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6 **IN THE COMPETITION**
7 **APPEAL TRIBUNAL**
8

Case No: 1673/7/7/24

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

13 Friday 20th December 2024
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15 Before:

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18 The Honourable Mr Stephen Morris
19 Tim Frazer
20 Andrew Taylor

21
22 (Sitting as a Tribunal in England and Wales)
23

24
25 BETWEEN:

26 Proposed Class Representative

27
28 **Professor Barry Rodger**

29
30 v

31 Proposed Defendants

32
33 **Alphabet Inc., Google LLC and Others**
34
35

36 **A P P E A R A N C E S**
37

38
39 Kieron Beal KC, Daniel Carall-Green and Bethanie Chambers (Instructed by Geradin
40 Partners) on behalf of Professor Barry Rodger

41
42 Kassie Smith KC (Instructed by RPC) on behalf of Alphabet Inc., Google LLC and Others
43

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Friday, 20 December 2024

1 (10.30 am)

2 (Proceedings delayed)

3 (10.34 am)

4 MR JUSTICE MORRIS: Good morning, Mr Beal. Let me just start by giving the
5 standard notice. Some of you are joining us via live stream on our website, so I must
6 start with the customary warning.

7 An official recording is being made and an authorised transcript will be produced, but
8 it is strictly prohibited for anyone else to make an unauthorised recording, whether
9 audio or visual, of the proceedings and breach of that provision is punishable as
10 contempt of court.

11 With that introduction, I say good morning to everybody. I start by thanking the parties
12 for their skeleton arguments and their endeavours so far in cooperating so as to reach
13 a conclusion on some of the matters.

14 **Timetable**

15 MR JUSTICE MORRIS: Unless there's any housekeeping matters, Mr Beal, what
16 I would like to do by way of introduction is just to indicate where we are, specifically
17 on the date of the hearing, and that might assist you and us to shorten matters
18 somewhat.

19 MR BEAL: Well, could I very briefly interrupt just to say the parties have spoken this
20 morning and that a further measure of agreement has been reached on this side of
21 the bench. But obviously I'm all ears if, Sir, you've already got a date in mind.

22 MR JUSTICE MORRIS: Well, we do have dates in mind. I think at the moment the
23 estimate is one day with one day in reserve, subject to something I'm going to raise in
24 a moment, which might possibly affect the estimate.

25 We are looking at two dates in the week of 10 March, so we're looking at 10, 11, 12,
26 13 or 14 March. We would have thought, assuming that it's going to be a date there,

1 that it would follow that we can then work through, or you can work through, the
2 timetabling.

3 But yes, Mr Beal?

4 MR BEAL: So, just by way of representation, if I may; I appear with Ms Chambers for
5 the Proposed Class Representative, Professor Rodger, and my learned friends
6 Ms Smith KC and Mr Kelly appear for Google this morning.

7 MR JUSTICE MORRIS: Thank you.

8 MR BEAL: The date we had, subject to your approval, landed on was 6 March with
9 7 March in reserve for the hearing. Dates working back from that would then be that
10 the --

11 MR JUSTICE MORRIS: I think before you do that, I think I need to find out whether
12 that's feasible. Perhaps -- I'm just checking -- it's okay for you; it's okay for us. Okay.
13 Well, then that would work, I think.

14 MR BEAL: And then I've got some proposed dates --

15 MR JUSTICE MORRIS: That's 6 and 7 March?

16 MR BEAL: 7 March.

17 MR JUSTICE MORRIS: Okay. All right.

18 MR BEAL: And then working back from there, can I just then pull up the draft order?
19 We've got an updated draft order to pass up. (Handed)

20 MR JUSTICE MORRIS: Yes, I think we may have it. Sorry, just pause a moment,
21 please. We received something this morning; we've printed it off. Unless this is more
22 updated?

23 MR BEAL: It won't be from that one, I don't think.

24 MR JUSTICE MORRIS: No, I think it's the same one. Yes? Yes. Okay. I'm looking
25 at that document. It's the same one. If you want to talk us through the timings on those.

26 MR BEAL: Yes.

1 MR JUSTICE MORRIS: If there are some minor other drafting points, perhaps we'll
2 come back to that in a moment.

3 MR BEAL: So the first one that is determined differently is paragraph 6 --

4 MR JUSTICE MORRIS: Yes.

5 MR BEAL: -- where the proposed date is going to be 31 January.

6 MR JUSTICE MORRIS: 31 January?

7 MR BEAL: Yes. Then, the next date in paragraph 7 is proposed for 19 February.

8 MR JUSTICE MORRIS: Okay.

9 MR BEAL: Paragraph 8 I'm not sure we had a specific date for but it would, I suspect,
10 make sense to have it halfway between the two, on Valentine's Day. And then
11 paragraph 9 --

12 MR JUSTICE MORRIS: Just give me the date again, I didn't hear it?

13 MR BEAL: 14 February. Yes.

14 MR JUSTICE MORRIS: That's paragraph 8, yes.

15 MR BEAL: Paragraph 9 would then, I think, be the 14th as well.

16 MR JUSTICE MORRIS: Yes. Thank you.

17 MR BEAL: Paragraph 10 is then the 6th March with one day estimate in reserve for
18 7 March 2025.

19 MR JUSTICE MORRIS: Yes.

20 MR BEAL: Skeletons would be 28 February, that's paragraph 11.

21 Paragraph 12 would be -- I'm sorry, I've got that the wrong way round. My learned
22 friend is quite right.

23 MR JUSTICE MORRIS: So the bundle in paragraph 11 is to be filed on 24 February?

24 MR BEAL: Bundles would be filed on 24 February.

25 MR JUSTICE MORRIS: Then --

26 MR BEAL: Skeleton arguments would be filed on 28 February.

1 MR JUSTICE MORRIS: Yes.

2 MR BEAL: Authorities bundle is to be filed on 3 March. Disclosure is still to be
3 discussed.

4 MR JUSTICE MORRIS: We'll come to paragraphs 14 and 15 in a moment.

5 MR BEAL: Yes. The CRO, the Confidentiality Ring Order. What is being proposed
6 is, given that the parties are really not very far away -- I don't know if you've had an
7 updated version that has --

8 MR JUSTICE MORRIS: I've got an updated version. I haven't digested the areas of
9 dispute, but carry on.

10 MR BEAL: Well, rather than weary the Tribunal's patience this close to the end of
11 term, we're proposing that the solicitors go and thrash out any form of final agreement
12 in the time that hopefully will be available now that this hearing is going to be shorter
13 than it otherwise would have been.

14 MR JUSTICE MORRIS: Fine. I don't think we have any -- I think that's a sensible
15 idea.

16 MR BEAL: Thank you very much. Okay, that only leaves disclosure.

17 MR JUSTICE MORRIS: Well, it does and it doesn't. Can I just raise one point --

18 MR BEAL: Yes.

19 MR JUSTICE MORRIS: -- in relation to -- I mean, in my mind I had three headings
20 today. I had timetable for the hearing; I had the Confidentiality Ring which is sorted;
21 and then I had -- you call disclosure, I call, sort of, "going forward".

22 MR BEAL: Yes.

23 MR JUSTICE MORRIS: In relation to the issue we've just discussed, if you go to -- and
24 really this is going to be for Ms Smith -- paragraph 6.

25 **Jurisdiction**

26 MR JUSTICE MORRIS: The first point I raise is that it's been drawn to my attention

1 that there are potential jurisdiction issues that were raised in correspondence and that,
2 as I understand it, there were two outstanding jurisdiction issues; Google's position is
3 that they considered that those were matters that were substantive defences.

4 I am not fully on top of the issue, but our provisional view is that, if those two defences
5 are still live issues, they are things that ought to be dealt with at the CPO hearing.

6 I'm raising it with Ms Smith. We don't think -- and let's assume that they are -- it might
7 extend the hearing time for the CPO hearing; we don't think that it would necessarily
8 delay matters further than that.

9 When I come in a moment to paragraphs 14 and 15, I'm going to indicate how we see
10 matters going forward. But I wanted to raise that issue, that at the moment, we see
11 that issue, if it is going to be relied upon, needs to be addressed at the CPO hearing
12 because we believe that it goes to the issue of the definition of the class.

13 MR BEAL: Well, if I may, very briefly, while I'm still on my feet, could I please ask for
14 a copy of my chronology prepared for this hearing to be handed up?

15 MR JUSTICE MORRIS: Yes.

16 MR BEAL: I'll tell you why: it's because there were very clear directions from this
17 Tribunal that any jurisdiction issues should be subject to an application to contest
18 jurisdiction, and one sees on the bottom of page 3 --

19 MR JUSTICE MORRIS: What date are you looking at?

20 MR BEAL: 9 October 2024. Essentially, RPC, on behalf of Google, asked for an
21 extension of time within which to file any application to contest jurisdiction.

22 Over the top of the page, 10 October 2024, there was a letter from this Tribunal to the
23 parties stating that the acting President was unwilling to delay the application and he
24 granted an extension only till, I think, 8 November. Then, we see on 8 November,
25 two-thirds of the way down page 4, there was a letter from RPC on behalf of Google
26 confirming it no longer intended to contest jurisdiction. Now it's true that --

1 MR JUSTICE MORRIS: Just a moment, sorry, Mr Beal. Let me -- yes, except -- I've
2 got that letter of 8 November in front of me. Google, paragraph 4 -- I don't know if
3 you've got it:

4 "The following objections are also properly considered as substantive defences on the
5 merits and so remain available to Google outside of any jurisdiction challenge."

6 MR BEAL: Yes.

7 MR JUSTICE MORRIS: That's the point I'm looking at and that's the point which
8 I think, at the moment, we consider would be better dealt with at the CPO hearing.

9 MR BEAL: So, what I'm seeking to do, with your permission, is to frame the precise
10 ambit of the dispute between the parties. We say that those aren't substantive defence
11 issues, they actually are a jurisdiction issue and Google are now out of time to contest
12 jurisdiction on that basis.

13 MR JUSTICE MORRIS: Sorry, I didn't hear that?

14 MR BEAL: Google are out of time because they were meant to bring the application
15 to contest jurisdiction.

16 If they're right that they are substantive defences, then, subject to instructions, it seems
17 to me eminently sensible that that issue is dealt with as soon as possible and not left
18 hanging over to a substantive trial. You don't want to have a very complicated
19 substantive trial and then find out that actually large chunks of the claim aren't within
20 the jurisdiction of the CAT after all, if that is essentially what the outcome will be.

21 MR JUSTICE MORRIS: Just let me make a note of that.

22 MR BEAL: Thank you. I hope that isn't me getting my retaliation in first. I will
23 obviously listen to what my learned friend has to say about the substantive points.

24 MR JUSTICE MORRIS: One moment. (Pause)

25 So I mean, subject to your point about them being not able to make the point now, you
26 agree that they ought to be dealt with at the CPO hearing?

1 MR BEAL: Well, as long as it's dealt with on the usual summary judgment process
2 basis. If it's arguable that those claims are within the jurisdiction of the CAT, then they
3 should go forward and be heard. Obviously, if it's unarguably against us, then we're
4 better off finding out sooner rather than later. But it would be on the summary
5 judgment basis.

6 MR JUSTICE MORRIS: Okay, I understand that debate, but it would still be something
7 that would be dealt with effectively at the CPO hearing.

8 MR BEAL: Yes. Well, can I take instructions on the summary judgment basis point?
9 I want to make sure I've got my instructions firmly in mind.

10 MR JUSTICE MORRIS: All right. (Pause)

11 Yes?

12 MR BEAL: Thank you for allowing me to take instructions. I was worried I'd said the
13 wrong thing; I haven't. The submission stands.

14 MR JUSTICE MORRIS: Ms Smith, perhaps I can hear you on this point?

15 MS SMITH: Thank you. My Lord, can I, just before I turn to the jurisdiction point that
16 your Lordship has raised, address very briefly the two points about the timetable and
17 the Confidentiality Ring Order.

18 We proposed that the amended timetable, in light of an indication in a solicitor's letter
19 that we received at 10.06 pm last night, which made it clear that counsel was not
20 available after 7 March. It was on that basis that we made the offer this morning to
21 the other side to move the timetable forward to 6 March and the consequential
22 movement in directions.

23 We also made an offer which was accepted by the other side as regards the
24 Confidentiality Ring Order. There is one point in addition to what Mr Beal said, which
25 is we will go away -- we don't want to waste the Tribunal's time today going line by line
26 through a draft order. We will go away and seek to resolve the issues between us.

1 But insofar as there are any issues outstanding, we propose that the best way forward
2 would be to draw those issues to the Tribunal's attention in writing on 6 January and
3 ask -- we hope there won't be any issues, these really are issues of detail
4 outstanding -- that any outstanding issues of detail are dealt with by the Tribunal on
5 the papers. That would enable Professor Rodger to respond to our requests for further
6 information, which is currently timetabled to happen on Friday, 10 January. We think
7 that's the most efficient way of dealing with this, if at all possible.

8 MR JUSTICE MORRIS: Yes. All right. Thank you.

9 MS SMITH: Turning then to the jurisdiction point, as I understand matters, if I could
10 take your Lordship back to my instructing solicitor's letter of 18 October, which is in
11 hearing bundle volume 2 -- I don't know if you have it electronically or in hard
12 copy -- tab 40.

13 MR JUSTICE MORRIS: Okay.

14 MS SMITH: It's tab 40, page 860, if you're following it on the electronic bundle.
15 CMB/860, it's a letter of 18 October.

16 MR JUSTICE MORRIS: Thank you. Yes. Okay.

17 MS SMITH: So, that is a letter from my instructing solicitors, Google's instructed
18 solicitors, to the Registrar when we were engaged in correspondence with the Tribunal
19 about the issues of jurisdiction. You'll see at paragraph 4 of the letter --

20 MR JUSTICE MORRIS: Yes.

21 MS SMITH: -- page 861, that at that stage, Google intended to raise four jurisdictional
22 objections. The first of those is an argument about applicable law, which depends on
23 where the transactions on Google Play take place, whether they take place outside
24 the UK or the EU.

25 The second is a substantive issue of territorial scope of Section 18, Article 102. Again,
26 this depends on where the transactions on Google Play take place, the transactions

1 that are subject of these proceedings.

2 C and D are more what we say are "pure" jurisdictional points: forum non conveniens
3 and service out. We make the point and a submission that we maintain in paragraph 5,
4 that as regards the objections in paragraph 4a and 4b, that's applicable law and
5 territorial scope, the Tribunal considered analogous jurisdictional issues in the Ennis
6 proceedings.

7 In Ennis -- we give the case reference there -- the Tribunal decided that the applicable
8 law and territorial scope issues were not suitable for summary determination, and
9 they'll fall to be established by Dr Ennis at trial, although they also noted that the
10 applicable law might well have been suitable for determination as a preliminary issue.
11 Obviously, as I understand it, I'm afraid we don't have the judgment of the Tribunal we
12 refer to there in the bundle. I didn't realise this was going to be an issue, but we can
13 try and get hold of copies if necessary.

14 As I understand it, that's because applicable law and territorial scope are issues that
15 may very well turn on substantive evidence. They're not issues that are, in our
16 submission, appropriate for summary judgment. Maybe a preliminary issue hearing,
17 but a preliminary issue hearing that would take place after certification on the basis of
18 relevant evidence, in our submission.

19 So, those were the four potential points that we were making at that stage on
20 18 October.

21 In light of a letter from the Tribunal on 29 October, which is at tab 42, page 866, we
22 were directed to make any jurisdictional challenges under Rule 34.

23 We responded on 8 November, the letter that your Lordship has already referred to,
24 saying that we no longer intend to pursue the pure jurisdictional challenges which in
25 our submission were in 4(c) and 4(d). However, we do maintain, or we made it clear
26 that we did maintain in paragraph 4 of our letter on page 871, the substantive defences

1 on the merits which are the applicable law and the territorial scope issues.

2 MR JUSTICE MORRIS: Yes.

3 MS SMITH: There was, as I understand, no pushback on that from the PCR
4 subsequently.

5 MR JUSTICE MORRIS: Okay.

6 MS SMITH: So, that is our position. We do say --

7 MR JUSTICE MORRIS: One moment, please. (Pause)

8 Okay. So, I mean, you say that these can't be determined at the CPO hearing,
9 effectively?

10 MS SMITH: In our submission, no. They are issues that may very well require
11 evidence; they are issues which are substantive defences on the merits and have
12 previously been dealt with as such by the Tribunal in the Ennis v Apple proceedings,
13 for example.

14 MR JUSTICE MORRIS: One moment, please. Yes, I have that point, thank you.
15 Okay, so are you pushing back against the suggestion that they can be dealt with at
16 the CPO hearing?

17 MS SMITH: My Lord, yes. We haven't considered exactly what evidence we would
18 need et cetera, but yes; we say they are not issues that are appropriate for
19 determination at the certification stage. They may very well be issues that can be
20 determined by the Tribunal as preliminary issues subsequently, but they do go
21 to -- they are substantive defences.

22 MR JUSTICE MORRIS: All right. And what about -- do they not go to the issue of
23 defining the class? If you are right, do they ... I'm just reading it. (Pause)

24 MS SMITH: Exactly. My Lord, I ask --

25 MR JUSTICE MORRIS: I mean, they might be about -- ultimately, there will be certain
26 transactions, if you are right, that will be excluded. Is that right?

1 MS SMITH: My Lord, yes. They don't, in our submission, go to the initial definition of
2 the class. The class -- and I'm just trying to turn up the Collective Proceedings Claim
3 Form so that I make sure I quote it verbatim -- is defined as -- this is paragraph 17 of
4 the Collective Proceedings Claim Form.

5 MR JUSTICE MORRIS: Can you give me the bundle page number, please?

6 MS SMITH: CMB 124, paragraph 17, if your Lordship has that?

7 MR JUSTICE MORRIS: Yes, I do.

8 MS SMITH: "All UK-domiciled Third-Party App Developers who, during the Relevant
9 Period, made one or more Relevant Sales."

10 So, the class -- and obviously when we're dealing with a class, we are dealing with
11 claimants, individuals, third-party app developers -- all UK-domiciled third-party app
12 developers fall within the class.

13 Then the Relevant Period is defined on page 125 --

14 MR JUSTICE MORRIS: Yes.

15 MS SMITH: -- basically, going back six years, and a Relevant Sale is also defined on
16 page 125:

17 "Any sale of a Third-Party App via the Play Store" and "any sale to an Android Device
18 user within a Third-Party App on which the Commission is charged."

19 So, that is the definition of the class. It is defined by reference to the domicile of the
20 developers and all of their sales on which they pay Commission during the Relevant
21 Period, form the subject of the claim.

22 So, in our submission, there will then be a subsequent question when and if the
23 Tribunal decides to certify the claim on the basis of this class definition. As to the class
24 definition, there may be questions about domicile, whether it's clearly defined, whether
25 it's appropriate for an opt-in rather than an opt-out, those sorts of issues.

26 But the question about where the Relevant Sales were made and where the relevant

1 transactions took place, which may go to the applicable law and territorial scope
2 issues, in our submission are matters that are subsequently to be determined in the
3 substantive proceedings once evidence has been put forward on that: what proportion
4 of the sales, which transactions, we say, and what applicable law refers to which
5 transactions? But first we need to define the claim --

6 MR JUSTICE MORRIS: So, you're saying that where the applicable law is not UK or
7 EU law, then those transactions are out of the claim, effectively?

8 MS SMITH: Yes, but that will be a matter that is to be determined once we have --

9 MR JUSTICE MORRIS: I understand you say you can't determine it without evidence,
10 but does that in any way affect the issues at certification stage? Does knowledge, for
11 example, of the volume of those transactions that you say fall outside, have any
12 relevance to issues which will arise at certification?

13 MS SMITH: No, my Lord, in my submission, it's not an issue that the Tribunal has
14 taken into account before and certainly, my recollection, I was just checking, is that it's
15 not an issue that was taken into account by the Tribunal when it decided to certify in
16 the Ennis proceedings.

17 MR JUSTICE MORRIS: Okay. I hear what you say. Thank you very much. Mr Beal?

18 MR BEAL: Just very briefly, if I may, on that. We recognise that there will need to be
19 witness evidence if the issue is to be dealt with, because, for example, we'll need to
20 understand the contractual arrangements, who the class members were contracting
21 with, the basis upon which they were contracting with people; all of these will be
22 relevant considerations.

23 Can it be dealt with as a preliminary issue? In our respectful submission, preliminary
24 issues are often touted as a shortcut and turn out to be a long cut. So, we wouldn't
25 recommend that. If there's a pure point of law, then we would expect it to be brought
26 forward on a summary judgment basis, resisting certification in the way that the Rules

1 provide for in the usual way.

2 So, if it's not --

3 MR JUSTICE MORRIS: It's not suggested by Ms Smith that it is a pure point of law.

4 MR BEAL: No, and on that basis, I respectfully agree with her that it doesn't affect
5 certification and it will need to be fleshed out in due course, but we do put a marker
6 down that preliminary issue would not be the way forward. It would simply be
7 a circuitous route.

8 MR JUSTICE MORRIS: Yes, well, that's not something we're going to address today.

9 MR BEAL: No.

10 MR JUSTICE MORRIS: Okay. All right. I think, at some stage, we will want to just
11 discuss that between ourselves, but can we park it for the moment?

12 MR BEAL: Of course.

13 MR JUSTICE MORRIS: And can, perhaps, we move on?

14 **Timetable (continued)**

15 MR JUSTICE MORRIS: The only other point I wanted to raise in relation to
16 timetabling, another one for Ms Smith.

17 Ms Smith, you suggest, in the order, your response includes provision for expert
18 evidence, at this stage. Are you able to tell us whether or not you do intend to adduce
19 expert evidence for the certification hearing?

20 MS SMITH: My Lord, we don't intend -- it's not our intention at the moment. We
21 have -- there is provision in the order for us to request further information and
22 disclosure by the end of today, in fact. We've already sent a pretty full request for
23 information as regards funding arrangements, which we sent to the PCR last night.
24 We will, of course, be sending requests for further information by 4.00 pm today, of
25 matters that we say are relevant to the CPO application.

26 If the position -- it may be that we need to revisit our position on expert evidence,

1 seeing what responses we get by 10 January from the PCR. It is not our intention to
2 put in expert evidence at the moment, but we need to leave that option open depending
3 on the responses we get from the PCR by 10 January.

4 MR JUSTICE MORRIS: Is that something which would raise a concern on the
5 claimant's part if that were to happen? And does there need to be some provision for
6 the --

7 MR BEAL: The timetable already builds in scope for us to respond.

8 MR JUSTICE MORRIS: It's built it in. And I'm not stopping you, but I'm not sort of
9 encouraging you either, to put it bluntly.

10 MR BEAL: If I can put it this way, you asked for clarification and you were told, not
11 yet.

12 MR JUSTICE MORRIS: Yes.

13 MR BEAL: And that's fine. Bit like chastity but when one seeks that.

14 MR JUSTICE MORRIS: I hope we've got the -- we're not particularly keen,
15 I mean -- and if there were to be any expert evidence, certainly it would assist us,
16 I think, just as the Claimants' expert report for the main case has got a nice executive
17 summary at the outset, we'd expect something similar.

18 But, the sooner people know, the better, I think, on that.

19 **Drafting issues**

20 MR JUSTICE MORRIS: I think there were one or two minor drafting differences on
21 that section. I don't know whether you can iron them out between you.

22 MR BEAL: There were some drafting changes suggested by --

23 MR JUSTICE MORRIS: Can I just --

24 MR BEAL: -- Google's solicitors yesterday and we incorporated those.

25 MR JUSTICE MORRIS: Just working through, it's really paragraph 8 and 9, there's an
26 issue about whether it's "member of the proposed class" or "proposed class

1 members". I would hope that you can sort that out between you.

2 MR BEAL: I struggle to get too excited about that one, I'm afraid.

3 MS SMITH: Well, the point is well taken, but --

4 MR JUSTICE MORRIS: Paragraph 2?

5 MS SMITH: (b). There's the similar --

6 MR JUSTICE MORRIS: Yes, the same point.

7 MS SMITH: The same point.

8 MR JUSTICE MORRIS: And then there's an issue, actually, in paragraph -- also in
9 paragraph 2(b), about whether it's observations or written and oral submissions.

10 Again, something that can be sorted out between you? I've got nods on one side.

11 MR BEAL: I can't imagine that's going to be a deal breaker.

12 MR JUSTICE MORRIS: All right. Well, I'm not going to hear any arguments on that.

13 Okay.

14 **Going forward**

15 MR JUSTICE MORRIS: That moves on really to the last part, which is paragraphs 14
16 and 15. Can I just tell you where we are on wishes to make?

17 We are not minded, at this stage, to make orders or directions which relate to issues
18 going to the possible joint case management of this case with the Coll and Epic
19 proceedings. The issues before us today are essentially the application for disclosure
20 by Google of documents relevant to those proceedings and directions concerning the
21 possibility of setting up a joint CMC for the three sets of proceedings.

22 However, we are aware, obviously, of the overlap, and we are aware of the potential
23 for joint case management. This is very much a provisional view because I certainly
24 don't see all the complexities of the interaction between the issues. But in a perfect
25 world, to the extent that there are common issues, we would see the force of having
26 them decided at a single trial.

1 With that in mind, what we have in mind in relation to this issue is as follows: we hear
2 the certification matter in March and we give our decision promptly, then and there, on
3 that day or the day after, with reasons to follow.

4 We do that with a view to then proceeding to these issues of overlap and joint case
5 management promptly. We would, all other things being equal, be seeking to set up
6 a joint case management conference, assuming we certify, assuming we do, pretty
7 soon thereafter. I'm talking about a week or two, thereafter.

8 With that in mind, we would consider, the Tribunal would consider, and I would
9 obviously have to speak with the Tribunal members on the other case, notifying the
10 Claimants in the other proceedings of the intention to have a joint case management
11 conference sometime, I suspect, before the end of March.

12 That is how we foresee proceeding, and that, we hope, would both overcome the issue
13 of dealing with things too prematurely whilst at the same time moving forward quickly.

14 We would also consider, although we haven't taken a decision on this, we would
15 consider if it were feasible and if it would move things along more quickly, we would
16 consider considering the paragraph 14 application in relation to disclosure at the
17 certification hearing, so that if we were minded to order any disclosure, we could order
18 it fairly promptly so that people could be moving more quickly to see what they might
19 need to see.

20 Now, somebody might say to me, that's not going to be feasible, because actually what
21 is disclosed will not be both disclosed and digested sufficiently quickly in time. But,
22 anyway, that is our current thinking, Mr Beal, over to you.

23 MR BEAL: Just give me a moment to take instructions on those observations. (Pause)

24 MR JUSTICE MORRIS: I mean, I should say, we are prepared to rise for a few
25 moments if people want to discuss it.

26 MR BEAL: I'm sorry, Sir. I think I've --

1 MR JUSTICE MORRIS: Mr Beal, I'm not hurrying you. Please, don't feel pressured.

2 MR BEAL: In the light of your helpful observations, if I may say so, on what you
3 propose to do with an eye going forward, I'm not going to push paragraph 15.

4 MR JUSTICE MORRIS: Okay.

5 MR BEAL: On paragraph 14, Google have agreed to give us non-confidential versions
6 of the pleadings. So, that's accepted, that we'll get that as a minimum.

7 I think, again, in the light of your helpful observations, could I put down this marker?
8 It's certainly not in terrorem, but getting a very substantial volume of material on the
9 day of the certification hearing wouldn't be massively helpful.

10 But we accept that we don't -- well, if there were an order for very prompt disclosure
11 following the certification hearing, assuming the matter goes in our favour, then that
12 would assuage our concerns. We could then deal with getting that further, the witness
13 evidence and the expert reports and so on; they could then be digested in relatively
14 short order, as long as we get very prompt disclosure of them.

15 Now, prompt disclosure shouldn't be a problem for the non-confidential versions,
16 because, of course, they're there, there's a handle. All they have to do is produce
17 them. I mean, in a sense, that kind of makes the argument for me, which is why we're
18 not having them now, given that they're going to be necessary, assuming certification
19 goes in our favour. But I can see why you would want to at least know the lay of the
20 land on certification before reaching that conclusion.

21 I suggest -- therefore, what I'm actually asking for is simply for it to be dealt with at the
22 CPO application as a sweep up, as, in the light of any observation you've given as to
23 certification by that stage, with reasons to follow, it could then be addressed at that
24 hearing. I anticipate that the instructions will be to seek the very prompt disclosure of
25 the matters set out in paragraphs 14(a) and 14(b) at that point.

26 MR JUSTICE MORRIS: Can I just -- okay. I just want to make that --

1 MR BEAL: Of course.

2 MR JUSTICE MORRIS: I just want to digest that. So, paragraph 14, insofar as
3 non-confidential version of the pleadings in paragraph 14(a) has been agreed to be
4 given.

5 MR BEAL: Yes.

6 MR JUSTICE MORRIS: Yes. In relation to the rest, and I have to say, reading the
7 correspondence, I was a little bit confused about what you were asking for because
8 I got the impression that initially you were asking for non-confidential versions under
9 paragraph 14(a), and then at some stage it got changed to confidential. But I'll leave
10 that to one side.

11 MR BEAL: Yes.

12 MR JUSTICE MORRIS: Just to tell you that I noted that in the correspondence.
13 But you are -- your position is that in relation to paragraphs 14(a) and (b), apart from
14 what is now going to be disclosed, that you would want that dealt with at the CPO, at
15 the hearing in March, and if the Tribunal was willing to make that order, that that
16 disclosure should be made promptly.

17 Now, you raise the issue. I don't think the fact whether the version ordered would be
18 confidential or non-confidential under paragraph 14(a) would make any difference.
19 They would both be available, presumably, and could be made available promptly. I'm
20 expressing no view about whether the applications will succeed.

21 You're happy, but you want it dealt with then.

22 MR BEAL: Yes.

23 MR JUSTICE MORRIS: Okay. All right.

24 MR BEAL: And there'll be a Confidentiality Ring, one hopes, in place by then which --

25 MR JUSTICE MORRIS: Well, I certainly hope so, yes.

26 Yes, Ms Smith?

1 MS SMITH: Thank you, my Lord. Your Lordship is correct that in the correspondence,
2 the PCR's requests for disclosure were limited to non-confidential copies of Google's
3 pleadings and the skeleton arguments, witness statements and expert reports.
4 And the references are the letter from Geradin Partners to RPC of 6 December,
5 paragraph 12, CMB, page 892, and the letter from Geradin Partners of 12 December,
6 paragraph 10, CMB, page 900.
7 And it's for that reason our skeleton at paragraph 14, CMB, page 31, only refers to the
8 PCR requesting disclosure of non-confidential copies, because that was all that was
9 asked for in the correspondence.
10 It does then appear that, without explanation, the PCR expanded his request, which
11 then appeared in the skeleton and the draft order, without having ever explained why
12 or on what basis it was expanded to cover confidential documents. And it wasn't
13 something that we were expecting or necessarily had been given any notice of. Well,
14 I had not been given any notice of.
15 But, in any event, my Lord, your Lordship had already picked up that point. It is
16 correct.
17 As regards your Lordship's indication that you hear the certification application in
18 March, give judgment very promptly and then --
19 MR JUSTICE MORRIS: Give a decision promptly.
20 MS SMITH: A decision with reasons to follow.
21 MR JUSTICE MORRIS: I'm not promising a judgment quickly.
22 MS SMITH: Of course.
23 MR JUSTICE MORRIS: And you notice I interjected very quickly there.
24 MS SMITH: Yes, my Lord. That's well accepted.
25 Then, there'll be a joint CMC a week or so shortly thereafter. Obviously it is of utmost
26 importance that the Claimants are notified of the intention to do this. Up to now, they

1 have not been notified by the PCR except insofar as they made it clear they were not
2 prepared to incur the costs, particularly Coll who's bringing funded proceedings;
3 they're not prepared to incur the costs of considering joint case management unless
4 and until certification is granted. I can give you the reference for that letter.

5 But, my Lord, as regards your Lordship's indication that you would also consider the
6 paragraph for disclosure at the certification hearing itself, can we make these points
7 in that regard?

8 In our submission, the application for disclosure of Coll's and Epic's documents is most
9 properly made and should be made as a matter of principle and practicality to those
10 parties -- against those parties. And I'll explain why. There are two reasons why,
11 my Lord.

12 First of all, the collateral use restrictions that are contained in Rule 102(1) of the
13 Tribunal's Rules prevent us, Google, from providing documents filed by other parties
14 to other proceedings. Those are the Coll and Epic proceedings. We cannot provide
15 those documents under the Rules because they have not been produced to us in these
16 proceedings.

17 And, in fact, those collateral -- I can take your Lordship to that Rule if it exists.

18 MR JUSTICE MORRIS: You don't need to. So, Rule --

19 MS SMITH: It's 102(1).

20 MR JUSTICE MORRIS: 102(1). I read it yesterday. I had a look at it.

21 MS SMITH: So, my Lord, those collateral use restrictions obviously prevent us from
22 disclosing other parties' documents --

23 MR JUSTICE MORRIS: Yes, okay.

24 MS SMITH: -- but they also prevent us disclosing in these proceedings our own
25 documents --

26 MR JUSTICE MORRIS: Insofar --

1 MS SMITH: -- insofar as they refer to those other documents that have been produced
2 in other proceedings. So, my Lord, of course I was going to make the
3 submission -- and in fact, it's been overtaken by events -- the appropriate time to
4 consider requests for disclosure of those sorts of documents is at a joint CMC between
5 Epic, Coll and Rodger.

6 MR JUSTICE MORRIS: Yes.

7 MS SMITH: They need to be given proper notification of that, in our submission.

8 MR JUSTICE MORRIS: Okay, so just pause for a moment. Then paragraph 14(b),
9 and let's leave to one side the point about references in your documents to their
10 documents.

11 MS SMITH: Yes.

12 MR JUSTICE MORRIS: Leave that to one side because that's a bit more confusing.
13 Paragraph 14(b), you say, can't be dealt with until there's a joint CMC.

14 MS SMITH: Yes, my Lord. We also say that as a matter of principle and also
15 practicality, applications for those documents should be made against the custodians
16 or the producers of those documents -- the authors of those documents.

17 MR JUSTICE MORRIS: Yes, okay.

18 MS SMITH: That is Ms Coll and Epic, for the collateral use restriction reasons, but
19 also there is an issue, your Lordship, of which the Tribunal should be aware, which is
20 the issue of third-party confidential information. When I say "third party", I mean third
21 parties over and above the parties to these proceedings, but also the parties to the
22 Coll and Epic proceedings.

23 The point is this: that under the Confidentiality Ring Orders in place in the Coll and
24 Epic proceedings, and also I think the draft Confidentiality Order that's being
25 discussed -- no, well, certainly the Confidentiality Orders that are in place in the Coll
26 and Epic proceedings. Google and Epic, who are the most likely custodians of relevant

1 disclosure documents, as your Lordship will understand -- Google and Epic have
2 obligations to notify any third parties of proposed disclosure of third-party confidential
3 information.

4 MR JUSTICE MORRIS: Okay.

5 MS SMITH: Of course, there may be documents within the possession of Google and
6 Epic that refer to other market participants -- other companies in the market.

7 MR JUSTICE MORRIS: Okay, pause a minute please. Pause a minute, I'm just
8 digesting. This issue applies to both paragraphs 14(a) and 14(b), does it? So I'm
9 using paragraphs 14(a) and 14(b) as the two classes of documents.

10 MS SMITH: It does, yes; it does apply to the red parts of paragraphs 14(a) and 14(b).

11 MR JUSTICE MORRIS: Not your pleadings?

12 MS SMITH: That is the -- not our non-confidential pleadings --

13 MR JUSTICE MORRIS: Okay.

14 MS SMITH: -- what we have offered to provide and which offers have been accepted.

15 MR JUSTICE MORRIS: So for example, the witness statements and expert reports.

16 MS SMITH: Both, yes. I can't say whether it applies to the non-confidential versions
17 as well as the confidential versions, but it certainly applies to the confidential versions.

18 MR JUSTICE MORRIS: Okay.

19 MS SMITH: No. Obviously, we can't say it applies to every document --

20 MR JUSTICE MORRIS: No, okay, I understand.

21 MS SMITH: -- but there may very well be third-party information in those -- certainly
22 in disclosure documents. There may also be third-party information in expert reports
23 and witness statements.

24 This issue has not been even acknowledged in the PCR's proposed request, but it is
25 a real issue. At the moment, for your Lordship's information, under the CROs in force
26 in the Coll and Epic proceedings -- and I understand this is standard form across these

1 types of proceedings -- before disclosing third-party confidential information, the
2 parties are required to promptly notify those third parties, and then give the third parties
3 14 days to make an application or object to the Tribunal.

4 MR JUSTICE MORRIS: Yes.

5 MS SMITH: That appears, for example, in the Confidentiality Ring Order in the Epic
6 and Coll proceedings. At the most recent CMC, which involved requests for disclosure
7 by Google of Epic, Epic asked for 28 days in total to consider those requests, to
8 consider whether those disclosure documents contained third-party confidential
9 information, and in order to enable them to give the prompt notification and allow the
10 third parties 14 days to make requests.

11 Again, these are issues that will arise and that, again -- we make it clear that as
12 a matter of principle and practicality -- the other parties, Coll and particularly Epic,
13 need proper notice of any of these types of issues that are going to be canvassed at
14 the joint CMC, and need to obviously be there, but also need to have proper
15 opportunity to consider all of these types of issues.

16 MR JUSTICE MORRIS: Okay.

17 MS SMITH: If a disclosure -- well, no, they need in fact -- sorry, one step back.
18 Your Lordship has suggested that you may consider a section 14 application for
19 disclosure at the certification hearing. If that is the case, then we say, in fact, they'd
20 be better dealt with subsequently at a joint CMC --

21 MR JUSTICE MORRIS: I can see --

22 MS SMITH: -- at which Coll and Epic are involved because of these issues -- the
23 collateral issues.

24 MR JUSTICE MORRIS: So you're saying that in practical terms, the paragraph 14
25 issues are not going to be able to be dealt with at the certification hearing.

26 MS SMITH: It would be very difficult.

1 MR JUSTICE MORRIS: Or certainly paragraph 14(b) issues.

2 MS SMITH: Yes.

3 MR JUSTICE MORRIS: Okay.

4 MS SMITH: And very well maybe, as well, our own confidential skeleton arguments,
5 witness statements and expert reports, because they may also include Coll and Epic
6 information which is covered by the collateral use restrictions. But they may also
7 include, if the PCR wants confidential versions of third-party information.

8 MR JUSTICE MORRIS: Okay. Can I ask you this question: you have agreed to
9 disclose a non-confidential version of your pleadings?

10 MS SMITH: Yes.

11 MR JUSTICE MORRIS: Does that not run into the Coll issue? Are there other things
12 in the non-confidential version of your pleadings which refer to matters which are
13 confidential to Coll, or -- sorry, are covered by pure paragraph 14(b)? In other words,
14 if you're replying to something that they've said --

15 MS SMITH: I understand that either because the pleadings have been referred to
16 publicly in open court or we've been through them, that those issues do not arise as
17 regards the non-confidential version of the pleadings.

18 MR JUSTICE MORRIS: In relation to the non-confidential version of the pleadings
19 which you've just discussed.

20 MS SMITH: Yes.

21 MR JUSTICE MORRIS: And nor do they raise any third-party issues.

22 MS SMITH: No.

23 MR JUSTICE MORRIS: No. All right, fine.

24 MS SMITH: Not the non-confidential. But my Lord, it is also important that
25 your Lordship is aware -- and we only became aware of this in the solicitor's letter that
26 we received at 10.00 pm last night -- that it does appear -- I don't know if your Lordship

1 has copies of those letters.

2 MR JUSTICE MORRIS: I'm not sure I do. Are they --

3 MS SMITH: How many do we have? So as regards disclosure, the PCR -- this is
4 paragraph 7. This is something that was news to us and that we only became aware
5 of last night. Geradin Partners appear to have previously written to the legal
6 representatives of Ms Coll and Epic to request copies of certain documents filed in
7 those proceedings, and has received non-confidential copies of these certain
8 documents under paragraph 9.66, limited to documents referred to or quoted in open
9 court.

10 They don't say what documents they have received.

11 MR JUSTICE MORRIS: Yes.

12 MS SMITH: Nor do they say, perhaps more importantly, what further documents they
13 require.

14 MR JUSTICE MORRIS: Under paragraph 14(b)?

15 MS SMITH: Yes. So my Lord, we are still unclear, to put it low, why they require more
16 disclosure, certainly before the certification hearing, though, I think that ship has
17 already sailed -- we're not going to get any more disclosure before the certification
18 hearing. Again, at or shortly after the certification hearing, the position is still really
19 quite unclear.

20 MR JUSTICE MORRIS: Your basic concern is that you think if we completely parked
21 this issue to be re-raised on 6 and 7 March, that the objective which the Tribunal has
22 in mind of moving it along quickly so that things will be available for a joint CMC might
23 not be achievable because of the timescale. I hear all that, I'm not sure we need to
24 decide anything about that today, save that I wonder aloud whether any procedure
25 required in relation to notifying third parties can happen in advance.

26 I'm thinking in very general terms -- I haven't in my own mind got it clear -- because

1 I haven't seen the terms of the orders -- exactly the process that was involved. But
2 can that be -- I mean, people might not consent, you might object, but can that process
3 of seeking third-party consent be expedited in such a way that it might still be possible
4 to address the issue at 6 and 7 March?

5 MS SMITH: Could I take instructions?

6 MR JUSTICE MORRIS: Yes.

7 MS SMITH: Thank you. (Pause)

8 MR JUSTICE MORRIS: Yes, Ms Smith.

9 MS SMITH: My Lord, I'd make the following points: first, as we understand it -- I am
10 not here to represent the interests of Coll and Epic; their interests are best represented
11 by their own legal teams. It is open to the PCR, which I understand they have not yet
12 done, to make explicit requests -- reasoned requests -- of the Coll and Epic parties for
13 disclosure of their documents as per paragraph 14(b).

14 MR JUSTICE MORRIS: Yes, okay. That would be a reasoned request, sorted in
15 correspondence.

16 MS SMITH: My Lord, and then could be made in the Coll and Epic proceedings.

17 MR JUSTICE MORRIS: They would have standing, would they, to go in the Coll and
18 Epic proceedings as a third party? Well, at the moment they're not even certified, as I
19 say.

20 MS SMITH: No.

21 MR JUSTICE MORRIS: So as a third party.

22 MS SMITH: I mean that would be open to the Tribunal; that would be a matter for the
23 Tribunal, but within the Tribunal's case management powers, given the overlap
24 between the three sets of proceedings, it certainly would be, in my view, feasible for
25 the Tribunal to entertain that sort of third-party application.

26 MR JUSTICE MORRIS: Right. Okay. So that's vis a vis, what I call, pure paragraph

1 14(b).

2 MS SMITH: Yes.

3 MR JUSTICE MORRIS: In relation to requests made of you.

4 MS SMITH: Yes.

5 MR JUSTICE MORRIS: You're saying, "We're not going to disclose anything that's
6 Coll stuff; you've got to go there". In relation to your documents, which have third-party
7 confidentiality issues --

8 MS SMITH: Yes.

9 MR JUSTICE MORRIS: -- is it possible for you, in the time leading up to March,
10 subject to what they expected, to actually set in train that process?

11 MS SMITH: My Lord, I think what we would need in good time -- I mean properly good
12 time before the certification hearing -- if we were to consider and respond to
13 a disclosure application on that date, we would need to know the following: first, we
14 would need to know exactly why the PCR requires copies of all of our skeleton
15 arguments, witness statements, expert reports and pleadings, both confidential and
16 non-confidential for the purposes of considering case management --

17 MR JUSTICE MORRIS: Yes.

18 MS SMITH: -- because that is the only --

19 MR JUSTICE MORRIS: That was the reason they put forward.

20 MS SMITH: -- reason why they have put forward that they need this disclosure.

21 MR JUSTICE MORRIS: Okay.

22 MS SMITH: It is not -- and I stress not -- at all obvious to us --

23 MR JUSTICE MORRIS: No, I understand -- yes, I -- yes.

24 MS SMITH: -- why they need all of that simply for case management purposes.

25 MR JUSTICE MORRIS: Okay.

26 MS SMITH: So that's the first thing we would need in order to --

1 MR JUSTICE MORRIS: Yes.

2 MS SMITH: -- properly be able to consider this request before the certification hearing.

3 Then we would need reasoned proposals from them as to how we are to deal with the

4 collateral use issues and the third-party confidentiality issues, which I have raised with

5 the Tribunal. We'd need all those matters to be addressed in any proper application

6 that's made in good time before a certification hearing in March.

7 MR JUSTICE MORRIS: Okay. All right. Yes, fine. Mr Beal?

8 MR BEAL: So, please would you look at CMB -- case management

9 bundle -- page 797, tab 22.

10 MR JUSTICE MORRIS: 797?

11 MR BEAL: 797. Tab 22.

12 MR JUSTICE MORRIS: Sorry, which paragraph are you looking at?

13 MR BEAL: So the paragraph is actually -- that simply tells you it's a letter from RPC --

14 MR JUSTICE MORRIS: Yes.

15 MR BEAL: -- dated 9 August. The paragraph is over the page. Page 798. Please

16 could I invite you to read paragraphs 5 and 6. (Pause)

17 MR JUSTICE MORRIS: Okay.

18 MR BEAL: That was Google accepting that there is a very considerable overlap

19 between our proceedings and Epic and Coll's proceedings. Case management -- both

20 sets of proceedings should be considered alongside each other, and it was appropriate

21 for a representative from our case to attend the CMC in Epic.

22 MR JUSTICE MORRIS: Yes.

23 MR BEAL: Now, in fact, that didn't happen.

24 I've spent five weeks in this Tribunal doing Interchange, pass on, and that case has

25 involved my claimants, who are a series of merchants -- FTSE 100 companies who

26 are bringing a claim against Mastercard and Visa -- and it's been teamed up through

1 an umbrella proceedings order with a claim brought by Mr Merricks against
2 Mastercard by himself. The reason for that joinder, for the purposes of pass on, was
3 that the card schemes were alleging against my clients they had passed on their loss
4 to consumers. Mastercard, in the Merricks' claim, was saying consumers haven't
5 suffered any loss, but they were running two horses in opposite directions, at least in
6 part. And the way the case has evolved is Mastercard says that there was no pass on
7 to speak of until my claim started, which was 2010, 2011.

8 So it's the risk of inconsistent arguments being run against the business class and the
9 consumer class that comes to the fore in the case.

10 MR JUSTICE MORRIS: I'm aware of that, yes.

11 MR BEAL: That's why it would be very useful to see the nature and extent of the
12 witness evidence, so that we don't end up in a position where two horses are being
13 run in opposite directions in our case with the Coll case. It's abundantly clear that
14 there is a very substantial overlap with the Coll case, and that question of pass-on will
15 undoubtedly come to the fore in both sets of proceedings.

16 Our ambition in due course, and we've made no secret about it, is that it therefore
17 makes sense for this Tribunal to grasp the nettle of pass-on, so that it's dealt with in
18 a way that is consistently applied between both sets of proceedings --

19 MR JUSTICE MORRIS: Right.

20 MR BEAL: -- as has happened in Interchange.

21 MR JUSTICE MORRIS: Right.

22 MR BEAL: Now, whether that can be done is not a matter for today --

23 MR JUSTICE MORRIS: No.

24 MR BEAL: -- and I'm not proposing to deploy the arguments I have prepared for today
25 to try and persuade you out of your initial view that this isn't going to be dealt with
26 today, and you're putting a marker down in due course for this to be dealt with at some

1 point.

2 I would, however, suggest that it's perfectly capable of being dealt with once the issue
3 of certification has been addressed, and it would be sensible for it to be dealt with at
4 the CPO hearing on 6 or 7 March so that we get these documents, which are clearly
5 going to be relevant and important to our case, as soon as possible now.

6 MR JUSTICE MORRIS: Well, all right.

7 MR BEAL: My Lord --

8 MR JUSTICE MORRIS: I have the point, but let's deal with the practicalities of
9 third-party confidentiality -- I'm not saying you need to deal with them now, but the two
10 points that are made are: it's not going to be as smooth and as quick, because there
11 has to be some process of release in relation to third-party information; secondly,
12 because of the collateral undertaking at that certification hearing, we, the Tribunal, are
13 not going to be able to order Google to disclose Coll and Epic pleadings, et cetera.
14 That matter will need to be addressed directly to Coll and Epic.

15 MR BEAL: We have addressed that --

16 MR JUSTICE MORRIS: Yes.

17 MR BEAL: -- directly to Coll and Epic, and they have given us --

18 MR JUSTICE MORRIS: Some.

19 MR BEAL: -- some of their pleadings as they stood at the time -- I understand they've
20 been amended since -- and they've given us some documents to the extent that, for
21 example, witness evidence or expert evidence has been referred to in open court. I'm
22 not sure about expert witness --

23 MR JUSTICE MORRIS: Yes, okay.

24 MR BEAL: -- actually, but to the extent it's been referred to in open court.

25 MR JUSTICE MORRIS: All right, but what are we going to do? How can we deal with
26 that on 6 March?

1 MR BEAL: I respectfully endorse your suggestion that we approach Coll and Epic to
2 see what they would be --

3 MR JUSTICE MORRIS: Yes.

4 MR BEAL: -- prepared to consent to. But of course, this is all subject to the jurisdiction
5 of the Tribunal in Rule 102(2) to give permission for documents to be disclosed,
6 notwithstanding, or in the face of, a party's objection.

7 Now, it may well be that Ms Coll does not object to the sharing of information. She
8 might want to see documents from our case, and it may be in her advantage to do so.
9 And no doubt, a degree of consensus can be reached. What actually happened in
10 Interchange was that the Tribunal gave a direction that all of the material in the
11 Confidentiality Ring for trial be disclosed to Mr Merricks' representative.

12 MR JUSTICE MORRIS: Yes, but we can't do that, I don't think, at the hearing on
13 6 March, because Coll and Epic are not going to be there.

14 MR BEAL: So with respect, absolutely --

15 MR JUSTICE MORRIS: Yes.

16 MR BEAL: -- and that's why we would want to put them on notice --

17 MR JUSTICE MORRIS: Yes.

18 MR BEAL: -- if -- once certification has taken place, we would then want to put them
19 on notice of having some sort of information-sharing arrangement into an appropriate
20 Confidentiality Ring.

21 MR JUSTICE MORRIS: Sorry, you're saying then in relation to paragraph 14(b), that
22 would not be dealt with at the certification hearing. You may well give them notice in
23 advance, you may think between now and then you want to make an application in
24 those proceedings if you think it will hurry it along. That's not something I can express
25 a view on. But I think the position we're getting to in relation to paragraph 14(b) is that,
26 one way or another, to the extent that it's not resolved -- and hopefully you'll all be

1 happy with what you've got by then -- we will not be in a position to deal with any
2 outstanding claim effectively for disclosure as against Coll and Epic.

3 MR BEAL: We will now need to take steps in light of the helpful observations from the
4 Tribunal today to work out what practically can be done --

5 MR JUSTICE MORRIS: Yes.

6 MR BEAL: -- to ensure that we hit the ground running, all being well, post-certification.
7 Whether or not it's possible on 7 March, for example, to have a short hearing at which
8 representatives from the Coll and Epic cases, are able to say whether or not they
9 agree or disagree with the proposal of putting information from one Confidentiality Ring
10 into another, we will have to wait and see. And I'm thinking on my feet without
11 instructions.

12 So I simply want to -- in answer to your question, Sir, "Are you saying it can't be dealt
13 with on the 6th and 7th?" No, I'm not. I'm saying we're not in a position yet to say
14 whether it can be definitively dealt with then --

15 MR JUSTICE MORRIS: Right, okay.

16 MR BEAL: -- and we will take steps to try and make sure it can be dealt with then,
17 because we think it's imperative --

18 MR JUSTICE MORRIS: Okay.

19 MR BEAL: -- that we move as quickly as possible, given the risks.

20 MR JUSTICE MORRIS: All right. I understand that, but you will have noted the points
21 that Ms Smith has made --

22 MR BEAL: Absolutely.

23 MR JUSTICE MORRIS: -- about the practical difficulties, both in relation to Coll and
24 Epic and in relation to third-party information.

25 MR BEAL: So third-party confidential information is protected by the Confidentiality
26 Ring arrangements. That routinely happens. And in the umbrella proceedings in

1 Interchange, an objection was taken, in fact, by my clients -- I didn't do the case, but
2 the directions hearing -- to the furnishing of confidential information from my clients to
3 Mr Merricks' representatives. And the answer from the Tribunal was, "Well, it's going
4 into a Confidentiality Ring. They'll abide by the Confidentiality Ring terms. Your
5 confidential financial information is protected". And that was the view that the
6 Tribunal --

7 MR JUSTICE MORRIS: That's third-party information?

8 MR BEAL: That's third-party information.

9 MR JUSTICE MORRIS: Right, I'm not sure we need to decide that now --

10 MR BEAL: No.

11 MR JUSTICE MORRIS: -- and I'm not sure there's anything that requires deciding
12 now, and we're going to rise in a moment just to give some thoughts to various points
13 that have arisen. But, one of which is whether we -- and I'm not sure at the moment
14 I'm persuaded that we should -- provisionally have some form of provision to allow for
15 Coll and Epic, in relation to disclosure, to in some way participate on 7 March. I'm not
16 sure -- at the moment I'm persuaded of that. And I think, probably, you need to work
17 on that.

18 MR BEAL: I haven't formally asked for that.

19 MR JUSTICE MORRIS: No, you haven't, but you did mention that as a possibility.

20 MR BEAL: I've raised it.

21 MR JUSTICE MORRIS: The only question is whether we -- and I'm not sure either of
22 you have asked for this -- ought to be making some form of interim procedural orders
23 to speed this process along in terms of somebody notifying somebody of what they
24 want by a certain date. I'm not super keen on it. I think you've got the message that
25 you need to get on with it, but I think you've also got the message that, whilst we totally
26 understand the theoretical benefit of resolving any of these cross-disclosure issues

1 | sooner rather than later, the practicality of it will need a bit of work.

2 | MR BEAL: Well, could I say this, please, just in relation to that second point.

3 | Third-party disclosure, it's entirely open to Google to have worked out what the position

4 | is with third-party confidential information by 6 March, 7 March. That's something that

5 | they ought to be doing on an ongoing basis about the documents that are likely to

6 | have to be disclosed in any event in the Coll proceedings. It's not very difficult to work

7 | out what those are. I would have thought in the Coll proceedings, if there is third-party

8 | confidential information, it's already been redacted and therefore only disclosed into

9 | a Confidentiality Ring in that case. So they would have already carried out the

10 | redaction exercise for any third-party confidential information in the Coll and Epic

11 | proceedings, and therefore that ought to be a job done. It's a question, then, of which

12 | of those documents are then --

13 | MR JUSTICE MORRIS: Sorry, the Coll proceedings?

14 | MR BEAL: In the Coll proceedings, it is already subject to a confidentiality order.

15 | MR JUSTICE MORRIS: But the fundamental position of Google in relation to

16 | paragraph 14(b) is that you ought to be asking them?

17 | MR BEAL: Well, I hear that's what they've said, and we are obviously taking that

18 | forward as well, but there will be certain documents that they hold in relation --

19 | MR JUSTICE MORRIS: We won't be able to make an order, I don't think -- well, I don't

20 | know, I'm thinking aloud -- we'll be in difficulty making an order in relation to paragraph

21 | 14(b) at 6 and 7 March without having Coll and Epic here.

22 | MR BEAL: But paragraph 14(b) isn't a problem with third-party information --

23 | MR JUSTICE MORRIS: No.

24 | MR BEAL: -- it's a problem with Ms Coll and Epic's information.

25 | MR JUSTICE MORRIS: Yes.

26 | MR BEAL: And so I fully take on board that we need to liaise with them and work out

1 | what's the --

2 | MR JUSTICE MORRIS: Yes.

3 | MR BEAL: -- art of the possible there. The third-party confidential information -- what

4 | I'm saying is, to the extent that --

5 | MR JUSTICE MORRIS: In paragraph 14(a)?

6 | MR BEAL: Paragraph 14(a), then it's dealt with by -- the job of redaction has already

7 | been done in my respectful submission, or will have been done, to the extent that that

8 | information is then filed for the Confidentiality Ring purposes in the Coll and Epic

9 | proceedings.

10 | So I mean, at the moment, we're not actually asking for the underlying documents.

11 | We're simply asking for pleadings, skeleton arguments, witness statements and expert

12 | reports.

13 | MR JUSTICE MORRIS: Right.

14 | MR BEAL: Now, to the extent that, for example, an expert's report filed in Coll by

15 | Google refers to third-party information, that would have been blanked out so that it

16 | doesn't get disclosed in the Coll case, and it will only be unredacted in the

17 | Confidentiality Ring.

18 | So the way to cut through this is to have a direction for information sharing between

19 | Confidentiality Rings.

20 | MR JUSTICE MORRIS: Right.

21 | MR BEAL: But I appreciate we're not at that stage yet, and that's why I'm not formally

22 | asking for anything at this stage.

23 | MR JUSTICE MORRIS: All right. Fine. Are there any other matters that we need to

24 | discuss before we rise? I want to rise for a few minutes just to discuss what we call

25 | the non-jurisdiction point, and then we can come back and just work our way through

26 | the order to check that we have covered everything in the order. Mr Beal?

1 MR BEAL: Nothing further.

2 MR JUSTICE MORRIS: Ms Smith, anything that we haven't covered?

3 MS SMITH: My Lord, I think all the points on disclosure are clear that we can't deal
4 with paragraph 14(b) at the certification hearing. It's properly matters that need to be
5 raised against Coll and Epic. As regards paragraph 14(a), we need to see a properly
6 reasoned disclosure application.

7 MR JUSTICE MORRIS: Well, I understand and I'm not going to make any direction
8 on that, but you have made the point, and it will be on the transcript, that you feel that
9 they haven't given sufficient reason for the disclosure of those items.

10 MS SMITH: Particularly in light of Mr Beal's submission just now that it's abundantly
11 clear they should be case managed together. He has to give us reason as to why he
12 needs disclosure in order to support a submission that has already been made on the
13 basis of the pleadings.

14 MR JUSTICE MORRIS: Yes. Presumably -- well, it depends, I mean, you're saying
15 that if they are to be case-managed together, any issues of disclosure can happen at
16 a later stage, you say.

17 MS SMITH: Any joint case management.

18 MR JUSTICE MORRIS: But it may be that the manner in which they are
19 case-managed together or heard together, and what is and isn't common, that
20 statement, "abundantly clear should be case managed together", may in fact be
21 a more complex issue than just --

22 MS SMITH: Well, we await the application and we await the reasons given.

23 MR JUSTICE MORRIS: Yes, and exactly what issues will be dealt with together and
24 how they would be case-managed together. They may be saying that they need to
25 see material in relation to that. They may be saying it, but you want to know why
26 they're saying it.

1 MS SMITH: We would need to see that.

2 MR JUSTICE MORRIS: All right. Okay. Anything else?

3 Right, well, we'll rise for a few moments. Thank you very much.

4 (11.44 am)

5 (A short break)

6 (12.12 pm)

7 **Directions of the Tribunal**

8 MR JUSTICE MORRIS: We have been discussing this issue that we characterise as
9 jurisdictional that is the paragraphs 4(a) and (b) of the letter issue. We still have
10 a residual concern, possibly as a result of me personally not being sufficiently on top
11 of, for example, the Ennis case, that it might have an impact on class definition.

12 The question, which we're not going to ask for an answer to now, is: on the assumption
13 that Google is correct in its case that transactions taking place outside the UK and the
14 EU cannot be the subject of the claim, if you took the position of an app developer
15 whose relevant sales only take place outside the UK and the EU, would such an app
16 developer fall within the class?

17 It's, in a way, a question ultimately for Mr Beal, but on the assumption that Ms Smith's
18 argument is correct, that's the question in our minds. And it may be that we have got
19 it all wrong. It may be in reality, that's not a very practical -- that there is going to be
20 either none or minimal number of people who fall within that definition.

21 But we would like a bit of clarification on that. With that in mind, we're going to ask
22 you both to put in a submission or a letter by 6 January, setting out your position as to
23 whether or not the issues at paragraphs 4(a) and (b) might potentially be relevant to
24 class definition.

25 That's where we've got to on that, and I hope I've expressed it clearly enough and
26 expressed what we see as the concern clearly enough.

1 MR BEAL: Thank you very much. Loud and clear, Sir.

2 MR JUSTICE MORRIS: Yes. Good. Okay. Subject to that, I don't think we have
3 anything further to say.

4 Obviously, we'd like you -- I think everything is agreed on the order, effectively, subject
5 to that. I don't know whether you want to have a run-through. Maybe we don't need
6 one. If the parties send us a copy of the order within the next day or so, agreed, then
7 the order can be made, and the hearing will be the 6th and 7th March.

8 The Tribunal will, I think, take steps to liaise with the Tribunal dealing with Coll and
9 Epic in terms of setting up a potential date for a potential joint CMC. It may be that
10 you yourselves ought to be telling us what your availability is in the last two weeks of
11 March, perhaps the first week of April, and we will do the same. But obviously, nothing
12 is set up because we need to raise this with the other Tribunal and the parties in the
13 other case.

14 Okay? Any other matters, Mr Beal?

15 MR BEAL: Thank you very much.

16 MR JUSTICE MORRIS: Ah, yes. Thank you. I was going to make that right at the
17 outset.

18 Mr Taylor raises the point, and I want to raise with the parties, that he personally knows
19 Chris Pike who is part of the Claimant side expert team and that he has in the past
20 worked with Mr Pike. I'm sure that Mr Pike will be aware of that, but we wanted to
21 make sure that everybody is content with Mr Taylor continuing to serve on this panel.
22 But we thought we'd raise it. If there are any points on it, please do raise it. Yes?

23 MS SMITH: Thank you. I think we need to take instructions from our clients on that,
24 but thank you for the indication and for the clarity.

25 As regards the rest, I think everything is clear and we'll get an agreed order over to
26 you as soon as we can.

1 MR JUSTICE MORRIS: Very good. Thank you all very much.

2 MR BEAL: Thank you very much.

3 MR JUSTICE MORRIS: I think all that I need to say is to wish you all a happy
4 Christmas. Thank you.

5 **(12.18 pm)**

6 **(The hearing concluded)**

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