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4 record.

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

Case No: 1601/7/7/23

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

12 Friday 7th June 2024

13
14 Before:
15 Andrew Lenon KC
16 Tim Frazer
17 Anthony Neuberger
18 (Sitting as a Tribunal in England and Wales)

19
20 BETWEEN:

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22
23 **Proposed Class Representative**

24
25 **Dr Sean Ennis**

26
27 v

28 **Proposed Defendants**

29
30 **Apple Inc and Others**

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32
33
34 **A P P E A R A N C E S**

35
36 Robert O'Donoghue KC & Daniel Carall-Green on behalf of Dr Sean Ennis (Instructed by
37 Geradin Partners)

38 Timothy Parker on behalf of Apple Inc & Others (Instructed by Gibson Dunn)

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(10.30 am)

Opening remarks

THE CHAIR: Good morning. I am going to start with the customary warning. Some of you are joining us via live stream on our website. An official recording is being made, and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings. Breach of that provision is punishable as contempt of court. Thank you.

Submissions by MR O'DONOGHUE

MR O'DONOGHUE: Mr President, I appear with Mr Carall-Green for the class representative and Mr Parker for the Apple defendants. The tribunal has very helpfully set out a seven-item agenda. You did indicate, sir, with the agenda, that the sequence in which the items appeared was not necessarily the order of the day. We are in your hands to that extent. From my perspective, with the tribunal's permission, I had intended to cover -- items 5 and 6, I think have gone.

THE CHAIR: Yes.

MR O'DONOGHUE: 7 is to be confirmed. That leaves 1, 2, 3 and 4. What we have proposed to do, sir, with your permission, was I would deal with issues 1, 2, 3, very briefly -- this has been well traversed in the correspondence and skeletons -- and Mr Carall-Green would then deal with the application concerning contacting the class members, but we are in your hands, sir, whether you want to do things in a different order.

Thank you, sir. Starting with agenda items 1 and 2, which we say are two sides of the same coin. On agenda item 3, I can be extremely brief. We recognise that the substance of the interaction is not for today, but there are some points of directions

1 | which we say are important to tee up in that context.

2 | On agenda items 1 and 2, there is a measure of harmony, at least to the following
3 | extent. There is now agreement that there are material overlaps between the present
4 | proceedings and the Kent proceedings, and that it is desirable to avoid or at least
5 | mitigate those overlaps and potential for inconsistencies.

6 | Just to pick that up in my learned friend's skeleton, which is at the back of the core
7 | bundle, tab 53, at page 688, if the tribunal can quickly look at paragraphs 5 and 6 over
8 | the page.

9 | **THE CHAIR:** Can you hold on.

10 | **MR O'DONOGHUE:** Yes, the proposed defendants' skeleton argument. Core
11 | bundle 689, tab 53.

12 | Thank you, sir. 5, you will see the reference to diametrically opposed. Then at the
13 | end of 5, mitigate the possibility of inconsistent findings. Then over the page at 6, on
14 | pass through, there is a concession of overlap.

15 | You see in the second section of paragraph 6 there is an attempt to downplay the
16 | extent of overlap and potential inconsistency. But one can test the point in the
17 | following way. If we are right that there is no pass-on by the developers to the UK
18 | consumers in the Kent class, then there is no claim in Kent. It is, we say, about as
19 | stark an overlap and potential conflict or inconsistency as one can imagine. It is not
20 | some sort of footling overlap or minor inconsistency.

21 | We say the Apple concession in the skeleton, which is a new one, it is an important
22 | and necessary concession.

23 | We have cited a consistent body of case law in our skeleton on the imperative in the
24 | tribunal's case law of avoiding inconsistency between overlapping proceedings. I don't
25 | need to tell the tribunal that this was one of the main reasons for the genesis of the
26 | umbrella proceedings practice direction. Just to pick up an authority from only a week

1 ago, this was again reiterated in Interchange at the end of last week. It is in tab 24 of
2 the authorities bundle. It starts at 556 for those looking electronically but I want to pick
3 up paragraph 4 on page 559.

4 You will see paragraph 4, there is a recognition that the overlap in that case was in
5 some respects quite attenuated because you will see it says there is a substantial
6 temporal disconnect between the Host Cases and Merricks. Then if you read on, it
7 says:

8 "There is obviously considerable similarity in the pass-on issues arising in both sets of
9 proceedings, such that a question of ensuring consistency arises."

10 That, we say, is essentially one of the significant potential inconsistencies in this case.
11 But I simply note that in a case where there is a substantial temporal disconnect, even
12 then the imperative of ensuring consistency was a fundamental one.

13 Then further on at 24.1, at 568, it is the second sentence:

14 "... The importance of consistency of approach is one that was stressed in the Second
15 Ruling. It would be most unfortunate, even as between temporally segregated claims,
16 ..."

17 That's the temporal disconnect point we saw in paragraph 4:

18 "... for questions of pass-on to be decided differently, when those questions are (in
19 substance) quite possibly the same. That risk is best avoided if the pass-on questions
20 in the two sets of proceedings are heard together, in Trial 2. We accept that there are
21 other ways of attempting to avoid inconsistency -- namely to hear the Merricks pass-on
22 issues on the same evidence but later -- but it seems to us that the most natural case
23 management solution is to grant the application; and that good reason needs to be
24 shown in order for the application not to be granted."

25 So that's the point of principle.

26 Now it is a concern from the class representative's perspective that almost a year after

1 these proceedings were issued, certification has still not been decided. There has
2 been some finger pointing on both sides as to who is to blame for delay. We say, for
3 example, the jurisdiction challenge scuppered some of this. They say: you issued late,
4 and so on, but I don't think it is remotely useful today to waste time on the blame game
5 and I don't intend to.

6 The question now is a pragmatic, forward facing one. How can the interests of justice
7 best be served going forward? To use the vernacular, we are where we are.

8 It is, I think, common ground the question of certification must be dealt with promptly.

9 That was the exact word used by the tribunal in its letter of 15 May. The question for
10 today is how is that to be achieved in the circumstances, and what, in practice, would
11 that entail? I've three short points to make on this. The first question is that the issue
12 of directions and case management, it doesn't arise in a vacuum. It is, as I noted at
13 the outset, common ground that there are material overlaps between these
14 proceedings and the Kent proceedings and that inconsistency between those
15 proceedings should be avoided or at least mitigated. We also know that the Kent trial
16 will commence shortly after Christmas, early in the new year.

17 We fully accept, of course, sir, following the tribunal's correspondence that the
18 substantive details of the interaction between Kent and Ennis are not for today. It is
19 only agenda item 3 tangentially, but we say what is important is at least to avoid
20 a situation that the directions handed down today in respect of certification would be
21 preclusive of any interaction between Kent and Ennis going forward. We say that
22 would be prejudicial and a fait accompli.

23 To put it another way, the directions for certification today should at least not rule out
24 the possibility of any interaction whatsoever and allow that potential issue to be
25 considered in an orderly fashion.

26 **THE CHAIR:** While you say that it would, if the hearing of the CPO application was in

1 September, why do you say that would be preclusive of any via media, as you put it?

2 **MR O'DONOGHUE:** Well, sir, with a trial scheduled to start at Christmas, for the CPO,
3 or from a standing start in September, even assuming that certification can be granted
4 during September, it effectively gives us two months, realistically, to consider is there
5 supplemental evidence we wish to bear, and no doubt Apple wish to respond, and with
6 the best will in the world, realistically, the prospects of achieving that in a manner that
7 is fair to our class members, we say, are remote.

8 Of course, we may come to the (inaudible) in due course, but looked at from today's
9 vantage point, the prospect of catching up from a standing part in September seems
10 to us very, very ambitious indeed. You may remember, sir, from the jurisdiction
11 hearing earlier in the year, that at that stage, which was January, Apple said, well, the
12 possibility of catching up was "not impossible", and we would suggest that nine months
13 down the line, it is extraordinarily difficult indeed. It is not simply a question as to
14 whether we could be shunted or shoehorned into catching up in two or three months,
15 there is a question of fairness to our class members. These are access to justice
16 cases and there is a balance between speed and haste, if I can put it like that.

17 But we do say that from a standing start in September, that seems to us, unbelievably
18 ambitious. It may be that that's where we end up, for all sorts of reasons, but we say
19 it is very, very far indeed from being optimal.

20 **THE CHAIR:** I see that, but in practice, there is not that much difference, is there?
21 If the CPO application is in July, then we have August, where it seems to be assumed
22 that nobody is going to do anything very much, then we are into September.

23 If we have a joint CMC shortly after, if we programme now for a joint CMC with Kent
24 shortly after the CPO hearing, conditional on the CPO, it doesn't seem to us there
25 would be enormous difference, if you like.

26 **MR O'DONOGHUE:** Sir, I will make my case for July. You can make of that what you

1 will. But what I will say, at this stage, is these are exceptional circumstances. It's not
2 as if everyone on the PCR side will be on the beach in Marbella if we are certified. We
3 will have to roll up our sleeves and in that context, August and September will be vital,
4 to make very, very substantial progress during those two months.

5 Now at this stage I would suggest it's almost a case that every day counts but I will
6 develop the July/September dichotomy.

7 Again, on the question of timing, one of the reasons we say that July is achievable,
8 given the exceptional circumstances we face, is there has, in my submission, been
9 a significant crystallisation in terms of certification case law, as to what is and is not
10 up grabs at the certification stage. I just want to show you very quickly, two authorities
11 on that, very recent. One is Ad Tech from this week. It is in tab 25 of the authorities
12 bundle. It starts at 575 for my purposes. Sorry, 576. It is about two-thirds of way
13 down that paragraph, where the president said:

14 "Hearings of applications for Collective Proceedings Orders are not intended to be
15 trials of the proceedings, but seek to ensure that the collective proceedings are
16 properly constituted in the interests of the represented class. It is this consideration
17 which is paramount. The interests of the represented class are not served by the
18 litigation of issues best left to trial."

19 Then a couple of pages on at 578, under 9(2), (3) and (4):

20 "It is clear from the decision in the Supreme Court in Merricks that there is no 'merits
21 test' that collective proceedings must pass in order to be certified, beyond the minimal
22 requirement that the claim must not be capable of being struck out ... This is a very
23 low standard -- similar, if not identical, to that applicable in individual claims -- which
24 facilitates access to justice by the class representative on behalf of the class."

25 Then, at (3):

26 "The pleadings need only satisfy a very low threshold at this stage. In setting out the

1 averments made by Ad Tech, the Tribunal should not be taken to have adjudicated
2 upon any of the matters therein.

3 "(4). We therefore content ourselves in noting that the technically layered and complex
4 market environment pleaded by Ad Tech is one where it is arguable that Google,
5 present in all layers of the ad-tech stack and alleged to be holding over 50% market
6 share in each of the markets in which abuse of dominance is alleged, could
7 discriminate against non-Google entities and favour itself, as pleaded."

8 Finally, 29(2) on page 586, the penultimate sentence:

9 "The Tribunal's role in case management is particularly evident in collective
10 proceedings, beginning with certification, but not ending with it. The Microsoft test,
11 properly understood, is a continuing test, at which the 'blueprint to trial' is regularly
12 tested against actual progress, so that trial dates are held, and orderly trials take
13 place."

14 Then one final reference before I move to the second authority, page 590,
15 paragraph 37, top of the page:

16 "Google, in our judgment, came very close to suggesting that a claim should only
17 proceed if a prima facie articulation of loss could be produced."

18 And then you see the extract. Then the tribunal says:

19 "The Microsoft test is not a barrier to access to justice. If it were, it would be clearly
20 contrary to the decision of the Supreme Court in Merricks. The general rule -- in
21 collective proceedings as in the case of individual claims -- is that arguable claims
22 ought to proceed to trial. Of course, in the case of collective proceedings there are a
23 number of additional requirements ..."

24 Then 39:

25 "The Microsoft test does not fall within this class of rule -- a pre-condition to
26 certification. The Microsoft test concerns the management to trial of a properly

1 | pleaded claim: it is only when the Tribunal can see no clear way of trying the case that
2 | the Microsoft test should act as a bar to certification."

3 | And even then, it notes the possibility of being given a second go.

4 | Then 40:

5 | "In our view, the approach encouraged by Google [which you saw at 37]. Would go
6 | further than the Microsoft test and act as a barrier to justice by requiring a claimant to
7 | meet an unrealistically high threshold for the articulation of their methodology."

8 | Then the final authority is Gormsen 2 at tab 19. It starts at 503, paragraph 54. Second
9 | sentence:

10 | "... it is incumbent upon all -- lawyers and experts -- to ensure that what their work
11 | focusses on is that which is necessary to decide certification. The Tribunal will -- if a
12 | case is certified -- come to trial in due course. PCRs should also take some comfort
13 | from this: where a PCR has sought, responsibly, to be brief and to focus on what
14 | material is required for certification, the Tribunal will not allow an application to fail on
15 | technical grounds. As has been said on many occasions, collective proceedings are
16 | concerned with access to justice, and the certification process needs to be seen in
17 | that light."

18 | Now mapping these recent principles on to the present case, we would make three
19 | points. First, in the real world, there can be no question about the arguability of our
20 | claim. Apple tried and failed to say that the claim was not arguable in the jurisdiction
21 | challenge, based on applicable law and territoriality arguments. It raised no other
22 | arguability question. In any case, given that the Kent proceedings had been certified
23 | and they do include an unfair pricing claim which is materially the same as our case,
24 | there can again, in the real world, be no serious question as to the arguability of my or
25 | the PCR's claim.

26 | Second, on methodology again -- we are not getting into the weeds and trenches

1 today, but I would simply note the following. Dr Perkins' methodology is, we say,
2 a straightforward application of the United Brands methodology. He has, limb one,
3 price cost tests; limb 2A, unfair in itself; limb 2B, a series of comparators with the Apple
4 excessive commissions. We say even in terms of eyeballing, that methodology is at
5 least as good and certainly as comprehensive as Mr Holt's in the Kent proceedings.
6 Again, I am emphatically not asking the tribunal today, to make any assessment of
7 that now. But it is relevant, we say, at least in terms of how one approaches the
8 question of directions. In simple terms, we say there is no obvious gap in the
9 methodology.

10 The third point is that in light of the principles I showed you, we did ask Apple what
11 point not raised in Kent do they say would be a show-stopper for purposes of the
12 certification. That was on 23 May. I won't turn it up.

13 Apple said they would respond in their skeleton. If we then go to their skeleton, we
14 have the sum total of two sentences in one paragraph. That's at paragraph 11 of their
15 skeleton. We can just quickly look at that. It's at the back of the core bundle. So it is
16 core bundle 692, paragraph 11. They essentially make two points. They, in rather
17 elliptical terms -- second half of paragraph 11 -- allude to some potential conflict within
18 the class. Second, they say the class is small and identifiable, and therefore, opt out
19 isn't necessary to provide access to justice. And that's it.

20 So despite having had a year to think about this, since the claim was issued, and
21 despite having brought a jurisdiction challenge, including a strike-out, this seems to be
22 the sum total of the opposition to certification.

23 Now again, I am not getting into the merits of any of these points today, but I think
24 what can be said with some confidence is that these points do not need to wait until
25 September and they do not need up to three days of the tribunal's time to chew over
26 them. They are, we say, short and fairly self-contained points that can and should be

1 dealt with briskly.

2 Now, bringing all this together, we say essentially there are two options that we would
3 commend to the tribunal. We say there is a possibility that certification could be dealt
4 with on paper. That was floated in the Coll proceedings. Now in that case, which is
5 two years ago, the reason the tribunal said it would not deal with things on paper is
6 because it said at that stage, the certification case law was, and I quote "developing".
7 That's at paragraph 8.1. We say in the light of recent certification cases, that that can
8 no longer be said with a straight face and that objection, such as it was, we say has
9 evaporated. The principles on certification are now very well established.

10 I apprehend, sir, of course, that in circumstances where Apple says with some
11 vehemence: well, we want a hearing, it may not be entirely attractive from the tribunal's
12 perspective to say: we will deal with this on paper. But we say, in principle, this is
13 something which can be done and we would advocate that given the exceptional
14 circumstances we face, it should be done.

15 The second option we commend to the tribunal, in the alternative, is that there is
16 a short certification hearing in July. We say no more than two days; one with one in
17 reserve. We have set out during the week a series of revised directions as to how we
18 say one gets to July.

19 Perhaps we can turn this up quickly. It is in the supplemental bundle, our letter on
20 Wednesday.

21 **THE CHAIR:** We have copies of that letter.

22 **MR O'DONOGHUE:** Thank you, sir. It is paragraph 6 of that letter. We suggested
23 Apple's response, 5 July, our reply, 15 July, which involves a degree of masochism on
24 our part, so we are sharing the pain. Third party applications by the 19th, skeleton
25 also the 19th and hearing in the week of 22nd, a day, with a day in reserve.

26 So, sir, given the exceptional circumstances we face, of course there is an element of

1 compression in this. I make no apologies for that. As I indicated, it involves
2 a significant sharing of the collective pain on the part of the PCR as well.

3 So those are the directions we put forward.

4 One final point on this. If we go back to the jurisdiction challenge judgment which is
5 in the core bundle at tab 9, at page 194, this is in the context of the Hague Convention
6 challenge. The tribunal said it there:

7 "In our view, the loss of the opportunity to catch up with Kent proceedings, if service
8 would be affected in accordance with Article 5 of the Hague Convention, was an
9 exceptional circumstance justifying the order for alternative service. That conclusion
10 could not be affected if it is alleged by Apple that PCR had delayed in bringing
11 proceedings. The potential advantage of having both cases tried at the same time
12 and avoiding inconsistent outcomes would remain, irrespective of whether any blame
13 attached to the PCR for delay."

14 So that's why we say there are multiple claims, exceptional circumstances in the
15 present case. This does mean that the leisure that might apply in other cases, when
16 it comes to directions, cannot be applied, at least in toto, in this case. And we indicated
17 that we are prepared to share in that collective and painful endeavour.

18 Of course, as we set out in our skeleton, certification is not a once and for all lifetime
19 event. It can be revisited at any point subsequently, so there is protection for Apple
20 there as well.

21 Then just to finish off on agenda items 1 and 2, to set out Apple's position, as we saw
22 in their skeleton there, their starting point is a concession that there are material
23 overlaps and that avoiding inconsistency is at least desirable. But they say in the
24 same breath then: well, you shouldn't do this before September. We say there is an
25 element of speaking out of both sides of their mouth on this point. Again, as I said at
26 the outset, if certification at a hearing does not take place until September, the

1 prospects, at least in any fair manner, of the PCR catching up for a trial after
2 Christmas, we say are remote.

3 We say effectively, therefore, what Apple's proposal amounts to is that there would, in
4 practice, be no interaction between Kent and Ennis, or at least not an interaction that
5 is fair to our class members. The effect of this would be to deny members of the Ennis
6 class access to justice and, indeed, we say neuter the tribunal when it comes to
7 avoiding inconsistency between the two sets of proceedings. We say both of these
8 outcomes would be anathema to public policy and the proper and fair administration
9 of justice.

10 That's all I want to say on agenda items 1 and 2. Very, very quickly on item 3, the
11 tribunal has my point on what I call Apple's saved by the bell approach to certification,
12 should not be permitted to preclude any realistic interaction with Kent. The only
13 suggestion, sir, we make under item 3, which I think chimes with something you put to
14 me, was that there could, today, be a conditional indication that there would be a joint
15 CMC between Kent and Ennis if, of course, the Ennis claim is certified.

16 We say it is important that that direction is made now, for two reasons. First, this is,
17 as I indicated earlier, a case in which every day counts, given the proximity of the Kent
18 trial. We therefore want to avoid a situation of inertia following certification, where
19 there would be a need for another episode to deal with a further direction in relation to
20 a joint CMC. We say that nettle should be grabbed today. Second, of course, we did
21 invite the Kent representatives to attend but they declined, but we say it would be in
22 their interests that there is clarity and visibility today in a tribunal order, of
23 the possibility of a joint CMC in short order in the coming weeks or months. It will
24 assist them to know so that they can plan accordingly. There is benefit in that being
25 formalised rather than being a matter for speculation, or a matter of reading the tea
26 leaves on the transcript. That's all I want to say on agenda item 3.

1 Those are my submissions on agendas 1, 2, and 3.

2 **THE CHAIR:** We are provisionally in favour of that direction, that there should be,
3 now, a conditional order made for a CMC.

4 **MR O'DONOGHUE:** Thank you. I don't know if it is opposed but we will hear from
5 Mr Parker.

6 **THE CHAIR:** Shall we deal with those items first, Mr Parker?

7 **MR PARKER:** Sir, yes. We are entirely in your hands.

8 **THE CHAIR:** Yes.

9

10 **Submissions by MR PARKER**

11 **MR PARKER:** So those first two issues perhaps come down to point 1, or question
12 1. Should there be a hearing at all? We have seen the application from the other side
13 for either a rolled-up hearing of certification at trial -- I'm not quite clear if that has been
14 abandoned. My learned friend has not said so, so I do want to deal with that, whether
15 there should be a paper certification or, alternatively, some sort of provisional
16 certification which can be revisited later.

17 Then the second issue is if there is to be a hearing, what should be the case
18 management directions in terms of working towards it.

19 Can I just make two brief provisional points, preliminary points, before I get into those
20 issues? We accept, of course, that -- and have always accepted -- that there is
21 a degree of overlap between the issues arising in this case and in Kent. That's never
22 been denied. We also accept that if this claim is certified, there will be a need for some
23 degree at least of choreography, to try to ensure that the risk of inconsistent outcomes
24 is minimised or entirely ameliorated.

25 But by the same token, the PCR rightly accepts through Mr O'Donoghue today, we are
26 not deciding and we probably can't decide, what the actual substance of that

1 interaction will be. Among other things because we don't have the tribunal, the chair
2 for Kent, here with us, to work out what would be appropriate at this stage. So that's
3 really not on the menu for today. So the focus must be on the directions for getting
4 this CPO application done.

5 Second, we also agree it's really not necessary, despite the frequent baiting, perhaps
6 eagerness, from PCR, to be told all about the details of what the opposition to the CPO
7 application will be, in circumstances where we have not yet filed our written response.
8 So we are very reluctant to be drawn into that.

9 My learned friend is very pejorative. He says the sum total is only one or two lines in
10 the skeleton about what it is likely to be about. But that is really a little bit unfair and
11 puts the cart before the horse. The issue is when that happens, not what's going to
12 be in it once we file it.

13 So on the question of whether there should be a hearing, as opposed to paper
14 certification or the other postulated alternatives, those paragraphs 8 to 10 of the draft
15 order from the PCR, there has been no attempt by the PCR to actually explain what
16 the proper basis for taking that approach would be. And we respectfully submit that
17 there is not one and it would be, really, directly contrary to the statutory provisions and
18 the case law and certainly so in this case.

19 I just want to briefly develop three points, three reasons, why we say that is the case.
20 The first point is that what's proposed is really very difficult to square with the
21 legislation, both the primary legislation and also the rules. Could I invite the tribunal's
22 attention to that for just a moment? This is authorities bundle and tab 1 is the Act.

23 Page 3 contains section 47B(4). That's just next to the second hole-punch on page 3.

24 It says:

25 "Collective proceedings may be continued only if the Tribunal makes a collective
26 proceedings order."

1 That strongly suggests the idea of putting off a rolled-up hearing until trial is really not
2 appropriate, for reasons that I will come to. The other relevant factor is the rules. They
3 are further back in the bundle in tab 20. They start at page 505. I would like to look
4 at 511, if I could, please. Authorities bundle, tab 20, page 511. Hopefully you have
5 section rule 77 at the top there.

6 It says:

7 "The Tribunal may make a collective proceedings order, after hearing the parties, only
8 ..."

9 So that obviously envisages that the parties will and should be heard.

10 The other point across the page, two pages forward at 512, this is rule 79:

11 "Any member of the proposed class may apply to make submissions either in writing
12 or orally at the hearing of the application for a collective proceedings order."

13 What that emphasises -- and I will come to this as the second point -- is that
14 certification is not just a contest between the proposed defendants and the proposed
15 class representative, but it very much involves the interests of the proposed class
16 members. In an opt-out class claim, they are being asked to buy into litigation,
17 effectively without their consent and it is the tribunal's gatekeeper role -- this is the
18 second point, there are numerous authorities emphasising this -- to check that the
19 statutory conditions are actually met. We will see that is meant to be a transparent
20 process.

21 That's also relevant, I should say, to the directions that are to be discussed because
22 there has to be sufficient time and notice built into the process, so that members of the
23 class, after they have been given the notice of the claim, can apply if they want to, to
24 make any submissions to the tribunal at the transparent hearing.

25 It is also noteworthy that those rules set out very prescriptive conditions that have to
26 be satisfied for certification. It is very difficult to see how those could be read as

1 permitting certification, where the conditions are only provisionally satisfied. We are
2 very sceptical about the statutory propriety of the proposal for provisional certification.
3 The second point, this is the gatekeeping role, doesn't require too much emphasis.
4 Can I just remind you of the authorities we have quoted in our skeleton? That's core
5 bundle-page 691. Rather than wade through them, I will just show you where those
6 citations are. That's in our footnote 10 on core bundle-page 691. There is the
7 quote -- I hope you have a footnote 10 at the bottom there.
8 I am hoping you will find that on 691. That should be my skeleton, with paragraph 9.
9 Then at the bottom, a footnote, footnote 10, referring to Merricks in the
10 Supreme Court. Merricks reminds us that the CAT is given an important screening or
11 gatekeeping role over the pursuit of collective proceedings.
12 Gutmann from the Court of Appeal:
13 "[t]he CAT therefore plays an important gatekeeper role in certifying claims and will
14 always vigilantly perform the function."
15 Then third, Mastercard, a decision of the tribunal:
16 "It is part of the Tribunal's function, as a gatekeeper, to satisfy itself that the class
17 representative is likely to be able to bring a claim to fruition, so as to fully assert the
18 rights of class members which will be extinguished by whatever results from the
19 collective proceedings."
20 The other helpful authority I want to refer to on this topic on importance of the
21 gatekeeper role and what that means for the mode by which certification should be
22 decided, is the case of Coll, Elizabeth Coll. That's in the authorities bundle tab 9, at
23 page 192.
24 I should say, in terms of my learned friend's application for written certification, Coll is
25 really the high watermark of their argument, but as you will see in a moment, this
26 doesn't really lend them too much support at all.

1 Just to remind you briefly what the case was about. You can see, if we pick up, please,
2 in paragraph 8 -- my learned friend referred you to Coll but didn't show you the case.
3 What he said was that the reason they decided not to go for paper certification was
4 because the case law was not yet settled. The point really goes a bit further than that.
5 You can see at 8, it says:
6 "On 22 June, the PCR notified the Tribunal of Google's position ..."
7 Which was they were not opposing certification. Google was the defendant:
8 "... and invited us to consider whether or not we would be prepared to determine the
9 CPO Application on the papers."
10 You can see from the last line of 8:
11 "We declined to accede to that invitation. We did so for a number of reasons:
12 "First, and most importantly, as Lord Briggs explained in [Merricks at 4], 'The CAT is
13 given an important screening' ... [function]."
14 We have just seen that:
15 "In particular: '... collective proceedings may not be pursued beyond the issue and
16 service of a claim form ..."
17 That's the CAT's permission:
18 "... in the form of a CPO, for which representative must apply.' Given the Tribunal's
19 role and the potential impact of a CPO on, in particular, Proposed Class Members, it
20 is important in our view that the conduct of a CPO Application is transparent. We are
21 conscious that this is a developing area of the law."
22 This is the point my learned friend made. Because it is a developing area of law, it
23 may not be so appropriate to do it on paper. They also then say over the page at
24 subparagraph 2:
25 "Secondly, whilst the PCR offered to answer any questions in writing that the Tribunal
26 might have in relation to this CPO Application, we did not consider that to be a

1 satisfactory substitute for an oral hearing in this case. In our view, we did not consider
2 that it would necessarily prove to be cost or time effective for the parties or the Tribunal
3 to become engaged in what had the potential to become a number of exchanges ..."
4 You can immediately see the practical concerns about a written procedure. Short cuts
5 make long delays, as the phrase goes.
6 That really dovetails with the point I made about the rules, particularly rule 79.5 which
7 is that part of the process is that the members of the proposed class have the chance,
8 after notice is given of the claim -- and the agreed date for notice, by the way, is to be
9 14 June -- after they have had notice, if they want to, to prepare, instruct lawyers and
10 pitch up and say what they want, either in favour or against the certification.
11 My learned friend also referred to Ad Tech which I just want to say something about.
12 That's also in the same bundle. That's behind tab 25 at 573. You will recall -- you can
13 see from the first page of the judgment at 575, again a claim involving Google. 575
14 paragraph 2, the first line, this was a claim of some considerable technical complexity.
15 Just at the very bottom of that paragraph, it says that the value at risk, if the pleaded
16 claims are successful, ran into a number of billions of pounds. Unsurprisingly, Google
17 had resisted certification, as is its right.
18 The basis of the objection, you can see in paragraph 3, first, that the claim form was
19 insufficiently pleaded. Second, that the methodology was insufficiently articulated.
20 That was what was to be dealt with in the certification application. So a very different
21 proposition. And we also see at 4, that there are questions of limitation and the
22 structure of Ad Tech's legal team but they were not advanced as objections to
23 certification.
24 Then the tribunal says at 5 -- I think we just saw part of this but the context of the whole
25 paragraph is really quite useful. It says:
26 "The hearing initially listed for this application was adjourned. Ad Tech criticised

1 Google for opposing certification on grounds that were too granular; Google stated it
2 could not properly be ready for the hearing in light of the voluminous materials filed by
3 Ad Tech. Clearly, a respondent to an application for a collective proceedings order is
4 entitled to resist such an order on whatever (proper) grounds it sees fit; and the
5 applicant for the order must not only explain to the Tribunal why the making of a
6 collective proceedings order is justified, but also respond to such other points as the
7 respondent makes. Nevertheless, the volume of material that has been produced for
8 the purposes of this application is troubling, both in terms of [time and cost] ..."

9 Then you have seen my learned friend, I think, referred you to the following part of the
10 passage.

11 Later in the same judgment, paragraph 38, page 591, again my learned friend just
12 read you the first part of paragraph 38 but I wanted to show you the end of it. It says
13 that the Microsoft test is not a barrier to access to justice. If it were, it would be clearly
14 contrary to the decision in Merricks:

15 "The general rule -- in collective proceedings as in the case of individual claims -- is
16 that arguable claims ought to proceed to trial. Of course, in the case of collective
17 proceedings there are a number of additional requirements (safeguards for the
18 protection of both class and defendants) that need to be satisfied. These are set out
19 in rules 78 and 79 of the Competition Appeal Tribunal Rules 2015. Clearly, where
20 these requirements are not satisfied, an application for a Collective Proceedings Order
21 should fail."

22 So what we see is that there was a clear distinction between issues that are real
23 certification issues and the unattractive prospect of somebody trying to start a mini trial
24 of the merits in the context of a CPO -- the arbitration of a CPO application. I can
25 make quite clear that we are fully cognisant of the distinction and that the intention is
26 to focus purely on certification issues.

1 What I have adverted to in my skeleton, which will be developed in full in the response
2 to the CPO application in due course, is that in our submission, there are clear conflicts
3 of interest between members of the class. In effect, the way the claim is set up
4 involves a cutthroat scenario between some members of the class and others about
5 how the claim should be conducted. If we are right about that, that is obviously, we
6 say, a point to be dealt with at the certification stage.

7 We were slightly put off -- the letter that came on Wednesday which included this Ad
8 Tech judgment, seemed to suggest that the possibility of conflicts of interest was not
9 a certification issue. That letter referred to paragraph 52 of this judgment, which I can
10 just show you. This is Ad Tech at 52. That is page 597 of the authorities bundle.

11 Paragraph 52:

12 "Google raises a number of points [in their skeleton] regarding the definition of the
13 class, including a potential conflict of interest between Publishers (the opt-out
14 sub-class) and Publisher Partners (the opt-in sub-class). This was not raised as a bar
15 to certification, and (having heard submissions) we are very much of the view that
16 what Google described as a conflict of interest was no such thing and certainly did not
17 require the class definition to be amended. The issues that Google raised are more
18 appropriately and effectively dealt with during the course of the proceedings, and in
19 particular when questions of distribution come to be considered."

20 This is a case about a conflict between two subclasses that are separately
21 represented. That's a very different point from one PCR with a single opt-out class,
22 who has a fiduciary duty to all of the members, attempting to combine a group of
23 people whose interests in the claim are at odds with one another. This is really quite
24 distinguishable. We have included in our response to that the following case in the
25 bundle, the last tab and this is Trucks.

26 I don't think I need to actually read the paragraphs. The paragraphs are paragraph 94,

1 page 624, and 97 and that's at 625. What they essentially show is that a conflict of
2 interest between the members of a single class is very much a matter that has to be
3 dealt with at the certification stage. To the extent it is being suggested that certification
4 is somehow going to be, you know, a collateral attack on Kent or a mini trial of the
5 merits, that's just simply not right. You, I hope, can rely on our side to focus ourselves
6 on what are really the certification issues and not the trial issues.

7 The point that we take out of all of that is really the idea of paper certification, where
8 there's never a hearing -- and we will decide that today -- before the members of the
9 class have even been notified formally about the claim and have a chance to say if
10 they would like to be heard. The idea of doing that in private behind closed doors or
11 worse, provisional certification or rolling up certification until later, even though there
12 may be numerous conflicts, as we say, between members, really just would not be
13 appropriate.

14 The third and final point on this aspect of the case -- this is really about the idea of
15 provisional certification and, again, my learned friend did not actually press that this
16 morning, although he didn't abandon it either, but I will just take the point very quickly.
17 In the written application for provisional certification, the basis that was put forward for
18 that was rule 85 of the CAT rules and also the discussion of that provision in McLaren;
19 the Court of Appeal's decision in McLaren.

20 The short point, and with respect, the obvious point, is that rule 85 empowers the
21 tribunal to vary or revoke a CPO once it has been made. It has nothing to do with the
22 process or circumstances or conditions leading to the making of a CPO.

23 In our submission, it provides no basis whatsoever for the idea that you could have
24 a provisional certification at this stage, under that rule. McLaren also really does not
25 assist. We dealt with this in our skeleton at paragraph 9.2. I don't propose to turn it
26 up. The short point the court was making in McLaren was that at the certification

1 stage, pre-discovery, the methodology of a claim is usually at a provisional stage. It
2 is very often provisional and may be subject to review. What the court says is the
3 methodology, if it later proves flawed, can be revisited. So we can have a second
4 question later, if the methodology collapses, about whether certification should be
5 continued. The idea is you can have more than one consideration of a certification
6 question, not less than one, or not one much later in -- the first one much later in the
7 proceedings.

8 So for those reasons, we respectfully say that particularly in circumstances where the
9 proposed defendants are opposing certification, and where notice of the matter has
10 not been yet formally published for the class, it would be quite wrong to take a short
11 cut on certification and have no hearing, rush it through on paper, or kick it down the
12 road for trial.

13 That then brings us to the second issue which is the pragmatic question, if we have
14 a hearing, what are the directions going to be? That really seems to come down to
15 something quite narrow which is whether we are on track for a late July hearing or
16 a hearing as soon as possible in September. Perhaps not an earth shattering matter
17 of deep jurisprudential tenor. Everything else, the timeline leading up to that, really
18 seems to flow from what we think about the hearing dates.

19 Just to be very frank, the particular concern for the proposed defendants is the
20 proposal that they have to file a written response by 5 July. We are all in favour of
21 a prompt resolution of this matter, but the timetable has to be a fair one. We have
22 asked for 26 July. That is already a lot shorter than one would normally expect in
23 these cases.

24 My learned friend also, I think, seems to accept that we are all running on a much
25 shorter clock. It probably also shouldn't be overlooked that this is not the only game
26 in town. The team is also simultaneously working on the responsive evidence for Kent

1 | which is itself a very heavy job. So this is not the only thing that's going on.
2 | The only real argument that my learned friends advance in support of a July instead
3 | of a September hearing, is the assertion that if we have the hearing in September, that
4 | will preclude, my learned friend's word, any possible interaction with Kent. With
5 | respect, we simply don't accept that premise is right. The tribunal has asked about
6 | that.
7 | The PCR rightly accepts that whatever his participation in Kent is going to be, it will be
8 | limited in some way. Again, that concession must be right. We certainly don't accept
9 | that by having an early September as opposed to late July hearing, that some red line
10 | is crossed that makes the thing impossible.
11 | Can I also just make it absolutely clear: there has been a lot of innuendo, suggesting
12 | that somehow our side is trying to tactically engineer a delay for some unknown or
13 | unstated purpose. I just want to categorically put that to bed. The only interest both
14 | defendants have is in having enough time to actually complete and prepare their
15 | response and get it filed for the tribunal. There is no interest whatsoever for the
16 | defendants to create a situation where there can be no possible means of interacting
17 | between the two cases or having a hermetic seal between them. But by the same
18 | token, there is nothing very much we can do about the timing. The fact is that the
19 | claimant has started this case some two years after Kent. And as my learned friend
20 | says, we are where we are. But that, the late start and the desire, having started the
21 | race late, to try to catch the lead pack by the PCR, cannot be a basis for sweeping
22 | away the defendants' right in certification -- which we have seen is a real and serious
23 | process -- to respond properly. That's sort of the essence of our position. It's not
24 | entirely irrelevant that the reason that we are in this position is because you have this
25 | very long delay, which is entirely unexplained, between Kent having started and Ennis
26 | getting the claim going. If he had started sooner, we would not be in this position.

1 So we do invite the tribunal to adopt the draft case management directions that we
2 have proposed.

3 The last issue on just purely -- well, last two issues, purely pragmatic directions. The
4 first is the length of the hearing. We have suggested two, plus one in reserve. My
5 learned friends have suggested one plus one. Again, that is probably decided in the
6 toss. Our position is, looking at where things stand, we think it's probably likely to
7 need two days to ventilate the issues between these parties and leaving open the
8 possibility that members of the class or interested persons may apply to be heard by
9 the tribunal, it would be unfortunate if we decided today that it would only be, for
10 example, a two day hearing, if a number of people come out of the woodwork and that
11 extends the timeline. We would not want to go part heard or not be able to deal with
12 the matter in the time that we have.

13 We are to some extent in the tribunal's hands. It may depend on available dates.

14 I should also say, very lastly, we have no objection at all to the idea of a joint CMC
15 being directed following the -- we would say, if certification of the claim and they would
16 say when certification of the claim. That's not objectionable at all. That's what we say
17 on the first three agenda items and I leave my learned friend on the class
18 communications issue, unless there is anything else I can assist with.

19

20 **Reply submissions by MR O'DONOGHUE**

21 **MR O'DONOGHUE:** Just a couple of minutes in a brief response if I may.

22 My learned friend's submissions were instructive. As I indicated to the tribunal, we
23 asked on 23 May, what are the show-stoppers for certification? I showed you the one
24 and a half points in the skeleton at paragraph 11. My learned friend, in his
25 submissions, confirmed, one, as I apprehend, no arguability point has been taken.

26 The only point he mentioned, in fact, is the alleged conflict of interest. He didn't even

1 mention the point about opt-out proceedings.

2 The tribunal is entitled to interrogate the following question. They put forward a time
3 estimate of three days, which has now, on the hoof, been reduced to two. So far as
4 we can tell, we are going to spend those two days arguing about a potential conflict of
5 interest. In my submission, one needs to apply a degree of realism to that submission.
6 We do not need several months or even two days to deal with the conflict of interest
7 point which we say is misconceived, because the short answer, frankly, is anyone who
8 wants to opt out can opt out.

9 It is quite wrong for Apple to come to the tribunal, given the exceptional circumstances
10 we face, and say: well, we want a three-day hearing but apart from one point, we are
11 not going to tell you what it's about. It's not about us trying to get a sneak preview of
12 the certification points. Given the exceptional circumstances we face, the tribunal is
13 entitled to know in reasonably exhaustive fashion, what would be the issues at the
14 certification stage that are said to be show-stoppers. If the long and short of this is the
15 conflict of interest point that until this week, the richest company in the world is dealing
16 with, the suggestion that that can't be done before September, that the response to
17 that cannot be done before 5 July, and that it cannot be done in one or two days, in
18 my submission is completely and utterly unrealistic.

19 So that is why we say a July hearing is eminently achievable, given what has
20 effectively been a collapse in my learned friend's case in terms of the issues for
21 certification. As we understand it, there is effectively one point for certification, maybe
22 one and a half. So that's the first point on the directions.

23 Of course, they have had the claim for a year. We are now two months after the
24 jurisdiction judgment. This is not their first rodeo. They have had Kent. The
25 suggestion, "well, we are only starting to get our act together now as to what we might
26 say in certification", should be given pretty short shrift.

1 Again, these are exceptional circumstances. A company as well-resourced as this
2 should be expected to get its act together and not muck around with being coy in terms
3 of opening the kimono, as to what will be the issues for certification.

4 Second point, a lot was made of the position of third parties. The notice in this case
5 will be served next week. That gives five weeks until a hearing in July. We say in the
6 circumstances, again exceptional, that is a reasonable period.

7 Then on the directions, I mean, the tribunal is entitled to ask, based on what my
8 learned friend has said, why does he need until September to deal with the issues he's
9 raised? He simply has not come back with a coherent reason as to why this cannot
10 be done in the timetable we have suggested. It's not as if the tribunal has been
11 presented with a witness statement saying, well, the following problems arise, these
12 are the issues. It is in my submission a rather cowardly approach where they are
13 hinting at potential difficulties without having the courage to get off the fence and tell
14 the tribunal in terms of case management what are those difficulties, why do they
15 necessitate waiting until September.

16 It is, in my submission, a bit rich for someone who says they need months to prepare
17 for a certification hearing to then say when it comes to a trial we can, from a standing
18 start, realistically in October, catch up no problem. That cannot be taken as a given
19 today. It is highly likely we will need to serve non-duplicative evidence -- certainly
20 economic, potentially factual, that is all to be decided -- but the suggestion today that
21 based on a September hearing we should be effectively cut off at the pass because
22 they cannot get their act together before July, in my submission is one that should be
23 rejected.

24 **MR CARALL-GREEN:** Sir, I am in your hands about timetabling. I am very happy to
25 make a start now. You may wish to take the morning break or retire to consider items
26 1 to 3 first.

1 **THE CHAIR:** We will take a five-minute break.

2 **MR CARALL-GREEN:** I am grateful.

3 **(11.30 am)**

4 **(A short break)**

5 **(11.44 am)**

6

7 **Submissions by MR CARALL-GREEN**

8 **MR CARALL-GREEN:** Sir, this is the PCR's application for an order restricting
9 communications between Apple and the members of the class. The structure I am
10 going to adopt is to give you a bit of the background, then I am going to address the
11 problem that needs to be grappled with, then propose a solution, and finally deal with
12 some objections from Apple. That's where I am going.

13 Now in terms of the background, the procedural background is set out in our skeleton
14 argument, starting at paragraph 22, which can be found in the core bundle page 678.
15 I am not going to ask you to turn it up, because I would just like to give a sketch of the
16 background before we get to the current position.

17 From 28 November 2022 onwards, it was believed because of the tribunal's decision
18 in McLaren that communications with the class were prima facie prohibited and that
19 a defendant or a proposed defendant had to apply for permission. So for that reason,
20 on 23 October 2023, Apple applied for such permission. You can see that in the core
21 bundle at tab 20. The PCR resisted that application which then led to Apple's request
22 on 17 November of that year for an interim order, so not final permission to
23 communicate with class members but an interim order on a more limited basis, and
24 that's at core bundle tab 26.

25 The tribunal then acceded to that request. On 27 November, they made what is called
26 the interim contact order. You can find that in the core bundle at tab 8. So at that

1 stage, the position was that Apple was prohibited from contacting the class, save as
2 permitted by the interim contact order which allows it to contact potential industry
3 experts in the Ennis class for the purpose of seeking to obtain evidence or information
4 in relation to the issues in the Kent proceedings.

5 That position persisted for not that long, until 8 December 2023, when the Court of
6 Appeal overturned the tribunal's decision in McLaren and held that the CAT rules
7 themselves did not prohibit communications. You will find that in the authorities bundle
8 tab 18. We will come to the relevant passages from the Court of Appeal's judgment
9 in a moment, but the Court of Appeal made clear that the tribunal could regulate
10 communications in the exercise of its case management powers.

11 So the point I make first is that the Court of Appeal's judgment is, effectively, simply to
12 invert the default position. Previously the default was no communications with
13 permission required; now the default position is that communications are permissible,
14 save that a class rep or a PCR can invite the tribunal to make an order in the exercise
15 of its case management powers to regulate those communications.

16 So what the PCR is asking for now, by the order he seeks -- and I will take you to the
17 drafting of that in my third section on the solution -- is effectively for the position that
18 obtained between 27 November and 8 December 2023 to be restored. So the PCR is
19 not asking for anything especially surprising or outlandish, but for the position that the
20 tribunal itself established, at least on a holding basis, to be restored.

21 Now I promised just a moment ago that I would take you to the relevant passages from
22 the Court of Appeal's judgment, and there are several. But if we can start in the
23 authorities bundle tab 18, page 460, please. I will start just above letter G --

24 **THE CHAIR:** What page are you on?

25 **MR CARALL-GREEN:** 460.

26 **THE CHAIR:** Yes.

1 **MR CARALL-GREEN:** Starting just above the letter G, the appellant there:
2 "... recognise that if there is no a priori restriction [ie if the rules don't prohibit
3 communications] the CAT can nevertheless impose a restriction by way of its case
4 management powers in appropriate circumstances in individual cases."
5 Taking it slightly out of order, I am going to jump up to paragraph 98, just above letter
6 E:
7 "If, on the other hand, it is a matter of case management to impose restrictions [I have
8 just shown you that it is], they can be tailored to the requirements of each case,
9 including the position of individual consumers who might require greater protection
10 than others."
11 This is important:
12 "It may be appropriate to impose some restrictions at the initial CMC or when making
13 the CPO, ..."
14 And we are at the initial CMC now. I raise this because the point is taken against me
15 that the case has not yet been certified, but the Court of Appeal explicitly recognises
16 that the first CMC which takes place before certification could be an appropriate stage
17 at which to make an order of this nature.
18 Finally, on this page, returning to the sentence just after the one I read first, the Court
19 of Appeal says:
20 "The dispute would therefore appear to be about what the default rule should be, rather
21 than about whether a particular communication should be permitted in a particular
22 case."
23 So that confirms the point I made earlier which is that the effect of the Court of Appeal's
24 decision is simply to invert the default position. It doesn't comment in detail or indeed
25 at all, on whether communications would be appropriate in any particular case. That
26 wasn't what the Court of Appeal was being asked to decide.

1 Then in terms of how the Court of Appeal suggests this kind of application ought to be
2 dealt with as a matter of principle, if I could invite you to turn to page 465. Starting
3 right at the bottom of the page, the Court of Appeal introduces the postface from
4 a Canadian decision called Del Giudice that starts in the quotes at the bottom of
5 page 465, starting at paragraph 52 of that post face. If I can draw out two pages from
6 the post face, starting on the last line of the page:

7 "If the defendant wishes to communicate with class members and the communication
8 is: (a) out of the normal course of the defendant's business or affairs; and (b) on a
9 topic that is substantively significant to the class action, then -- not as a matter of
10 courtesy -- but as a means to avoid problems and objections, the defendant's lawyer
11 should ask class counsel if there are any problems or objections to the notice class
12 counsel should respond with its objections, if any."

13 Now skipping to just below the letter C:

14 "If after considering class counsel's comments, there remains a dispute between the
15 parties about the notice, then the defendant's counsel should consider inviting class
16 counsel to schedule a [CMC] ..."

17 So essentially there will be that application if agreement is not reached.

18 What is the significance of that postface? Well, it is given in paragraph 115 of the
19 Court of Appeal's judgment. The Court of Appeal says, or Lord Justice Popplewell
20 says:

21 "I have set out the postface in full because it might be regarded as helpful for the CAT
22 to issue a practice direction, or to make orders [again] at the first CMC or when making
23 a CPO, to guide the parties as to communications from defendants in an appropriate
24 case, and the postface in Del Giudice might form a helpful starting point."

25 So the Court of Appeal clearly states that the post face could be the starting point for
26 a practice direction or an order. There is no practice direction at the moment, sir, so

1 that simply leaves the question of whether you should make an order in this particular
2 case.

3 Just two more passages from the Court of Appeal's judgment, to illustrate how the
4 case concludes. First of all, page 468. I am now at paragraph 122, starting just below
5 the letter E:

6 "It is accepted by the appellants that some restriction on freedom to communicate with
7 class members can be justified in seeking to achieve that objective ..."

8 That is the fair, just and orderly disposal of litigation proceedings:

9 "... but submitted that it can be achieved on a case by case basis by the exercise of
10 case management powers."

11 So that is the Court of Appeal's disposal of the argument regarding article 10, the
12 freedom of expression. Again, the proper exercise of case management powers can
13 constitute a legitimate interference with that right.

14 Then the final disposal at page 471, now on paragraph 134, starting just below D:

15 "It remains open to MMCR [ie the PCR there or the class rep there] to invite the CAT
16 to make an order on a case management basis ... The CAT, with its detailed
17 understanding of the claims and the evidential and procedural position, is far better
18 placed to consider whether to make such an order ..."

19 So from all those passages, sirs, it is clear that the Court of Appeal is in no way saying
20 that controls on communications are somehow inappropriate. It very much leaves that
21 question open to you. It simply says that the rules don't impose that prohibition by
22 default. And that, indeed, is how the chair interpreted the Court of Appeal's
23 decision -- the Chair in Kent interpreted the Court of Appeal's decision, and we have
24 a transcript from the Kent CMC late last year in the supplementary bundle at tab 13.
25 I don't propose to turn that up, because you will have read the Court of Appeal's
26 judgment for yourselves and you will know what it says.

1 I deal with that with some care because my learned friend says in his skeleton
2 argument at paragraph 22.1 that there is some kind of special legal threshold for this
3 kind of order, and that I need to show that the case is "extraordinary" or that the order
4 I seek is "necessary". For that, he relies on the Court of Appeal's judgment at
5 paragraph 111, which is at page 464, starting at the end of the page.

6 You see there that the Court of Appeal was referred to the Ontario cases. Then, just
7 after B, we see that in one of the Ontario cases, Patterson J observed that there was
8 nothing in the legislation that prohibited defendants from communicating with the class
9 members. So much as the Court of Appeal has established the position here.

10 Then, at C -- and this is the passage on which my learned friend relies -- "He", that is
11 the Canadian judge:

12 "... cited the statement of principles by Hoy J in [a case called Smith], where the latter
13 had emphasised that there was no absolute prohibition on such communications, and
14 that an order limiting communication was an extraordinary one which had to be
15 justified as necessary to avoid a real and substantial risk ..."

16 What is the significance of that case? The Court of Appeal tells us in paragraph 112
17 which begins just above letter E, the significance of the case is that it confirms the
18 position in Ontario that there is no default position under the rules.

19 Secondly, it suggests that that is a regime which satisfactorily balances the interests
20 of the parties.

21 Ie, a rule which doesn't impose a blanket ban but which invites a decision maker in
22 each individual case to impose case management restrictions, depending on the facts.

23 So we know what the significance of this case is and it decidedly isn't to absorb the
24 language of extraordinary and necessary into domestic law.

25 We don't really know what the significance of those terms was because we don't know
26 what rules Judge Hoy was applying and, therefore, what threshold he had to cross.

1 What we do know is that the tribunal here is empowered to restrict communications in
2 the exercise of its case management powers and we know that when doing so, it
3 should have regard to the governing principle at rule 4 of its rules. The tribunal has
4 those in the bundle at authorities bundle tab 20, page 506. I don't propose to turn it
5 up, because the tribunal will be very familiar with those principles that are similar to
6 those articulated in the overriding objective.

7 So in my submission, there is no extraordinary and necessary threshold. But even if
8 there is one, I say that it is crossed. Because the evidence does make this case
9 sufficiently extraordinary, if indeed that is needed, and an order is necessary in order
10 to avoid a real and substantial risk to the fair determination of the proceedings. So the
11 evidence on which I rely for that is what we should look at now.

12 So this is my second section which I described as "the issue that needs to be grappled
13 with". Now the evidence is again surveyed in my skeleton argument at paragraph 36.
14 I will take the section as read but I would like to highlight five of the key sources of
15 evidence on which I rely. For this we will need the supplemental bundle because that
16 contains electronic versions of the underlying documentary evidence on which
17 Mr Geradin relies in his witness statement. I understand that was provided
18 electronically but not in hard copy. Please correct me if that is wrong.

19 For the supplementary bundle I would like to start at page 94. What we are looking at
20 here is the Competition and Markets Authority's final report on its market study of
21 mobile ecosystems dated 10 June 2022. Starting at the top of the page:

22 "Apple ... effectively control[s] the terms of access between consumers and
23 developers of native apps. They decide which apps are allowed in their store, how
24 apps are ranked and discovered and the commission that will be taken from app
25 developers' revenues."

26 Now skipping to paragraph 2.32:

1 "Apple ... [has] captured such a large proportion and volume of consumers in the UK
2 that [its] ecosystem is, for practical purposes, indispensable to online businesses.
3 Apple act[s] as a gatekeeper to most UK consumers of mobile devices and as a result,
4 can set the rules of the game for providers of online content services."

5 The same point is made on page 256 of the bundle, which is the document. I am
6 reading the first bullet on this page:

7 "Apple's ... control over [its] mobile ecosystem allows it to set the 'rules of the game'
8 for app developers who rely on [Apple's] App Store to reach customers and have little
9 or no ability to negotiate over terms."

10 They rely on the App Store, of course, because it is the only route to market. If you
11 are an app developer, and this point was made during the jurisdiction hearing, the only
12 way you can get to your customers is through Apple.

13 What, then, are the implications of this? Well, the CMA identify at page 83 of this
14 document, one implication that appears to flow from this. I am reading from
15 paragraph 1.15 in this report:

16 "Through this final report, we have surfaced a great deal of information that was not
17 previously in the public domain. However, there has also been some information that
18 we have chosen not to publish – in some cases because the information is highly
19 commercially sensitive, and in others because parties that provided the information to
20 us indicated that they wished to remain anonymous for fear of repercussions."

21 Now that repeats a statement that is made in the CMA's interim report. That's also in
22 the supplementary bundle at page 617. No need to turn it up, because it makes this
23 point in the same terms.

24 **THE CHAIR:** Sorry, what page?

25 **MR CARALL-GREEN:** For the interim report, sir, that would be page 617. But the
26 question is, of course, what repercussions might app developers fear? Well, the CMA

1 describes those potential repercussions at page 269 of the final report. That's of the
2 bundle but it is still in the final report.

3 What could app developers possibly be afraid of? Well, here we are, paragraph 6.47:
4 "The majority of developers that we requested information from had negative
5 experiences with Apple's app review process. Developers variously described the
6 process as 'obscure', 'arbitrary', 'capricious' and 'Kafkaesque'. These developers
7 raised a large number of concerns about the issues App Store review had caused for
8 their businesses, and we had similar concerns from developers who responded to our
9 online questionnaire or to our Interim Report."

10 So the point is that Apple can take an app developer's access to market, its life blood,
11 and switch it on and off at will. The process by which Apple decides whether or not to
12 list an app in the App Store has been described as arbitrary and capricious.

13 We don't need to take the CMA's word for this. For our second set of resources, we
14 can go straight to what the app developers themselves have said. Two examples.
15 First, an app developer called Qustodio that makes an app that gives parental controls
16 over devices for children. Qustodio's remarks to the CMA are at page 1719 of this
17 bundle.

18 Starting at the beginning, under heading 2, at the top of the page:

19 "As is publicly known, last April 2019 Qustodio filed a complaint against Apple for an
20 abuse of a dominant position consisting in threatening with expulsion and blocking
21 updates from our parental monitoring app within the Apple App Store, without objective
22 justification."

23 That's the complaint, that the arbitrary and capricious app review process will be used
24 to shut down an app developer's access to market. Then that footnote at the end
25 there, footnote 2:

26 "Kidslox, another app active in the parental monitoring market, joined the complaint.

1 Some other operators supported the complaint confidentially but decided not to do so
2 formally, for fear of further retaliation."

3 So there you are, direct documentary evidence from Qustodio that app developers
4 fear retaliation from Apple.

5 The second example is the example of Spotify. This is documented in various places
6 in the bundle, but at page 1334 is a potted summary. Or it contains a potted summary.

7 This is an article from Variety magazine. At the bottom of the page, the penultimate
8 paragraph:

9 "Spotify has alleged that Apple has taken punitive steps against the music-streaming
10 company to retaliate for Spotify pulling out of the App Store's in-app purchase system.
11 That has included rejecting Spotify's app multiple times for purported violations of the
12 App Store guidelines, Spotify has claimed."

13 For our third source, I would like to zoom out one step and look at what industry bodies
14 have said. We have seen the app developers themselves. Now industry bodies.
15 I refer in particular to the Coalition for App Fairness. Page 1314 explains what the
16 Coalition for App Fairness is, in its own words, in a submission to the CMA.

17 The second paragraph on that page, starting at the second line:

18 "[The Coalition] is an independent nonprofit organization founded by industry leading
19 companies to advocate for freedom of choice and fair competition across the app
20 ecosystem and it comprises more than sixty members of all sizes."

21 Let's see what the Coalition for App Fairness says, on page 1327 of the bundle. The
22 paragraph immediately above the sub-heading, starting on the third line:

23 "The app store review process provides Apple ... with unique control over app
24 developers, and is a prime example of a digital platform acting as a 'private regulator'
25 for hundreds of thousands of businesses. Yet the erratic review process deployed by
26 Apple creates a hostile business environment for developers, delaying them in rolling

1 out new and improved features for their users. Worse, the app review process can be
2 used as a tool for retaliation as Apple can block for frivolous reasons the apps of
3 developers who have expressed their discontent with Apple."

4 **THE CHAIR:** Is there any evidence of Apple behaving in a way which you would say
5 was inappropriate in relation to legal proceedings?

6 **MR CARALL-GREEN:** Sir, these submissions are made in the context of
7 administrative legal proceedings. What we are talking about here is calls for evidence
8 by the CMA. I will take you now to the US position, where the US subcommittee in
9 Congress expressed concerns that app developers had not come forward to Congress
10 to give evidence because of fear of retaliation from Apple.

11 Sir, that document is at tab 14, sub-tab 20 of the supplementary volume. I will take
12 you to 1353 first of all. Starting at the last paragraph:

13 "Finally, the market power of the dominant platforms risks undermining both the
14 political and economic liberties. The Subcommittee encountered a prevalence of fear
15 among market participants that depend on the dominant platforms, many of whom
16 expressed unease that the success of their business and their economic livelihood
17 depend on what they viewed as the platforms' unaccountable and arbitrary power."

18 Then to your point, sir, page 1360, you can see here in the middle of the page, starting
19 on January 7, 2020, the committee -- that is a committee of the US Congress -- has
20 sent a round of RFIs to market participants to gather evidence in connection with its
21 investigation. Then in the next paragraph:

22 "Unfortunately, some market participants did not respond to substantive inquiries, due
23 to fear of economic retaliation. These market participants explained that their business
24 and livelihoods rely on one or more of the digital platforms. One response stated,
25 'Unfortunately, the CEO is not able to be more public at this time, out of concern for
26 retribution to his business,' adding, 'I am pretty certain we are not the only ones that

1 are afraid of going public'."

2 Further on, what these market participants said to Congress is at page 1400. Starting
3 at the top of the page:

4 "Several market participants told the Subcommittee that they 'live in fear' of the
5 platforms."

6 Then specifically on Apple, skipping a few lines, starting after footnote 374:

7 "An attorney representing the app developers said they 'fear retaliation by Apple' and
8 are worried that their private communications are being monitored, so they won't speak
9 out against abusive and discriminatory behaviour."

10 Then, sir, the US Congress report returns to the means by which this retaliation might
11 be effected. That starts on page 1651 of the bundle. The first paragraph that begins
12 on that page, although not the first four lines, but the first paragraph beginning on that
13 page:

14 "The Subcommittee learned that Apple has engaged in conduct to exclude rivals to
15 benefit Apple's services ... For example, Mr Shoemaker ..."

16 Mr Shoemaker used to work at Apple:

17 "... explained that Apple's senior executives would find pretextual reasons to remove
18 apps from the App Store, particularly when those apps competed with Apple services."

19 Similarly, skipping down to the last paragraph:

20 "One social media platform expressed concern that Apple has absolute discretion
21 about whether to approve apps or accept updates. Developers are frustrated that
22 Apple's interpretation and enforcement of the Guidelines ..."

23 These are the guidelines that govern App Store review:

24 "... have changed over time, despite prior precedence and the fact developers rely on
25 understanding the Guidelines. One developer described ..."

26 I'm now over the page:

1 "... Apple's Guidelines as 'arbitrarily interpreted' and another party called them 'opaque
2 and arbitrary.' Internally, after an app was rejected from the App Store, an Apple
3 employee wrote to the leadership of the App Store that Apple's decision 'still isn't
4 obvious to people inside the company.'"

5 This continues on page 1653, two more references from this report:

6 "Another app developer that competes with Apple's services noted that the Guidelines
7 are constantly shifting, that Apple arbitrarily decides when an app no longer complies
8 with the rules and those decisions always favour Apple's interests. Others have noted
9 that Apple unilaterally determines if, how, and when to apply its Guidelines, and that it
10 also freely makes up 'unwritten rules' when convenient."

11 Finally, on this report, the next page, 1654 -- I said earlier that Mr Shoemaker used to
12 work at Apple and this paragraph makes that point good. Penultimate paragraph:

13 "In a subsequent interview with Phillip Shoemaker, Apple's former Senior Director of
14 App Store Review, the Subcommittee asked about Apple's treatment of app
15 developers. Mr Shoemaker responded that Apple was not being honest when it claims
16 it treats every developer the same. Mr Shoemaker has also written that the App Store
17 rules were often 'arbitrary' and 'arguable,' and that 'Apple has struggled with using the
18 App Store as a weapon against competitors.' He has noted that 'Apple has complete
19 and unprecedented power over the customers' devices. The decisions they make with
20 regards to third-party apps needs to be above reproach, and currently are not.'"

21 So the point that I draw that from that report is that there is ample evidence that Apple
22 can and does use its App Store to retaliate against others who act contrary to its
23 wishes or interests. And Apple, of course, can do so because if, as I say, if you are
24 an app developer, Apple is your only route to market, so at the touch of a button, Apple
25 can turn off your whole business and as Mr Shoemaker says, Apple's conduct on that
26 front does not appear to have been above reproach.

1 My fifth and final source, sir, are some commentators. First, academic. For this,
2 I invite you to turn to page 1267 of the bundle. This is another submission to the CMA.
3 This time made by two academics, Dr Paul and Dr Irvine, who are both at the
4 University of Strathclyde.

5 The first paragraph, they say this:

6 "Apple ... can remove developers' apps from [its] platform with scant justification, and
7 can impose restrictions and obligations upon these developers around their business
8 models and practices. This serves as strong, coercive pressure."

9 Then the next paragraph, the last three lines:

10 "The CMA and wider Government should explore the strategic loss of control to the
11 UK economy that this may have and the potential negative impacts of this kind of
12 coercive influence being able to be exerted over app developers."

13 Lastly, by way of commentary, at page 1747. This commentary is journalistic rather
14 than academic. This is an article from the New York Times. I start reading in the last
15 paragraph at the bottom of the page:

16 "Yet Apple has also changed rules in ways that many developers find capricious and
17 unfair and, more to the point, scary. While complaints have been raised for a long
18 time about what Ben Thompson of Stratechery calls Apple's 'rent-seeking' practices,
19 many developers do not want to speak out for fear of falling afoul of Apple and, worse,
20 getting banned from its store."

21 It says:

22 "There is plenty more evidence of this nature."

23 There is a limit to how much I want to take you through in this hearing but it is all
24 canvassed in Mr Geradin's witness statement, in the core bundle at tab 19, pages 487
25 to 500.

26 We can go on reading through that, but I trust that the tribunal has the point that there

1 is plenty of evidence to similar effect.

2 Now I stress at this stage that Apple has put in no evidence in answer to any of these
3 points. Not a single page. So there is no reason for the tribunal not to accept
4 Mr Geradin's evidence in its entirety. The only attempt at responding to the evidence
5 is in my learned friend's skeleton argument at 22.3(2). There, my learned friend
6 describes Mr Geradin's evidence as "baseless", "innuendo", "hyperbole" and
7 "hearsay."

8 So just to take stock, the baseless evidence includes the findings of the CMA, the
9 direct documentary evidence of what app developers and industry bodies say, the
10 evidence of Mr Shoemaker, who worked at Apple, a glut of other evidence before the
11 US Congress and multiple academic and journalistic sources. There is in fact no
12 attempt by Apple to engage with anything that these sources have said, and instead
13 we have nothing more than a casual dismissal, but there is a mountain of evidence
14 and it all points in the same direction.

15 What is that direction? Well, two things: Apple has immense power over app
16 developers. Second, app developers fear that Apple will use its power to retaliate
17 against them.

18 Now I could go further on the basis of the evidence and say that Apple does frequently
19 retaliate against app developers, and the evidence does support that position because
20 Spotify gives an example and it is unlikely, in my submission, that app developers are
21 simply jumping at shadows. But for present purposes, it is not necessary to go that
22 far. The simple point is that app developers perceive a threat of retaliation if they cross
23 Apple and that is enough to give rise to serious risks in the litigation.

24 Well, what are those risks? Two examples spring to mind. This is leaving aside the
25 actual risk of retaliation to app developers. But the first is procedural, that app
26 developers may perceive that they are under pressure to opt out, for reasons that are

1 contrary to their interests. The second is evidential, ie not giving evidence or not giving
2 undistorted evidence.

3 Now as I will come on to, it's not clear that evidence from the class will be required but
4 if it is required, then it should be undistorted. There cannot be any question of that.
5 And if it is not required, then it's not clear why Apple would need to communicate with
6 the class on non-business matters in any event.

7 Now Apple has raised in my learned friend's skeleton argument a point which, I think,
8 sir, is a version of the point which you put to me earlier. He says there's no evidence
9 at all of the proposed defendants attempting to exert improper pressure on proposed
10 class members in relation to the proposed claim. We say that completely misses the
11 point. The PCR is trying to guard against a risk that the evidence shows exists.
12 Waiting until Apple has actually attempted to put pressure on app developers would
13 defeat the object of the exercise because then it would already have been done.

14 In any event, my learned friend's argument essentially amounts to an assertion that
15 although the evidence of the public authorities and the app developers and Apple's
16 director and academics and journalists have all identified that there is this threat, that
17 app developers may modify their behaviour in order to appease Apple, Apple will make
18 a special exception for the UK app developers in the class in this case.

19 That is not plausible, given the CMA itself which one would expect to be concerned
20 with UK businesses, has articulated concerns about app developers being intimidated.

21 But in any event, if Apple is willing to give a reassurance that app developers will not
22 be put under pressure, then it should simply accede to the order in the terms proposed.

23 **THE CHAIR:** What is the current position in Kent?

24 **MR CARALL-GREEN:** So far as I am aware, no order has been made. I may be
25 wrong about that, but in any event, we are talking there about consumers. So we are
26 not talking about a class that depends on Apple for its livelihood.

1 **THE CHAIR:** That's true, yes.

2 **MR CARALL-GREEN:** So, that brings me to the drafting, sirs. That is in the core
3 bundle at page 26. There is some red drafting at paragraphs 16 and 17 of the draft
4 order.

5 At core bundle 26, sir. I will give you a moment to read 16 and 17. Three observations
6 on that, if I may, sir.

7 The first is the intention behind the drafting is to honour the spirit and guidance in the
8 post face in Del Giudice. So engagement between the lawyers and referral to the
9 tribunal in the event that agreement cannot be reached.

10 Second, this doesn't restrict all communications. It only restricts communications that
11 have a bearing on the proceedings. We don't seek to interfere with the ordinary
12 legitimate communications that Apple will have with its contractual counterparties.

13 Third, as I said at the top of my submissions, we don't seek to reopen what was
14 determined by the Interim Contact Order. So we simply restore the position that was
15 obtained under that order. So Apple continues to be allowed to engage with the Kent
16 proceedings in the way that it sought via the Interim Contact Order, and if there are
17 further exceptions that need to be carved out, well, that can be a matter of negotiation
18 or application in due course.

19 I would like to deal here with the point about privilege.

20 **LORD NEUBERGER:** Just before you come on to that, I noticed that the drafting of
21 16 doesn't quite follow the post face in the Canadian case, which I think are two
22 conditions. One is it was not in the ordinary course of business. And, secondly, that
23 it substantively affected the proceedings in question, neither of which, I think, are in
24 that. Is there any reason for that or?

25 **MR CARALL-GREEN:** The drafting is intended to be compendious. We would have
26 no objection to clarificatory drafting that, for example, said there was no intention to

1 prohibit communications that would have no material effect on the proceedings. If the
2 tribunal would be minded to clarify the wording in that way, then I am sure we can find
3 a way of doing it without difficulty.

4 Yes, the point about privilege, sirs. My learned friend raises this briefly in his skeleton
5 argument. It is something that comes up in the Court of Appeal's judgment. We, of
6 course, accept that legal professional privilege exists, and where it exists, it's not to
7 be overwritten. But it is important to discern exactly what legal privilege protects and
8 what it doesn't protect. So the basic proposition that I want to reinforce is that privilege
9 does protect the content of confidential communications but does not protect the
10 existence of documents.

11 That ought to be obvious, given that it is entirely normal and routine for parties to
12 identify in advance of trial who is to be called as a witness, for example in the case
13 management information sheet in the Commercial Court, or indeed, in a procedural
14 order which might specify by name certain witnesses, including expert witnesses.

15 I don't think I need to make this proposition good by reference to authorities, because
16 it is, of course, a Hornbook proposition that when one gives disclosure, one lists the
17 documents out. So one says that they exist, and then privilege is a prohibition or
18 a reason for resisting inspection, ie seeing the content of those documents.

19 If the tribunal would find it helpful, there are two commentaries in the bundle that will
20 make that good. But I don't propose to go to them, because I take it that that is an
21 uncontroversial and obvious point.

22 So that means that privilege would not protect, for example, the existence of
23 a document or its date or its intended recipients or a sufficient description of
24 a document to allow a challenge to privilege to be made. That's what happens in
25 disclosure. One says what one has and then says "but you can't see it because it's
26 privileged", but that description has to be of sufficient detail to allow the other party to

1 | whom disclosure is given to decide whether or not to challenge the claim to privilege.
2 | That is in the Hollander commentary that I have included in the authorities bundle
3 | tab 21. It gives a couple of examples of orders from courts and tribunals to the effect
4 | that descriptions of that nature are to be given.

5 | Now the Court of Appeal appears to have recognised this. So if we can go back to
6 | the Court of Appeal's judgment in McLaren. This is at page 464 of the authorities
7 | bundle. Starting between B and C, this is not a discussion in the context of privilege,
8 | I should make that clear. But the Court of Appeal speculates or floats the idea that
9 | difficulties:

10 | "... could be avoided by a careful case management approach by the CAT towards the
11 | applications for permission, so as not to require disclosure to the class representative
12 | in anything more than a generic form, and/or the use where appropriate of
13 | confidentiality clubs with which the CAT has plentiful experience."

14 | So as a rule of thumb, I suggest that it might be said that when it comes to privilege, if
15 | one thinks about the questions of who, what, when, how and why, privilege is really
16 | focusing on the what: what are you saying? That's privilege. But other details such
17 | as who is being communicated with and what the purpose of the document is, the date
18 | of the communication, those things will come out in the disclosure list. So it ought to
19 | be possible in this instance for the parties and the tribunal to discuss a particular
20 | communication, a proposed communication, without delving into the privileged
21 | content, if indeed the content is privileged. This is simply a question of the design of
22 | the process, so Apple can give sufficient details, like a disclosing party, to allow any
23 | challenge to be made.

24 | So that's all I wanted to say on the drafting. The last point is to deal with Apple's
25 | objections. The reality is I have dealt with all of them in my submissions, except one,
26 | and that's Apple's need to communicate with the class.

1 Now my learned friend, in his skeleton argument at 23, says that we take this the
2 wrong way round. But that's a straw man. We raised this point because the tribunal
3 will wish to consider, when deciding whether and how to regulate communications, the
4 scale of the risk, that a large number of important and legitimate communications will
5 be impeded. We say that the answer to that is that the risk is low. First, Apple has
6 not identified any reason why it would need to contact the class members. We don't
7 have a pleaded defence, but Apple has not explained any issue which it said would
8 give rise to a need for evidence from class members.

9 What my learned friend writes is that contacting the class may be necessary for the
10 proposed defendants to obtain factual evidence, about what we know not, or in order
11 to approach potential experts, in what we know not. He does not even go so far as to
12 say that it would be necessary and it appears to be speculation at the moment.

13 Now, second, this is not a case in which the tribunal ought to proceed on the
14 assumption that evidence from the class will definitely be necessary. The case, after
15 all, is about one thing, which is unfair pricing, meaning that the crucial evidence is
16 likely to focus on the costs plus analysis and on comparators. Both of those will
17 presumably be the subject of expert economic evidence and it is not obvious why the
18 class would need to give evidence in relation to such issues.

19 Third, even if that is wrong and Apple needs some kind of evidence from an app
20 developer specifically, it's not at all clear why that evidence would have to come from
21 our class. Our class is confined to UK app developers and to those who paid the
22 charge, paid the commission. Now, the price charged to app developers is essentially
23 the same worldwide, so it's not clear why Apple couldn't take evidence from an app
24 developer in, say, Ireland or Canada or Jersey or the Isle of Man. Finally, if Apple
25 really genuinely does need to contact the class members in order to gather evidence
26 in advance of trial -- and beyond the permission that it already has, in preparation for

1 the Kent trial in January, so it needs to go further than that for some reason in our
2 case, it can simply seek permission and agreement can be reached on the proper
3 mechanism by which Apple should seek that evidence. One can imagine, for example,
4 that there might be different considerations applying to an application to contact all of
5 the class members, as opposed to a targeted communication to, say, one or two that
6 are thought to be potentially willing to give evidence.

7 That deals, sir, with all of the objections that Apple have raised and as I say, none of
8 them raises any real obstacle. Those are my submissions.

9

10 **Submissions by MR PARKER**

11 **MR PARKER:** Just before I launch into class communications, can I just clarify one
12 point from this morning. I'm sure it was me that misspoke, but I just wanted to clarify.

13 My learned friend Mr O'Donoghue seemed to take from what I had said that the
14 question of conflicts within the class was the sole issue at the certification phase. I can
15 confirm that is just not right. There are also other opt-in/opt-out issues and
16 considerations of funding. I raise that point, because it has been suggested by them
17 that it was not the certification issue. I just want to make that perfectly clear.

18 On class communications, you have seen the draft order, it is a bar on all
19 communications, except those related to a search for possible experts. That
20 application is based entirely on the dicta of the Court of Appeal in McLaren, which I will
21 come to in a moment. But before I do, can I just tell you what our five points on this
22 topic are, and then hope to substantiate them by reference to the McLaren decision.

23 The first point, we do say that the PCR has adopted altogether the wrong threshold.

24 It is suggested by them in their application -- my learned friend didn't commit to what
25 he says today the standard ought to be. The written application said that a bar on all
26 communications between the defendants and their own business counterparties would

1 be “desirable” and “appropriate”. There is no authority at all cited for that, and so far
2 as we are aware, in support of it. We say that the correct threshold -- I will make good
3 the submission in the case law -- is that the order must be shown to be necessary, to
4 avoid a real risk to the fair determination of the proceedings.

5 That's the first point, threshold.

6 The second point, it is very significant that the claimant has not been certified. My
7 learned friend tried to brush that aside but we will see in the case law, in McLaren,
8 there are really two points to this. The first is that pre-certification, the PCR is a
9 self-appointed representative of the class whose appropriateness, whose lack of
10 conflict of interests, et cetera, has not been determined by the tribunal, has not been
11 certified.

12 This is what the Court of Appeal says in McLaren. The idea that all communications
13 have to go through him on his own self-appointment is a bit of a bootstraps point.
14 Further, as we will also see in McLaren, the rules themselves -- the CAT
15 rules -- envisage direct communications on particular points between proposed
16 defendants and members of the proposed class before certification. It cannot be that
17 the order that's being proposed could cross-cut what the Court of Appeal has said is
18 in the rules. I will show you that in McLaren.

19 The third point is that an order barring communications in this case is entirely
20 unnecessary on the facts. There is no evidence whatsoever that the proposed
21 defendants have or would use improper communications to the class in a way that
22 would disrupt the fair process and hearing of the proceedings. It is particularly
23 significant -- it has been six months, six full months or almost six months, since the
24 Court of Appeal in McLaren has lifted all restrictions. So up until today and as we
25 stand here today, any communications could be sent entirely lawfully by the proposed
26 defendants to the proposed class members, and it is telling both that nobody has been

1 | terribly worried about that, apparently, for the last six months, until this application was
2 | made just two weeks ago, and also that there is no evidence of any impropriety at all.
3 | That, with respect, speaks volumes.

4 | Can I just say, you have been given a bit of a tour of some of the material which has
5 | been recited in Mr Geradin's witness statement. You will be relieved to hear that I am
6 | not going to take you back through that, save to make a few overarching points about
7 | the submission. The first is it has absolutely nothing to do with this case or to do with
8 | litigation. Second of all, it invites the tribunal entirely to prejudge the issue. Essentially,
9 | what they want you to find is because Apple has extraordinary market power over
10 | members of the class, there is a risk of a possible abuse of that power. That sounds
11 | like the substance of their cause of action. We say it would be quite wrong for the
12 | tribunal to get into that.

13 | Thirdly, on this topic, that really is, when one actually scrutinises the statement, that
14 | really is hyperbole, based on multi-multi-hand hearsay. I am afraid that if one were to
15 | take the disproportionate time and effort to get into that collateral issue, Apple would
16 | have a number of things to say about the various sources that have been referred to
17 | and the people who have been specifically quoted by my learned friend.

18 | But I repeat, the application, this set of evidence, was teed up some time ago, but after
19 | McLaren, the whole question has gone into abeyance. It is just two weeks ago that
20 | this application has been revived and we've not yet had an opportunity to file
21 | a response to Mr Geradin's statement. It is a little bit unfortunate for my learned friend
22 | to say there's been no response. That became wholly irrelevant when the bar on class
23 | communications was lifted by the McLaren judgment.

24 | It's been reinvigorated just recently. You will have noticed that was a detailed affidavit
25 | with something like a 1,700-page exhibit amended to it. You can probably imagine
26 | why we have not spent the last two weeks since the application was made, trying to

1 deal with what is really a satellite issue that, with respect, has nothing at all to do with
2 this litigation.

3 The fourth point which is somewhat related, is that the application seems to be based
4 on the notion not that the defendants -- proposed defendants -- have or would
5 communicate in ways that would undermine the litigation, but rather, that the proposed
6 class members, according to my learned friend, live in fear of possible -- they're acting
7 out of a second-guessing, a fear of retaliation from Apple. It is very difficult to see how
8 an order on class communications actually makes any difference, given that is his
9 submission.

10 Again, I will show you this on the authorities. Surely, at the very least, it is a threshold
11 matter. He must show you, must convince you, that there is a real risk that the
12 proposed defendants actually would communicate with the class in improper terms
13 that would interfere with the litigation. What he's asking for is a quia timet injunction
14 to prevent what he says is a threatened unlawful act which would be inappropriate
15 correspondence. There is absolutely no basis, in our submission, in fact, for that.

16 The fifth and last point is the suggestion that the proposed defendants have no real
17 need to communicate with the class in the context either of the litigation or generally.
18 Again, I will show you where this comes through entirely clearly in McLaren. But we
19 say, first of all, that puts things entirely the other way around.

20 It is an extraordinary order to say that company A cannot communicate with its own
21 business counterparties -- people who have everyday business with the proposed
22 defendants, selling apps, getting commissions, submitting apps for verification,
23 et cetera -- it is an extraordinary order to bar one from communicating with the other
24 and to suggest that there is no need for them to communicate and that every
25 communication, unless it relates to finding an expert, has to be invigilated by the PCR,
26 the self-appointed current representative of the class. That is an extraordinary

1 submission.

2 **THE CHAIR:** Communications that may relate to, concern or effect these
3 proceedings. It's not absolutely --

4 **MR PARKER:** It is not difficult to imagine, for example, discussion between a
5 proposed class member and the proposed defendants about things like
6 a disagreement on the commission. A disagreement about whether an app meets the
7 requirements for being added to the store. A disagreement about what the particular
8 terms of the developer programme licence agreement mean in the context as between
9 them. That is everyday business communications.

10 Again, this is not just my point. This is the Court of Appeal's point in McLaren which
11 I am going to make good in a moment. But on top of that, it has been suggested: well,
12 my learned friend doesn't think that the proposed defendants should have any need
13 to communicate with potential witnesses. With great respect, the proposed
14 defendants set their litigation strategy and they may well communicate under privilege
15 with potential litigation privilege -- again, we will see this all in McLaren -- they may
16 communicate with potential witnesses on terms that they see fit. And they may either
17 acquire documents or evidence that become part of the proceedings and over which
18 privilege will no longer apply at that stage. Or they may dislike entirely what they find
19 and shelve it because it is covered by litigation privilege. That is for us to set out our
20 litigation tactics, not for the person suing us or representing the class of person suing
21 us to decide whom we can contact about being a witness, in what terms. That, with
22 respect, is entirely backwards.

23 There also seems to be a complete mismatch between the supposed fear -- what we
24 have been told is that app developers fear that Apple would reject their apps, would
25 turn off the tap, would -- you know, would cut access to the apps. But the order has
26 nothing to do with that. The order is a bar on communications between them. There

1 is a problem solution gap, if I can put it that way.

2 So that's just the overview of the points. What I really want to do is just tease those
3 points out as they appear in the McLaren decision. I do want to go through that in just
4 a little bit of detail, because it's the only authority on which my learned friends have
5 relied. I hope I can be forgiven for doing that. Can I ask you, please, to turn that up.

6 That's in the authorities bundle behind tab 18, and I am picking it up at page 438.

7 Just to give you the context for what was going on here, this was a case, as you may
8 recall if you have seen that recently, in which the proposed defendants actually had
9 written to members of the class and objection was taken to the content of that
10 communication. That was the background to why application was made to restrain
11 communications. You see that at 14. You see that the CPO was made on 20 May
12 2022, and provided for the opt-out deadline. The opt-in deadline for those domiciled
13 outside the UK was 12 August:

14 "On 26 July 2022 solicitors for the appellants wrote letters in identical terms to 21 large
15 business purchasers drawing attention to the opt-out date and indicating that they
16 intended to seek disclosure, which if ordered might involve substantial work and
17 expense for those large businesses."

18 So you already have a bit of a sort of dog whistle communication which has been sent
19 in that case from the proposed defendants to the members of the class. And the
20 allegation from the PCR in that case was that this was, in effect, an invitation for
21 members of the class to opt out. So it was an allegation of prior improper
22 communications.

23 Then if we move forward, if I may, please, in the judgment. Just of note, the next
24 relevant part is paragraph 41. Just so you can see where I am going and where the
25 court has gone. Paragraph 41, the court explains how it is going to address the issue.

26 Just to be very clear, the point here was not a decision about the exercise of

1 a discretion to make an order barring communications; the CAT had found in this case,
2 and in another case, that the rules automatically impliedly barred communications
3 between the proposed defendants and proposed class members. So what we are
4 looking at here -- and you can see from the structure in 41 -- is an analysis by the
5 Court of Appeal, who concludes the rules do not provide by implication for that. And
6 they are explaining the various reasons why it's very clear the rules did not bar such
7 communications.

8 In the course of that, what I am going to do is pick out the bits that are helpful for the
9 consideration of how the discretion should be exercised and what the important
10 considerations are. So if we could pick it up at paragraph 74, page 453 of the bundle.

11 The court here points out that there is no rule in civil litigation generally, preventing
12 a defendant or its legal representatives from contacting the defendant, and the court
13 says it was not aware of any case in which a bar of that nature had been imposed.

14 At paragraph 75, the court goes on to say that is equally true of the three ways in which
15 group claims are advanced in other contexts. Again, no bar on direct communications
16 from one party to another, imposed in any of those contexts.

17 Now, over the page at 80 -- this is page 455, paragraph 80 -- the Court of Appeal, this
18 is Lord Justice Popplewell, says this:

19 "I find this comparison between collective competition proceedings in the CAT, and
20 other procedural forms for collective pursuit of civil claims, instructive. If it is not
21 necessary for other civil claims, pursued individually or collectively, to be subject to
22 the Restriction ..."

23 Pausing there, that is the restriction on communications between a defendant and the
24 class:

25 "... and there is nothing in the context and purpose of the collective proceedings in the
26 CAT which makes them distinguishable in any way which is material to this issue, it is

1 difficult to see how the context or purpose of collective competition proceedings [can
2 be said to justify the implication] as a necessary one."

3 Over the page, 456 at paragraph 84, this point is an important one which I have
4 adverted to, Lord Justice Popplewell says:

5 "Rule 94(2) requires particular consideration because it is, in my view, inconsistent
6 with the implication contended for."

7 Then he discusses what it may be intended to cover. The last sentence is:

8 "Even so, it is inconsistent with the implication contended for two separate reasons.

9 "First, if there were implied a ban on all communications between defendants and
10 represented persons it would be surplusage ... The fact that such a restriction is
11 imposed specifically for this particular circumstance suggests that it does not apply [to
12 others] more generally ..."

13 So that's the because you have a general bar or a specific bar over here, that implies
14 you don't have a general bar. But then this, and this is important:

15 "Secondly, rule 94(2) only applies to some aspects of settlement of collective
16 proceedings. It is of no application to opt-in proceedings. The Rules must therefore
17 envisage that a defendant is free to negotiate and conclude an individual settlement
18 directly with an individual claimant in opt-in proceedings. This is consistent with the
19 definition of collective settlements in section 49A(1) of the 1998 Act which confines
20 them to opt-out proceedings. Moreover, rule 94 is expressed to apply only to the
21 position after a CPO has been made, suggesting that prior to certification a defendant
22 may negotiate settlements directly with members of the class even where the
23 certification sought is on an opt-out basis."

24 That's really a very important point. This is the first reason why it's important we are
25 pre-certification. The Court of Appeal has said that that rule at least suggests that
26 prior to certification, it is open to defendants to settle directly with individual members

1 of the proposed class. So it must follow -- and of course, the Court of Appeal has
2 confirmed that on a case management basis, one can make an order in
3 this -- restricting class communications, but based on that paragraph, it must follow
4 that any bar cannot cut across what is implied or envisaged by the rules, which is the
5 possibility of proposed defendants settling with opt-out proposed class members prior
6 to the certification being made.

7 So the order sought by my learned friends would totally cut across what the Court of
8 Appeal says is actively allowed under the rules and, with respect, that cannot be right.
9 So that's the position. I should just say I only make this submission as a matter of
10 principle. It's not being suggested that that's in the offing.

11 The second reason why it is quite significant that the claim has not yet been certified
12 comes in the next section. In paragraph 87, the Court of Appeal explains the
13 significance of the appointment of a person as the class representative. I won't read
14 that to you. But it rather underscores the fiduciary relationship between the proposed
15 class representative and the members of the class. It really underscores what I have
16 been saying earlier about conflicts of interest. It can't be a position where a single
17 person with fiduciary duties to a whole group is appointed to represent them all, where
18 their interests are in conflict with one another. That's simply a non-starter.

19 Moving on to paragraph 88, what you can see here is Ms Ford, who is arguing for the
20 PCR in this case for the bar on communications, at 88:

21 "Miss Ford laid particular emphasis on this trusted role of the class representative as
22 someone vetted for suitability ..."

23 At 89, says Lord Justice Popplewell:

24 "There are two reasons why this does not support the implication contended for ...
25 First, the same is equally true of a solicitor conducting litigation [in ordinary civil
26 proceedings] ..."

1 And the second reason is at paragraph 90, over on 458:

2 "Secondly Miss Ford's submission focused on the position after a CPO is made, but
3 the position is different unless and until that occurs. Until a CPO is made, the
4 proposed class representative has no such representative status. The issuing of the
5 claim form does not clothe it with authority to pursue claims which belong to others,
6 and confers no badge of suitability. It may be entirely unsuitable to fulfil that role.
7 A proposed class representative is no more than a self-appointed would-be class
8 representative. MMCR's submissions were underpinned by the argument that
9 preventing direct communication between the defendants and members of the class
10 was justified by the members being able to rely upon the class representative to look
11 after their interests as the conduit in communications with the defendants, because it
12 had been vetted as suitable for that purpose. That is not so prior to the making of
13 a CPO."

14 Those are the two reasons why we have said it is very significant that we are at the
15 pre-CPO stage in this case.

16 But that really only answers sort of part of the point. If I could move on next, please,
17 to paragraph 96. That's at page 459. You can see here that the Court of Appeal takes
18 the reasoning I have just mentioned and says that it may well apply post-certification
19 too. So it might be felt that these last points about the position prior to a CPO have no
20 bearing on whether the restriction might properly be implied in a modified form, so as
21 to apply only once the CPO has been made, but that is not so. Rule 85 provides that:
22 "... an application may be made by amongst others, a defendant or a represented
23 person to vary or revoke the CPO so as to remove or substitute the appointed class
24 representative on the grounds that they no longer fulfil the suitability requirements in
25 rule 78. This recognises that there may come a time after a CPO has been made when
26 the class representative may not be someone who can be trusted fairly and adequately

1 to look after the interests of all the members of the class. If so the position is the same
2 as pertained prior to the making of the CPO."

3 The next heading, which is really a very important one in our submission, the heading
4 is above paragraph 99. It is "Practical consequences", but what I want to show you is
5 from paragraph 102. There are some very important points here which go both to the
6 propriety for making an order at all, and also its possible terms and what it should or
7 should not cover. At 102, the court is summarising the arguments of Ms Demetriou,
8 who was a KC who was there appearing for the proposed defendants:

9 "At the forefront of her argument that the Restriction brings unacceptable and unfair
10 consequences was the submission that it interfered with litigation privilege. In this
11 case, the Shipping Companies had to disclose the detail of their approach to class
12 members in seeking disclosure of relevant evidence, notwithstanding that such an
13 approach had been sanctioned as appropriate in principle by the CAT's April 2023
14 order.

15 "103. There is considerable force in this argument. Tribunal scrutiny of such an
16 approach is an invasion of litigation privilege because it forces the Defendants to
17 disclose to their opponents details of their pursuit of evidence for the purposes of
18 defending the claim. That is a class of communications which attracts litigation
19 privilege because the communications are for the dominant purpose of the litigation.

20 The vice in litigation privilege being invaded in respect of the conduct of a party's case
21 in preparations for trial is that it may involve a party having to reveal to its opponent
22 aspects of its litigation strategy, or its unused material. But the right to maintain
23 privilege does not depend on whether it does so in a particular case. The privilege
24 attaches to a class of communications. Moreover, where legal professional privilege
25 exists, it is inviolate: there is no balancing exercise to be undertaken between the
26 interest in maintaining privilege and competing public interests in disclosure of the

1 | communications; privilege is a right, which cannot be overridden as a matter of case
2 | management or discretion: ..."

3 | Just pausing there, with great respect to my learned friend that is a complete answer
4 | to his submission that this class of communications is not covered by litigation
5 | privilege. That is on point binding authority that it plainly is.

6 | Lord Justice Popplewell then cites Derby Magistrates' Court, and he continues:

7 | "The Ruling has resulted in that principle being breached in this case and would
8 | potentially do so in many other collective proceedings before the CAT. That poses an
9 | unfair dilemma for defendants between foregoing their privilege or foregoing their
10 | legitimate pursuit of evidence."

11 | That is a very powerful point against making an order in the terms that have been
12 | sought or making an order at all.

13 | Continuing at 105, we see that the same position applies in relation to, among other
14 | things, experts. At 105, it says:

15 | "A consideration of the effect of the Restriction on privilege does not stop with what
16 | has happened or may happen in this particular case ..."

17 | Next sentence:

18 | "There is an obvious risk of that occurring in relation to most applications for disclosure
19 | from represented class members, which are specifically contemplated by rule 89(1)(c).
20 | One can readily foresee that it may do so in other ways, apart from disclosure. One
21 | obvious opportunity for it do so is in relation to expert evidence."

22 | We have seen in this case the order has been tailored to some extent to try to take
23 | care of the expert evidence point but not so at all in relation to factual matters or indeed
24 | any of the other matters we are coming on to.

25 | Just dropping down to F to explain why this is important:

26 | "A class representative is free to approach any number of potential experts until it finds

1 one whose views are regarded as most favourable for the conduct of its case. The
2 less favourable or perhaps unfavourable views of others would remain clothed in
3 litigation privilege. Not so for defendants under the Ruling, who would be bound to
4 disclose such approaches if the potential expert happened to be a member of the
5 class. This would be contrary to the overriding objective in rule 4 of putting the parties
6 on an equal footing or dealing with the case fairly. It would unfairly interfere with
7 defendants' pursuit of evidence and the fair conduct of their defence. One could
8 multiply examples."

9 That's a point that relates also to the point about the factual witnesses that I have
10 already made.

11 Then, at 106, we get the point about the ordinary course of business which I have
12 already telegraphed. Lord Justice Popplewell says:

13 "The Restriction also interferes with the ability of defendants to act in the normal
14 course of business, which is not carved out as an exception where it overlaps with the
15 subject matter of the proceedings, including compromising a legitimate entitlement to
16 commercial confidentiality."

17 Just to be clear, although my learned friend says in argument that there is, as I have
18 said earlier, no possibility that the discussions in the ordinary course of business could
19 touch on the subject matter of the litigation, for reasons I have already given that is,
20 with respect, wholly unrealistic. They have an ongoing business relationship under
21 the terms which are impugned by the class claim. It seems almost inconceivable that
22 there would not be discussion around such matters.

23 You can see at 107 -- I won't read it out -- the court identifies an example of the
24 interference that's occurred already under the ruling which had applied elsewhere in
25 the Mastercard case.

26 My learned friend showed you one very small part of paragraph 108 but, with very

1 great respect again, that is a selective reading and, in our submission, misunderstands
2 where we are on litigation privilege. I want to show you the whole paragraph to make
3 good that point. Lord Justice Popplewell says:

4 "My conclusion so far as practical consequences are concerned is that whilst there are
5 potentially unsatisfactory consequences on both sides' case, there are three aspects
6 which militate against the implication contended for which, it is worth re-emphasising,
7 must be a necessary one. The first is that it is likely to inhibit a defendant's ability to
8 conduct its defence, and thereby operates unfairly, an unfairness which is not
9 remedied by the ability to seek permission from the CAT which involves having to
10 forego legal privilege. The second is that it may unfairly interfere with a defendant's
11 legitimate interests in the normal conduct of its business, and the normal course of
12 business of class members."

13 Now I think this is the sentence my learned friend read you. He says:

14 "It might be said that each of these could be avoided by a careful case management
15 approach by the CAT towards the applications for permission, so as not to require
16 disclosure to the class representative in anything more than a generic form, and/or the
17 use where appropriate of confidentiality clubs with which the CAT has plentiful
18 experience."

19 That seemed to have been the suggestion from my learned friend, but we go on to see
20 that that is rejected:

21 "But that has not been the experience of the application of the Ruling in this case which
22 has treated the implication in the Rules of a prima facie restriction on all
23 communications as requiring detailed scrutiny by the Tribunal itself (and therefore
24 disclosure to the class representative of the scrutinised material) if any departure from
25 the restriction is to be allowed. Further, if the application for permission were framed
26 in such generic terms as to avoid the problem (eg we wish to seek some disclosure of

1 documents from some class members) it would not enable the CAT to determine
2 whether a departure from an existing prohibition implied in the Rules is justified. I am
3 not persuaded that the adverse practical consequences of the Restriction can be
4 avoided in this way."

5 So with great respect to my learned friend, this passage says the opposite to what he's
6 saying. It's not a matter which can be managed by the CAT. You have only the two
7 options: you either get such generic applications, "we, the proposed defendants, are
8 going to communicate with possible witnesses to find evidence", full stop, in which
9 case there is no scrutiny of the terms of those communications to test their propriety;
10 or you have to say what it is that your chain of inquiry is and the terms of your
11 communication for proper scrutiny, in which case you are being asked to trade-off your
12 litigation privilege for the price of possibly finding some worthwhile evidence. It is, with
13 respect, the opposite of what my learned friend says it is.

14 Then he says at 109, Lord Justice Popplewell, the third practical aspect that points
15 away from this is the experience in Canada.

16 We don't need to say too much about the Canadian authorities. I should just make
17 clear, my learned friend has referred to the passage in paragraph 111 at 465 which
18 you have seen. That is the requirement in the Canadian jurisprudence that because
19 the order sought is an "extraordinary" one, it has to be justified as "necessary" to avoid
20 a real and substantial risk.

21 My learned friends also urge on you the guidance which has been set out in the Del
22 Giudice case -- I may be terribly butchering that name, we have rival pronunciations
23 but that's what I am going to call it -- but as we will see in a moment that case
24 reinforces precisely the same test. There is no other authority for the appropriateness
25 test that my learned friend has suggested. And they are urging on you the approach
26 in Del Giudice and it says very clearly that the threshold is one of necessity just as

1 stated there.

2 Judge, just very briefly to wrap where we are in this case, the last points that we make:
3 you can see on page 469, the tribunal concludes on this issue and it just summarises
4 again the reasons why the Court of Appeal is convinced that there is no implication in
5 the rules that these communications are barred, while leaving open the possibility that
6 some bar on communications, when properly justified, could be made on a case
7 management basis.

8 The second question it then deals with: there was a debate about whether the tribunal
9 in that case actually had considered on a case management basis, not on the basis
10 there was a blanket prohibition on communications but on an individualised basis,
11 whether or not the tribunal had actually considered making an order on that
12 case-specific basis.

13 There is one interesting passage in paragraph 132. The reason I refer to it is because
14 the Court of Appeal says that there are certain things you don't see in the decision that
15 you would expect to see in any decision granting one of these applications on
16 an individualised basis. So it does actually help us identify what the relevant
17 considerations are and what the threshold looks like.

18 So 132, the court says:

19 "Two further considerations point strongly against MMCR's position on this issue. First,
20 had a case management order been treated as an alternative basis for the decision,
21 one would have expected some detailed reasoning as to why it was appropriate, and
22 why the sending of the Letters was sufficient reason for making the Order. The
23 justification for such an order is not self-evident. The vice of the Letters identified by
24 MMCR was that they were intended or likely to influence the recipients in the opt-out
25 decision. Before the opt-out period the appellants had undertaken not to communicate
26 further on that subject and by the time the Order was made the opt-out period had long

1 since passed. If the Letters were to justify a prospective order aimed at different risks
2 [ie not convincing people to opt-out] There would need to have been findings as to
3 what risks as to future conduct were involved, and why those risks merited a blanket
4 ban on communications rather than one tailored to the risks. The Letters had not been
5 sent on behalf of K-Line [that was one of the defendants], so that it is difficult to see
6 how the Order could have been made against it on a case management basis."

7 Just pausing there, the other defendants had form, as it were, but K-Line had not sent
8 anything objectionable to the proposed defendants. So the court was saying, well,
9 what could have been the basis for justifying an order against K-Line without any prior
10 conduct to show that as being required? He says:

11 "There is no obvious correlation between the terms of the Letters and the scope of
12 Restriction, and the absence of any reasoning for treating the former as justifying the
13 latter is a powerful indication that the Tribunal was not purporting to exercise case
14 management powers."

15 So that gives a good flavour of what is really required: a close connection between
16 a specifically identified risk and the terms of an order to ameliorate that particular risk.

17 The last thing I do want to mention before I just wrap up on this point -- I am aware of
18 the time, I'm closing if that is convenient -- is just to show you one or two passages
19 shortly in Del Giudice. That's tab 3 in the same bundle. I just want to pick it up very
20 briefly at 63. Authorities bundle, page 63, behind tab 3. First of all, before we think
21 about what the actual guidance is and what an order might look like if one is ever to
22 be made, what the court says at 39 is:

23 "Not every communication to members of the class needs to receive court approval.
24 The parties are free to communicate to the public about a class proceeding, and a
25 press release that provides information to the media that does not evade or undermine
26 the formal notice requirements is not a notice regulated by the Class Proceedings Act,

1 1992.

2 "An order restricting communication by the defendant to class members is
3 extraordinary; however, if communication by a defendant to a class member during
4 the opt-out period is inaccurate, intimidating, or coercive, or is made for some other
5 improper purpose aimed at undermining the process the court will, on the motion of a
6 party or class member, intervene to ensure the fair determination of the class
7 proceeding. When there is sufficient evidence of inappropriate behaviour or the need
8 to ensure the integrity of the class proceeding, the court can impose conditions on
9 communications between the parties and putative class members or class members.

10 "An order restricting communication by the defendant during the opt-out period should
11 only be granted if it is necessary to prevent a real and substantial risk to the fair
12 determination of a class proceeding, because reasonably available alternative
13 measures will not prevent the risk."

14 So we say that's the threshold against the rather deafening silence from the other side
15 about what the threshold is meant to be.

16 The last --

17 **THE CHAIR:** What do you say about recommendation in the post face?

18 **MR PARKER:** That's the next point I am just coming on to.

19 We fully agree that that guidance is helpful as far as it goes, but what you have seen
20 from the authorities is several-fold. First of all, we are not talking about a practice to
21 be adopted. The guidance is discussing a practice to be adopted between counsel in
22 the handling of these things.

23 The second point is we absolutely maintain that if the tribunal is to make an order that
24 the requirements that I have mentioned are shown to justify it, but when we get into
25 the guidance that's helpful for thinking about, if an order is actually justified, what its
26 terms might be and how the parties are to interact.

1 If an order is justified, we submit that it should be tailored to particular types of
2 communications, for example communications that have nothing to do with privilege,
3 have nothing to do with the ordinary course of business, and in some way engender
4 a risk of interfering with the litigation.

5 So what the guidance essentially sets out is more a practical downstream mechanism
6 by which one party, where the restriction is in place, writes to the other and says: "I am
7 proposing to send this. If you have any objection tell me what it is and I might not, and
8 if I disagree then we can come before you and argue it out". But it's certainly not being
9 suggested that that's an a priori starting point, that we start from the idea that
10 communications are restricted and have to go through the PCR, even before
11 certification. That's not the upshot of the guidance. That's why I showed you the
12 paragraph just now in Del Giudice, to show that that's the threshold test. We only
13 come to the guidance at the latter stage.

14 But as far as the guidance is concerned, if and when such an order is made then of
15 course that makes practical sense that there should be that back and forth procedure.
16 That's a different question, we anticipate, from the threshold for actually imposing
17 a bar on communications.

18 **THE CHAIR:** I suppose if there is a rationale for restricting communications after
19 a CPO has been granted, then there would seem to be some sort of rationale for some
20 sort of restriction before a CPO is granted, would there not? Simply because the scope
21 for abuse would be the same?

22 **MR PARKER:** The Court of Appeal is quite clear that the tribunal has jurisdiction to
23 make these kinds of orders, notwithstanding the fact that the bar is not automatic, and
24 it does certainly appear to envisage that it could possibly be made at the first CMC.
25 The further inference is being drawn that that means before certification, which seems
26 reasonably logical, but subject to the points I have made. Number one, the threshold

1 ought to be very significantly higher because the PCR is self-appointed. And the
2 second point I have made, which is as the Court of Appeal says, the rules seem to
3 envisage the possibility of direct settlement between proposed members and
4 proposed class members -- direct communications for settlement -- before
5 certification, then it must follow that any order could not cover, for example, that.

6 But that's entirely different, of course, from threatening, intimidating communications,
7 you know "opt-out or we will never do business with you again", that sort of thing. But
8 our submission on that is obviously that it is nowhere near demonstrating that there is
9 that risk, particularly not given that we have had six months of trouble-free existence
10 without any restriction.

11 That, I think, concludes -- those are all the points I want to make, unless the tribunal
12 has further questions. Thank you.

13 **MR CARALL-GREEN:** If the tribunal would be assisted by reply points, I have some
14 I want to make. I could take ten minutes.

15 **THE CHAIR:** We will leave it until quarter past.

16 **MR CARALL-GREEN:** Thank you.

17 **(1.15 pm)**

18 **(The short adjournment)**

19 **(2.15 pm)**

20

21 **Reply submissions by MR CARALL-GREEN**

22 **MR CARALL-GREEN:** Sir, just a few brief points by way of reply. First, dealing again
23 with this point about privilege. My learned friend gave you what he called a complete
24 answer to my submission on privilege, but the answer was to a submission that I had
25 not made. I accepted, I think, that privilege -- where it applies -- would be inviolate.
26 So it would not be for the tribunal simply to override privilege. The point that I was

1 making was that privilege covers some things and does not cover others, and that
2 there are examples in the case law and in practice, every day, up and down the
3 country, of details being given of documents to enable other parties to challenge
4 privilege, that don't violate that privilege.

5 So it is clear from the Court of Appeal's judgment that a case management restriction
6 on communications is possible. It is, in principle, possible. And in that regard, the Del
7 Giudice guidance, and on this side of the room we adopt the Italianate pronouncement,
8 that is not just guidance. I took you to the passage from the Court of Appeal's
9 judgment, where it said a practice direction or an order would be appropriate to reflect
10 the post face in that Canadian precedent. So there must be a way of doing this that
11 doesn't violate privilege and I have explained how that can be done, so the solution is
12 simply to design the process in such a way that it doesn't involve the divulging of
13 particular details of the content of privileged communications.

14 That's what I want to say about privilege. Then five brief points by way of reply to the
15 five heads of my learned friend's submissions.

16 His first submission was that on this side of the room, we are applying the wrong
17 threshold, that we had used the "desirable" and "appropriate" threshold. Sirs, that
18 phraseology was simply a call for the exercise of the tribunal's case management
19 powers in accordance with the overriding objective and rule 4 principles. I do say that
20 is the appropriate test.

21 But, as I said earlier, if a necessary threshold is required, then it is crossed. I have
22 taken the tribunal to a wealth of evidence, an enormous public record, of Apple's
23 conduct and the risks that app developers believe exist to their businesses. It is hard
24 to imagine another case where the pressure on and the risk to the class is greater. So
25 if not this case, then when?

26 So that's the wrong threshold.

1 The second is my learned friend's submission on the fact that we are pre-certification.
2 Again, we know for sure from the Court of Appeal's judgment that an order of this
3 nature is possible pre-certification. Now here, one of the risks that I have identified is
4 the risk that app developers may act contrary to their interests when it comes to the
5 question of whether or not they should opt out. But there is also the specific question
6 of how app developers will act in relation to certification. We have discussed today
7 the possibility that third parties may wish to make representations to the tribunal in
8 connection with certification. If that is to be the case, then the tribunal will want to
9 know that any representations from app developers are undistorted and represent their
10 genuine undistorted beliefs and views on the matter. So there is a reason to make an
11 order before those representations come in at the precertification stage.

12 His third submission was that there is no need for an order, because there has been
13 no impropriety in this case. Again, I dealt with that earlier. We don't want to wait until
14 there has been impropriety. The order sought seeks to combat the risk of any
15 communications that might cause app developers to act contrary to their interests.

16 My learned friend says the evidence I have taken you to has nothing to do with this
17 case. But, of course, it is about Apple and it is about app developers. What the
18 evidence is about is the parties, class members insofar as they are parties, and their
19 relationship and how they are likely to interact with each other. It does not involve
20 prejudging the outcome of the case. The evidence that you have seen simply tells you
21 what app developers perceive in terms of the risks to them and how they are likely to
22 respond if they think that that pressure is being exerted by Apple.

23 Now my learned friend said that Apple would have a number of things to say about the
24 evidence that I took you to. But it is, of course, striking that Apple has not said any of
25 them. Their explanation for this is what is contradictory, because we are told both that
26 we have brought this application to you late, even though we brought it at the first CMC

1 | which is what Lord Justice Popplewell indicated would be appropriate, but we are also
2 | told that there has not been enough time to deal with Geradin 1 which is a witness
3 | statement dated 10 November. I'll leave it to the tribunal to decide whether there has
4 | been ample time to respond to that witness statement.

5 | His fourth submission was essentially a rhetorical question. How would an order
6 | restricting communications help? Perhaps I can respond with another rhetorical
7 | question, which is given the evidence which the tribunal has seen today, what does it
8 | consider would likely happen if the class members were faced with a communication
9 | from Apple about this case that did not come with the appropriate caveats and had not
10 | been carefully constructed to avoid any even inadvertent impression being given that
11 | app developers were being put under pressure to act as Apple wished?

12 | Finally, my learned friend's fifth submission was an order that Apple cannot
13 | communicate with its contractual counterparties would be extraordinary. The tribunal
14 | has already observed that that's not what we are asking for. We have been clear and
15 | I was clear in response to an intervention from the tribunal, that ordinary business
16 | communications ought not to be covered by an order of this nature, and insofar as
17 | more precise wording is required in drafting of the order to make that clear, then the
18 | PCR is very open to that.

19 | So to sum up, sirs, the question, in my respectful submission, for the tribunal, is this:
20 | in light of the clear and voluminous evidence that Apple can put pressure on app
21 | developers to act contrary to their interests, and that app developers fear that
22 | pressure, what should the tribunal do? Apple's answer to that question is absolutely
23 | nothing at all, and the PCR's answer is that the tribunal should make a measured and
24 | balanced order, and I invite the tribunal to make it in the terms that he has proposed.

25 | **THE CHAIR:** The tribunal is going to rise for approximately five minutes.

26 | **(2.23 pm)**

1 (A short break)

2 (2.28 pm)

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4 **DIRECTIONS**

5 **THE CHAIR:** We propose to give directions now, with reasons to follow. I am working
6 off the draft order with the different colours. I am not going to say anything about the
7 recitals, I will leave that to be agreed between the parties.

8 Paragraphs 1, 2, 3 are not contentious. In relation to paragraphs 4 to 7, we prefer the
9 later dates, that's to say the dates in blue.

10 Paragraphs 8 to 10 should come out. Paragraphs 11 to 13 are not contentious.

11 In relation to paragraph 14, we direct as follows: the hearing of the CPO application
12 be listed in the week commencing 16 September, time estimate of two days, with one
13 day in reserve.

14 In relation to paragraph 15, the introductory words should come out -- that's to say if
15 the CPO application is granted -- but (a) should be retained.

16 In relation to (b), the introductory wording can come out, and it should read "a joint
17 CMC in these proceedings and the Kent proceedings shall be listed before the chairs
18 in both sets of proceedings on 23 September 2024, with a time estimate of one day."

19 I should make clear that both the dates for the hearing of the CPO application and the
20 CMC are to be fixed not for the convenience of counsel. In other words, if counsel are
21 not available, somebody else will have to be found to do them.

22 (ii), over the page, should be retained, as should (c). And 16 and 17 should come out.

23 18 and 19 are not contentious.

24 I hope that's clear.

25 **MR O'DONOGHUE:** Paragraph 5?

26 **THE CHAIR:** Which is paragraph 5?

1 **MR O'DONOGHUE:** (Inaudible) the date to reply, if there is a realistic possibility, we
2 have to contact (inaudible).

3 **THE CHAIR:** What date do you want?

4 **MR O'DONOGHUE:** 20 August, given the hearing on the 16th --

5 **THE CHAIR:** That's fine. The 20th, that's fine.

6 Yes. Thank you very much for your submissions.

7 **(2.32 pm)**

8 **(The hearing concluded)**

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