind. We are still 12 months out from the trial and there is time to accommodate a
3 | proper exercise that will allow us to assess the profitability of the [Epic's game store]
4 | [Epic Games Store]. In the end, you will need to grapple with this allegation relating
5 | to the 0% counterfactual. It's difficult to see how you'll be able to do that unless you
6 | have lifted the lid on Epic's finances. So that's why we seek the first category. I will
7 | come to Mr Jowell's proposals in relation to that category. You'll recall that this was
8 | the one category that Epic originally addressed in its witness evidence and made an
9 | offer in respect of. But first can I just show you why the other two categories are
10 | equally necessary by reference to the pleadings.

11 | BRIDGET LUCAS KC: Can I just ask in relation to 35(a), I seem to recall in Coll, and
12 | obviously whatever we order there doesn't necessarily have to follow here, but do I
13 | recall correctly that we directed that a witness statement be provided, providing some
14 | flesh and bones as to how the accounts are maintained which might enable more
15 | focused inquiries to be made.

16 | MR HOLMES: You did, madam. I think there were several witness statements. Two
17 | witness statements were given by somebody in the Google accounting department.
18 | That would be undoubtedly helpful. It is distinct I should say, from the offer of witness
19 | evidence in relation to the success or failure of the Epic Games Store which is a very
20 | tendentious issue which needs to be interrogated not on the basis of a witness
21 | statement which will set out Epic's position but on the basis of internal documents. But
22 | for a procedural statement that explains how the accounts work, if that provides a
23 | convenient cut through, we would be absolutely content with that. It is the kind of
24 | constructive proposal we would have expected Epic to bring forward.

25 | BRIDGET LUCAS KC: Yes, thank you.

26 | MR HOLMES: Just moving on to the second category, this is documents concerning

1 Epic's distribution arrangements and strategy. If we could go back, please, to the
2 amended claim form it is in the hearing bundle section B volume 1 tab 6 and if we pick
3 it up at page 98. Paragraph 144B you will see that distribution via Google Play is said
4 to be the only practical means by which alternative app stores are able to secure
5 Android distribution. At 144C, you see the allegation in the fourth line that distribution
6 via the Google Play Store is indispensable in order for rival app stores to get access
7 to Android devices. And in the final two lines, the plea that the Google Play Store is
8 an essential facility for the distribution of alternative app stores.

9 So a plea of indispensability, Google Play is said to be here the only viable route to
10 market for app stores. Mr Jowell said that that was always pleaded. Now we don't
11 accept that. He referred you to paragraph 105 on page 86. That paragraph relates to
12 the practicability of distribution via one of two possible routes to market which are
13 identified in the original pleading, namely direct downloads from websites.

14 If you turn to page 71, you will see what was originally said about the other route which
15 is pre-installation. You will see at the foot of the page that a number of different app
16 stores exist for Android mobile devices. They include app stores developed by OEM's.
17 These are pre-installed. You see that apps on those could be downloaded without
18 any security warnings. And so this was a route which was in fact used by OEM's,
19 among others, to pre-install apps. So it wasn't at that time suggested that there was
20 no viable route to distributing competing app stores. That is a new allegation.

21 The specific allegation to indispensability was a narrower one. You see that in
22 paragraph 77 at the end of the paragraph which was the passage relied on by Mr
23 Tricker in his witness evidence. The Google Play Store is a must have distribution
24 channel for developers. It was in relation to the distribution of apps that it was said
25 that the Google Play Store was indispensable. We don't accept that this was always
26 pleaded. But at the end of paragraph 144B, there is an oddly contrasting factual

1 revelation to the plea in relation to indispensability. So if we could go back to that
2 please, it's on page 98. We have been told at the start of 144B that there is only one
3 practical means of distributing app stores and that is by reference to Google Play.
4 Then one finds at the end of 144B that Epic in fact has plans to attempt to launch the
5 Epic Games Store as an app store on Android outside Google Play. It expects
6 difficulties will arise and the attempt may ultimately not succeed. So, what Epic is
7 doing here is revealing the fact that it is planning to attempt the impossible and has
8 now attempted the impossible on its pleaded case by launching an app store outside
9 of Google Play.

10 Now one can readily see why this was pleaded. When we come to look at the
11 Australian disclosure, the circumstances in which that arose were that the trial began
12 on 18 March and on 20 March an Epic official announced at a developer conference
13 that the Epic Games Store was launching on Android. That led to the breakneck speed
14 last minute disclosure that was given. Epic obviously want to avoid that scenario from
15 arising here. So they pleaded the fact which is intention with their case their intention
16 to launch the Epic Games Store.

17 Where that leaves us is that the Tribunal will need to assess indispensability claims
18 which are now on the face of the pleading in the light of that revelation and that factual
19 development order to see whether Epic can credibly assert, on the one hand, that
20 Google Play is the only viable means to market while, on the other hand, launching
21 outside Google Play. We don't see how you can possibly do that without proper and
22 adequate disclosure about the Epic Games Store certainly. Of course in this
23 connection it is not sufficient for Epic to reserve its rights to plead further in due course
24 or for Epic to offer to tell its story through a witness statement. We need to see the
25 internal documents to test what Epic is saying and what it's doing.

26 BRIDGET LUCAS KC: Would a starting point for that be the Australian disclosure?

1 MR HOLMES: I will come to that, madam. This was offered late in the day and we
2 will see it does appear on its face to cover relevant documents going to the Epic
3 Games disclosure. We learned on Sunday night for the first time that it consists of
4 about 100 documents. They are imprecise about it. They say over 100, so we surmise
5 from that that it is somewhere in the 100 and X, some low number above 100.
6 We would need to see that and we would need to see it rapidly to see whether it really
7 does the trick, given the extraordinary circumstances in which the collection was made
8 over the space of a week with only two custodians. I will develop that when I come to
9 my practical proposal if I may.

10 Now, the Epic Games Store is not the only alternative distribution channel which Epic
11 is using. If we could go, please, in our skeleton argument to the annex to that we have
12 attached, this is in hearing bundle one, tab 4 and if we could pick it up 49.7. That is
13 27 of the internal numbering. This relates to the distribution channels used by Epic for
14 its Fortnite app. You see at the top -- I'm afraid some of the text is difficult to
15 read -- you've got a nice picture of somebody playing Fortnite on Android. Fortnite is
16 not available of course on Google Play, distributed by or other means. Then "Fortnite
17 play on Android, get it now on the Epic Games Store for mobile." That is the text you
18 can't really read in grey in the middle of the page. The point is the Epic Games Store
19 is a means of getting it. Then you can click on install on Android. "Play Fortnite on
20 Android. How to play Fortnite on your Android phone or app. You can either download
21 Fortnite or play using cloud gaming."

22 If you turn on a page, you see, "Get started download the Epic Games Store on your
23 Android device. After that install Fortnite from the store and start playing. You can
24 also play Fortnite on Android through cloud gaming. No Fortnite download required.
25 Just launch and play. Play using X Box, cloud gaming, play using Ge Force Now.
26 Play using Amazon Luna."

1 It's clear that as a developer Epic is availing itself of a number of alternative app
2 distribution channels, all accessible on Android devices without the need for any
3 recourse to the Google Play Store.

4 In respect of this, there's another subtle refinement of Epic's case that I should briefly
5 show you. I'm conscious of the time, but just for completeness. If we could move in
6 the same bundle to tab 6 and turn to page 61 and look at the first words of
7 paragraph 26. This is under the heading "The parties Epic" so it is where Epic
8 introduces itself. You see at paragraph 26: "Epic is in the business of developing" and
9 it originally pleaded 'video games'. That has been crossed through and in its place
10 now it says "Apps and software for games consoles, personal computers and mobile
11 devices." The focus is now on apps, notwithstanding the distribution of its games by
12 various streaming services on Android. This amendment is then repeated *passé*. It
13 goes on throughout the pleading. In the same vein, turning back to page 57, you see
14 a refinement of its market definition at paragraph 9. You see that now they clarify, as
15 they say, that the case is said to concern the market for the distribution of native
16 software applications for mobile devices which use the Android operating system
17 excluding the web apps through which streaming services are provided.

18 So the Tribunal will need at this forthcoming trial to decide not only if Google Play is
19 the only viable way of distributing Epic's app store on Android, notwithstanding the
20 decision to launch the Epic Games Store outside Google Play on Android. It will also
21 need to assess these other distribution channels that are also used by Epic to
22 distribute its content on Android to see whether they are in the same market, whether
23 Epic is really in the business of distributing only apps or, as it originally pleaded, but
24 now seeks to delete, video games by whatever means they reach consumers.

25 These factual allegations as to whether Google Play is really the only practical means
26 of distributing apps and app stores will in turn be important for deciding whether

1 Google should be required to distribute apps and apps stores for free via Google Play
2 whenever another billing system is used. To assess these matters fairly, the Tribunal
3 will need to lift the lid on Epic's current distribution arrangements for the Epic Games
4 Store and for its apps. The specific documents sought are in Cran 5 at
5 paragraph 35(b). If we could go back to that, please, for one moment. So that's the
6 second volume of the hearing bundle. Tab 11, picking up on 815.

7 So you've got there documents that evidence and explain the rationale for Epic's
8 decision to launch the Epic Games Store on Android. That's the category that the
9 Australian disclosure goes to. That and only that.

10 Recent documents that evidence and explain Epic's strategy for the distribution of
11 Fortnite and its other apps or app stores, including pre-installation on or via third party
12 app stores or via streaming services, or on or via other platforms and distribution
13 channels. That goes to the other distribution channels that I've just shown you some
14 examples of.

15 Then the agreements pursuant to which Epic Games and third parties Epic distributes
16 its app and its app stores via Android, in order to see what the terms are on which that
17 distribution is occurring and recent documents that address the comparative features
18 of native apps, web apps streaming services and other methods of distribution to
19 assess Epic Games' market definition as now advanced.

20 We say that these categories are clearly described and straightforward. They relate
21 directly to the pleaded case which the Tribunal will need to resolve. They are standard
22 requests for issues based disclosure and for a large operator like Epic, documents of
23 this kind will undoubtedly exist and experienced solicitors will have no trouble turning
24 them into reasonable and proportionate custodial searches.

25 What the Tribunal should be astute to avoid is that we find ourselves with a cherry
26 picked selection of curated final decision papers. We need a wider selection than that

1 | if the Tribunal is to have a hope of understanding the extent to which Google Play is
2 | really the only show in town as is now alleged and it goes to the core to the case.

3 | BRIDGET LUCAS KC: In those categories you've got there, 35(b) (i) and (ii) you're
4 | looking for documents that evidence and explain the rationale for Epic's decision.
5 | When you use the word "Explain" that also suggests that first port of call might be a
6 | witness statement that does that.

7 | MR HOLMES: Madam, the difficulty with a witness statement is that we say it's no
8 | substitute--

9 | BRIDGET LUCAS KC: -- for the documents themselves.

10 | MR HOLMES: -- for the documents themselves. What we will have in a witness
11 | statement is Epic's world view, its publicly stated position in this litigation. We will
12 | need to test the evidence of their witnesses and the only way in which one can test
13 | the pleaded case and the witness evidence is by reference to documents. That's why
14 | we say witness statements don't provide a short cut here. These are not categories
15 | that one would balk at the start of litigation. The disclosure we have from Epic dates
16 | from March 2020 in relation to these matters. There's obviously been a lot of water
17 | under the bridge since then. I showed you the streaming services which are used. I
18 | showed you the Epic Games Store which is now launching. That needs to be tested.
19 | It needs to be tested we say by reference to documents. There's really no reason why
20 | a large at sophisticated operator launching a full-frontal assault on another company's
21 | business practices should not give disclosure of this kind.

22 | I apologise madam, I'm informed it was August 2020 and not March [2000] [2020] as
23 | I said. That's the second category.

24 | The third category concerns information about the charges charged and paid by Epic
25 | for app distribution and the pass on rates to consumers. To see the need for this
26 | category, if we could visit the pleading one final time, the first bundle tab 6, page 101.

1 You will see that paragraph 149B in the middle of the page advances the unfair when
2 compared plea. At (ii) as well as the Epic Games Store comparison which I addressed
3 you on earlier, the other comparison is the fees charged by other PC games
4 distribution platforms.

5 If we could look further at page 103, paragraph 153, you've seen the allegation here
6 that Google's rates restriction would fall as low as 0%. In the final sentence, the plea
7 is that this reduction in Google's commissions would be passed on in at least in part
8 to consumers.

9 So Epic's case is that the distribution of its app store and apps for free on Google Play
10 would not only be of benefit to it, but also it would flow through to some unspecified
11 degree to consumers.

12 If you look up the paragraph 152, it's true that Epic has previously pleaded pass on,
13 but that was limited to a claim in respect of lower fees charged by Epic or other
14 non-Google distribution channels which carefully avoided the point of overlap with the
15 Coll proceedings which now arises. The plea that reduced fees by Google would be
16 passed on is a new one, and that intersects directly with the case that this Tribunal will
17 need to resolve in Coll.

18 You will recall, madam, that Epic relied heavily in order to get its ticket to participate in
19 October 2025 precisely on the overlap with Coll. You will also recall that getting factual
20 evidence from a developer perspective weighed with the Tribunal in deciding to permit
21 partial consolidation. We say that Epic is uniquely well placed to provide disclosure of
22 documents and data relevant to these allegations which you will be grappling with at
23 the October '25 trial. As a developer it will hold documents and data evidencing the
24 rates it pays to distribution channels and the prices it charges to consumers and as a
25 platform operator it will hold documents and data evidencing the rates that it charges
26 and the price charged by its developer customers.

1 The specific requests are in Cran 5 hearing bundle 2 tab 11 at page 816. I am sorry
2 to jump around. It just seemed more convenient to develop it request by request.
3 So at (i) recent documents evidencing the rates payable by Epic, (ii): recent
4 documents on the prices charged by Epic, (iii) documents and data evidencing pass
5 on by Epic by developer, including its price to consumers via the various channels it
6 uses and (iv) documents evidencing the prices charged by developers who distribute
7 on the Epic Games Store. We say that these are all ordinary course of business
8 materials that Epic should be able to assemble without enormous difficulty or cost. It
9 is data that will be helpful in assessing Epic's allegations as to fair comparator rates
10 and pass on in the counterfactual. We say that is the third category of material sought.
11 We say that all these categories are relevant and necessary for the trial.
12 So that brings me to Epic's offer. Do the new offers since Thursday afternoon provide
13 a satisfactory resolution? As we understand it, following the skeleton argument and
14 the Friday night letter from Epic, the position is now as follows: the main offer is some
15 pre-existing Australian disclosure which is said to cover categories one and two. In
16 relation to category one, it also offers effectively a refresh of the Australian disclosure,
17 but similarly circumscribed in scope. The other categories which take up most of the
18 space in the order are basically just further disclosure within the same heads that were
19 given in the Australian proceedings but brought up to date if you see what I mean.
20 In relation to category two, it offers a witness statement in late February 2025 on
21 whether Epic perceives the games store to have been a success or failure together
22 with data on subscriber numbers. And in relation to category three it is offered since
23 skeleton arguments to update some disclosure showing the headline rate charged on
24 some but not all of the distribution channels it uses.

25 BRIDGET LUCAS KC: Yes.

26 MR HOLMES: We say that this is not an adequate offer. So, starting with the main

1 pillar of what is offered, which is the Australian disclosure, so the background is as
2 follows: the Australian trial covering broadly the same allegations save for no claim of
3 excessive pricing between Epic and Google began on 18 March 2024.

4 On 20 and 21 March, a couple of days into trial, Google made two urgent applications
5 for further disclosure from Epic. These applications were made following the sudden
6 announcement by Epic at a developer conference that it planned to launch the Epic
7 Games Store on Android. No previous indication having been given to the court or to
8 Google. The first request Epic agreed to provide. That related to Epic Games Store
9 financial performance and it is now offered in response to the first category. The
10 second request related to the plans for launching the Epic Games Store on Android.
11 That was resisted by Epic but the judge granted disclosure in any event by order of 26
12 March 2024 and that is now offered in relation to the second category sought.

13 The applications were made to allow for cross-examination of Epic's witnesses which
14 were due to commence on 2 April only a few days later. So as a result the disclosure
15 was required to be assembled and given by Epic within the period of one week. You
16 will appreciate that this was an extraordinary situation in which disclosure was needed
17 very urgently as a result of a late development. The scope of the searches undertaken
18 was therefore necessarily highly circumscribed. The documents were of necessity
19 identified and collected in an extremely short period. It is not the kind of considered
20 disclosure exercise that can be expected in relation to new allegations one year out
21 from trial.

22 Now, starting with the first request, relating to the Epic Games Store financial
23 performance, the notice to produce is in the supplemental bundle starting at page 23.
24 You'll see the request known as a notice to produce was filed on 21 March. Turning
25 over the page you see that the request was for a production on the morning of 28
26 March, so 7 days later. The request is then set out and it was in large part a tailored

1 request searching for documents having a particular title as a result of materials that
2 Google had in disclosure. So, first of all, any document titled or referred as to a
3 business report for the period September 2020 to March 2024, then reports,
4 presentations or memoranda prepared for or provided to any of the applicants' board
5 of directors containing information on the actual or forecast financial performance of
6 the Epic Games Store, an updated version of a particular spreadsheet, the financial
7 corporate financial model for completeness and to avoid any risk of missing relevant
8 documents, any financial model with the same title. And for the period from 1 March
9 to June 2021 to 20 March 2024, periodic profit and loss statements for the Epic Games
10 Store. We have seen that category was a non-starter because of the clarification
11 which has been given in these proceedings. For the period from 1 June 2021 to
12 20 March 2024 profit and loss forecasts for the Epic Games Store.

13 Some of these are clearly potentially relevant documents responsive to the first
14 category. I don't shy away from that. Where we have grave doubts, however, is in
15 relation to what was actually provided and whether it will be sufficient to assess
16 profitability. That's why we used the template from the Coll proceedings. We have
17 not seen this disclosure ourselves given collateral use restrictions. Epic UK's solicitors
18 have had it and have reviewed it, but they have refused to provide it to us. They say
19 that's not how disclosure works, nor have they revealed the number of documents
20 going to Epic's profitability that were disclosed in response to this first notice. You saw
21 that they have provided that information for the second notice, the 100 documents, but
22 not for the first notice.

23 BRIDGET LUCAS KC: Yes.

24 MR HOLMES: We understand that the disclosure was very limited indeed, no doubt
25 reflecting the extremely tight time frame within which searches were undertaken. We
26 are therefore very sceptical about whether this disclosure will help much if at all. And

1 so therefore we say that the requests set out in David Cran's witness statement are
2 likely to be needed, requests that the Tribunal has already given its blessing to in the
3 Coll proceedings.

4 The second tranche of Australian disclosure concerning the launch of the Epic Games
5 Store is explained in the supplemental bundle at page 1. Because this was contested,
6 it's resulted in a court order. You see that the date of the order is 26 March 2024. As
7 set out in paragraph 1, rolling disclosure was then ordered between the 28 March and
8 the 3 April so concluding one week after the order was made. Paragraph 2 shows the
9 limited scope of the searches. It was limited to reasonable inquiries of only two Epic
10 individuals, the CEO Tim Sweeney, and the Epic Games Store general manager
11 Steven Allison who had made the public announcement as to an Android launch.

12 Turning on to page 3, you see that the date range covered a four-month period from
13 December 2023 to the present, that being March 2024. It covered documents
14 recording a decision to launch the Epic Games Store, documents recording or
15 discussing reasons for launching, whether and when to launch, and the timing of the
16 launch, and then again the limitation to the two individuals concerned.

17 Norton Rose informed us at 5 pm yesterday afternoon that the exercise yielded in the
18 order of around 100 documents, that is how we read their letter, they can correct us if
19 that's wrong. It is difficult to check what to make of this offer without seeing the
20 documents which again haven't been provided. The fact remains that this is a very
21 circumscribed category. Moreover, it covers only one of the four requests under the
22 second category. It doesn't address other strategy documents in relation to distribution
23 of the Epic Games Store, Fortnite or Epic apps more generally, including on streaming
24 services.

25 I heard Mr Jowell suggest that there had been a further offer in relation to Luna, the
26 streaming service. I'm sure we can procure a copy of the letter. It didn't find its way

1 into the bundle. But the letter which came I think on Friday night, is that correct, offered
2 some updated data sets, an additional data range for the single custodian's email and
3 Slack. So that was what was offered. The first disclosure set which was provided
4 some months after the request was confined to a small number of documents which
5 were, as I understand it, not usefully addressed to the matters at issue. We
6 understood that there were further proposals coming and those further proposals
7 turned out to be very limited indeed. I can address you on what Mr Jowell says if he
8 wants to develop his submission about that, but we say that would be only one of a
9 number of distribution channels.

10 There's also no offer encompassing the assessment of comparative features of the
11 various distribution methods, so we don't think that this offer meets the second
12 category.

13 The offer of a witness statement you have my submission on. Witness evidence just
14 isn't a substitute for proper disclosure. Now there will undoubtedly be some work
15 involved to undertake searches covering the requested category, but the requests
16 themselves are perfectly ordinary disclosure requests, and they should not be difficult
17 to implement with reasonable and proportionate searches.

18 Finally, as regards the third category, all that Epic has offered is a statement of its own
19 headline rates, and an offer to update previous disclosure as to the headline rates for
20 a limited number of distribution channels used by Epic between 2017 and 2021. So
21 the table which is being updated is in the supplemental bundle in tab 10, page 31. It
22 is highly confidential so I shan't state any specifics. You see that it sets out some
23 distribution channels, but not all of the ones now used by Epic. For example, the rates
24 for the streaming services we saw in their current Fortnite publicity materials are not
25 set out here. These are only headline rates so we don't know whether they had been
26 subject to any special terms across these distribution channels.

1 So where this leaves us is that on request three, Epic has come some way to offering
2 data relevant to the distribution costs it faced. It clearly needs updating to include all
3 distribution channels and even when that is done we say that the offer is insufficient
4 because it does not cover the pass on disclosure which Google also seeks.

5 In relation to that, Epic now accepts that it may need to offer reasonable and
6 proportionate disclosure going to pass on but it suggests first that Google holds the
7 relevant data, and that any disclosure should therefore be given after expert reports.

8 Now, a brief word about expert reports; it was suggested that Google had been tardy
9 in supplying expert reports from the Coll proceedings. The Tribunal will have well in
10 mind that the Class Representative reports were served last Wednesday at 9.41 pm
11 and Google will not serve expert reports until 26 February 2025. So the proposal here
12 is to kick things this into the long grass to a stage very shortly before trial, the final run
13 up. We say that doesn't do the trick.

14 There are two further points; first, it's incorrect to suppose that Google is better placed
15 than Epic to disclose relevant data. We say that as a developer, Epic has specific
16 documents and data going to its own pass on rates that are likely to be particularly
17 informative and which go beyond anything in Google's possession. Moreover, Epic
18 may have data relating to how a particular developer varies its prices, depending on
19 where the 0% or the 12% commission applies. To the extent that data exists, it could
20 be helpful in showing how a fairly substantial difference in commission rates affect the
21 prices charged to end users by the same developer at the same point in time.

22 Secondly, for relevant material held by Epic to be disclosed after expert reports is too
23 late, you have that point. Epic has suggested also, it wasn't a point that was developed
24 orally, just to knock it on the head, that Google should instead pursue third party
25 disclosure requests. We say that's an unreal submission. Epic is here as a party to
26 these proceedings. It has pleaded a case on pass on, and it should give disclosure to

1 allow that to be tested. That will be useful not only in the Epic proceedings but also in
2 the Coll proceedings. It's precisely the kind of overlap which justified Epic's
3 participation in the Coll trial. Pass on will be a key issue for you at this trial, not least
4 because the Tribunal may have heard that there is now a further class claim by
5 developers, UK developers partly in respect of UK sales which is on the stocks.
6 Obviously, early days. The Tribunal will still need to determine whether certification is
7 granted in relation to that and there are also some applicable law issues and,
8 jurisdiction issues that need to be dealt with. But, having said all of that, there is a
9 pound for pound conflict which the Tribunal may be faced with between the Coll claim
10 and the Rodger claim. Pass on will be important to that. On that we say that Coll
11 should give targeted and proportionate disclosure. This data is not difficult data for it
12 to provide.

13 MR JOWELL: I think you meant to say Epic.

14 MR HOLMES: Apologies, Epic. The way forward, where does that leave us? There's
15 an offer of some disclosure but one that falls short of the reasonable categories we've
16 requested. It is also an opaque offer. You have my submissions about that. We don't
17 know what we're going to get. It was assembled at breakneck speed.

18 As a practical way forward, we would suggest the following course: It needs to be
19 handled delicately and carefully because there's limited time now ahead of trial and
20 we can't afford mis-steps. We say that Epic should give disclosure of the pre-existing
21 collections which is offered under the first and second categories in short order. They
22 are already assembled. There's no reason to wait until 20 November for those. We
23 see no reason why this should not be done more or less immediately.

24 BRIDGET LUCAS KC: That's the Australian documents?

25 MR HOLMES: Those are the Australian documents. We're content of course for it to
26 have the highest confidentiality designation in view of the sensitivity of the materials.

1 Epic should also collect its additional documents offered by way of an update to that
2 disclosure and we are content to receive those by 20 November.

3 If you are with me as to the need for disclosure under category two in relation to
4 distribution more generally and Epic data relevant to pass on, we need to find a way
5 of breaking the impasse. If you think it's necessary in principle what we would suggest
6 is that the parties should seek to agree parameters for the two main gaps that it is
7 already apparent are not covered by the existing disclosure sets. That's in relation to
8 category two distribution more generally, the streaming services and other distribution
9 channels and Epic data relevant to pass on. If the offered Australian disclosure is
10 insufficient or the parties are unable to resolve the other categories sought by
11 agreement, it may then be necessary to return to the Tribunal, either for a further
12 hearing or for resolution on the papers. This case is an important one. As I tried to
13 show you, the disclosure is important to resolving the case. Hard fought litigation
14 between two large companies and the issues raised in Epic's revised case will be
15 central to the trial, and it's important to get Epic's disclosure right. So we propose a
16 return date be set aside provisionally now in case that road map doesn't produce a
17 satisfactory outcome. I hope that's clear. I'm sorry that's it not been possible to offer
18 this in advance. You'll appreciate there were late developments which really meant
19 that this only crystallised I think very, very recently as a result of Epic's late offers. We
20 see that as a realistic way forward which strikes a fair balance between the parties
21 given the difficulty for you in doing justice here today based on the conflicting requests
22 that are before you.

23 Subject to any questions from the Tribunal, I think those are my submissions. I shall
24 just check with those instructing me to see if there's anything else.

25 I'm grateful. It has also been suggested to me that we would also accept the sensible
26 suggestion you made for a witness statement in short order explaining the accounting

1 position at Epic, so that any further requests can be targeted and focused.

2 BRIDGET LUCAS KC: Thank you.

3 MR HOLMES: I'm grateful.

4 BRIDGET LUCAS KC: Thank you very much. Mr Jowell, I see it's ten to one. Would
5 you like to carry on now, or should we break for lunch?

6 MR JOWELL: I can make a few provisional points now so we take up the time.

7 BRIDGET LUCAS KC: Yes.

8 MR JOWELL: But I will need to take instructions on the points that my learned friend
9 raised, and I think come back with some proposals of our own if I may. Briefly I should
10 start by saying that my learned friend at various points in his submissions suggested
11 that we had been dilatory in coming up with our proposals and so on. If I could remind
12 you briefly of the chronology here: they first requested this disclosure after having had
13 our amendment application for two months on 6 September. Now by 19 September,
14 so less than two weeks after that, we had written back to them alerting them to the
15 disclosure relating to Australia and also telling them that we were going to consider
16 whether we hold other materials which might be provided. Therefore, we took a
17 constructive approach right from the outset, but we can hardly be criticised for not
18 coming back with alternative proposals in that sort of time frame.

19 So what we did was then to consider very carefully what proposals we could make in
20 relation to disclosure on the Epic Games Store profitability that would be a reasonable
21 and proportionate response to their request for that category. We would never take
22 an issue with the fact that that is a potentially relevant class of documents. We do
23 take issue with the suggestion that somehow this is the central disclosure in the case.
24 On the contrary, it must be obvious that the central disclosure in the case is that to be
25 given by Google in relation to a claim of excessive pricing by Google and Epic's own
26 profitability in relation to its game store is but one comparator among many that have

1 | been pleaded by us and indeed by Coll.
2 | Now, the fact that these very extensive categories in Cran were based upon the
3 | disclosure that Google has had to make in the Coll proceedings, was known to us first
4 | when we were just informed of it by Mr Holmes just now. It is interesting, it would have
5 | been useful if we had been told that earlier, but it is also revealing. Because of course,
6 | that is disclosure that has been tailored, presumably, to Google's own business.
7 | Google, notwithstanding the fact that Epic is a very successful business, it is 100th of
8 | the size in terms of market cap approximately of that of Google and it is run very
9 | differently. And what may be appropriate for Google is not necessarily going to be
10 | appropriate for Epic.

11 | BRIDGET LUCAS KC: I understand that.

12 | MR JOWELL: The second general point I should make -- and I think it is one that my
13 | learned friend really tacitly accepted in his final submissions, is that it is usual in this
14 | Tribunal for disclosure to be done in stages. It is particularly important so that
15 | disclosure doesn't get out of hand. It gives the other side an opportunity to consider
16 | the disclosure and then to come back and consider what is actually outstanding.

17 | And so, clearly, the sensible way forward on the first category, the (a) category, is for
18 | us to give what we've proposed already, and then for Google to consider it, and see
19 | whether there are any substantial gaps and come back. Because we are proposing
20 | to give it sooner than they asked for it, there is plenty of time for that all to be achieved.

21 | So, in relation to category (a), that remains and that clearly is the sensible approach.

22 | And I will need to come back to you in terms of whether we can give the Australian
23 | disclosure sooner than the 20th. It's not a question again of us trying to be difficult by
24 | not having provided it already. There are processes that need to be gone through in
25 | relation to disclosure including adding Bates numbers appropriate to these
26 | proceedings and checking for third party confidentiality. It can't be necessarily done

1 overnight. It does take a little time.

2 So, we will consider and get back in terms of whether we can expedite the disclosure
3 of the Australian documents. I think in relation to the other material, let me take again
4 (c) first, in terms of the commissions, my learned friend took you to the table that we
5 offered to update. And he said "Well that only includes certain distribution channels".
6 When we said we would update the channel, if we'd been asked we would have made
7 this abundantly clear, we meant that we would update it also in relation to any other
8 significant distribution channels of course. So we will add any further material
9 distribution channels and include the percentages there.

10 As regards pass on in category (c), this is a matter that was already pleaded. It isn't
11 an area where we are in any better position to give disclosure than Google is. Google
12 as I have shown you also has a differential charging structure now. It charges 15%
13 for the first million and it has a far greater array of developers' data than we do to which
14 it can have access. So yes we're perfectly amenable to discussing with Google further
15 disclosure in this category once we've understood what the gaps are. But it should be
16 mutual, and therefore what we would propose is that if there is to be this further
17 hearing, and this further exchange of correspondence or communications between the
18 parties in relation to pass on disclosure, it should be in relation to mutual pass on
19 disclosure. And for that purpose we need to understand what, if anything, Google has
20 already disclosed. So those are the key points that I should just highlight in relation to
21 those categories (a) and (c).

22 In relation to category (b), I should say this: the fact that the disclosure was done at
23 pace in Australia really doesn't mean --

24 BRIDGET LUCAS KC: -- it was not done properly.

25 MR JOWELL: It was not done properly. It's not fair to say "Oh this was some sort of
26 litigation tactic that they suddenly launched the Epic Games Store on the eve of the

1 Australian litigation", the fact is that this arose out of the EU legislation, the Digital
2 Markets Act which came into force around that time, and also the win in the case in
3 the United States against Google. That's what prompted it, and then there was a
4 round of disclosure that followed. That should certainly be the starting point in our
5 submissions at the end point of disclosure on that.

6 As regards the other distribution routes, my learned friend really makes very heavy
7 weather of a very minor amendment in relation to native apps and seeks to build these
8 enormous disclosure requests on the top of them and they simply don't bear that
9 weight. Indeed if you go to Mr Cran's original witness statement, he deals very, very
10 lightly with this point in only one paragraph. It isn't, in our submission, properly
11 motivated.

12 You will see it is on page 821 of the second volume paragraph 52, the only paragraph
13 in which he explains these categories. He notes that we changed the distribution
14 market by narrowing apps though native apps. He says this goes to a pleaded issue
15 in dispute given that Google's defence refers to web apps and then they say Google
16 is entitled to test Epic's new case on market definition against disclosure from Epic,
17 particularly in relation to recent developments.

18 Well, that really doesn't justify ... the fact that we've narrowed a market definition
19 slightly surely can't justify these very extensive new categories of disclosure that they
20 seek. But if there are more specific categories, we are bound to consider them. Those
21 are my general submissions and I will come back to you if I may on the specific
22 proposal.

23 BRIDGET LUCAS KC: Yes.

24 MR HOLMES: Can I just make a factual correction? We understand that Google's
25 solicitors informed Epic's solicitors in their letter of 27 September 2024 that
26 paragraph 35(a) requests were based on the Coll disclosure. For your note that is in

1 the hearing bundle volume 2 at page 1115.

2 BRIDGET LUCAS KC: Thank you. I don't know how you feel about this, but if you
3 want to discuss the terms of the order that you would both be inviting me to make and
4 highlight any issues still in dispute after you've had chance to take instructions.
5 Obviously Mr Jowell, if there is a measure of agreement about the order you would
6 like us to make, if you could do that over the short adjournment.

7 MR JOWELL: Yes. And in particular, I think we had already agreed in principle to do
8 that in relation to the other minor matters that remain in dispute. We will seek to narrow
9 those as well.

10 MR HOLMES: Maybe at least we can narrow the areas of difference. Mr Jowell has
11 our proposal so we look forward to receiving his.

12 BRIDGET LUCAS KC: Yes. Thank you. We will come back at 2 o'clock.

13 **(3 pm)**

14 BRIDGET LUCAS KC: Thank you. I'm sorry to drag you all back at 3 o'clock, but we
15 just wanted to check --

16 MR JOWELL: It's a good thing. I think we have in essence reached agreement on
17 the terms of the order, subject of course to the Tribunal's views. I think before I take
18 you through what is proposed, in fact there is some finalisation going on our side so
19 we get the final date. I think Ms Hannah would like to say a few things from the
20 perspective of Coll.

21 BRIDGET LUCAS KC: Yes, certainly.

22 MS HANNAH: Madam, I just wanted to make three brief points -- I won't trouble the
23 Tribunal for terribly long, the first one of which is a very practical point. This relates
24 principally to the disclosure that the defendants will be providing in respect of Epic's
25 excessive and unfair pricing claim. This is the supplemental bundle, tab 12, the terms
26 of the draft order. I'm working electronically, it's page 39, paragraph 8.

1 BRIDGET LUCAS KC: Yes.

2 MS HANNAH: So that provides that the defendants shall provide to Epic by way of
3 further disclosure by 20 November 2024, those documents disclosed by the
4 Defendants to the Class Representative in the Coll proceedings. I just wanted to
5 request that the Defendants be ordered to provide a mapping key for that disclosure
6 because each of the documents that the Defendants have provided to Ms Coll in the
7 context of the Coll proceedings obviously have a Bates number on them. I am not
8 sure whether the proposal is that they would simply keep that number when they are
9 disclosed to --

10 BRIDGET LUCAS KC: Or have a new one.

11 MS HANNAH: Or they add a new one, but it's been very helpful where there's been
12 disclosure in the Epic proceedings for Ms Coll to have a mapping key which essentially
13 allows you to check that it is the same document you are referring to in both sets of
14 proceedings. We think that will simplify the process where we are potentially referring
15 to documents disclosed to Ms Coll in the Coll proceedings, where we're referring to
16 them in correspondence or in submissions, then we don't need to wait for the process
17 to be completed of Google checking those documents to identify whether there is
18 confidential information that has not been shared with the Epic Claimants. So, that
19 was just one point.

20 BRIDGET LUCAS KC: I saw Mr Holmes nodding.

21 MR HOLMES: Yes, that's agreed. There's no problem with that.

22 BRIDGET LUCAS KC: Does it need to go in the order or can it be taken as read?

23 MR HOLMES: It's on the face of the transcript.

24 BRIDGET LUCAS KC: Super.

25 MS HANNAH: Then two brief points, principally in relation to pass on. So I think there
26 was a suggestion that Epic's pass on data was important in the context of the Coll

1 | proceedings. As you'll remember, of course, the Coll claim concerns all app, in-app
2 | purchases and subscription purchases from the UK store front of the Play Store, no
3 | matter which developer they are purchased from. Of course that will include
4 | purchases from the Epic Games Store but it will also include purchases from all
5 | developers who make their apps available on the UK Play Storefront.

6 | So there was some suggestion that Epic's disclosure on pass on would be important.
7 | I wanted to note that from the Coll proceedings perspective, of course our experts
8 | have in fact used Google's data in performing an analysis of pass on, on a developer
9 | wide basis. We have made reference to data around Google's differential charging
10 | structure, so specifically the fact that Google charges 15% commission for all
11 | subscriptions in that analysis and that has been using Google's extensive transaction
12 | data.

13 | The final point is simply one point of correction to a point that was advanced by Mr
14 | Holmes, where he said there was a pound for pound conflict between the Coll
15 | proceedings and the new class claim filed on behalf of developers. I'm sure you'll have
16 | the point, but of course, the Coll proceedings are purchases made on the UK store
17 | front of the Play Store, no matter where the developer is based. And the developer
18 | proceedings are for UK domiciled app developers. The purchases of apps can be
19 | from anyone anywhere. In the Venn diagram it is a fairly --

20 | BRIDGET LUCAS KC: -- they're not co-extensive.

21 | MR HOLMES: Yes. I hope I didn't misspeak, but I think on the transcript I made clear
22 | it was in relation to the UK sales by UK developers that there was a pound for pound
23 | relationship. It's only in relation to that.

24 | BRIDGET LUCAS KC: Thank you. I'm sure you said that, Mr Holmes, but now we
25 | have it on the transcript that is what you meant to say, that is fine.

26 | MS HANNAH: Those were the three points unless I can be of further assistance.

1 BRIDGET LUCAS KC: No, that's very helpful. Thank you.

2 MR JOWELL: I think there are some very minor --

3 BRIDGET LUCAS KC: Would it be helpful if we rose for another 15 minutes? You
4 would be able to pin it down.

5 MR JOWELL: Yes, thank you. We're literally a couple of dates apart.

6 BRIDGET LUCAS KC: So if we come back at 20 past.

7 MR JOWELL: I would be very grateful.

8 (Short break)

9

10 BRIDGET LUCAS KC: Yes.

11 MR JOWELL: It is fair to say we're pretty much in agreement! If I may, what I will do
12 is run you through the order and Mr Holmes or Ms Smith will jump up and protest when
13 I get it wrong, although they have been provided with this document so I hope we are
14 all on the same page.

15 BRIDGET LUCAS KC: Is it helpful to have the one from the supplemental bundle open
16 or not?

17 MR JOWELL: It probably would be, yes. So, the first four paragraphs are the same.

18 BRIDGET LUCAS KC: Yes.

19 MR JOWELL: Paragraph 5 it is now agreed that we will provide both sets of Australian
20 materials earlier and they will be disclosed by 14 October 2024, so without any new
21 Bates numbers, subject to the proviso that in so far as there is any material which
22 contains any non-party highly confidential materials, those will be produced as soon
23 as possible after any issues relating to that development and in any event by
24 25 October accompanied by an appropriate disclosure statement. That applies to both
25 sets of the Australian materials. Those that previously were in 5(a) and those that
26 previously were in 5(f).

1 BRIDGET LUCAS KC: Yes.

2 MR JOWELL: Next we've agreed that by 13 November, Epic will provide further
3 disclosure in the paragraphs -- so we will provide what is in (b) and (d) of our current
4 five.

5 BRIDGET LUCAS KC: Yes.

6 MR JOWELL: Then in addition we will provide the refreshed version of our data set,
7 this is E. We've specified that that will be updated to reflect all distribution channels
8 used by Epic, actual commission rates. In addition, we will provide a witness
9 statement addressing Epic's general accounting policies and practices, and the
10 availability of material responsive to the categories in paragraph 35(a) of the fifth
11 witness statement of David Cran relevant to the profitability of the Epic Games Store.
12 We will do so by 1 November.

13 BRIDGET LUCAS KC: Yes.

14 MR JOWELL: Next Epic will provide by 26 February 2025 at the same time as the
15 Defendants file their experts reports and any other further factual evidence. They will
16 provide the witness statement addressing the outcome of the [Claimant's] [Claimants']
17 strategy to launch the Epic Games Store on Android at that time and d]ata showing
18 the number of users. Epic Games Store on Android between launch on
19 16 August 2024 and December 2024 -- that's effectively -

20 BRIDGET LUCAS KC: Six.

21 MR JOWELL: Yes. Then, this is new, we then have "The parties will seek to agree
22 the parameters of any further disclosure on the part of Epic and/or the possibility of
23 mutual disclosure by Google in relation to the categories of disclosure identified at
24 paragraphs 35(a), (b) and (c) of Cran 5. In the event the parties cannot reach
25 agreement, parties will write to the Tribunal by 18 November 2024, to see whether a
26 convenient date is found for a further hearing on these issues, or we will notify the

1 Tribunal if the issues can be resolved on the papers."
2 Then, we have a slight difference here or something for the Tribunal to resolve: "Any
3 outstanding differences will be determined, if necessary, at a half day hearing to be
4 provisionally listed." Now, the difficulty is this: that one possibility is to list it in the week
5 of 25 November. The other possibility is to list it in the week of 2 December, both of
6 course subject to the Tribunal's availability. One difficulty is this: that the 28 November
7 is Thanksgiving, which of course does pose an almost insuperable obstacle for
8 American clients. So, we would prefer it not to be the 28th certainly or the day after.
9 Whether it is earlier than the 25th or the week of 2 December we're in the Tribunal's
10 hands.
11 BRIDGET LUCAS KC: You might also be in the High Court's hands in the sense that
12 I'm due to be appearing in a case in the High Court that is floating over the last week
13 in November.
14 MR JOWELL: Very well. In that case, we invite you to fill in the blank.
15 BRIDGET LUCAS KC: Yes.
16 MR JOWELL: Then we've got the provision that I think is currently in 7 and that's
17 unchanged. Then we have the provision in current 8 which has been amended, so
18 that the Defendants shall provide to Epic by way of further disclosure by 25 October
19 date of disclosure given the Coll proceedings, and by 13 November 2024, it will
20 provide qualitative disclosure for those proceedings.
21 BRIDGET LUCAS KC: Yes.
22 MR JOWELL: That are relevant to Epic's excessive and unfair pricing claim.
23 BRIDGET LUCAS KC: Yes.
24 MR JOWELL: We then come to the partial waiver of collateral use restrictions. I think
25 those in substance are largely unchanged. We have previous paragraphs 9 and 10.
26 And then save what was 10 we've agreed it will be four weeks prior. We then have a

1 provision that stipulates that Epic will identify any non-party highly confidential
2 information contained in the material referred to in the list provided pursuant to
3 paragraph 11(b)(i) and shall notify any third parties accordingly pursuant to
4 paragraphs 18 to 21 of Schedule 1 of the CRO. And to the extent that there are any
5 unresolved issues regarding the disclosure to the Class Rep of non-party highly
6 confidential information, claimed in the Defendants's expert reports as part of this
7 notification procedure, Epic shall notify the effective material on a line by line basis
8 and notify of the same no later than 19 February 2025. Google shall apply any
9 necessary redactions to the effective material and shall provide the report to the Class
10 Representative with such information.

11 BRIDGET LUCAS KC: Yes.

12 MR JOWELL: The next paragraph then stipulates that Epic shall use its best
13 endeavours to resolve any outstanding third party objections after 19 February and
14 shall inform the Defendants as soon as reasonably practicable after any third party
15 confidential information issues are resolved so that Google may provide less redacted
16 copies. And then thereafter the defendant shall notify the Claimants as soon as
17 possible no less than ten weeks before commencement of the trial with any further
18 documents it may intend to rely on at trial of proceedings in October 2025.

19 BRIDGET LUCAS KC: Yes.

20 MR JOWELL: Then, paragraph 14 is as it is. The only other change I believe is in
21 relation to what is previously 15(e) where we previously had 28 days and 14 days and
22 we invoked the wisdom of Solomon and made it 21 days.

23 BRIDGET LUCAS KC: 21.

24 MR JOWELL: Next, as for hearsay notices, we are not as confident that we've got
25 complete agreement on the dates. But, as I understand it, at least what we proposed
26 is that currently, for 18(b) we have got our week proposed, 9 March 2025. In what

1 was paragraph 19, now 21, we have proposed the 4 April -- forgive me.

2 BRIDGET LUCAS KC: 19 March I've got in the draft.

3 MR JOWELL: Forgive me, 19 March. Then what was previously 19, now 21, we have
4 4 April. In previous 19(a) now 21(a) we have 2 April and in (b) we have 4 April. I
5 hope I have done that faithfully and it may be that the other side have -

6
7 MISS SMITH: Unfortunately, madam, most of the time was taken up, understandably,
8 in discussing when we broke the first part of the draft order and the new regime in
9 effect. We haven't had a chance, to be frank, to agree the other dates. I hate doing
10 this sort of thing, effectively negotiating in front of your Ladyship but I will try and to set
11 out our position. I think we're almost there. Just running through the last section of
12 the starting with "Partial collateral use restrictions" which is at the bottom of page 39
13 of the bundle, paragraph 9. 9 is agreed. There are no changes to it in any event.

14 10 we will need to amend in the second line the reference to what was paragraph 9(b)
15 will now be 11(b). 9(b)(i) to reflect what comes in the following paragraph has been
16 amended.

17 I think it was indicated that we could have four weeks there. The date in the next
18 paragraph, the problem with the date of 19 February is Google's expert reports are to
19 be filed on 26 February. Seven days is not going to give us enough time to go through
20 the list provided. We proposed, which is extremely tight, 12 days ahead on
21 14 February. We really do need that time to 14 February when our expert reports are
22 going be put in on 26 February.

23 Then I think the next paragraph to which changes have been made, is what was on
24 the hard copy in the supplemental bundle, paragraph 13. We would propose a redraft
25 of that to mean that this paragraph is dealing with the second tranche of materials as
26 regards we might need to waive collateral use restrictions which are the documents if

1 you look back at paragraph 9(b) we've been dealing with the materials that are to be
2 in our expert reports. That's 9(b)(i). There is then any other material that we may
3 intend to or rely on at trial 9(b)(ii).

4 So to make it absolutely clear what's on the face of the hard copy, paragraph 13 is to
5 refer to the documents in 9(b)(ii) and also to reflect the language used previously in
6 the order in paragraph 10, the same best endeavours obligation on the part of Google,
7 so that paragraph 13 reads thereafter, "The Defendants shall use best endeavours to
8 provide to the Claimants in the Epic proceedings the list pursuant to paragraph" -- I
9 think it will be 11 -- "9(b)(ii) above no less than ten weeks before commencement of
10 trial of any further documents that the defendants intend or may intend to rely on at
11 trial for the Coll proceedings in October."

12 We think that's much clearer. It makes it clear which of the two tranches of documents
13 we're talking about and uses the same best endeavours obligation to provide that list
14 no less than ten weeks before trial. The problem with 'as soon as possible' is it could
15 impose a rolling obligation which really would be too onerous.

16 BRIDGET LUCAS KC: Okay.

17 MISS SMITH: Then everything is agreed on the provisions relating to the expert
18 evidence in the Coll proceedings on the hard copy in the supplemental bundle. That
19 is paragraphs 15 and 16, although the paragraph numbers will change.

20 As regards hearsay notices, paragraph 18(b) the proposal by Epic that we should
21 initiate the third party notification procedure under the confidentiality ring order than by
22 no later than 19 March, again we say can't work when we have only been given the
23 hearsay notices on 14 March. That's only three working days to review the material
24 before we initiate the third party notification procedure. So we would propose that that
25 date at the end of the sub-paragraph in green be deleted and instead 'prompt' inserted
26 because again we don't know the volume of material we're going to have to review at

1 this stage.

2 I can say, however, that we are prepared to accept in paragraph 19 Epic's proposal in
3 green of 4 April. That would be reflected in the subsequent dates 2 April and 4 April.
4 We are prepared to cut the usual time that the parties are given of 28 days in that
5 situation on the basis of the explanation that was given to us by Epic over the
6 adjournment.

7 My lady, that reflects Google's position on those remaining provisions of the order. I
8 hope we are almost there.

9 BRIDGET LUCAS KC: Yes, thank you.

10 MR JOWELL: I think we are nearly there. I have an equal and opposite difficulty; I
11 think these are the only two sticking points. You heard Ms Smith say in what was
12 paragraph 18(b) that it is not possible to initiate any necessary third party notification
13 procedure within three days. We understand that the same issue arises for us in
14 relation to what is in paragraph 13 where it is proposed that we should notify Google
15 by 14 February rather than 19 February of third party redactions. The difficulty with
16 that is that it relates to the provision of the expert reports. We will need to give third
17 parties two weeks' notice and so if we do it by 14 February, that gives us just one week
18 to review the expert evidence and identify all of the third party confidential information
19 in respect of which we may need to notify third parties. And we are concerned that
20 that will not give us sufficient time, so therefore whilst we understand their desire to
21 say promptly we do say that we need to stick to the 19th.

22 MISS SMITH: I think there is a slight misunderstanding of the 19th and 14th in what
23 is paragraph 11 on the face of it, it relates to a list that we are providing of the
24 documents that we are going to be referring to or the material we are going be referring
25 to in the expert reports which are to be filed on 26 February. There's no need for Epic
26 to look at the expert reports. It's an obligation on us to provide them with a list so that

1 they can --

2 MR JOWELL: Forgive me, it is correct it is the list. But it is still the same issue arises

3 I'm told.

4 BRIDGET LUCAS KC: So it sounds like you're fairly close. It sounds like these are

5 slightly practical issues, issues of timing.

6 MR JOWELL: They are.

7 BRIDGET LUCAS KC: I think you probably both have an appreciation certainly of your

8 own position when you are against a tight window to achieve something, and then

9 hopefully of the other party's similar difficulty. It sounds like we are now drafting on

10 the hoof. It might be better if the parties can go away and try and resolve this. If you

11 can't agree the dates, put both of them in a draft order because I'm going to ask you

12 to go and produce a draft order. If you put the dates in the order that you can't agree,

13 if there are any, and a short explanation as to what the issue is, then --

14 MR JOWELL: -- that sounds eminently sensible.

15 BRIDGET LUCAS KC: -- I can decide it.

16 MR HOLMES: Madam, just one further point from me in relation to the date of the

17 disclosure hearing, I wonder whether counsel's clerks might liaise with the Registry as

18 to the availability of respective counsel so that a date can be found that works for

19 everyone in those two weeks as I see that there are a few other dates.

20 BRIDGET LUCAS KC: Yes, there are.

21 MR JOWELL: I intend no discourtesy, but as things currently stand, I won't be able to

22 make that hearing date, regardless of which week it is.

23 BRIDGET LUCAS KC: We will take it very personally Mr Jowell!

24 It sounds like we have made very good progress. Thank you all for that. Is there

25 anything else we need to think about?

26 MR JOWELL: Not from our end.

1 BRIDGET LUCAS KC: No. So, can we take it that the business for today is
2 concluded?

3 MR JOWELL: Yes, thank you very much for your Lady's patience.

4 BRIDGET LUCAS KC: Thank you to the parties. As I said, when we very first started,
5 it was very helpful having such clear skeleton arguments and witness statements and
6 really useful bundles. And the parties' approach in agreeing these dates in a draft
7 form of order is very very helpful. So thank you.

8 **(Adjourned at 3.45 pm)**

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