IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square London
EC4Y 8AP

Thursday 5 May 2022

Before:
Ben Tidswell
Dr William Bishop
Tim Frazer
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr. Rachael Kent

Proposed Class Representative

v

Apple Inc. and Apple Distribution International Ltd

Proposed Defendants

A P P E A R AN C E S

Ronit Kreisberger QC, Michael Armitage Kennedy and George McDonald (On behalf of Dr. Rachael Kent)

Brian Kennelly QC and Daniel Piccinin (On behalf of Apple Inc. and Apple Distribution International Ltd)

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Thursday, 5 May 2022

(10.30 am)

THE CHAIRMAN: Good morning everybody. I need to do the bit about the live stream again if you don't mind.

The proceedings, of course, are being live streamed and I need to start with the customary warning that the proceedings are in open court, 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 and breach of the provision is punishable as contempt of court.

Thank you. Mr Kennelly?

Housekeeping

MR KENNELLY: Just to give you one reference which I should have given yesterday on review of the transcript. It was the point about the risk of pass on in *Attheraces*. I should have given it to you then.

If you take up the first volume of authorities, this will only take a second, it is behind tab 8. I am not going to go through it, just to show you the paragraphs. Page <A-170>. I apologise, I should have taken you to this passage yesterday because I referred to it.

THE CHAIRMAN: Yes.

MR KENNELLY: It is paragraph 223. Sorry page 170, please. Paragraph 223. Last three lines.

MR BISHOP: I am sorry, I --

THE CHAIRMAN: It is on screen. Sorry, Mr Kennelly.

MR KENNELLY: Not at all, Sir. It's page 170, paragraph 223. The last sentence, the judge says he concludes, as a matter of fact, that ATR would wish to pass on, to such extent as is commercially prudent, increases in the charges.

But if you go to page 171, paragraph 225, the judge accepts that ATR will be obliged to absorb all, or significant part, of the charges, so the pass on will be limited.

THE CHAIRMAN: Yes.

MR KENNELLY: Thank you.

THE CHAIRMAN: Yes. Thank you.

Submissions by MS KREISBERGER

MS KREISBERGER: If it pleases the Tribunal.

Sir, members of the panel, with your permission I propose to organise my submissions as follows. I would like to begin with a number of preliminary high level remarks about the application, then move on to the applicable legal principles and, finally, deal with Apple's various criticisms of Mr Holt's methodology.

Starting with my introductory remarks, I would first like to address the submission which you heard Mr Kennelly make repeatedly yesterday. I am quoting just one of those occasions. He said:

"The PCR has avowedly turned their face to anything beyond the cost plus analysis."

Sir, that is a gross mischaracterisation of the PCR's case. It is Kafkaesque. It is not that -- it is not only that the PCR's methodology extends beyond an analysis of cost to consider a range of evidence -- and I will, of course, come back to that -- it doesn't incorporate a cost plus test at all.

If I could ask you to turn up paragraph 6 of *Attheraces*, which is at authorities bundle 1 <A-9-196>. I will be using the hard copy bundle.

The Court of Appeal there said:

"What is a non-abusive right price and how is it to be ascertained" --

THE CHAIRMAN: I am sorry.

MS KREISBERGER: It is at the top of the page, sorry, paragraph 6.

THE CHAIRMAN: Yes.

MS KREISBERGER: Sorry, Sir:

"What is a non-abusive right price and how is it to be ascertained by the court? Is it, as was held in this case [below], that the cost of production of the information plus a reasonable profit (called cost plus)?"

So cost plus is quite simply where you take the cost and you add a reasonable rate of return, you add your mark-up to the cost. That gives you the competitive price. That is what a cost plus analysis is.

Mr Holt hasn't done that here. At this early stage, he hasn't attempted to identify a non-abusive price by adding a rate of return to his estimate of Apple's costs.

Let me show you that immediately. If I could ask you to turn up <C1-9-351>, paragraph 2.2.2, I will read it out. Mr Holt says:

"My principal methodology involved conducting a standard profitability analysis which compares estimated operating profit against capital employed, in order to estimate profitability by reference to a normal rate of return informed by the cost of capital. In principle, I do not consider that any increment above cost of capital represents excessive pricing; prices can be legitimately high where a firm engages in innovation. I have not taken the App Store's cost as the limit of its "*economic value*" as Apple suggests, nor do I consider that any profit generated by the App Store greater than its WACC is automatically excessive. My preliminary finding that the App Store is excessively profitable is based on the magnitude or persistence of the price cost margin (or excess return over WACC). It is on that basis, and taking account of Apple's unique gatekeeper status, which in my view warrants further investigation of the commission, including by reference to Apple's own costs data; rather than relying solely on public domain information as I have so far had to do."

What you see there is that what Mr Holt did was to conduct a standard analysis of profitability for the purposes of limb 1 of the *United Brands* test. What that analysis indicated to him is that the App Store returns are so persistently high that, in his expert view, they warrant further investigation. In other words, his expert evidence is that the limb 1 analysis shows that there is a case for Apple to answer at trial.

What he has not done at this stage is to use his limb 1 analysis to identify the competitive counterfactual rate. That would be cost plus. He hasn't done that.

Mr Holt's approach is consistent with the function of expert evidence at the certification stage. That purpose is to show that the methodology is sufficiently plausible to establish some basis in fact for the commonality requirement. It is to that the expert evidence is directed at this stage.

Now, Mr Kennelly makes the mistake of treating Mr Holt's evidence as if it were final. It is not. It is simply directed to showing that there is a methodology which offers a realistic prospect of establishing loss on a class-wide basis.

Now, Mr Holt's hand is, of course, not stayed at trial. He might ultimately consider whether cost plus or any other methodology, once he has had the benefit of seeing Apple's costs following disclosure, whether it might be appropriate. But I make no submission about that, that will be a matter for him to consider down the line.

That deals with my first introductory point. This is not a cost plus case.

THE CHAIRMAN: Just a quick question about the counterfactual rate. Mr Holt does identify a counterfactual rate but he does that just from the comparators; is that correct?

MS KREISBERGER: Exactly right. I was coming on to that next.

THE CHAIRMAN: I don't want to rush you.

MS KREISBERGER: I am very grateful, that really completes my point. He doesn't do it under limb 1 and, really, the entirety of Mr Kennelly's submissions were, "Oh, well, you have treated limb 1 as your economic value". That is simply not the case.

Limb 1 should be understood as a red flag which tells Mr Holt there is a problem which requires further investigation. That is not cost plus. So his ROCE/WACC analysis is an animal of a very different stripe to the *Attheraces*, "Here are the costs, here is the price".

My second point, by way of introductory remarks, is in relation to Mr Kennelly's related submission. This is where I am moving on to your point, Sir.

Mr Kennelly said:

‘The PCR says in terms that the profitability of Apple is the exclusive means by which he will evaluate economic value.’

He also said, and I can give you the reference for this, it is page 24 of the transcript, lines 11 to 12. He said:

"On the PCR's case, it is enough to show that a dominant undertaking enjoys high profits over a lengthy period."

Both those statements are wrong.

As I have shown you, Mr Holt hasn't treated the ROCE analysis as equivalent to economic value of the App Store. What he does is, having considered profitability, he then goes on to consider a range of evidence to see if that evidence alters or reinforces his view that the commission is excessive. I will come back to the evidence but just by way of preliminary remark, his evidence includes his review of comparators. That is your point, Sir.

I think it is helpful to go there now, so that is <C-9-366>, Holt 2. Paragraph 2.3.24. He says this, in short:

"Overall, my view remains that it is difficult to identify suitable comparators for the App Store ..."

He says elsewhere they are not perfect but, you know, one doesn't expect to find perfect comparators in the real world. So whilst it is difficult to identify suitable comparators, "the available evidence reinforces my view that competition in the [distribution of apps] would lead to downward pressure on the commission".

So the comparators may not be perfect, but they are informative as to what would happen to the commission in a competitive market where rivals compete to supply apps. That is the counterfactual.

What his comparator analysis does is give him a good indication that the current level is abusive because it is above the level that would pertain in conditions of workable competition. I will come back to the legal test.

Now, again, Sir, I think you are ahead of me, but I will just show you Holt 1, staying in the same bundle at tab 8. Page 262, paragraph 7.3.92.

MR FRAZER: Sorry, Ms Kreisberger, you took us to 2.3.24 where Mr Holt says the available evidence reinforces his view that competition would lead to downward pressure on the commission. Competition leading to downward pressure is probably a truism; it is a long way from saying that the price is excessively high or is unfair. What should we take from 2.3.24?

MS KREISBERGER: That is an important point, actually, and the nub of much of this. I am grateful for that. I am going to come on and address you on that, but let me just foreshadow the point.

When we come to look at the *United Brands* test and the Court of Appeal's seminal reading of that test at paragraph 97, it is very clear that a price which could not pertain in conditions of workable competition, a price which is above the competitive level, is abusive. So I don't accept that that is a long way from saying it is abusive.

We can quibble about magnitude and degree, but we can't do that on a summary basis. It is sufficient to show for these purposes that the price that the commission level is above that which would pertain in a competitive market.

Mr Holt, of course, says it is sufficiently persistent and the magnitude is such -- and I will come on to magnitude, there can't be much doubt there. But when I see returns of this magnitude over such a long period of time, I can see that this is not a competitive level. I go to my comparators, it confirms that for me. That is sufficient, for today's purposes, to show that there is a reasonably arguable case on *United Brands*.

MR FRAZER: Thank you. Sorry to interrupt you.

MS KREISBERGER: Thank you.

So turning back to Holt 1. We were on page 262, paragraph 7.3.92:

"Based on the evidence which I have summarised above [that is the comparator analysis] ... notwithstanding its limitations, my preliminary view is that a competitive level of

commission in a competitive ... market would be in the range of 10 to 20 per cent with a midpoint of 15 per cent".

That is the provisional estimate of the price range. That is your point, Sir. It is completely wrong to say that Mr Holt calculates economic value on the basis of cost. He doesn't do it.

As I will come to show you, economic value is the same point that I was just debating with Mr Frazer. It is a concept which correlates to competitive price, it is essentially a different way of saying the same thing.

For now, Mr Holt's indication of a competitive commission rate is drawn from the comparator review. Those candidate comparators -- and I may now be labouring the point -- have informed his expert assessment of how competition would erode Apple's extraordinary returns. Again, not cost plus.

THE CHAIRMAN: So in a way, what -- I think you are saying that Mr Holt has come from the other end of the telescope, so instead of comparing costs and adding a reasonable return, he has actually worked out what the profitability is by reference to the ROCE and the WACC; is that right? Is that a way of looking at it?

MS KREISBERGER: Yes, so what he does is he looks at profitability in the same way the CMA do, for instance, in their study. He does the ROCE/WACC comparison and he sees extremely high returns, very high levels of profitability. He doesn't then say to himself: well, what would a competitive price be on that basis? He says: well, I see these high returns, the red flag is raised, now I am going to consider all of the evidence and it is not just comparators. That is also important and I will come on to that. He looks at all the evidence and he finds the evidence is consistent with these high returns being the product of the absence of competition. For these preliminary purposes, his working assumption of what a competitive commission rate would be is based on the comparators he looks at. It is preliminary.

THE CHAIRMAN: I think the complaint that is being made is that, when he does the analysis, the second bit you have talked about, he takes no account of the demand side. I may

be hurrying you on too quickly to where you are going to get to, but assuming he had the choice of, if he had the information, doing the cost plus or he has done something quite different, which is the comparison between the ROCE and the WACC, as you say, he has then identified what you say is a red flag.

MS KREISBERGER: Yes.

THE CHAIRMAN: Then he is asking himself a number of questions which could fit, as we know, into the excessive box or the unfair box, it doesn't matter terribly.

MS KREISBERGER: Or both.

THE CHAIRMAN: Or both, and the complaint, I think, is, in doing that, he hasn't paid any attention to the demand side and it is treated as something which is a matter for Apple to raise rather than for him to deal with. I think that is putting it how Mr Kennelly put it yesterday.

Now, what the consequence of that is, is another matter, but I am just wondering maybe you are going to come to that?

MS KREISBERGER: I will. But let me give an initial reaction.

To make that submission is to say that *United Brands* and all of the authorities which follow up to *Flynn Pharma* got it wrong. It is dealt with in terms in *Flynn Pharma*. This is recycling of an argument that was rejected roundly. There is no separate measurement of the demand side factors under the *United Brands* test. The economic value of the product, another way of saying its competitive price, is baked into the limbs of the test. Lord Justice Green says that may be via the plus element under limb 1, it may be via your comparators under limb 2, it may be a combination of the two. That is what the test is directed to, because the headline point that you see, for instance, in subparagraphs 1 and 2 of paragraph 97 in *Flynn* is the purpose of the test is to work out what is the competitive price. That means what price would pertain under conditions of workable competition. That is the demand side. What is the competitive price? How do you get there? You get there using *United Brands* methodology and there is lots of flexibility.

To say that something else needs to be done involves saying *United Brands* is wrong, *Flynn Pharma* is wrong. So that is my initial reaction.

It is also not clear what the basis for the submission which Mr Kennelly makes is. I will come on to that because there has been a distinct shift in the case, why is this different? Because certainly *United Brands* and *Flynn Pharma* are categorical. It is clear, it is unambiguous. You get to the competitive price through the limbs of the methodology. There is no separate consideration of demand side.

MR BISHOP: I understood Mr Kennelly to say there was no separate heading for demand side but that it needed to be specifically addressed in at least one of those. I may have misunderstood Mr Kennelly, but I thought that is what he was saying. Then he went on to say that there was no such explicit consideration of it under any particular limb. That I thought was what he was saying?

MS KREISBERGER: If that is the position, it is thoroughly bad, if I may say so, because all Mr Holt has done is apply *United Brands*. So he looks at profitability based on reasonable rate of return through the ROCE/WACC analysis. That is one answer. Then he looks at evidence in the round -- I think I need to come on, I want to take you through the relevant evidence -- and asks himself competitive or not? Competitive level or not?

That is addressing the demand side.

MR BISHOP: So you are saying no one needs to hold up a flag saying economic value here, this is the point at which I consider it?

MS KREISBERGER: Economic value is the entire purpose to which the *United Brands* test is directed.

MR BISHOP: I see, okay. No explicit use.

MS KREISBERGER: No separate component.

MR BISHOP: I understand your argument.

MS KREISBERGER: I am at risk of repeating myself. I will come back to that, if I may.

Just to sum up, Mr Holt's analysis of Apple's extraordinary profitability and his review of the evidence currently in the public domain, remembering that is all we have at this stage, including but not limited to candidate comparators suggests that a rate of 30 per cent commission is both excessive under limb 1 and unfairly high under limb 2. That is sufficient to show that there is a case for Apple to answer, which should be allowed to advance to trial. Because full and proper scrutiny of Apple's charges under chapter 2 can only take place based on the data, once we have had disclosure and evidence. These are early estimates.

So those are my first two points by way of preliminary remark.

My third point regards Apple's claim that the extraordinary high returns enjoyed by Apple in running the App Store, most of which is generated by the commission, should be understood as rewards for innovation. He refers to this variously in his skeleton as "a spark of creativity" and a "good idea".

I just want to pause there before dealing with the substance of the point. The numbers on profitability are eye-catching. Mr Holt's provisional estimate of worldwide App Store revenue puts it at around $20 billion in 2020, most of which is attributable to the commission. To compare that to App Store costs, the report from a subcommittee of the US House of Representatives, which I will take you to, suggests an amount of less than $100 million for costs. That figure comes out of an interview with a senior ex-employee of Apple. That is the figure in the public domain.

Mr Holt takes a much more conservative approach and allocates around $10 billion to costs, not $100 million. But in any event, since Mr Holt's first report, we have had the CMA's interim report on mobile ecosystems, that was in December last year, and that report confirms the App Store returns are persistently high. We needn't turn it up right now, and Mr Kennelly took you there yesterday, but just for your note, appendix D is at <A/33>, appendix 1 to the study. That records that UK -- so I gave you worldwide figures -- UK App Store revenues from the commission alone in 2020 were in the range

of US$400 million to US$600 million, having increased by 40 to 60 per cent since 2018. That is at paragraphs 21 to 22 at page 1971.

They also found that App Store global gross profit margins were in the range of 75 to 100 per cent in 2020. That is paragraphs 16 and 23. And the CMA also cites the finding of the US District Court in *Epic v Apple*. I will come back to that. The finding there was that the App Store operating margins were over 75 per cent. That is operating margins for both fiscal years 2018 and 2019.

There is no serious challenge before you today to Mr Holt's provisional estimates. The App Store's high profitability is now a matter of public record and Mr Kennelly has refrained from putting his own alternative revenue or cost figures in front of you. But turning back to Apple's claim that these returns are justified by innovations, there is a clear and simple response which lies at the heart of Dr Kent's case, which is that these high returns cannot simply be explained away as rewards for innovation. I am going to come back to Apple's overblown claims of innovation, but just parking that, these returns should be understood as the fruits of a longstanding monopoly. This is highly relevant to the excessive pricing test.

Now, Apple, through its imposition of a set of interlocking rules and regulations, it has created a closed system which is entirely sealed off from competition for the distribution of apps to iPhone and iPad users. Now it has achieved that by erecting two key barriers to entry. The first is the complete prohibition of rival app stores from iOS devices; the second is the prohibition on side loading native apps iOS apps by users. In other words, users can't directly download iOS apps from websites on their phone, which you could, for instance, say, on a Mac book.

So, having hermetically sealed off the competition, Apple then employs a further device to exploit the monopoly position that it has contrived to create. What Apple does is this, it interposes itself between app developer and user by requiring the developer to use Apple's payment system for every relevant purchase. Not just for buying the apps, but

for all purchases within apps on the App Store. The European Commission described it thus, they said:

"Apple becomes the intermediary for all in-app purchases and takes over billing relationship."

Just for your note, that is <A/30.1/1635.1>

It is that which facilities Apple's capture of its 30 per cent levy from every relevant payment by the user before developers receive a penny.

Now, it is right, as Apple observes, that this complete immunisation of the App Store to the forces of competition is the subject matter of the exclusionary abuses which also form part of Dr Kent's claim. Apple hasn't applied to strike out those claims. It accepts that they are reasonably arguable and should proceed to trial. But what Apple appears to have missed is that Apple's exclusion of competition to the App Store also forms a central plank of Mr Holt's preliminary analysis of the commission as exploitative of consumers.

If I could ask you to turn back to Mr Holt's first report at paragraph 7.2.4. That is <C1-8-240>, there he says that the App Store monopoly and the barriers to entry erected by Apple, along with other factors, “explain why Apple has been able to maintain a high level of commission for so long, while accumulating a persistently high level of profit from the relevant services."

That is the last sentence.

Following Apple's Response, he then rejects, in terms, Apple's claim that the commission is a reward for innovation. He describes the commission as a high gateway toll which reflects the absence of competition. That is how he understands the commission. Let me give you the reference, that is his second report which is at tab 9, page 354, paragraph 2.2.13.

He says this:

"… while intangible value can, in principle, arise where firms are able to earn above normal returns due to factors such as sustained competitive advantage, in my view, that is not the case here because Apple's high profitability arises out of the App Store's unique

position as the only gateway to iOS device users by virtue of Apple's complete exclusion of any competition. It is important, when considering intangibles, to avoid capturing Apple's ability (by raising insurmountable barriers to entry) to charge supra-competitive prices as an intangible asset. Such an approach would be ... circular and … dissociated … from what would be expected in a competitive market".

THE CHAIRMAN: Is this a dependency point or is it something broader than dependency, the point you are making here?

MS KREISBERGER: It is broader. I will come on to dependency.

I will, of course, be taking you to *Flynn Pharma* and *United Brands*, but the test says -- and I think it is 97.5, but we will have a look at it in *Flynn Pharma* -- if you do a cost plus test -- I have explained that is not the case here, but you look at limb 1 -- you then ask yourself, well, are there any factors which explain this? A highly non-prescriptive approach, there are no fixed categories of evidence, you look around.

So what Mr Holt says, this is still -- I mean one can characterise it as limb 1 or limb 2, part 1, unfair in itself. In substance, what the test requires is that you look at the margin and, if it looks excessive, you then ask yourself why. Apple say, it is innovation. Mr Holt has looked at that claim and he has given his expert view that it arises not out of innovation. He is not saying there is no innovation, but it doesn't explain these persistently high returns. What explains them is the exclusion of competition. That is a piece of evidence that you can look at under limb 1 and under limb 2. In fact, you must look at it. Your analysis would be wholly deficient if you ignored the competitive scenario.

THE CHAIRMAN: Just to explore that further, so dependency is looking at the extent to which demand side benefit might actually be neutralised or might be misunderstood because of the dependent relationship, in which case there may be an obscuring of the real --

MS KREISBERGER: You misunderstand what someone is willing to pay, essentially.

THE CHAIRMAN: Precisely. Whereas, what you are saying here is this is a broader point about the entire exercise and the context in which it sits, so that your assessment has

to take account of the absence, the total absence, of competition, is what you are saying?

MS KREISBERGER: Absolutely. There is an authority in addition to *Flynn* that sets the point out crisply. That is an authority from this Tribunal and it is not -- I am not at that stage in my note, but I am going to try --

THE CHAIRMAN: I don't want to hurry you.

MS KREISBERGER: I am happy to isolate it now. I think it is tab 10, from memory, of the authorities bundle, which is bundle 1. <A-10>. It is <A-10-330>, this is the *Albion Water* case.

It is an interesting one, I will come back to it because it is a cost plus case, just cost plus. They frame some of the points as unfair in itself but it is just cost plus and the Tribunal said this at paragraph 265. I will just check I have the right -- they start by saying:

"In this case, we have found that the economic value of the non-potable water to be supplied ... to Shotton Paper equates to the costs reasonably attributable to the service of the transportation and partial treatment of water".

In other words economic value is cost. They set out the size of the excess. They say, "In our judgment … there is a substantial disparity between the [price] and the economic value of the services ...". Economic value equates to cost. Cost plus.

They then go on to say, critically at 266:

"When assessing the relationship between the disputed price and the economic value of a service, and thus the potential unfairness of a price, we must ['must'] take into account the competitive conditions and any related abusive conduct that may enable the undertaking concerned to fulfil its pricing ambitions ..."

So monopoly, other abuses, all relevant to the assessment, the evaluation of the price. It is basic economic logic: why do I observe these high returns?

THE CHAIRMAN: So another factor to take into account in your assessment, either in limb 1 or limb 2.

MS KREISBERGER: Or both.

THE CHAIRMAN: Or both, as to why there is the disparity. Whichever approach you are using, whether you're using cost plus, identifying a difference with the current price --

MS KREISBERGER: Precisely.

THE CHAIRMAN: -- or whether you are just using the ROCE and WACC analysis and identifying what looks like an excessive profitability, you are still applying this context to it to ask yourself -- as part of asking yourself the question: what is actually happening and why is this price different from what I would expect?

MS KREISBERGER: Precisely, Sir. That is exactly the point. As part of your evaluation of all the relevant evidence, that is a highly pertinent question: does the competitive scenario explain the high returns?

THE CHAIRMAN: Thank you.

MS KREISBERGER: Of course, we are at the stage of an application for summary judgment so it is enough to show that there is an arguable case on the point. I don't need to be right on these points, of course.

THE CHAIRMAN: Yes.

MS KREISBERGER: With that diversion, what Mr Holt is really saying is, he has taken account of the fact that Apple has successfully stamped out any prospect of competition and it has comfortably exploited its gatekeeper status in the 14 years that the App Store has been operating. This isn't a transitory increase in profitability.

For so long as Apple's intricate set of restrictions remain in force, there is no prospect whatsoever of competition eroding these very high returns. That is a pivotal aspect of Dr Kent's case. As I said, the Tribunal is not, at this stage, asked to decide if Dr Kent is right; it is Apple who must persuade you that it is not even reasonably arguable that Apple's returns are unfairly high due to its monopoly position and that it is fanciful to say that returns of this order of magnitude are anything other than a reward for creativity. That is what Apple have to persuade you of.

I want to deal with that proposition from Apple. It is easily rebutted and I am still in my preliminary remarks. I would like to give four immediate answers.

The first is that claims about supposed innovations which benefit the App Store -- and I will come back to this, I will develop this point later on -- these supposed innovations cannot, and should not, be assessed by the Tribunal in the context of this summary application. But not only that, they need to be viewed with a sceptical eye. Mr Kennelly devoted a lengthy section of his submissions yesterday to an account of what he claims to be a variety of innovations by Apple which benefit the App Store. We don't need to go there, but the same point is picked up at paragraph 35 of his skeleton which refers to numerous software, hardware and integration innovations. Mr Kennelly referred you to annex D, to Dr Hitt's report, which waxes lyrical over many pages over what are described as selected innovations that have benefited the App Store. Mr Kennelly told you that he was relying on what he described as non controversial parts of Hitt 1. That is an error, I am afraid. They are not uncontroversial. They are hotly disputed.

Apple is asking you to accept at face value its claims of multifarious innovations to justify the commission as the basis for knocking out now the excessive pricing claim. These are factual and evidential claims about these alleged innovations, and their supposed relevance to the commission, the level of the commission. As such, it is an improper basis for a summary determination of Dr Kent's claim. That is for the trial panel. But, it is worth noting that claims that the App Store is an innovator have been deprecated in another context. That is the well publicised battle between *Epic v Apple*.

If I could ask you to turn up the judgment of Judge Gonzalez Rogers -- that is at <A/29/1448> this is the judgment from the Northern District of California. That is where it begins. If I could ask you to turn to page 1548. You see the heading there "Decreased Innovation".

Now, the judge begins, in the first paragraph, by rejecting the argument that the commission itself reduced innovation, the level of the commission. But then, from the second, the final, paragraph, she accepted Epic's contention that Apple's restrictions reduced innovation in games -- this is a judgment about games distribution. She said this:

"… Epic Games argues that Apple's restrictions have reduced innovation in game distribution itself. The parties agree that the App Store provides features besides distribution, including search and discoverability, to help users discover games, in-app payment processing, developer tools and security."

Then she says:

"Competition could improve each of these features: a third-party app store could provide better "matchmaking" between users and developers" --

THE CHAIRMAN: I am sorry we need to move --

MS KREISBERGER: Sorry, I am in the hard copy. My apologies. So moving on to the next page.

THE CHAIRMAN: We don't have control over it.

MS KREISBERGER: Yes, sorry, I must remember to -- it is 1549. Thank you:

"... could provide better "matchmaking" between users and developers, could have simpler in-app payments and could impose a higher standard for app review to create more security.

"Notably, Apple conducted developer surveys in 2010 and 2017. Comparing the two indicates that Apple is not moving quickly to address developer concerns or dedicating sufficient resources to their issues. Innovators do not rest on their laurels. While more developers may be "satisfied", or "very satisfied", than not, a significant proportion are not. For example, a top reason for dissatisfaction with the App Store is lack of functions which other platforms have, such as personalised recommendations. An email summarising 2018 write-in answers suggests that developers perceive the App Store as lacking features common to other platforms."

You see there a number of complaints:

"Apple store needs to have 'smart search' ability. [It is] ridiculous for a multi-billion-dollar company [to have to spell names exactly].

"[T]he search algorithm is terrible. …"

"Discoverability is still a significant challenge …"

"The App Store desperately needs A/B testing", and so on. These are not happy campers.

Indeed, Apple's own former head of app review, Phillip Shoemaker -- sorry -- 1550 if I could ask you to move on. Thank you:

" … Phillip Shoemaker has described the App Store as “antiquated”, with no radical innovation, only evolution, for the last ten years.

" … developers complain that app review guidelines lack clarity and are inconsistently applied. Part of this issue stems from the sheer number of apps ... Apple has been slow either to adopt automated tools that could improve speed and accuracy or to hire more reviewers ... the in-app … processing tool … lacks features.”

"Apple's slow innovation stems in part from its low investment in the App Store. As Mr. Barnes described, '[o]nly a small amount of direct and allocated R&D ... [flows] ... to the Apple App Store' ... Even Dr Schmalensee admitted that the estimates which were put together … show very little R&D allocated to the App Store."

It goes on to say:

" … the evidence remains that ‘core’ matchmaking features of the store see little investment."

She concludes:

"Ultimately, the point is not that Apple provides bad services. It does not: most developers are satisfied …, particularly with the developer tools. But the point is that a third-party app store could put pressure on Apple to innovate by providing features that Apple has neglected. Because this competition is currently precluded, Apple's restrictions reduce innovation in ‘core’ game distribution services."

Sir, it is axiomatic that monopolists have little incentive either to innovate or to charge competitive prices. Apple's claims of innovation, which are the fulcrum on which its application rests, are highly contentious and they need to be taken with more than a pinch of salt.

That will be for the trial panel to assess in due course if this application is dismissed.

That was my first answer.

Moving on to my second. Apple hasn't thought to strike out the allegation that it is a monopolist in the affected markets. Let's turn up claim form <C/5/84>, paragraphs 85 to 86.

Could I ask the panel just to read those paragraphs.

(Pause).

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: Sorry, I think I have given a wrong -- it is page 84. I have given a bad reference I am so sorry. I have read it out badly rather than -- it is page 84. Paragraph 85.

THE CHAIRMAN: We all got to the right place via the wrong mechanisms.

MS KREISBERGER: You have had an opportunity to see there that the pleaded allegation, the last sentence, is that Apple's a monopolist. I just want to be clear that that is the pleaded case.

Apple accepts that these are allegations which should go forward to trial. It has even suggested a timetable for doing so, despite the fact we haven't yet seen their defence. What that means is there is a contradiction at the heart of this application because, once it is accepted that there is an arguable case that Apple has achieved a position of unassailable monopoly for the App Store, then as a matter of logic, as a matter of basic economic principle, it must be reasonably arguable that these high returns, many years on from the inception of the App Store, reflect that monopoly power, not innovation.

As Francis Jacobs, the Advocate-General in *Tournier*, pointed out, monopolies have a natural tendency to charge monopoly prices, which couldn't be charged, he said, in a competitive market. I will just give you the reference, no need to turn it up. That is <A/25/1228>

Put another way, it cannot seriously be suggested that it is fanciful to attribute the App Store's profitability to the fact that it is a big tech gatekeeper, immunised from all competition, rather than a nimble innovator.

Following on from that is my third and related answer, which is Apple also does not apply to strike out the exclusionary abuses. It is common ground that they go forward to trial. The particular point I want to draw the Tribunal's attention to here is that the exclusionary abuses found a claim for damages on behalf of the proposed class. On the basis that the rate of commission would have been lower in a competitive counterfactual absent Apple's restrictions. I just want to show you the pleaded case. That is <C/5/91>, I hope I get it right this time.

The paragraphs are 112 and 113.

112 describes the competitive markets in the counterfactual and then 113 pleads the effect in terms of harm to the class. You see at the end of 113, in a competitive market, commission rates would be lower, both Apple's commission rates and rival app stores. In the premises, iOS device users would have paid lower rates of commission and there you see Mr Holt's preliminary analysis is a competitive rate of commission in the range of 5 to 15 per cent.

That is the same analysis of the counterfactual rate that underlies the excessive pricing claim. Apple don't apply to strike it out here.

So, on one hand, Apple accepts that the proposed class is entitled to bring claims for unlawful overcharges, caused by Apple's exclusionary practices which give rise to and preserve the App Store monopoly in breach of chapter 2. On the other hand, it resists as unarguable the claim for unlawful overcharges caused by Apple's excessive prices in breach of chapter 2 which stem from that same monopoly, which is the subject of the exclusionary abuses. So this application is Janus faced.

If there is a case to answer on the exclusionary abuses, it follows, as a matter of logic, that there is a case to answer on excessive pricing.

Now, that is where I was going to show you paragraph 266 of *Albion Water*. I don't need to show it to you again. But that links the two directly and that is the point we debated, Sir.

Turning to my fourth and final answer by way of preliminary remark on the point why there can't be any doubt that the excessive pricing claim is reasonably arguable, the Tribunal need only look at the proliferation of enforcement action, regulatory scrutiny and private claims against Apple in relation to the commission, the App Store commission - they are being pursued in the UK and around the world under competition rules - to see that there is a reasonably arguable case that should be permitted to advance to trial. Just for your note, they are summarised at paragraphs 133 to 138 of the claim form. That is <C/5/101> and an update is given in the Reply at paragraphs 84 to 89. That is <C/7/178>.

I am going to pick out five. I'll try to take this briskly, if I can.

The first source - I have grouped two together - that is action from the CMA. If we could turn up the interim report, that is at <A/32/1680>.

Now, as Mr Kennelly said to you yesterday, this is a study intended to contribute to the new pro-competition regime for digital platforms. It is at paragraph 27. Paragraph 6, at page 1682:

"Apple and Google … control the key gateways through which users access content on mobile devices and through which content providers can access potential customers ..."

They go through the restrictions that I have just addressed you on. The App Store is the only permitted App Store on iOS devices, Apple and Google can determine which apps are allowed in their store, how they are ranked. Then, critically:

"... and also often charge significant levels of commission (up to 30%) on app developers' revenues from in-app transactions by requiring these transactions to be made through their own in-app payment systems."

If I could ask you to move forward to page 1732, paragraph 2.70, second bullet, which means we move over the page to 1733:

"Both companies are likely to be charging above a competitive rate of commission to app developers, which will ultimately mean users paying higher prices for subscriptions and in-app purchases such as within games. There are well publicised concerns from

a number of app developers regarding the level of commission charged for certain types of in-app payments and subscriptions."

That conclusion is based on appendix D, which you have seen, and I have given you the numbers on gross profit margin, UK revenue and so on.

Now, Mr Kennelly showed you paragraph 7 of my skeleton argument and he said it argues there that the CMA had found an abuse. So I need to correct that. Could I ask you to turn up <C/1/3>, which quotes the point I just took you to. The skeleton says:

"Apple is thus inviting the Tribunal to conclude that an allegation which the CMA considers to be '*likely*' has no realistic prospect of success … "

That doesn't say anything about an infringement or an abuse. The allegation is that prices are above a competitive level and, as I showed you, that is at the heart of the test of unfair pricing under *United Brands*. So what the skeleton is saying is the allegation is relevant to the PCR's claim of excessive pricing. There is no suggestion there that the CMA found an abuse, because, of course, they didn't.

But, my second example of CMA action under this heading is an investigation launched by the CMA last year under chapter 2 into suspected abuses by Apple concerning the App Store. If you could turn up authorities 3, tab 30, page 1633. <A/30/1633>.

That is the press release from the CMA and I am just going to read out the last two paragraphs on page 1633. This is an investigation into suspected anti-competitive conduct by Apple under chapter 2:

"All apps available through the App Store have to be approved by Apple ... the complaints from developers focus on the terms that mean they can only distribute apps to iPhones and iPads via the App Store. These complaints also highlight that certain developers who offer 'in-app' features … are required to use Apple's payment system … Apple charges a commission of up to 30% to developers on the value of these transactions or any time a consumer buys their app.

The CMA's investigation will consider whether Apple has a dominant position in connection with the distribution of apps … and, if so, whether Apple imposes unfair or

anti-competitive terms on developers using the App Store, ultimately resulting in users having less choice or paying higher prices for apps and add-ons."

We don't know precisely the form the CMA's case will take, but it is an abuse investigation which includes the commission and the effect of the price on users. It looks pretty close.

Mr Kennelly didn't take you to that.

THE CHAIRMAN: Is that a convenient point to take a break?

MS KREISBERGER: Yes. I am grateful Sir.

THE CHAIRMAN: Thank you.

(11.38 am)

(A short break)

(11.50 am)

THE CHAIRMAN: You were at one of five, I think, of your examples.

MS KREISBERGER: We have happily completed one and we are on to the second one. That is the US judgment in *Epic v Apple* which I have already shown you.

If you could turn up page 1491. The first paragraph says this, second line:

"Under any normative measure, the record supports a finding that Apple's operating margins tied to the App Store are extraordinarily high. Apple did nothing to suggest operating margins over 70 per cent would not be viewed as such … "

Then, moving forward to page 1592, halfway down:

"Having carefully considered the evidence, the court finds that Apple's app distribution restrictions do have some anti-competitive effects. The evidence here shows that, unlike merchant fees in *Amex*, Apple's maintenance of its commission rate stems from market power, *not competition* in changing markets [that is the point I addressed you on earlier]. As explained above, Apple set its 30% commission rate almost by accident when it first launched the App Store … That commission has enabled Apple to collect extraordinary profits as Mr. Barnes credibly shows that … operating margins have

exceeded 75% for years. Yet the 30% commission rate has barely budged in over a decade, despite developer complaints and regulatory pressure. High commission rates certainly impact developers, and some evidence exists that it impacts consumers when those costs are passed on."

That is our case.

Then if I could ask you to turn back to page 1546. The last paragraph:

"Last, Apple argues that the 30 per cent rate is commensurate with the value developers get from the App Store."

Pausing there, that is Mr Kennelly's argument before you today:

"This claim is unjustified. One, as noted in the prior section, developers *could* decide to stay on the App Store to benefit from the services that Apple provides. Absent competition, however, it is impossible to say that Apple's 30% commission reflects the fair market value of its services. Indeed, at least a few developers testified that they considered Apple's rate to be too high for the services provided."

Again, pausing there, Mr Kennelly said to you yesterday, it doesn't matter what the developers think. A bit of a tension with his argument about price being what people are prepared to pay. But, also, that point is rejected here -- well, the judge considered it highly relevant as to what developers think of the charge:

"Two, Apple has provided no evidence that the rate it charges bears any quantifiable relation to the services provided. To the contrary, Apple started with a proposition [that is 30 per cent] … that proposition revealed itself to be incredibly profitable and there appears to be no market forces to test the proposition or motivate a change."

That is my second foreign judgment.

The third one is the US House of Representatives' Report on digital markets. That is authorities 3, tab 31, page 1636, <A/31/1636>.

This is a report of the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary. I hope I have that right, it is a mouthful.

Please go to page 1641. The last paragraph on that page:

"As a result, Apple's control over iOS provides it with gatekeeper power over software distribution on iOS devices. Consequently, it has a dominant position in the mobile app store market and monopoly power over distribution of software applications on iOS devices."

Moving to the next page, 1642, final paragraph, the first sentence reads:

"Apple's monopoly power over software distribution on iOS devices appears to allow it to generate supranormal profits from the App Store and its services business."

Page 1648, please. Final paragraph:

"In contrast, Apple owns the iOS operating system as well as the only means to distribute software on iOS devices. Using its role as an operating system provider, Apple prohibits alternatives to the App Store and charges fees and commissions for some categories of apps to reach customers. It responds to attempts to circumvent its fees and commissions with removal from the App Store. Because of this policy, developers have no other option than to play by Apple's rules to reach customers who own iOS devices. Owners of iOS devices have no alternative means to install apps on [turn the page, 1694] their phones. Apple notes that its 30% commission has remained static for most apps for more than a decade. A group of developers that filed a lawsuit against Apple challenging this policy argue that the persistence of Apple's 30% rate over time, 'despite the inevitable accrual of experience and economies of scale,' indicates that there is insufficient competition. Additionally, ... there is little likelihood for new market entry ... to compel Apple to lower its rates."

Finally, could I ask you to read to yourselves page 1651. The final paragraph:

"Apple's financial reports ..."

Could you read from there, and then, when you are ready, we need to turn the page to the next page.

(Pause).

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: So that is page 1652.

(Pause).

So you see there the reference to supra-normal profits derived by extracting rents from developers, it is because Apple locks out competition by banning rival app stores, and so on.

Number four. That is authorities 3, tab 30.1, page 1635.1, <A-30-1635.1>. This is the European Commission's investigation into App Store rules for music streaming providers. The first three -- I am going to read you the first three paragraphs or perhaps I will let you read them to yourselves but the full press release merits reading when the opportunity arises.

(Pause).

THE CHAIRMAN: So this is a subset of the (inaudible) dealing with music streaming.

MS KREISBERGER: That is right. Just to note the second bullet, sorry, the first bullet towards the end of the page:

"The mandatory use of Apple's IAP system for the distribution of paid digital content.

"Apple charges app developers a 30% commission fee. The Commission's investigation showed that most streaming providers pass this fee on to end users by raising prices."

So that is relevant to this case.

Before I get to number five, my last example, I just want to be clear. I am not suggesting these investigations or these judgments provide the answer or that they bind the Tribunal in any way. But they do put it beyond doubt that the allegation of excessive pricing is reasonably arguable and there is a case to answer at trial.

Turning to my fifth and final example. Now, I am just checking my bundle reference. <A/17.1>. This example, which I will show you in a moment, is a judgment of this Tribunal. It already found, in the context of Epic's battle with Apple, that claims which include unfair pricing claims against Apple in relation to the App Store are well arguable and raise a serious issue to be tried. Epic brought claims against Apple for injunctions in this jurisdiction, so if I could ask you to turn up page 642.1. That is the judgment. If you go to page 642.14, paragraph 49 summarises the pleaded claims. You see there,

subparagraph (b), these are the allegations under chapter 2 and article 102 and they include charging unfair prices for the distribution of apps via the App Store and/or the use of the Apple IAP prepayment system. That was one of the pleaded allegations.

If you move forward, please, to 162.27 the Tribunal held that -- and this was the then president Mr Justice Roth:

"I consider that there is a serious issue to be tried in the claims for injunctions against the US defendants. It would be inappropriate in this judgment to go through the analysis in any detail."

And he goes on:

"The … relevant markets … are well arguable, … seriously arguable case", and so on.

It is right he didn't give particular consideration to excessive pricing, but it did go through and it is a matter of some concern that this judgment wasn't raised by Apple.

There is, of course, also the service-out order in these proceedings which found the claim to raise a serious issue to be tried and no challenge was brought at that stage by Apple.

With that, Sir, unless you have any questions, members of the panel, I would propose to move on to legal principles.

THE CHAIRMAN: Yes. Thank you.

MS KREISBERGER: Thank you.

Just briefly, the principles on strike-out summary judgment, as Mr Kennelly said, they are common ground, he needs to persuade you that the excessive price claim is not reasonably arguable to knock it out now, Mr Kennelly also conceded that he needs to persuade you that the claim can be stifled at birth because there is nothing at all to be gained by a fuller investigation into the facts by the trial panel.

I would also like to remind the Tribunal of the recent judgment from February this year in *McLaren*. I am conscious that Dr Bishop will be familiar with it. The Tribunal there addressed the proper approach to applications for strike-out / reverse summary judgment in the context of CPOs at the certification stage, which hinge on the expert methodology, and the Tribunal stressed the importance of treating the expert

methodology advanced at that stage as necessarily provisional and subject to adaptation as data becomes available. It is a mistake to treat the methodology as if it is final. Conflicts between experts are a matter for the trial judge.

Sir, would it be helpful to just turn up those paragraphs or I can simply give them to you for your note?

THE CHAIRMAN: Well, it might be helpful to turn them up. There is, I think, a question in my mind about whether we need to think about strike-out and summary judgment separately, just as a first point. I think there is a separate point about how that sits with the certification regime. In relation to the certification regime, I have been thinking about this as being really largely separate from that. The only -- it is a practical point, isn't it, that we happen to have Mr Holt's evidence for the purposes of certification, which then has given rise to the opportunity for Mr Kennelly to make some observations about the shortcomings of it, as he says. I think, clearly, he is entitled to do that as part of a case, whether it is a strike-out or a summary judgment, it is probably more pertinent to a summary judgment application. I just wondered whether -- and I did hurry Mr Kennelly through this yesterday, and perhaps I am regretting that now, not putting this point to him, I am sure he can come back to it in his reply, but do we need to think separately about whether the strike-out point, which is whether there are reasonable grounds for making the claim, which is largely, I think, about the claim form and the extent to which your case is properly signalled to Mr Kennelly and, therefore, the facts have been properly pleaded. Is it helpful to think about that separately for the question of summary judgment, which appears to be about whether there is a reasonable prospect of succeeding. Is there any possibility that we could see -- a reasonable possibility that Mr Holt or somebody else might make good the defects that Mr Kennelly is pointing out? Whether those are defects of approach in law or the availability of evidence?

Perhaps that is not a helpful way of thinking about it, I was just thinking this morning about whether there is a useful distinction to be made in trying to resolve the arguments.

MS KREISBERGER: So, at the moment, it is not my position that there is any material difference between the two, because there is authority that says the principles are the same. If I may, I will reflect further on your question and come back to you. But what I do want to say in response to your comments are that it is not simply a practical point that this comes up at certification. I think there is a real risk, a danger, if one separates certification from the strike-out to this extent. It has to be borne in mind why the evidence has been put in in the first place in evaluating it, even for the purposes of strike-out, because I think there is a risk of real prejudice to the PCR. That prejudice is you put up the evidence to satisfy the commonality conditions and then the other side take a pop at it for the purposes of strike-out. And there is a conflation, which we see in this application, which is Mr Kennelly took you through Mr Holt's report as if it were his final evidence. So it is important, when approaching strike-out, to take the approach which the Tribunal took in *McLaren*, and I will show you that now, which is matters of expert methodology aren't really properly the subject of a strike-out application at certification.

THE CHAIRMAN: Yes. Really, when I talked about the practical point, that is what I meant.

MS KREISBERGER: Yes. I am grateful.

THE CHAIRMAN: I understand the point you are making. I also absolutely understand and accept that the test is not materially different for strike-out or summary judgment. You can argue about whether it makes any difference, but I don't think it does for present purposes. I suppose it is really only -- and perhaps the point wouldn't arise, were it not for the practical point of Mr Holt's evidence being in the form it is at this stage in the proceedings.

MS KREISBERGER: Yes. In terms of your question in relation to strike-out, it is actually my very last point of the day, so, when I get there, you know it is nearly over. But it is my very firm position, in my submission, that there is no pleading point. I think in practice, this point falls away, if you accept my position and my submission, which is you have a very full pleading on the various parts of the *United Brands* test, much fuller than one

would see in the High Court, actually. The pleading cites all the evidence that is currently available and on which Mr Holt relies and more. There isn't a strike-out point in practice. That may be helpful just to foreshadow now.

THE CHAIRMAN: Well, you will come to that, I am sure, and we will see that when it comes. Why don't we look at *McLaren*? I suppose the only other point to make about those cases to date where there has been a strike-out or summary judgment application alongside certification is that I think, in all of them, the question of methodology which is the subject of the strike-out, has also been the subject of argument in relation to certification. I think, not in all of them, but certainly in some of them, the experts have actually been subject to questioning by the Tribunal. I do think that is a point to be borne in mind when looking at those cases. Really, it just goes to the point we were talking about, which is that there is -- certainly my preliminary view on this is there is -- a difference between the exercise we are undertaking at the moment which is quite distinct from the certification exercise.

MS KREISBERGER: In a sense, what Apple is trying to do is to get a free kick at the evidence in relation to a different point, not the purpose for which it was adduced, which is only certification.

THE CHAIRMAN: I am not suggesting -- I understand that submission, I am just making the observation that I think we have to be careful about the relationship between certification and -- but let's look at *McLaren*.

MS KREISBERGER: Sir, if it helps, I will take you to the paragraph. It is authorities volume 2, page 818, tab 21 for those in hard copy. Paragraph 56 at the bottom of the page:

"We have concluded that the Applicant's case should not be struck out, in whole or in part, and that summary judgment is not appropriate. The reasons for these conclusions are set out in the discussion of the eligibility condition that follows ..."

So let's go to those paragraphs, that is page 824, paragraph 74:

"A key point to bear in mind is that there can be no bright line distinction between methodology and data. The two are closely linked".

That is important because it means your methodology, by necessity, adapts as data becomes available, that is why it is provisional.

Paragraph 75, part way down:

"Further [making the point I have just made], any chosen methodology may need to be adapted as data becomes available, or perhaps proves not to be available in exactly the way which was previously anticipated. The possibility of this occurring does not preclude certification. As Lord Briggs also recognised in *Merricks*, some gaps in data may ultimately turn out to be unbridgeable so that nothing might be recovered for part of a claim, but the Tribunal's task is to do the best it can with the evidence."

Moving forward to page 834, paragraph 105:

"We have already made the point that there is no rule that confines the concept of methodology to a particular econometric technique or expert evidence of economists ... it is not our role to determine the merits of the case at this stage."

I accept that is not what the job is here, but the Tribunal expressly relies on this paragraph in this entire section on eligibility to determine the strike-out summary judgment:

"That includes the merits and robustness of the methodology which refers to the refusal of the Canadian Supreme Court in *Microsoft* to resolve conflicts between the experts. That being a question for the trial judge ..."

"Ultimately, if the applicant's expert evidence can be successfully challenged at trial, the claim may fail. But" --

THE CHAIRMAN: Sorry, we need the next page.

MS KREISBERGER: Sorry. Page 835. I'm trying to remember that.

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: "But the *Microsoft* test is not so onerous that we should reject any methodology that may break down in the face of a challenge to evidence. That is not the 'low threshold' the test is intended to present. Instead, we need to determine whether the methodology offers a 'realistic prospect of assessing loss on a class-wide basis'. 'Realistic prospect' means just that. It does not mean that the Tribunal must

satisfy itself that the methodology is bound to work, or will work on the balance of probabilities, whatever the evidential challenge is. The Tribunal is not conducting a mini-trial."

Sir, I appreciate -- I hear what you say, that this is directed at eligibility. The Tribunal says in terms that is the basis for dismissing strike-out. But the point of approach must be the same in my submission, which is that Apple has the benefit of seeing advance notice, compared to the usual type of civil litigation, of seeing methodology, but it is not entitled to take a pot-shot at it on the basis that it is frozen in time. That is really what Apple are doing here. It has to be understood that Mr Holt says, '[t]hese are my preliminary views' - and I will take to you this - 'here are a number of ways in which I hope to improve on it, develop it as the data becomes available'. So that is highly relevant to how the Tribunal ought to approach the question of strike-out and reverse summary judgment.

THE CHAIRMAN: If Mr Kennelly identified a defect as a point of law in the approach that was being taken, that could appear in the claim form, in which case I wasn't sure whether Mr Kennelly was inviting you to the possibility of amendment, but that is one way of dealing with the point or, if you weren't going to amend, then the consequences would come from not being able to show reasonable grounds of making the claim.

So that wouldn't be frozen in time. At least, dependent on --

MS KREISBERGER: If it was an error of law.

THE CHAIRMAN: -- your response to it.

If -- and putting aside the comparators for the time being, we're just talking about this point about economic value of the demand side, and possibly the comparators need to be thought about slightly differently, -- if it was in the context of summary judgment, then, if Mr Holt was adopting the error of law that it was said appeared in your claim form, then of course he would no doubt follow the adjustment of the claim form; if he chose not to do that, then his evidence would be inconsistent with your claim. If he accepted, of course, the change, then you would expect his evidence to change.

So, I suppose -- I mean, I think I am accepting your point about not being frozen in time. I am still not entirely sure whether it is helpful to distinguish -- I do think it is helpful to distinguish the strike-out and the summary judgment application in that way to work through that logic, but I would be interested in any further views you or Mr Kennelly have on that.

MS KREISBERGER: I suggest, and if I may reflect further and come back to you, Sir, but I would suggest that the point you are putting is not so much a point of principle as regards differentiation between strike-out and summary judgment because the principles are the same but it is a point that arises here. If I can just show you that there is no pleading point, that may resolve the issue.

THE CHAIRMAN: That may well be right. Absolutely.

MS KREISBERGER: I am reminded that this is going to be front and centre of my submissions. Sir, you put the point just now on economic value in terms of limb 1, but, on Mr Holt's analysis, that is a mischaracterisation because economic value is not presented as his limb 1 analysis.

THE CHAIRMAN: Yes, I understand that you will say that Mr Holt is following the legal test. I understand that. I am really just trying to pick up the consequences of Mr Kennelly's argument.

MS KREISBERGER: Yes. I will come back to the issue on the substance, if I may.

THE CHAIRMAN: Yes, of course.

MS KREISBERGER: With that, I turn to excessive pricing.

I would like to begin by summarising Mr Kennelly's position. I confess to not finding it entirely straightforward.

He argues that it is not reasonably arguable that returns of this magnitude indicate unfair prices because they are a reward for innovation. He has to convince you that is an obvious proposition, it doesn't need to be tested on the evidence. I have already shown you that these are disputed claims that depend on factual expert evidence and have been rejected in another forum.

Apple has also sought to frame the point as an immutable fixed rule of law. Now, we do need to go to their skeleton to see exactly what they said at that stage was the legal principle. So, if I could ask you to turn up <C/2/34>.

At paragraph 16, they acknowledge that *Flynn Pharma* is the leading authority. That much is common ground. They then immediately go on to rely on *Attheraces* and that is really the case that they hang their proposition on. The skeleton then, if you turn the page, at <C/35> and <C/36> there is a section citing various parts of that judgment. We don't need to read them now and I will be going back to the judgment.

If you could move forward to page <C/37>. Now, up to this point in the skeleton, no proposition of law has actually been articulated. We get to paragraph 25 and I think it is best distilled from this paragraph:

"Although the point is settled law in Apple's favour, the Tribunal does not need to define the upper limits of fair pricing for the App Store in this case. All that Apple needs to show is that fair pricing for innovative intangibles like the App Store cannot be measured by reference to costs. As the Court of Appeal said in *Attheraces*, “there is nothing in the Article [102] or its jurisprudence to suggest that the index of abuse is the extent of departure from a cost + criterion”. A dominant undertaking is not generally required to price an innovative intangible at, or even near, cost plus a reasonable return”.

So that is my understanding of the proposition of law. You won't find it earlier on, but it seems to be that, for innovative intangibles, value should not be measured by reference to costs and having to crystallise it.

Moving on to page 38. Apple goes on to give the example of Wordle as a case where the value of an intangible good diverges wildly from cost. I say "case" in the general sense, there is no legal dispute or judgment about Wordle.

He goes on to rely on *Latvian Copyright*. I am going to take you to Apple's Response because what I am trying to do is really distil the proposition of law that is being put to you. If one looks at Apple's Response at <C/128>, paragraph 15 cites *Latvian Copyright* and *Attheraces*. And the latter part says:

"Nevertheless, particularly for intangible products and services, *Latvian Copyright* and *Attheraces* demonstrate that it is essential to compare the prices charged with the value that customers derive from the product or service" …importantly … "Measuring that value is a very different exercise from measuring the cost of production or return on capital employed."

Please turn back to page 38, paragraph 27. Again, it refers to *Latvian Copyright* and *Attheraces*. "*This was not a case*" -- this is a description by Lord Justice Green:

"*This was not a case involving a Cost-Plus analysis since in cases involving intangible property, it is recognised that such an analysis might be artificial*."

So, the proposition of law appears to be that for this category of intangible -- innovative intangibles, it is essential to measure value and impermissible to measure cost. That seems to be the proposition of law.

Paragraph 28 on page 38, so staying where we are, Apple really don't pull their punches here. They describe the PCR's excessive pricing claim as "absurd" because it is contrary to principle, law and common sense to assess the App Store's value by reference only to the costs of production, because it is an innovative and intangible service.

They say, even if we refer to some authorities, the language is qualified.

There is a further proposition of law at paragraph 33 on <C/40> which is that the true position is that prices are only abusive where they are extreme.

Then, I must finally show you paragraph 49(a) on page <C/46>:

"The costs incurred by Apple, and any (inevitably artificial) allocation of those costs … are irrelevant to the question of what value they bring to developers and consumers."

You have it there clearly. The proposition of law is that you don't measure costs for innovative intangibles.

Now, it became apparent yesterday that Apple's case on the law is built on shifting sands, because despite the repeated emphasis that you see there on this special category of innovative intangibles in the skeleton and the Response, I understood from what

Mr Kennelly had to say that Apple's claims about economic value are no longer confined in that way.

Mr Kennelly submitted to you in terms that in all cases there is a requirement to measure economic value by reference to demand side factors. That was his submission. He didn't clarify where that leaves the case on costs. I understand the proposition on the facts to be Mr Holt is wrong to rely on costs, what Mr Kennelly describes as cost plus, but I am afraid it is not clear to me whether it is being said that you don't measure costs when you are dealing with an innovative intangible. Mr Kennelly didn't refer to innovative intangibles in relation to his propositions. Or whether, like his new submission, that you always measure economic value by reference to demand side factors, whether the cost point applies to all cases, which is a really baffling proposition because I am about to take you to *United Brands* limb 1 which starts with costs.

In any event, that is my attempt at crystallising the propositions of law on which the application is based. I will now take you to the authorities, *Flynn Pharma*, a word on *Scandlines*, *Latvian Copyright* and *Attheraces*.

I will keep an eye on the time.

Flynn Pharma first, that is at tab 15, <A/472>.

A number of points about the legal test fall to be made based on the judgment. I will hope to take the other authorities more crisply, but *Flynn* is obviously the main one.

Now, my first point is that the judgment is crystal clear on the point that costs are the usual starting point for the analysis. They are not, as Mr Kennelly contends, irrelevant.

In order to see that, we have to begin with the classic test, adumbrated in *United Brands*, that is at page <A/487>. I may need nudging to turn the page.

If I could ask you to start at paragraph 56. The starting point is *United Brands*.

Turn the page, please, to <A/488>.

If I could ask the Tribunal just to read that summary of *United Brands*.

(Pause).

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: Apple's argument that costs are irrelevant can be put this way: limb 1 of *United Brands* should be set aside. Now, as I say, I don't know whether that submission is in this case or for innovative intangibles or some more general proposition, but either way it involves setting aside limb 1.

Now, that jettisoning of limb 1 is nowhere to be found in this judgment, *Flynn Pharma*. The Court of Appeal held in terms that in the ordinary course, if costs can be assessed, they should be. I ask you to move forward to page <A/542>, this is the judgment of the then Chancellor, Chancellor Vos. Paragraph 252:

"In my judgment, the first step in the analysis for the excessive limb is likely in most cases to be for the competition authority to consider whether the costs of production or the costs actually incurred in relation to the product in question, including of course, a reasonable rate of return, can be ascertained. In some cases, that simply cannot be done and, in others, it may provide an inappropriate counterfactual. But where it can be done [let me emphasise the following words], there is no reason, based on the applicable authorities, why the authority should not use that methodology to ascertain an appropriate counterfactual for the excessive limb of the analysis. In other cases, it may be necessary to determine the excessive limb by other methods."

Very clear.

It was ever thus. Over four decades after *United Brands* was decided, the Court of Appeal confirmed that the legal starting point remains the same. Plus ça change.

There is no reason, based on the applicable authorities, not to measure cost. So that is a bad proposition of law from Apple.

Now, when the Chancellor talks about the applicable authorities, those authorities include, and are considered in the judgment, *Attheraces*, *Latvian Copyright*, *Scandlines*, which Mr Kennelly took you to yesterday. That is not to say there won't be exceptions, but exceptions need to be judged on the facts. Again, this is a summary application. The test doesn't present any shortcuts, any universal prohibitions.

Nor is it right to suggest that a cost analysis is the exclusive approach, because there is *United Brands* limb 2. But in arguing that the PCR's profitability assessment is impermissible, Apple is jettisoning 40 years' worth of authority.

Let me show you page <A/509>. This is Lord Justice Green, who agrees with the Chancellor at paragraph 122. Halfway down:

" ... in both the law and in economics, all that is required is that there be '*a*' benchmark or standard against which to measure excess or fairness. The need for *a* comparator is economically logical since the concepts of fairness, excessiveness and reasonableness are all relative concepts. They must be compared with their counterfactual, e.g. unfairness, normality or unreasonableness. But case law and literature make clear that there are numerous counterfactuals which might be used, and importantly this includes the costs of the dominant undertaking as well as benchmarks set by reference to ROS or ROCE or some other similar measure. As was pointed out in argument the overarching discrimination of an abuse in *United Brands* at paragraph 249 [this is an important point] is by reference to a comparison with '*trading benefits*' realised in conditions of normal and sufficiently effective (i.e. workable) competition."

That deals -- again, that addresses Mr Frazer's question. A price which is above the competitive level meets the test:

"This necessarily comparative exercise does not exclude a benchmark premised upon the undertaking's own cost base or an assessment of what an appropriate ROS or ROCE would be for that undertaking."

So, costs are permissible.

In other words, what he is saying is, in a counterfactual competitive market, prices might be expected to converge with costs, including a reasonable rate of return. But what that counterfactual looks like is a matter of economic appraisal in the circumstances of the case on the facts. It can't be done in a vacuum. There are no rigid rules. It is evidential.

Now that takes me -- that is my first point. That takes me to my second point on *Flynn*, which is that, while Apple have dressed up their submission, their rule that reliance on costs is impermissible as a settled legal proposition, it is described in the skeleton as a short point of law -- sorry, that is the Response, just for your note, paragraph 35. In the skeleton, it is a sharp point of principle, settled law they say. It is no such thing. What they are urging on this Tribunal is a question of methodology. It is not a legal rule at all.

The same applies to the economic value question, which I will come back to.

Please turn to page <A/489>.

If I could ask you to read paragraphs 59 to 62 on that page, please.

(Pause).

So, the point I want to draw out here is that the Court of Appeal distinguishes three separate elements covered by the overall legal test in *United Brands*, namely, the legal test, the economic concept -- so the legal test is fairness, is the price unfair? You then go to the economic concepts of workable competition, economic value. They are two sides of the same coin. As his Lordship says, the paragraphs are connected. Those concepts tell you whether the fairness test is met or not, so a price which does not correlate to the competitive price, which is another way of saying economic value, that meets the test for abuse. So those are the economic concepts.

That is at paragraph 61, halfway down:

" ... charging a price with no reasonable nexus to its economic value and which is therefore excessive ... is *'such an abuse*' i.e. it is an example of the abuse described ... of a trading benefit reaped in conditions that are divorced from that realisable in conditions of ... workable competition."

So, in all of this, one is looking to see if the legal test of fairness is met. One does so by assessing what does "workable competition" mean? That is not a legal question. That is a counterfactual question. And then the third element is, as his Lordship puts it, methodology and evidence:

"In paragraphs 251 and 252, the court moves to consider how in evidential and methodological terms such an abuse can be '*determined objectively*'."

It brings me back to *McLaren*. If you are in the bucket of methodology, it is not an appropriate subject for a strike-out or summary judgment claim.

My submission, given that tripartite division that is set out in terms, is this is sufficient to dispose of the application because there isn't a short point of law.

In truth, this is a challenge to Mr Holt's methodology.

As I showed you in paragraph 72 of *McLaren*, that is closely intertwined with the question of the available data and evidence. Two sides of the same coin which can't be addressed on a summary basis. Divorced from data, facts and evidence.

So, these attacks on a provisional methodology need to wait.

Of course, we haven't had any data from Apple, despite making this application.

So, my submission is this application is based on a category error because it doesn't give rise to a short point of law. That is my second point on *Flynn*.

My third point on *Flynn* is the watchword 'flexibility'. The legal test is thoroughly non-prescriptive on the subject of how to assess whether a price is excessive and unfair, and what the methodology should be.

Staying on the same page, paragraph 63:

"Paragraph [253] is also important because it acknowledges ... there are other economic ways of devising rules for determining whether a price is unfair. ... the tests or methods referred to by the Court are not intended ... to lay down the only ways in which an unfair price might be determined. ... this militates strongly against any suggestion that the test ... is to be construed as if it set down a fixed and definitive methodology."

Move forward to page <A/495>.

His Lordship here is addressing the *Latvian Copyright* case. Paragraph 84, the court endorsed the following paragraph of the opinion from the Advocate-General headed:

"No single method or test".

"It can safely be stated that, at the current stage of legal or economic thinking, there is no single method, test or set of criteria which is generally accepted in economic writings or across jurisdictions ... Different authorities, as well as lawyers and economists, have suggested a number of [different] methods of analysis ... However, in point of fact, each reveals some inherent weaknesses".

"Nothing ... suggests that a competition authority can [only] use ... one test and ignore evidence adduced by an undertaking relating to another. Indeed, the opposite conclusion would seem to apply".

"... 'It falls to the competition authority to make the comparison and to define its framework, although it should be borne in mind that the authority has a certain margin of manoeuvre and that there is no single adequate method' ...".

That might explain why we heard nothing about *Latvian Copyright* yesterday. It supports my case.

Moving forward to the central paragraph, paragraph 97. That is at page <A/500>.

I am going to go through this quite carefully because it really answers these points. So, I hope you will forgive me.

There are the eight core principles adumbrated by Lord Justice Green and the flexibility in approach is the thread that runs throughout the applicable principles.

First, the basic test for abuse is whether the price is unfair. In broad terms, a price will be unfair when the dominant undertaking has reaped trading benefits which could not have obtained in conditions of workable competition.

Can I just pause there and I am going to leap ahead because I think it is an important point, Mr Kennelly said yesterday that the CMA interim report on mobile ecosystems isn't informative, he said, because the fact that price would come down in a competitive market is not to the point. Critically, Mr Kennelly conceded, for the purposes of this application, that the price would come down in conditions of competition.

If you look at the starting point of the test, that is enough. That is certainly enough, in my respectful submission, for me to persuade you that there is a reasonably arguable

case. He concedes that the price is not one which would pertain in conditions of workable competition.

Secondly, a price which is excessive because it bears no reasonable relation to the economic value of the good or service is an example of such an unfair price. It is excessive compared to -- you could put that in a different way, compared to the competitive price level. I showed you that he says economic value and competitive price are different sides of the same coin.

He goes on:

"There is no single method or '*way*' in which abuse might be established. Competition authorities have a margin of manoeuvre or appreciation in deciding which methodology to use and which evidence to rely upon."

Flexibility is the watchword:

"Depending upon the facts and circumstances of the case [so there are no universal rigid rules], a competition authority might therefore use one or more of the alternative economic tests which are available. There is however no rule of law requiring competition authorities to use more than one test or method in all cases."

Then, paragraph 5, very important:

"If a Cost-Plus test is applied, the competition authority may compare the cost of production with the selling price in order to disclose the profit margin. Then [it] should determine whether the margin is '*excessive*'. This can be done by comparing the price ... against a benchmark higher than cost such as [ROS or ROCE]. When that is performed, and *if* the price exceeds the selected benchmark, the authority should then compare the price charged against any other factors [I foreshadowed this one earlier] which might otherwise serve to justify the price charged as fair and not abusive."

Apple say innovation; we say monopoly rents.

Now, I want to pause at subparagraph 5 for another reason.

I have put to you that Mr Holt's analysis isn't cost plus. So I am now making a hypothetical point, but it is an important one. My hypothetical point is, even had he just approached

this on the basis of cost plus, that would be enough. This makes it very clear. Cost plus is permissible. If Apple want to argue that cost plus doesn't do the job, then it can bring forward evidence at trial to seek to convince the Tribunal that cost plus is not the right approach. But there is no principle of law which excludes cost plus. On the contrary, it is enshrined. I showed you *Albion Water* earlier, that is an example of a cost plus case. Economic value is defined as cost plus.

Mr Holt doesn't do that but, even if he did, it wouldn't be grounds for strike-out. You can do the economic value calculation on the cost plus basis.

Moving on:

"In analysing whether the end price is unfair, a competition authority may look at a range of relevant factors, including, but not limited to, evidence and data relating to the defendant undertaking itself and/or evidence of comparables drawn from competing products and/or any other relevant comparable, or all of these. There is no fixed list of categories of evidence relevant to unfairness."

Now, that is the stage at which everything comes into play. So you don't only have Mr Holt's comparator analysis in this case, we have the gatekeeper point, the monopoly returns, and when we go to the pleadings, you will see there is other evidence which the PCR relies on, like the discontent of app developers which Judge Gonzalez Rogers was so persuaded by.

It is all assessed at this point, the evidence in the round, competitive situation.

THE CHAIRMAN: Your submission about cost plus is -- I think you are saying that the exercise of cost plus is sufficient to satisfy the limb 1 exercise. You did, I think, say that it would be sufficient to assess economic value but limb 2 is part of that assessment, at well, isn't it?

MS KREISBERGER: It depends. This is my point. There are these methods and whether they get you there and tell you whether the price is above the competitive price depends entirely on the facts. So, let's distinguish -- I think what is at the heart, the nub of the question. That is why I took you to the tripartite distinction of

Lord Justice Green. It is important to distinguish law, economic evidence and methodology. What this says is there is no rule that says you can't just use cost plus. The question of whether cost plus is enough in any particular case depends on the evidence. That is only a matter which can be addressed at trial. But Apple don't say that. Apple say to you, 'You can say now cost plus is not economic value', because Apple say, 'oh, you have to measure demand side value'. Well, yes and no. Yes, cost plus could be enough, Lord Justice Green said so. It doesn't ignore economic value, because it has the plus. That is the whole point of the plus.

THE CHAIRMAN: Yes. So if you were in a relatively -- let's say you were in a relatively simple market and you carry out the exercise of cost plus, the plus is determined by potentially taking account of other industry evidence about a reasonable rate of return and you would say that brings into it things like the demand side --

MS KREISBERGER: Exactly.

THE CHAIRMAN: -- because it incorporates what people might pay in other circumstances. So then, once you have done that exercise, you would say that the application of limb 2 is as simple as looking at the excessiveness you have determined under limb 1 and there is nothing else to do because in itself it is unfair.

MS KREISBERGER: Yes. Exactly. And *Albion Water* is really the exemplar of that approach. In *Albion Water*, the Tribunal looked to see if there were comparators -- it's certainly not an intangible innovative product, it is a big bit of infrastructure -- and the Tribunal said, '[t]here are no good comparators for us to look at here. That doesn't prevent us doing the job. We will look at costs'. They looked at costs under limb 1 and then looked at costs under unfairness in itself. Essentially, they basically do the same exercise. They say that gets us to the competitive price and we see that this price is well above that competitive price.

Now, let's say that was the case that Apple were trying to strike out. You have a facility and the case is being brought that there are excessive charges and you needn't do anything but look at cost plus. The defendant in Apple's situation says, '[b]ut there is all this

other evidence, it is innovative, you haven't looked at that'. That doesn't arise as a point on strike-out or summary judgment. That is an evidential point, it will need to be assessed at trial. If we go through the rest of the test, the way this works is the claimant puts forward their case, the defendant is then entitled to rely on other evidence, different methods, and the Tribunal has to determine it. But there isn't a rule of law.

So, I don't want to mislead you, I am not suggesting for a moment that Mr Holt's analysis is cost plus. It is not.

THE CHAIRMAN: No, I understand that. I think I completely understand the point you are making. So, in your tripartite analysis, I think you are saying that you have made it very plain you have set up a legal test. You have made it very plain that you intend to capture the economic value and approach it by working that out. The methodology that Mr Holt has advanced so far has been for the purposes of certification and it is quite rudimentary, it is in advance of the data, and it is entirely -- I think you are saying -- it is entirely reasonable to allow you to progress that with the benefit of disclosure and whatever other evidence and material that Mr Holt wants to look at to formulate a case, which will be challenged and answered by Apple in due course. That is the point you are making.

MS KREISBERGER: Precisely. I can come on to show you the sorts of things that Mr Holt says he might want to look at and how it might affect his analysis, but that is where we are for now.

THE CHAIRMAN: If we were -- coming back to the facts of this case. If it was apparent in this case, if you look at what Mr Holt has done -- and, again, I am conscious I may be skipping ahead, because I know you want to deal specifically with the criticism, but if what Mr Holt has done, which is not a cost plus exercise but a different exercise, I don't think you are saying that you are arguing that that is sufficient for limb 1 and limb 2 in itself because we know that Mr Holt goes on and looks at some other things. Mr Kennelly is saying there are some things that are conspicuously absent from what

Mr Holt says he is going to look at and, indeed, he disavows the need to look at some things Mr Kennelly says are important. You say those are all matters of methodology --

MS KREISBERGER: Yes.

THE CHAIRMAN: -- because, one way or another, you accept you have to get to economic value. How you do it, you may be right you may be wrong, they may chuck stones at it and they may succeed, but, ultimately, that is not a pleading point nor a point which can be determined on the basis of Mr Holt's evidence for the purposes that have been given so far.

MS KREISBERGER: Exactly. To add to that, it is not a point of law. What is the proposition of law? The law is prices which are higher than competitive prices are unfair, essentially. As long as they are persistent and significant that is the law.

THE CHAIRMAN: Also, I think the law -- I think, on the basis of what Lord Justice Green says, is that you must conduct an exercise which is aimed at determining whether or not economic value bears a reasonable relationship to the price.

MS KREISBERGER: Yes, correct.

THE CHAIRMAN: So that is a legal proposition, I think.

MS KREISBERGER: I agree.

THE CHAIRMAN: It may be a proposition that requires an economic assessment.

MS KREISBERGER: I agree. Exactly. It is really putting the same point in different terminology because economic value is price under workable competition, he tells us that. But, precisely, that is the overarching test.

There is no rule of law on methodology. You are then into evidence, method, expert evaluation. There is no prescription as to what you can and can't do --

THE CHAIRMAN: Thank you.

MS KREISBERGER: -- within that framework.

THE CHAIRMAN: Yes. Thank you.

MR FRAZER: I think I understand this from your answers to the Chairman's questions, but in the hypothetical case of a cost plus submission, I know you are saying you haven't

made that, I think I am correct to understand that you are not suggesting that costs plus would be sufficient on its own, ignoring the last sentence of subparagraph 5. Am I correct to understand?

MS KREISBERGER: Yes.

MR FRAZER: You can't ignore the last sentence.

MS KREISBERGER: You can't ignore the last sentence.

MR FRAZER: Right. Even in a cost plus approach?

MS KREISBERGER: But that is an evidential question. So it may be that -- let's take the facts of *Flynn*, which illustrate the point perfectly. The CMA adopted a cost plus approach for the drug and the judgment says that is fine. But the pharmaceutical company said, 'But we have a comparator. These are capsules and they are below the price of tablets. What about tablets?' I think I have that the right way round.

Okay, the Court of Appeal said the CMA was wrong to ignore this comparator. But, again, that is not something you can really posit as a rule of law on the facts of any case. Is that a good comparator? If it is, it needs to be taken into account. But to get to the answer, "Is this a good comparator?", you have to evaluate it.

So, generally, that last sentence will be a matter of evidential dispute between parties.

But, having said that, it is always dangerous to stray into the realms of hypothesis. Mr Holt has done this precisely. He has asked himself -- he has looked at what Apple have to say about innovation, for instance, and he says, 'I am not saying you can't have high returns for innovative products, but I am not operating robotically, divorced from the facts. When I look at the facts, I see a monopolist shielded from competition who has had remarkably high returns for 14 years. That doesn't look to me like a transient high profitability or high margins which ultimately will attract competitors and erode the price down to competitive levels'. So he has done that exercise. So I don't need to argue a more difficult case, really.

THE CHAIRMAN: I am just conscious of the time.

MS KREISBERGER: Yes.

THE CHAIRMAN: I am wondering, how are you getting on? I am conscious we are distracting you.

MS KREISBERGER: I am getting on. It is a little hard to predict, but I would say I am around halfway through.

THE CHAIRMAN: What does that mean in terms of the arrangements you have with Mr Kennelly? I am thinking particularly about the prospects of finishing today or not?

MS KREISBERGER: I don't know if the Tribunal would be willing to sit late today to avoid a return tomorrow?

THE CHAIRMAN: I am wondering perhaps if we might start again a little earlier than 2 o'clock, at least as a way of giving you some extra time.

MS KREISBERGER: I will do my best and perhaps we can revisit part way through the afternoon. It is always a little difficult to predict.

THE CHAIRMAN: Yes. Let's start at 1.45 again and then we will see how you get on. If we need to find some time at the end of the day, we will see whether we can do that as well.

Thank you.

(1.02 pm)

(The short adjournment)

(1.45 pm)

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: Thank you, Sir. I was in paragraph 97 of *Flynn*, which is authorities page <A/500>.

I was just up to subparagraph 6.

THE CHAIRMAN: Yes.

MS KREISBERGER: "In analysing whether the end price is unfair, a competition authority may look at a range of relevant factors, including, but not limited to, evidence and data relating to the defendant undertaking itself and/or evidence of comparables drawn from

competing products and/or any other relevant comparable, or all of these. There is no fixed list of categories of evidence relevant to unfairness."

So, again, important, given all the factors, which Mr Holt has taken into account.

7, this is another important one:

"If a competition authority choses one method, (e.g., Cost-Plus) and one body of evidence, and the defendant undertaking does not adduce other methods or evidence, the competition authority may proceed to a conclusion upon the basis of that method and evidence alone."

That is my *Albion Water* point and my hypothetical example. If it was just cost plus, that is okay too. The defendant can then bring forward their own evidence and it will be a dispute.

THE CHAIRMAN: Of course, a lot of this is about whether the CMA should have looked at things other than the things they looked at and where the burden was and so on. That is partly why the comment is made in that context. But you are saying it goes beyond that to make the broader point that cost plus can stand by on its own if that is where it ends up.

MS KREISBERGER: Yes. We have authorities where that has been done, like *Albion Water*. So that is right.

I mean, there is a huge discretion and the question as to how you do at trial hangs in the balance based on the evidence. The CMA made a surprising judgment to say, '[w]e don't need to look at tablets, even though it is the same drug'. They said, '[w]e just close our minds to them'. They ran a very technical argument that the unfair -- the two parts of the unfair limb are disjunctive, they are alternatives, so they could just look at unfair in itself and ignore comparators, which is completely contrary to the whole thrust of the approach, which is you look at all the evidence. But in a private action, claimant relies on one set of evidence, defendant relies on another, and it is for the Tribunal to make the decision.

8:

"If an undertaking relies, in its defence, upon other methods or types of evidence to that relied upon by the competition authority then the authority must fairly evaluate it."

Well, really, you could put the Tribunal in that position.

So that is the classic -- the now classic statement of the test.

Just for your note, perhaps, with an eye on the time, Lord Justice Green also carefully considered the economic literature and he concluded at paragraph 107, which is at <A/503> for your note, that the literature fully chimes with that statement of the legal test. In other words, it is highly discretionary, there are no fixed rules, there are no universal prohibitions.

Before moving on, I just want to anticipate a response from Apple that we might hear, that the wide discretion as to method that I have just set out for you applies to competition authorities and not private claimants. If you could go to page <A/506> in the judgment, paragraph 112, second sentence:

"By the very nature of the legal test for abuse a competition authority has a margin of manoeuvre or discretion as to the method(s) it uses and the evidence it relies upon. How it goes about evaluating the evidence will be fact and context specific ..."

So, by the very nature of the legal test for abuse, so private claimants are in the same position as a public competition authority.

I am now on to my fourth point on *Flynn*. This goes to Apple's now central argument as to what it claims to be the correct approach to economic value. Mr Kennelly has now positioned that as his main point.

On Apple's case, they say you don't measure costs, you measure value. In other words, value is a discrete component of the *United Brands* test. And it has to be measured, there has to be provision for it under the methodology.

Following what is really a seismic shift in Apple's position since the skeleton, Mr Kennelly now says that this applies to all cases, not just innovative intangible products. He said this yesterday, and the reference is page 53, lines 23 to 26 of the transcript:

"... in all cases it is necessary to assess the economic value of the product at some point ... as we will see Lord Justice Green saying ... in all cases, the Tribunal must ask if there are relevant demand side factors."

That was the submission. I have now shown you both *United Brands* test and *Flynn*, paragraph 97. Neither refer to a discrete requirement to measure demand side value as a discrete component of the test. If it was, one would expect to see it in paragraph 97.

Now, curiously, Mr Kennelly purported to derive his proposition from paragraph 172 of *Flynn*, so let's have a look at that. Page <A/522>, starting at paragraph 171 at the bottom of the page. At 170, he says, "I am now going to move on to economic value", and he says, "I have some concerns about what the Tribunal did":

"First, the Tribunal observed that this was clearly a legal test. The categorisation of this as a *'legal'* concept seemingly led the Tribunal to treat economic value as a discrete component of the test in law to be applied. It is *'legal'* in the strictly limited sense that it has been ascribed a meaning in a court judgment but, at base, it is an economic concept which describes what it is that users and customers value and will reasonably pay for it and it arose in ... *United Brands* ... as an economic description of the abuse of unfair pricing ..."

I have shown you that.

THE CHAIRMAN: Yes.

MS KREISBERGER: Now, this is the important paragraph, paragraph 172:

"Second, [Mr Kennelly did not read out the full passage] the Tribunal did not agree with the submissions of all parties that economic value was simply a matter to be taken into account as part of other components of the test. The Tribunal held that it was not part of the '*in itself*' test but was part of *'a more general assessment*'. I agree with the parties on this. It is evident from the judgment in *United Brands* that the reference to '*economic value*' is as part of the overall descriptor of the abuse; it is not the test. The test should therefore, when properly applied, be capable of evaluating economic value.

So, for instance, as the CMA argues, when evaluating patient benefit it would be possible to measure its economic value in the Plus element of Cost-Plus, or even in the fairness element. Equally, if there is evidence of the prices being charged in relevant, comparator, markets which were effectively competitive then those prices could be capable of acting as proxy evidence of the economic value of patient benefit."

So economic value comes in at plus or the comparators and their proxies:

"In so far as an issue of fact arises which can be categorised as an aspect of '*economic value*' it needs to be measured and it can be evaluated in various parts of that test."

It is not something separate. The Tribunal, with respect, got that one wrong:

"If it is properly factored into 'Plus' or 'fairness' or into some other part of the test, or is reflected in other evidence which can stand as a proxy for economic value, then there is no incremental obligation to take it into account again, as a discrete advantage or as a justification for a high price. In paragraph 421, the Tribunal states that the analysis of economic value conducted at other stages of the test are '*broadly similar*' but that there is a '*different perspective*'. With respect I do not follow this. The analysis of the Tribunal ... suggests that it is a requirement *discrete* from other components of the test to be applied only after all those components have been worked through. But if this were so, it would (wrongly) risk *compelling* a competition authority to double count economic value. In short, economic value needs to be factored in and fairly evaluated, *somewhere*, but it is properly a matter which falls to the judgment of the competition authority as to where in the analysis this occurs."

THE CHAIRMAN: So that bit in the middle about where an issue of fact arises, the categorisation of economic value can be measured and can be evaluated. I think that comes back to Dr Bishop's question about the flag, about how obvious it has to be. I suppose that you are addressing a particular point. What I suppose I am not clear about is how much there is between you and Mr Kennelly in relation to this point. It may not be necessary because of the way -- your point is that, whatever this is, it is a matter of methodology --

MS KREISBERGER: Yes.

THE CHAIRMAN: -- and can be dealt with at a later stage that is not the subject of this.

MS KREISBERGER: Yes. So Mr Kennelly has to convince you that there is a point of law here. The point of law to be taken from this paragraph is you don't -- in terms, you do not need to assess demand side considerations if you have done one or more of cost plus, comparator analyses or looked at other relevant evidence. So the mistake in *Flynn* is the CMA did a cost plus, ran a cost plus analysis and the pharmaceutical company said there are tablet comparators and CMA said, 'we don't need to look at those'. But then the pharmaceutical company said something else. They said, 'apart from cost plus and our proposed comparators that you, the CMA, have ignored, what you need to realise is that this is a life-saving drug, and you need to put a number on that life-saving aspect of the drug'.

Here, Lord Justice Green is saying that is completely wrong. The Tribunal were persuaded by that unusual submission because, what number are you ever going to put on a life-saving drug. Infinity! Lord Justice Green says the Tribunal just got that wrong. The CMA did cost plus, they took account of value in the plus, they should have looked at tablets, they might ultimately reject tablets as a meaningful comparator because the argument is the tablet market wasn't competitive, but you have to look at it. You do not then say, 'but there is some other number that I need to get at to reflect demand side value", because that is not the *United Brands* test. The *United Brands* test is you have two limbs, you can use one or the other, and value is baked into the limbs of the test. There is no separate analysis, the Tribunal got that wrong.

THE CHAIRMAN: So, if you do have something, let's say, for argument's sake, there is here a benefit to developers because they can, a bit like (inaudible), they can monetise and there is a premium to be paid to somebody that is -- in this case, it happens to be to Apple, but maybe it might be to the developers or wherever it ends up. But there is some value in there and Apple are saying some attribution of value. This does seem to be saying that you need to make sure you have made an assessment of that. I don't

think you are disagreeing with that, you are just saying that there are a number of tools available as part of the toolkit of methodologies that might do that in different ways. Cost plus could be one of them, if you chose a plus that reflected that. Mr Kennelly says maybe that is not possible but you could have that argument. Or you could do it in a different way, presumably. No doubt there are all sorts of different ways an economist would look at this and think about, 'how do I assess what the value due to developers is?', because of, for argument's sake, the innovations that have been established.

MS KREISBERGER: Yes.

THE CHAIRMAN: There is not really a difference between you at least that far, is there?

MS KREISBERGER: The difference is he says it is something different. Mr Kennelly says that is not enough. He says you can't -- he says what you have done by applying the two limbs of the test, and he tries to disparage each of them, he says something quite interesting, which would turn on its head all of these authorities. He says there is something so special about the App Store and it is not the fact that it is a monopoly gatekeeper, that plus in cost plus is not going to cut it and comparators aren't going to cut it, and you have to accept there is probably no methodology that is going to cut it because the App Store is so special. That is an extraordinary submission to make.

It is the standard approach to say we will factor it in in the plus, we will look at comparators and we will look at the evidence in the round to see what is really driving these high prices. Is it monopoly, for instance? In no case is it said, well, with a really valuable product, a life-saving drug, you throw up your hands and say the whole thing doesn't work.

THE CHAIRMAN: I think he is also saying there is something here which needs to be measured and, on the face of it, Mr Holt is suggesting that he doesn't think it needs to be measured because he refers to extracts of Holt in which Mr Holt says, '[w]ell, that is really a matter for Professor Hitt and I am not going to deal with it'. For argument's sake, let's just say that -- well let's put that to one side as to whether he is right or not

because you would say it is a methodology anyway and it doesn't matter. What I think I am trying to establish is whether you agree that -- whether there is a difference between you about whether it needs to be taken into account, there may be a difference as to how it is to be taken into account and where it sits in the tripartite arrangement, but I don't think there is a difference between you in accepting that, if there is a material fact that is relevant, it needs to be taken into account somewhere.

MS KREISBERGER: Absolutely. I fully endorse that proposition.

Economic value, coming back to *Flynn*, 97, is the test. It is the descriptor of the whole test. How you get there is the methodological evidential question.

THE CHAIRMAN: Yes. Thank you.

MS KREISBERGER: But limb 1 and 2, that is a standard approach.

THE CHAIRMAN: Yes, of course.

MS KREISBERGER: But yes. I fully accept that you don't -- what you don't do, and what this says you don't do, is you don't do limb 1 and 2 and then ask yourself, you know, 'I need another approach to put a number on benefit'.

THE CHAIRMAN: Yes. I understand.

MS KREISBERGER: So, yes, it is the test and it is baked into the aspects of the test on methodology.

Now, finally on economic value, and I think this goes to Mr Kennelly's second point. He went further yesterday and he said economic value is what the customer is willing to pay, even in a situation of dependency. He said that, even where a customer is dependent, there is still some economic value. That is not quite right.

So, we need to go back to what Lord Justice Green said at <A/518>, paragraphs 153 onwards. I will read these out because it is important:

"This Ground of Appeal addresses the concept of '*economic value*' as ... used in ... *United Brands*. It focuses upon: whether the test is a legal or economic test; whether it is the same as or different to other components of the test; whether it is capable of taking [into] account ... demand side factors [we have just been debating that]; and,

whether a competition authority has a margin of manoeuvre or appreciation in [evaluating] *'economic value*' which the Tribunal should respect".

"The concept of economic value is not defined. In broad terms, the economic value of a good or service is what a consumer is willing to pay for it. But [this is the important sentence] this cannot serve as an adequate definition in an abuse case since otherwise true value would be defined as anything that an exploitative and abusive dominant undertaking could get away with. It would equate proper value with an unfair price. This is a well-known conundrum ... The same point was made ... in *Attheraces* ... it [has] attracted the soubriquet *'the cellophane fallacy*'. To overcome this in *United Brands* … the Court held that there must be a '*reasonable*' relationship between price and economic value."

Remember economic value is essentially the price under conditions of workable competition:

"The simple fact that a consumer will or must pay the price that a dominant undertaking demands is not therefore an indication [that] it reflects a reasonable relationship with economic value. But a proxy might be what consumers are prepared to pay ... in an effectively competitive market, hence the relationship between the two descriptions of abuse in paragraphs [249] and [250] [of *United Brands*] and the fact that the economic value description is said to be an example of the broader description of an abuse in paragraph [249]."

That is trading benefits not realisable in conditions of workable competition.

So he is making the opposite point to that which Mr Kennelly was urging you to accept, which was that economic value is the price that the developer here is prepared to pay.

Now, in a situation of dependency, one is not saying there is no economic value. What one is saying is that the price that the customer pays is not indicative of economic value because they will pay anything. That is why you need some methodology. You can't go by the price they pay, whether it be cost plus, comparators, or a combination of them.

The same point was made many years ago by Advocate-General Jacobs in *Tournier*. Let's just briefly turn that up because this, I think, goes to the central point. That is <A/1233>.

It is just on the page, no paragraph number, second paragraph down:

"The criterion of the importance of music to the business in question is superficially attractive [that is the customer] since it appears only logical that those who need music more should be prepared to pay more for it. However, it appears to me that the usefulness of the criterion breaks down in a situation where a given category of users is completely dependent for its functioning on the supply of music and where, because of the absence of competition that category must, in effect, pay whatever price is required of it."

So, that is why you can't rely on price.

Now, that concludes my submissions on the four points to be drawn from *Flynn Pharma*. Just very briefly, I want to take you to page <A/492> in the judgment to make a different point.

Mr Kennelly placed very heavy reliance on *Scandlines* yesterday. Please go to page <A/492>, summarising *Scandlines*. Lord Justice Green had this to say:

"This is a Commission decision and is cited by *Pfizer* and *Flynn* as indicative of an approach followed by the Commission in a case which is inconsistent with the stricter arguments now advanced ... Before this Court however the Commission urged caution. It says that this was a Commission decision only, it was limited to very particular facts, and [it] is one of the very few cases (ever) where the Commission has taken account of demand side factors in analysing economic value."

So, even the Commission was distancing itself from that one. The Court of Appeal took account of it in its summation of the law.

Moving on to *Attheraces*.

Now, Apple say that judgment is the provenance of their supposed legal rule that economic value must be measured. Initially, they said that is the case that tells you that is a rule

that applies to innovative intangibles. As of yesterday, they now say that is just the rule for everyone, all cases.

My submission to you is, to the extent that the judgment has a binding ratio beyond its own rather specific set of facts, it is that it should not be assumed in any particular case that it is sufficient to show that a price exceeds cost plus a reasonable rate of return to establish the abuse of unfair pricing. I have shown you it might be enough in some cases but in others it is not. So that is on all fours with *Flynn Pharma* and *United Brands*. Neither of those cases say, as soon as you depart from cost plus, it is automatically an abuse. That is just not the position.

Please go to page 193 of authorities at tab 9 <A/193>.

I want to show you briefly how BHB put its case. One of its main complaints was that using cost plus meant the judge failed to take account of all the relevant costs, because pre-race data was a by-product of horseracing. That is at page <A/217>, paragraph 135:

"The judge also took too narrow a view on the relevance of costs to BHB, confining [the] costs in the 'cost +' formula to BHB's costs of maintaining the database."

I think I can summarise. They go on to say the primary activity is horseracing, so you need to allocate some of those costs.

So you immediately see this is a case where cost plus is going to be problematic because, how do you allocate a proportion of horseracing costs to the pre-race data which is just an offshoot, a by-product?

Moving to paragraphs 172 and 175 at page <A/177> that may be not the right reference. Page <A/222>.

You see there, Mr Roth, as he then was, his first criticism was the mechanistic approach to pricing. He argued that pre-race data differs from standalone products, it is the offshoot point. The primary activity of British racing has to be policed and administered and governed. This costs money. That is at paragraph 175.

At 177, Mr Roth submitted that a broader view needed to be taken in holding that cost plus was the relevant benchmark, because of the nature of the product.

The court agreed with BHB at paragraph 181:

"As regards the relevant allowable costs in ascertaining cost +, the judge only took account of the direct costs of the BHB Database and expenditure directly related to the revenue sought from, or specifically targeted at, the overseas bookmakers ... this approach was wrong because it was too restrictive, given the nature of the pre-race data ..."

Now Mr Kennelly said that wasn't the premise of the operative finding. Well, that colours the whole of this judgment. This was not a good case for cost plus.

Moving on to paragraph 186, that is at page <A/224>:

"Mr Roth's second main criticism [after the problem with costs] was that the judge [equated] economic value with cost + [and his conclusion] did not involve any separate analysis of economic value. The judge gave no meaning to economic value other than the competitive price defined in terms of the supply side. Economic value looks to the demand side rather than the supply side. It means the value to the customer ..."

At 187, Mr Roth accepted that costs were relevant:

"Although a comparison between price and cost of production may be a step in the analysis of economic value, it was only a first step. Costs of production were relevant, but ... not … conclusive."

That is not what Apple is urging on you today. They say in terms costs are irrelevant, not just not determinative. It is much more extreme than the position taken in this case.

Now, I should have said I want to draw out three key points from BHB's submissions. The first is that it is a much more moderated approach to cost. The second is Mr Kennelly took you today to the judgment below to support his submission that price was affected. That is not right. If you go to paragraph 196 on page <A/226>, what the Court of Appeal -- well the submission made to the Court of Appeal, which it accepted, was that the downstream market which *Attheraces* operated on, the filler -- so-called filler market, was competitive. So, “Mr Roth also made the point that this was not a case

where the charges proposed by BHB would cause harm to end users or downstream customers of the pre-race data, for example, by leading to increased prices. The dispute in this case arises out of the negotiations between BHB and *Attheraces* on the commercial division of the revenues derived by *Attheraces* from the overseas bookmakers in the downstream market, which is competitive. *Attheraces* is not dominant and it has to compete with other suppliers."

So he was emphasising there that there was no suggestion that higher prices upstream were filtering through to customers downstream, let alone -- these are commercial customers -- let alone the consumer.

He emphasised no detrimental effect. That is the key distinction. The whole raison d'être of Dr Kent's claim is to claim for overcharges to the consumer class. So it is an entirely different situation here. This is just a battle about share of revenue, it is a battle for rent upstream between two big commercial enterprises.

At 198, still on page <A/226>, Mr Roth criticised the judge for ignoring comparators. I don't need to read them out, but you can see there (a) to (d). There were four sets of comparators in that case and BHB said the judge ignored them. So this is nothing like Mr Holt's provisional analyses which I have shown you puts comparators squarely in the frame.

Turning then to the Court of Appeal's conclusions I will draw out the main points. I can do this quite briefly because I have set out the proposition this stands for. On page <A/227>, at paragraph 207, the Court of Appeal held that:

“There is nothing in the Article or its jurisprudence to suggest that the index of abuse is the extent of departure from a cost + criterion."

In other words, you can't assume the limit of a competitive price for all cases is cost plus.

At paragraph 208, they said this:

"... even a hypothetically competitive market may yield a rate of profit above, as well as below, the reasonable margin represented by cost +."

We accept that. That is why you look at comparators.

It is no part of Dr Kent's case that the prohibition on unfair pricing is violated every time a dominant firm charges prices which exceed cost plus. That would be an extreme proposition. Coming back to Mr Frazer's point, this mirrors Lord Justice Green's invitation at paragraph 97.5 of the need, once the cost plus test has been performed, to compare the price against any other relevant evidence. That is all they are saying.

Paragraph 209, halfway down:

"Exceeding cost + is a necessary, but in no way a sufficient, test of abuse of a dominant position."

Again, very different from what Apple is submitting to you.

Over the page, <A/228>, paragraphs 210 to 211:

"BHB has two principal answers to the accusation of excessive pricing. The first is that, if the price is one which the market will reasonably bear by definition, it is not excessive. The second is that its own role and status are such that its returns are not and should not be treated as simple profit because they are ploughed back into the very product for which ATR are paying.

We are not prepared to accept the first answer, even with the adverb 'reasonably'."

So the second answer was a key feature of that case, there is no analogue to that here. It is for the good of the sport, essentially. The first point was rejected, and that is the point that Apple is seeking to resurrect, it is what the market will bear.

If I could ask you to turn up Apple's skeleton at <C/36>. Paragraphs 24 (a) and (b).

Could I ask to you read those paragraphs to yourself, 24 (a) and 24 (b).

(Pause).

When you are ready, it goes on to page <C/37>.

(Pause).

THE CHAIRMAN: Yes I think --

MS KREISBERGER: Page <C/37>.

(Pause).

So, Apple draws a bright line between, on the one hand, cases where consumers are thoroughly dependent on the dominant firm, and those where the downstream market is thriving. According to Apple, the price paid to the dominant firm is a reliable indicator of economic value in the second category not the first. But they have missed the irony of their contention. This is the category one case. Developers and consumers are 100 per cent dependent on Apple for the distribution of iOS apps. That is precisely why the fact that developers and users continue to bear the 30 per cent toll is not at all informative about economic value, because they don't have a choice. That is also why *Attheraces* doesn't help Mr Kennelly. High prices hadn't spilled over into the downstream bookmaker market and prices to consumers remained untainted. The price in question was confined to a battle upstream between two powerful commercial entities wrestling each other for their respective share of the profits. A battle for rents. Classic battle for rents.

With that, and having made some edits, to move things along, I am going to turn to my final point on the legal principles.

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: Apple urges the Tribunal to accept there may be no methodology capable of assessing whether the App Store charges are unfair or excessive. Just for your note, that is paragraph 31 of their skeleton <C/39>. Mr Kennelly pressed the point yesterday. What Apple is really saying is that big tech gatekeepers can act with impunity under competition law and charge what they like without the possibility of competition scrutiny. With respect, the Tribunal should treat that claim with deep scepticism.

As the Supreme Court pointed out in *Merricks*, in claims for damages, the court must often do its best, do the best that it can on the basis of exiguous evidence, the claimant must not be denied a trial because of forensic difficulties. For your note, that is paragraph 47 of *Merricks*. That is at <A/572>.

The same must apply to claims of unfair pricing against big tech platforms under chapter 2. The Tribunal has to evaluate the price under the legal test ultimately at trial on the basis of the evidence and methodologies before it, doing the best it can.

Now, if you just -- it is perhaps useful to say if one zooms out for a moment, one sees three different approaches taken in the cases. I think that has become apparent, but just to crystallise the point, we see a cost plus only approach, which is endorsed in *Flynn* and adopted in *Albion Water*; so that is limb 1 only. Potentially part 1 of limb 2 but on the basis of cost plus. It is the first bucket of cases.

The second is a comparator only approach. That is *Tournier*, that is *Latvian Copyright*, because the costs of the copyright couldn't be sensibly assessed.

Then you see cases where a combination of approaches is adopted. *Napp* is one which the Advocate-General in *Latvian Copyright* waxes lyrical about, a sort of exemplar of the combinatorial approach he says. But *Flynn* as well. Cost plus but also tablet comparators.

And most importantly, Mr Holt.

At its heart, Apple's submission seems to be that this is such a special case that, contrary to all those authorities, there is no methodology to assess App Store value. With respect, that is a submission that should be given short shrift.

Now, that concludes my submissions on the legal principles. I would say that is sufficient to dispose of an application which turns on a point of law. There isn't a short point of law, but, for completeness, I next turn to Apple's attacks on Mr Holt's methodology.

Now, I think I can take this quite briskly. I will go through the points, but we have covered a lot of them so I will just raise them for your note.

THE CHAIRMAN: Yes.

MS KREISBERGER: I have seven points, I think.

If we turn up <C/31>, paragraph 5. This is where Apple says:

"Th[e] question of principle [which] arises in this case [is] because the PCR's ... Claim is based on a methodology that purports to measure only the costs incurred by Apple ... and then purports to allow ... a 'normal' return on those costs."

I have already addressed you on this point, this is a straw man --

THE CHAIRMAN: (inaudible)

MR BISHOP: I am sorry, I am lost.

MS KREISBERGER: I am sorry. It is <C/31>. I am so sorry, that is tab 2.

MR BISHOP: Yes.

MS KREISBERGER: The paragraph is 5 at the bottom of that page.

MR BISHOP: Okay. Thank you, yes.

MS KREISBERGER: For those using the electronic version, it moves on to page 32.

The accusation there is the methodology purports only to measure costs incurred by Apple with a normal rate of return. That is a straw man which infects this entire application, but this is the first time it crops up because, as I have shown you, that is not what Mr Holt does. He doesn't only measure costs and allow a rate of return to get to economic value.

Just for your note, paragraph 48, which is on page 46, is another example of the straw man cropping up. Apple says, "... with the result that prices are assumed to [be] driven down to Cost Plus."

Mr Holt doesn't do that because, actually, he looks at his proxies, his comparators, to look at competitive rates. He doesn't assume cost plus anywhere.

Mr Holt deals with this himself in his second report. Could I ask you to turn up <C/349> and ask you to read paragraphs 2.1.2 to 2.1.4 to yourselves?

(Pause).

Perhaps you could let me know when you need to turn the page.

(Pause).

THE CHAIRMAN: I think we are all in the hard copy.

(Pause).

When you are using cost plus, of course he is not doing cost plus in the narrow sense, he is doing it perhaps in the broader sense of Lord Justice Green's paragraph 5 where he talks about other benchmarks.

MS KREISBERGER: Well, I wouldn't call it cost plus at all.

THE CHAIRMAN: Well, I thought you did. Maybe I misheard what you said. I had understood that you were not calling it cost plus.

MS KREISBERGER: Yes, correct. Sorry if I misspoke. Analogous of profitability.

THE CHAIRMAN: This is a benchmark analysis which is equivalent under paragraph 5, subparagraph 5 of 97 --

MS KREISBERGER: Yes.

THE CHAIRMAN: -- to what might be a cost plus approach, which would be to take costs and then apply a reasonable return to it. Here, he is working out what the profitability is by using a return on capital and weighted average capital.

MS KREISBERGER: Yes. As I said, it is not cost plus because he doesn't then take it to the next step and set a price. He just sees there is an excessive margin.

THE CHAIRMAN: He is working out what the margin is, exactly, yes, through that mechanism, which is a different approach to get to more or less the same place. But it is different, isn't it?

MS KREISBERGER: It is different because he doesn't, under limb 1, at all say, ‘And that tells me the competitive rate of commission would be X’, he does that under limb 2.

THE CHAIRMAN: Yes.

MS KREISBERGER: So he relies -- although he says, ‘I have to be careful, comparators aren't perfect’, actually, in terms of economic value, aka competitive price, he is doing that under limb 2.

THE CHAIRMAN: Yes, because the exercise he carries out is actually about identifying a business unit within Apple and working out what its margin is, and then taking that and applying some other factors to it to reach the combined conclusion of value.

MS KREISBERGER: Yes. As I put it when I opened, it is probably more accurate to say limb 1 raises the red flag that there are significantly and persistently high returns, and then he looks at all the evidence to see, well, is that indicative of an unfair price within the meaning of *United Brands* or can it be explained?

THE CHAIRMAN: Yes.

(Pause).

MS KREISBERGER: So you could say he is in *Flynn* 97 paragraph 5. He looks at profitability, sees it is very high over a long period of time and then he turns to consider the other evidence. Is it explained by innovation? He says, 'well, actually, I see this as the reward for being a gatekeeper not an innovator", which is on all fours with Judge Rogers in *Northern California*.

So you see at -- sorry, is everyone on the hard copy, just to check?

THE CHAIRMAN: Yes, we are, yes.

MS KREISBERGER: You see this is not an analysis which treats cost plus as the limit of lawful pricing, which is the specific submission made by Apple, and so it is unlike *Attheraces* where Mr Justice Etherton did precisely that. He took quite a narrow bucket of costs and said that is your limit. Very different.

I just want to draw to your attention, perhaps keeping Mr Holt's evidence open, not if you are in the hard bundle, to the PCR's pleaded case on unfairness. If you could turn up tab 5 <C/89> of the same bundle.

Sorry, that should be page <C-96>.

We will come back to the pleading, but this -- at the bottom of page 96, you see "unfairness in itself". Over the page, the various categories of evidence are listed, and then, at subparagraph (e), on page 98, you see one of the pieces of evidence relied on by the PCR is the response of app developers who complained about exorbitant fees. We saw that in the US *Epic* judgment from Judge Gonzalez Rogers as well. So they are complaining that the 30 per cent charge is an oppressive tax, it is exorbitant.

Mr Kennelly sought to dismiss the views of developers yesterday as having:

"... nothing to do with ascertaining the economic value [which] the App Store provides to them and to end users."

That is at page 21 of the transcript, lines 11 to 18.

Well, that is completely at odds with his own claim that economic value is what the customer is prepared to pay. And, as I said, app developer views were integral to Judge Rogers' express finding, following a full trial, that the 30 per cent rate is not commensurate with the value developers get from the App Store. There is no reason why one should discount their reactions when one is looking at the evidence in the round.

That is also a part of the evidential picture which Dr Kent relies on.

Finally, could I ask to you turn back to Holt 2, tab 9 <C/366>. Could I ask to you read section 2.4.1 under "Development of my methodology".

(Pause).

If I could ask you to read to the end of the page.

(Pause).

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: That is a clear statement from Mr Holt that his final analysis won't be limited to costs.

My third point -- sorry, my second point, I am skipping ahead. My second point on Apple's criticisms, I am picking up here paragraphs 34 to 35 of the skeleton. Just for your note, that is at <C/40>. That is Apple's claim that the App Store is highly innovative. You already have my submissions on that and I took you to the Rogers' judgment which concluded the opposite to be the case.

My third point is at paragraph 36 of Apple's skeleton at page <C/41>. You will appreciate I am just going through the various criticisms in Apple's skeleton.

THE CHAIRMAN: Yes.

MS KREISBERGER: That is paragraph 36. Here it is argued that high returns stem from the popularity of the App Store. I think you have my submission by now that the PCR's case is that the assessment of the App Store must take account of its monopoly

position. That is why it is unlike a competitive success story, like the hit song "Hey Jude", which Mr Kennelly opened with yesterday. The App Store is not a competitive success story; it is the opposite. Its success derived from its gatekeeper status. There is nowhere else for developers and users to go.

My fourth point picks up paragraph 42 of Apple's skeleton, which says that the fundamental flaw in Mr Holt's analysis is that he has failed to address economic value. I have shown you the point on the law on this in *Flynn Pharma*, which is that economic value is the overarching aim, it is not the test, it is not a component of the test as a standalone component distinct from limbs 1 and 2. To attempt to value it would result in double counting. That is what Lord Justice Green says.

I also want to show you Mr Holt's response. He addresses this accusation in his second report. That is <C/353>.

2.2.10:

"First, my profitability analysis does specifically account for an allocation of Apple's investment costs such as R&D, as well as other indirect costs in Apple's accounts, based on an estimate of the proportion of App Store revenue as a share of Apple's overall revenue. My profitability analysis does therefore account for relevant innovations and investments."

Then, at 2.2.13, at page <C/354>, I think you have seen that one before, perhaps I could just let you read that. This is, again, where he explains his expert view is that this isn't innovative value primarily, it is the rewards of the monopolist.

THE CHAIRMAN: Yes.

MS KREISBERGER: Turning back to Apple's skeleton and my fifth point, paragraph 45.

Here, Apple disputes Mr Holt's analysis of what constitutes a competitive market. Competition law doesn't share Mr Holt's vision where Apple is forced to allow competition in, essentially. But they say that is the subject of the exclusive dealing and tying claim. The unfair pricing claim only concerns the level of Apple's commission.

I have shown you that is wrong as a matter of law. I have shown you *Albion Water* and *Flynn Pharma*. That is just wrong. They can't simply say exclusion is just grist to a different mill, exclusionary abuses.

Sixth point, Apple also argues, and it is part of their argument that it is all too difficult, you can't -- there is no way of scrutinising the commission under chapter 2. One of the points they make there is at 49 (a) of the skeleton, page <C/46>.

Any allocation of costs will be inevitably artificial and you will also find that point, we needn't turn it up, at Response paragraph 36 (a). For your note, that is <C/137>.

Mr Holt responds to this at Holt 2, <C/351>. Paragraph 2.2.3. He disagrees. He says that there are widely accepted methods of allocating common costs and perhaps I will let you read 2.2.5 which goes over the page.

(Pause).

So neither Judge Gonzalez Rogers or the CMA felt constrained. They were able to meaningfully allocate costs or review a meaningful allocation of costs and calculate App Store margins.

My seventh point and final on Holt. This is Apple's various pinprick attacks on his analysis of comparators. At paragraph 52, page 48, it is said that the analysis is partial, it ignores the prevalence of 30 per cent headline rates, and alleges that whole hosts -- Mr Holt apparently alleges that whole hosts of digital markets are a hotbed of abuse. I would like to take those sub points in turn at a brisk rate.

This is just yet another example of Apple's case being a moving feast. In its skeleton, Apple said in terms that the Tribunal did not need to address comparators. Please turn up page <C/49> which is Apple's skeleton. Tab 2 of the bundle, paragraph 56.

First sentence:

"While Apple contends that the comparator analysis strongly supports its case that 30% is a fair commission, the Tribunal need not determine that on this application."

Yesterday, when pressed on this, Mr Kennelly did a volte face and he conceded that he would also need to knock out the comparator analysis to make his application good. Of

course he does, because that is where Mr Holt derives his analysis of, or his estimate of, economic value, the counterfactual commission rate. That is the comparator analysis.

Nonetheless, the question of whether comparators are meaningful benchmarks for hypothesising the competitive level is the exemplar of an evidential issue that can't be dealt with before you today. It depends on what the comparators' business model is, whether the products or services it supplies are sufficiently comparable. That is not an investigation which can be performed on a summary basis.

On that basis, any arguments about comparators shouldn't trouble you further, but I will respond to the other points for completeness only.

Apple's point on headline rates. Professor Hitt relies on headline rates charged by other platforms of 30 per cent. Mr Kennelly persisted yesterday in that approach. I am afraid to say that is misleading. Let me give you just one example. If you could turn up Dr Hitt's report, which is at <C/370>.

MR BISHOP: Page what?

MS KREISBERGER: <C/370>, tab 10. That is where it starts.

If I could ask you to move to page <C/405>. You see there, on top of this table on commission rates, Amazon app store, headline commission rate, 30 per cent.

If you go to the previous page, you see paragraph -- sorry footnote 130. It says:

"While I have reviewed contracts detailing individually negotiated rates in the past, I am precluded from discussing them ... I note that in the Epic v Apple Judgment the court found that sealed evidence in that case confirmed that the Amazon Appstore has an effective commission of 18.1%."

But he didn't put that in the table.

MR BISHOP: Is that an effective commission, so that is a weighted average, is it?

MS KREISBERGER: Precisely. Taking account of --

MR BISHOP: The large customers and all the rest of it?

MS KREISBERGER: Exactly.

If you could then turn up authorities bundle 3 <A/1545>. This is Judge Rogers' judgment in *Epic* again.

She had this to say. Sorry, it starts on the previous page, <A/1545>:

"Apple vigorously disputes this evidence. First, it points out that the 30% commission is standard for other stores, including on competitive platforms. For instance, Apple charges 30% on Macs, which Dr. Evans agrees is competitive. However, Apple's argument is suspect. Apple relies" --

Sorry, this is moving, if you are on the electronic, <A/1546>:

"... Apple's argument is suspect. Apple relies on 'headline' rates that Dr. Evans and Dr Schmalensee agree are frequently negotiated down. For example, the Amazon app store has a headline rate of 30%, but its effective commission is only 18.1%."

So the judge found that was suspect and the same approach has been taken before this Tribunal.

Point 3 on comparators is that Apple says Mr Holt is alleging hotbeds of abuse amongst various platforms. I will deal with that swiftly. It is a somewhat facile point. Whether 30 per cent is abusive when charged by any particular firm or platform depends on the facts. Is the platform even dominant, in the first place? Even if it is, the commission rate needs to be evaluated on the facts relating to that platform. The whole point of the legal test is that there are no bright lines. It is an evidential enquiry.

I am happy to say, I have got to my fourth and final point on comparators. The real significance of the comparator analysis is that Mr Holt was able to observe a compelling recent case study of the effects on platform commission of the emergence of competition. That is the PC games distribution example. Just for your note, it is addressed at Mr Holt's first report, paragraphs 7.3.58 and following. That is at <C/255>.

I turn back to the *Epic* judgments in the US. Again, authorities, <A/329>, back to where we were. <A/1545>.

She had this to say:

"Epic Games argues that Apple's app distribution restraints increase prices for consumers. Epic Games' argument is plausible. As Dr Evans testified '[w]e know from economics, both theory but also practical experience, in situations where there are barriers to competition and they're removed that what typically happens [is] ... that prices tend to fall [and] quality tends to improve'."

That is hardly a ground-breaking proposition. Prices come down when markets become competitive.

She went on:

"In the context of gaming, Dr Evans's observation has vivid illustration in the PC market. The incumbent Steam store charged a 30% commission for decades before Epic Games' store entered with a 12% commission. Immediately before that time, Steam lowered its commission to 20% and its average commission rate declined to 10.7%. Microsoft followed suit shortly after, with other stores offering pay-what-you-want. This competition has affected platform margins, which are considerably smaller on PCs than on other devices – 5% compared to 45%."

So again, for the purposes of Mr Holt's provisional analysis, you can see he says under limb 2 look at the effects of competition. These high returns stem from monopoly.

That concludes my submissions in relation to Mr Holt's methodology and I have one last point, you may be pleased to hear.

This is the suggestion that there may be some pleading point.

Now, as I understand the argument being made against me, it is that the pleading is defective because it does not refer to demand side factors on economic value. Now, I have taken you through the authorities now and they make clear that there is no need to cite demand side value beyond one's particular choice of methodology which is directed to answering the overarching question of whether the price is excessive compared to the economic value. But I want to address the point head on by showing you Dr Kent's claim form.

Now, the pleading, as I mentioned, sets out more fully than one might expect in an ordinary pleading the claim on excessive pricing and the evidence which is, at this stage, at least, relied on under each of the limbs of the *United Brands* test. Please go to <C/122>. That is at tab 5. Sorry <C/95>, paragraph 122.

You see there under the excessive limb there is a reference to public data from the US on revenues and costs which I showed you earlier. Then Mr Holt's ROCE/WACC analysis for the purposes of limb 1. And two other items of evidence, the sudden drop in commission to 15 per cent and the reaction of developers which Mr Kennelly dismisses as irrelevant. We say it is highly relevant to the question of value.

That is the excessive limb. That goes on to page <C/96> but I think you are all in hard copy.

Then you see the pleading moves on to the unfair limb, dealing first with unfairness in itself. Dr Kent relies on the persistency of the 30 per cent rate. As Judge Gonzalez Rogers commented, it hasn't budged in 14 years. The magnitude, nature of the differential, the gulf. Again, drop in commission overnight is relied on, that is over the page, page <C/97>. The fact that the App Store has other sources of revenue and, again, the response of app developers, that is subparagraph (e) on page 98, they have tried to bypass the commission, they have brought claims and they are very vociferous, and I have taken to you that material. They regard it as an unfair tax paid under duress.

So that all goes to the first part of the unfair limb, and then the second part of the unfair limb brings into play Mr Holt's comparator analysis and the fact that, looking at comparators, his view is you would expect commission rates to really tumble if competition were allowed on the platform. These are all so-called demand side factors.

THE CHAIRMAN: I was looking at, prior to that, paragraph 118. Maybe you are coming back to that.

MS KREISBERGER: Paragraph 118?

THE CHAIRMAN: Where you set out -- this is in your legal analysis. You set out a reference to demand side factors being taken into account, particularly in relation to the concept of economic value.

MS KREISBERGER: Yes. So that is limb 1, the ROCE/WACC analysis which incorporates a reasonable rate of return, and limb 2 the comparators which reflect demand side value. Because they are the proxy, and they are the best proxy we have for what price would be commanded in a competitive environment.

THE CHAIRMAN: Yes.

MS KREISBERGER: So those are all demand side considerations.

So, yes, I am grateful to you for that. It is said in terms that the demand side is accounted for, but the PCR doesn't make the *Flynn* mistake of seeing it as a discrete component of the test.

Sir, members of the panel, in my respectful submission, to sum up, this application has no basis in the law. It involves arguments about evidence and methodology and they must await trial. They can't be properly addressed in a vacuum.

Those are my submissions, unless I can be of any further assistance?

THE CHAIRMAN: No. Thank you very much, Ms Kreisberger. Thank you.

Mr Kennelly?

Submissions by MR KENNELLY

MR KENNELLY: Sir, I am conscious of the shorthand writers. I don't know if this is a convenient point.

THE CHAIRMAN: Whatever suits you better. We will take ten minutes at some stage.

MR KENNELLY: I will start now. I am telling the Tribunal, this time, I haven't forgotten.

MR BISHOP: You are not going to finish in 10 or 15 minutes, are you?

MR KENNELLY: No, I certainly won't.

Very well. I will begin, if I may, members of the Tribunal, with the approach to strike-out and summary judgment, the point that the Chairman regretted not developing with me in greater detail yesterday.

I think the suggestion was that the PCR was potentially disadvantaged because Mr Holt has put in evidence for certification that would not otherwise have appeared, potentially, in an application like this.

We made our application for summary judgment and strike-out in our Response. We made it, we applied for it there in our Response and the PCR responded in her Reply and lodged Mr Holt's second report in response to our -- among other things, to our application for summary judgment and strike-out. It was just as one would see in a High Court application when one applies for summary judgment or strike-out, especially in competition cases, it is very common for the respondent to the application to respond with some outline economic evidence saying, 'This is what I propose to do at trial. This is enough to get us over the line in a strike-out or summary judgment'. To produce an outline of what they propose to do to defeat the point that is being taken against them.

That is precisely what has happened here. We are not saying you have to take Mr Holt's report as his final word or trial evidence. I say the opposite of that in my opening. What is important to take from Mr Holt, and Holt 2 especially, is he tells you what he proposes to do at trial. It is upon that that I focus in the application.

I have made my point about that and I will come back to it as I respond.

To be absolutely clear, and I showed this yesterday to you, in paragraph 40 of the PCR's Reply, they accept that the test is whether Mr Holt's methodology demonstrates a reasonable prospect of success in this summary judgment application. It is the proper target of our submissions. That is paragraph 40 --

THE CHAIRMAN: Can we just look at that?

MR KENNELLY: Yes. So the Reply is in the first core bundle behind tab 7. Paragraph 40 is on <C/165>. Second sentence.

THE CHAIRMAN: Yes.

Are you saying that, as a result of that, they conceded that the methodology is in play?

MR KENNELLY: Yes.

THE CHAIRMAN: So you are saying that the tripartite, the scheme, the tripartite scheme, which has methodology as its third bit, is what they are referring to there?

MR KENNELLY: Absolutely. Mr Holt's proposed methodology is in play. We have to examine it to see whether it has a realistic prospect of establishing that prices are excessive or unfair.

Indeed, Mr Holt sets out the approach which he will take. He tells you what he will and will not do at trial. Mr Holt, quite properly, sets out the framework for his analysis on instructions. He is told what the legal test is, what is legally relevant and legally irrelevant, which is, again, not for him, it is a question of law.

Presumably, on that basis, he says in his second report -- and I showed you paragraph 2.2.6, there is no need to go back to it -- that he did not accept there was any need to ascertain the economic value from the demand side. I took you to that passage. That is him not accepting the legal relevance, or the relevance, of economic value from the demand side.

It is not surprising that Mr Holt regards as legally irrelevant economic value from the demand side when we see what the PCR thinks is the legal test. Dr Kent and the PCR were very clear today as to the legal test. Ms Kreisberger said that a competitive price is one which would be achieved if there were effective competition. So not a monopoly. She said on several occasions ‘it is very important to focus on this, that a price above that competitive price is an abusively excessive and unfair price under Article 102 of the Treaty and the chapter 2 prohibition’.

She said in terms that "A price above the competitive level", I am quoting directly, "meets the test for an abusive price under the chapter 2 prohibition".

THE CHAIRMAN: Is that right? I think we looked at some cases, didn't we, in which there was a debate about whether or not a price could be above a competitive -- a monopolist could price above a competitive price for a period of time without it being abusive. I think we did look at that, didn't we?

MR KENNELLY: We did look at the cases. The cases tell us that a dominant undertaking can price above -- if that is how you define the competitive level, above the competitive level without ever breaching Article 102 or the chapter 2 prohibition. It is a different standard.

THE CHAIRMAN: I hadn't understood Ms Kreisberger to be challenging that there were situations in which a monopolist could price above a competitive level without it being abusive. There may be reasons you identified through your analysis of economic value that would justify that. You would have to have a rationale for reaching that conclusion, was the understanding. I thought that was the submission. She is nodding.

MR KENNELLY: I will come to economic value. You will have the transcript and you can see precisely what Ms Kreisberger said. She said precisely what I said to you, which is that the test for abuse -- this wasn't confined to limb 1 -- was that a price above the competitive level, where the competitive level is the price that would be achieved if there was competition and not a monopoly, that that is an abusive and unlawful price under Article 102 and section 18. She explained. She said, and this is -- I have a direct quote because we got the transcript at lunch. This is on page 20, line 15. She said:

"This is a contradiction at the heart of [my] application, because, once it is accepted that there is an arguable case that Apple has achieved a position of unassailable monopoly for the App Store, then [this is] as a matter of logic, as a matter of basic ... principle, it must be reasonably arguable that these high returns, many years on from the inception of the App Store, reflect that monopoly power, not innovation."

This is going to the legal test. She is saying that prices that are a function of monopoly power are abusively excessive and unfair. Full stop.

THE CHAIRMAN: I had understood her to be saying that in circumstances where you have -- in the current circumstances of a monopoly, there was a very, very strong indication that the excessive prices were unlikely to be justified by, for example, demand side benefit and, for the purposes of this application, that put her in a strong

position to resist your application. But maybe you are saying she went further than that.

MR KENNELLY: She went much further than that. Her point is the legal position as I have described it to you. She says they have done far more than the law requires in order to show a case of abusive prices.

THE CHAIRMAN: We have the transcript reference and we will certainly look at that and any others you wish to give us.

MR KENNELLY: Yes. The Tribunal will see how she put it. On that basis that you ask, what is the competitive level, what prices will be achieved if there was competition, and prices above that are then arguably abusive subject to justification potentially, if that is the law, Sir, then before we get to the actual cases think of the consequences. Because in every case of dominance, there is already a finding that on the market there is an undertaking that is acting independently, to an appreciable extent, of its competitors, customers and, ultimately, consumers. In every finding of dominance, you will have a situation where competition is not effective on the market.

In nearly every situation of dominance, it could be said that if there were other competitors in the market, prices would fall. If Ms Kreisberger's approach is correct, in every one of those cases there will be an arguable case for abusive and excessive prices contrary to Article 102 and chapter 2 of prohibition.

THE CHAIRMAN: I think we get back to *United Brands*, don't we? Because what we start with in that is a statement of intent to get to conditions of workable competition and it may be that there are reasons why that looks different from what one might expect, for example, because of innovation or intangibles or any number of different things that might create a difference on the market. But I think -- just to put your mind at rest, I don't think we are heading down a path where -- I hadn't understood we were receiving a submission that every price above a competitive level is per se an abuse. Just to be clear, if that is what is being submitted, I would have some trouble accepting it and I don't want you to think we are going away with that in our minds.

MR KENNELLY: I am grateful for that indication, Sir. Just to be absolutely clear that I am not barking up the wrong tree, the reason I believe this was the point being made to you, and it is relevant to the point Ms Kreisberger made, she also linked it to the exclusionary abuse case. She said, if we can show on the exclusionary abuse, which I am not seeking to strike out, that, because of Apple's exclusionary practices, prices are higher than they otherwise would be, then she is home and dry on her excessive pricing allegation. How can I seek to strike out excessive pricing if I haven't struck out exclusionary abuse? Which, again, suggests that she is saying to you that the legal test for excessive pricing is whether prices are higher than they would be if there were more competition in the market. Again, you will have that very clearly.

MR FRAZER: Mr Kennelly, is this simply explained by the scope of subparagraph (i) of 97 in *Flynn Pharma*:

"A price will be unfair when a dominant undertaking has reaped trading benefits which it could not have obtained in conditions of 'normal and sufficiently effective competition' i.e., 'workable' competition."

MR KENNELLY: Indeed. Ms Kreisberger read that sentence to mean precisely what I am submitting to you she said today. When, in fact, as I submitted yesterday, and as you see, in order to reconcile *Flynn* with the case law that it says it is crystallising you have to read that sentence to mean that prices that arise in conditions of workable competition are prices that bear reasonable relationship to their economic value. In the context of Article 102 and the chapter 2 prohibition, prices that arise in conditions of workable competition and economic value are two sides of the same coin. Therefore, when the court says "prices that pertain in conditions of workable competition", it means the prices that bear a reasonable relationship to their economic value. You can't short-circuit the economic value analysis, which is what I think was being suggested to you this morning. That is not how the Tribunal took the point.

THE CHAIRMAN: Certainly, I think we will come -- as Mr Frazer says, we will come back to paragraph 97. I am sure we are all going to be closely looking at paragraph 97 for the

purposes of this, so -- that does, I think, make it absolutely clear that you start with the aspiration that is at subparagraph 1 and we all know this is not a straightforward exercise and these are – for, I think, well-rehearsed reasons – not straightforward cases. So there is a structure set out on 1 to 8 of paragraph 97 and absolutely it goes on to require certain things to be done within the framework set out there in order to arrive at a satisfactory answer to the first question.

I think, to that extent, if there is any difference -- I am not sure there is any difference between any of us, but that is helpful.

MR KENNELLY: Thank you. On the point about it being complex because Ms Kreisberger made various points about Apple's case, I am not going to waste your time by going through our pleadings and my skeleton argument. I hope my point has been tolerably clear that the law requires the claimant to show that somewhere in their economic analysis they are taking account and seeking to ascertain economic value from the demand side and that, in this context, Apple's profits, its profitability, cannot arguably measure the economic value from the demand side. That is correct, I say, as a matter of law, and it also is correct in the context of this case. I couldn't have been any clearer than that in my pleadings, in my skeleton or my opening. That is a clear point of principle between ourselves and the PCR.

We do need to go to the law because it is really the legal framework that explains why the PCR's case on excessive pricing is unarguable. There may be lots of complex issues that arise, were they to plead it out and show the proper methodology, but the error, the omission, I have described to you is a very simple one to perceive. Where there is an error, we see in the law, we go back to the law. One can look at paragraph 97 in *Flynn*, one can misread the first part of it, as I submit Ms Kreisberger did. It is important to recognise, as she said correctly there, that *Flynn* has to be read in the context of 40 years of EU and UK competition law. The Court of Appeal in *Flynn* was bound by the Court of Appeal in *Attheraces*. They were bound by the Court of Appeal in *Attheraces*. They weren't purporting to change the law or develop it in any way. They

were following *Attheraces*, and *Attheraces* relied on *Scandlines*. In fact, *Scandlines* was invoked in *Flynn* too. *Scandlines* -- Ms Kreisberger can pass over it very quickly, but *Scandlines* is part of our law also.

The point she made about -- I can touch on *Scandlines* very quickly, on the point she made on the Commission. She said, well, the Commission in advocacy before the Court of Appeal in *Flynn* sought to distance itself from the decision in *Scandlines*. The Tribunal saw in *Flynn* that, on the question of whether the CMA should have given weight to the patient benefit of the tablets or simply disregarded it because they were dependent, the Tribunal was upheld by the Court of Appeal. So to that extent, that point in *Scandlines* was followed by the Court of Appeal in *Flynn*. Whatever attempt the Commission made to back away from it was rejected in *Flynn* because Lord Justice Green said the Tribunal was correct in saying that simply because the patients were wholly dependent, it didn't mean you could disregard the benefit they got from the tablets.

But *Scandlines* itself, then, as part of our law, requires carefully scrutiny. In *Scandlines*, it was as clear as day that economic value had to be assessed, including demand side factors, and that the costs and the profitability, the ROCE, or however one wants to characterise profitability or measures that are based on Apple's costs or Apple's revenues, don't tell you about the demand side value of the product. That was the absolutely clear conclusion of the Commission in *Scandlines*. You couldn't use the profitability of the port, its costs or its revenues to work out the demand side value. The port had value to the ferry companies because of where it was located and its convenience. It didn't appear -- that value – to quote the Commission – didn't appear anywhere in the accounts or the balance sheet of the port. It required separate evaluation. That didn't mean a separate part of the legal test, but it had to be analysed somewhere.

Even more clearly in *Attheraces*, on the key issue in *Attheraces* it was directly on point. Ms Kreisberger tried to say it was about something else and different costs need to go

into the pot and there were various other factual differences. Again, the Tribunal saw the paragraphs I took to you. It was absolutely on point on this key issue. One needs to take into account economic value from the demand side and the extent to which costs or revenues or profits, ROCE, whatever you want to call it, can tell you what the value is on the demand side. The answer from the Court of Appeal and *Attheraces* was absolutely no to that question.

THE CHAIRMAN: I am not sure there is a difference of opinion between you and Ms Kreisberger in relation to whether or not it has to be taken into account. I think it is conceded, agreed, that if you have a demand side characteristic which is important, its effect is relevant, it's relevant and it has to be put into the mix. I think the difference between you, as I understand it, is more about how that is done and how prescriptive one needs to be about both identifying the characteristics and the application of the method, if you like. And in particular, for the purposes of today, whether you are entitled to tie Mr Holt down at this stage or whether, actually -- and, indeed, the PCR in relation to her pleading, or whether there is licence for the case to be developed further.

I don't think we need to spend time arguing about whether demand side is important, I think it is accepted it is. If it exists, it is important. There may be a dispute about the extent to which your arguments about innovation give rise to a genuine demand side characteristic that is relevant and Mr Holt has some things to say about what he calls the monopoly position of Apple and the ecosystem which bear on that, but I don't think those are relevant to the application before the Tribunal, are they?

MR KENNELLY: Sir, you are absolutely right that Ms Kreisberger said that they do take into account economic value. And she says now they take it into account from a demand side.

THE CHAIRMAN: Sorry, just to interrupt you, before you get to whether they do or not, she said she accepts they need to.

MR KENNELLY: Yes.

THE CHAIRMAN: So, as a statement of principle of the law, I don't think there is a difference between any of us as to whether demand-side characteristics, if they exist and are relevant, need to be fitted somehow into the overall assessment of economic value. I think that is, as I understand it, entirely agreed. It is a question of how do you actually do that.

MR KENNELLY: Absolutely. This is why we need to pin the PCR down. Even in a summary judgment application, it is appropriate, as we saw from the passage I took you to yesterday, in *O'Higgins*, for example, the FOREX case, it is appropriate to pin them down and to look at what they say they will do at trial. They tell you in the clearest terms that they will evaluate Apple's -- they will evaluate the demand-side economic value of the App Store by looking only at Apple's revenues and costs, Apple's profitability. They will also look at the fact that Apple is, they say, a dominant undertaking in the market and has maintained these high profits over a significant time. That is what they tell you they will do, and they do. Mr Holt was very clear they do not regard it as relevant to try and assess separately what developers and end users get or how they value the App Store. They are only looking -- and so the question for the Tribunal is, is it arguable, do they have a reasonable prospect of success of succeeding on an excessive pricing claim which involves assessing economic value from the demand side by looking only at Apple's profitability, even if it is high profitability over a lengthy period?

THE CHAIRMAN: So, yes. So in there, there are a couple of questions, aren't there? There is a question as to whether, as a matter of pleading, or given where the evidence is -- and I understand your point about the application being made and the response being made to it, but it is a question as to whether, at that stage, there needs to be, if you like, a pinning down, to the extent that you are suggesting, because Ms Kreisberger said that is a matter of methodology and that can stay at large, both, I think, as a pleading point and as an evolution of the expert point. There is that question.

Then there is a further question as to the extent to which it has been pleaded, or observations have been made, where do they take you in relation to the demand-side measurements? I think they are slightly different questions. I am not sure if that is helpful in terms of the flow of your submissions. That is certainly how I see it, that those are the points that she has made.

MR KENNELLY: But there is a prior question, Sir. There is a prior question before we get into how they say they evaluate economic value, which I say is just Apple's profitability. There is a prior question which is what they say is relevant to that assessment, which is a question of law. What is legally relevant and legally irrelevant is a question of law. They say that the -- they say it is relevant to the demand-side value that Apple's profits would be reduced if there was more competition in the market. They say that this diminution of what they call monopoly profits down close to the WACC is relevant to assessing the demand-side value.

Now, that is something which the Commission in *Scandlines* and the Court of Appeal in *Attheraces* tell you is legally irrelevant. It doesn't tell you anything about the demand-side value. Value is a question of law and that is something the Tribunal does need to determine. That is a point of difference of principle between ourselves and the PCR.

THE CHAIRMAN: Yes. I think, where that comes, as I understand it, in the analysis from the PCR is: once you get to the point of thinking about the demand side as I understand it, Mr Holt is saying the value of the innovations you described, if you accept they are established, which give rise to value in the hands of developers, is actually difficult to establish because of the monopoly nature, as he says, of the arrangement. So it is almost as if it is -- it is a bit like the dependency argument, isn't it? We talked about this yesterday where, in the dependency framework, you have this question, there may be patient benefits as argued in *Flynn*, but, of course, you may find it difficult to assess what those are because of the dependency. That is not to say you should ignore them,

but there may well be a perfectly legitimate argument that those patient benefits may be quite small once you take account of the dependency.

MR KENNELLY: Indeed. If -- which is --

THE CHAIRMAN: Or quite large.

MR KENNELLY: -- a situation where Mr Holt will be saying, 'here is the approach that I will take to assessing the value to developers and end users, and here is how I discount it to reflect dependency', we would see something in the pleading and see something in Holt. But we see nothing like that. Because they have set their face against that kind of exercise. Their starting point, and Ms Kreisberger was very clear about this, was that it is enough to say that prices are higher than competitive level, the monopolist is earning rents, prices are higher than competitive level and they would be lower if there was competition. That tells you prima facie that there is an excessive abusive price and one asks then to see, has Apple produced innovations, she said, or spent money on R&D which could justify that? None of that involves an analysis of what the demand side is getting by way of value. They find all kinds of ways to avoid having to engage with that key question. That is why, Sir, I can see you are thinking, is there a way you could do it, is there some way it could be brought in? They have declined the opportunity to do this work and, as I said in opening, for a very good reason, because, once they properly evaluate demand-side value as opposed to just wrapping it up in our costs and our revenues, the whole case falls apart because we see what developers earn from the App Store.

THE CHAIRMAN: I am afraid I have taken you off course. I am sorry about that. It has been very helpful. Is it a convenient time to take ten minutes?

MR KENNELLY: Certainly, Sir.

THE CHAIRMAN: Then we will let you get on without, hopefully, too many interruptions. What is your estimate for how long to go?

MR KENNELLY: About 10 to 15 minutes.

THE CHAIRMAN: After we resume?

MR KENNELLY: Yes.

THE CHAIRMAN: Very good.

(3.33 pm)

(A short break)

(3.45 pm)

THE CHAIRMAN: Yes, thank you.

MR KENNELLY: Sir, the short point that I was about to make was that, however Ms Kreisberger seeks to duck and weave about their case, when you look at how it is pleaded and Mr Holt's evidence, which I took you to, you can see that they say that, beyond Apple's costs and Apple's profits, the reasonable profits they allow us under their methodology, what other benefits developers and end users may get from Apple can be disregarded. They say that because, in their case, Apple has a monopolist position.

So the rest can be disregarded.

But the fact that end users or developers may be paying more because of Apple's dominance, which we deny, but, for present purposes, even if, which is denied, they are paying more, that is not a reason to ignore the value that they are getting from the App Store and the authority for that, that is a point of law, and the authority is clear in *Scandlines* and *Attheraces*.

In *Scandlines*, the only reason that the port could charge those very high prices was because of its location. It wasn't doing anything, really. The reason why it could charge those, what were called excessive prices, those limb 1 prices, was because of its location. Similarly in *Attheraces,* Attheraces, the company, was entirely dependent on BHB. The only reason it could be charged those very high prices by BHB was because BHB was the sole exclusive supplier. It was a monopolist.

In fact, the fact it was a monopolist was the only reason it could charge those prices, it wasn't doing anything particularly innovative. You will recall in *Scandlines* the Commission

even noted the port wasn't doing anything particularly innovative and, even if its services were just as good as anybody else's, it was still entitled to exact a price that reflected the value to the purchaser of the product.

MR BISHOP: *Scandlines* was a Commission decision; is that right?

MR KENNELLY: Yes.

MR BISHOP: It is just a decision of an administrative agency, isn't it?

MR KENNELLY: Absolutely. If that is where it was left, then it would carry far less weight. The value of *Scandlines*, the reason why I go to it, as I explained in opening, is that the Court of Appeal in *Attheraces* very clearly adopted the reasoning from *Scandlines*. Not because they felt they had to, but because they followed it--

MR BISHOP: I understand.

MR KENNELLY: That is why I said whatever -- you know, Brexit means Brexit and we regard it as a Commission decision only, but it is part of our law because it is in *Attheraces*. Its reasoning was adopted not because they were bound to, but because they followed it and they agreed with it, as Lord Justice Mummery said in his own separate reasoning.

That is very important because Ms Kreisberger made a great deal about innovation. She, again -- sometimes I had this kind of surreal experience of thinking I had been saying something other than my notes or she had been at another hearing and I hadn't attended. I did not base my arguments on value on the fact Apple was innovative. I said the Apple product was generating value for developers and end users. Whether it was innovative or not, if it generates value for end users and developers, that value must be -- my case doesn't depend on whether you agree with me or Ms Kreisberger as to the degree of innovation Apple has produced; it is the value that matters. I took you to all that material simply to demonstrate that, whatever the extent, which is not for us to determine today, there is no doubt value is being generated for developers and end users.

THE CHAIRMAN: You might find innovation delivering to end users and, of course, if you did, you might have an argument that you could assess the costs of research and development which led to the innovation, which might be said to reflect to some extent a measure of the benefit to end users. So that is one end of it. But if you are saying you are not limiting yourself to that, indeed you are disavowing the costs as being a measurement of the outcome, you are saying there's a benefit that comes from the nature of the product and, including the innovation, that is shared by developers and consumers, and in a way, it is a bit like, if you like, the premium that one sees in *Scandlines* because of the port, or possibly even *Attheraces* as well. Indeed, in *Attheraces*, you have almost an economic rent which needs to be distributed. That is basically the point you are making, isn't it?

MR KENNELLY: Exactly. There was no innovation in *Attheraces* or *Scandlines*, but still there was value and the value had to be ascertained. The point about Apple's products is that it is a fortiori in the case of Apple because, if I am faced with an argument, 'Well, you are not really generating anything of value at all', that is obviously unarguable. Whether one says it is innovative or not, it is certainly generating value and you have seen the figures which are not challenged. The broad numbers are indisputable.

The question of value -- and I come back to this question about costs, Sir, because, again, you suggested earlier in your comment to me that somehow R&D costs may play some role in assessing economic value from the demand side. I hesitated yesterday and, again, I think it is very important to focus on where the value comes from because costs can tell you about value. If, for example, every time you make a thing, you incur some costs and then you sell the unit and, every time you create a unit to sell, you incur some costs, in that scenario, the costs you incur may tell you something about the value of the product. But in an innovative intangible, there is no link between a cost you incur in making it and the value that arises when it spreads over the world and is reproduced and used by millions and billions of people. That is why, in this case,

Attheraces and *Scandlines* are a fortiori. It is even clearer here that costs cannot be a measure of the value on the demand side.

Albion Water is an example of where economic value was assessed and cost plus was used. Ms Kreisberger referred to it a couple of times. If we could just go to it to show you why it doesn't assist her at all. It is in the first authorities bundle behind tab 10. I will take you just to two paragraphs if I may. Paragraph 226. In *Albion Water* --

THE CHAIRMAN: I am sorry, I am afraid we are dependent on this.

MR KENNELLY: I am sorry, it is page <A/319>.

I should say, I will use the hiatus to make another point about *Attheraces*. It was said against me that the developers have complained about the level of commission. That is neither here nor there. In *BHB*, Attheraces was the complainant, it was the plaintiff, it was the claimant in the case. And in *Scandlines*, again, the user of the good was complaining. It doesn't tell you anything if the person who is paying what they regard as too much is complaining about it. That is neither here nor there in ascertaining the true economic value for demand side.

In <A/319>. In this case, the complainant, Albion Water, was trying to provide a downstream -- no pun intended -- service. It needed a product from Welsh Water but Welsh Water was also competing with it in the downstream market. There was a particular regulatory regime for common carriage where Welsh Water was required to carry water for Albion Water and then that would encourage competition between it, Welsh Water, and Albion Water. So, 226, they first look at *Attheraces*. Albion Water was complaining it was paying too much for the carriage of its water:

" ... *Attheraces* concerned a charge imposed by the [BHB]. The pre-race data was of considerable value to Attheraces as the customer ... for which it was readily willing to pay a premium ... An analysis of willingness to pay a premium may be relevant in some cases."

That is all I was trying to say in my skeleton that Ms Kreisberger took you to:

"This case is different, since the rationale of common carriage is to enable effective competition to develop in the water industry."

As I said, Welsh Water, the supplier of the carriage here, is also competing with Albion Water downstream:

"The Tribunal notes that: first, Albion remains willing and able to pay a reasonable common carriage price. Secondly, Albion was proposing to add value to the common carriage services to be provided ..."

Albion Water wanted to supply water to a paper plant shop:

"... unlike the situation in *Attherace*s, the First Access Price [the price that Welsh Water was trying to exact] has led both to a distortion of competition and to an adverse effect on the end user."

So there was a distortion of competition downstream which isn't alleged here. No distortion of competition is alleged downstream in the market in which the developers operate:

"In this case, Albion is not a willing purchaser at the First Access Price. [It] ... is paying ... under protest and benefiting from interim relief ... Shotton Paper wishes to contract with Albion and expects various benefits".

Then this:

"The First Access Price [the price that was challenged] would place the proposed common carriage arrangement in jeopardy and constitute a significant distortion of the competitive process."

Why is that? We see later on, paragraph 227, we see Welsh Water trying to justify, by non-cost factors, its high price. It says it is relevant to economic value. It talks about some costs. Well, that is a costs issue. It mentions intangible value. We will come back to that "the effects of the framework of economic regulations", "social or economic desirability" --

THE CHAIRMAN: Sorry, can we have the page, please?

MR KENNELLY: Sorry, <A/320> is the next page, (c) and (d) are just costs points that Welsh Water tried to raise to justify its high price.

If you go to paragraph 236, we see how economic value is assessed in this case. Page <A/323>. It says that the common carriage proposal -- the price that's offered -- only has economic value to Albion if it means it can provide water to Shotton at a retail price that can effectively compete with the one being offered by the supplier. The fact that the Welsh Water is a competitor of Albion downstream and can lower its own retail price means the economic value of the service to its downstream competitors may be equivalent to the costs reasonably attributable to the transportation and partial treatment of non-potable water. Because the supplier could price down to its own costs level, that meant you assessed the economic value of the service by reference to its costs.

So in that very special situation you could use costs as a measure of economic value.

THE CHAIRMAN: It is a form of comparator, isn't it?

MR KENNELLY: In that situation, yes. But it is a very narrow and unique situation. It is -- the PCR would struggle to show you other situations where costs or profitability are used as a proxy or a means for assessing economic value on the demand side. It just doesn't happen because it is not the law.

MR BISHOP: Isn't there something of a difference? I mean, in this water case, we have a water company which has obligations to distribute water to everybody equally. That is quite different from the British Horseracing Board, the representative -- both the representative and regulator of the industry. Here, the water company was saying 'oh, we want to add some value to it. Someone else wants to create value, we want some of it', and the downstream people say, 'well, there is no reason why you should, you have a common obligation to all of us'.

MR KENNELLY: Yes.

MR BISHOP: The British Horseracing Board said that the chaps taking feeds and sending them overseas were saying to the British Horseracing Board, 'oh, we want you to give us this at just your cost'. The British Horseracing Board very naturally said, 'look, why should we give this very valuable stuff to you and to other people? We want some of

that value to go back to the breeders and the trainers and the horseracing, the race tracks and all the rest of it'. It is quite different from a water company which already has an obligation to be supplying the water to everyone equally.

In other words, one, in the case of the British Horseracing Board, it was legitimate for it to say, 'look, we shouldn't have to hand over product for free, we want some slice of it'. But it is quite illegitimate for a water company to say, 'ah, you have found some value. We know water is very valuable to all of us', more valuable than almost anything else we have been talking about, yet no one is allowed to say, 'oh, no, I want a share of whatever value it is you are going to use from it'.

So it seems a disanalogy between these two. John Mummery may have said, 'ah, I like this passage in the administrative' --

MR KENNELLY: *Scandlines*.

MR BISHOP: The *Scandlines* case, but I suspect he was reaching for a -- he really thought there was nothing illegitimate here about what British Horseracing Board was doing. Quite different from *Albion Water*. *Scandlines* looks a rather confused case to me. It has many questions that needs to be asked about it --

MR KENNELLY: I respectfully agree that *Albion Water* is not the same kind of case at all. *Albion Water* was relied upon by the PCR. If *Albion Water* is relied upon to show why a cost plus analysis could work for Apple and cost plus is the expression used by PCR in its skeleton argument, it is plainly not appropriate here.

As you say, Sir, in *Albion Water*, the distinction was plain in its regulatory obligation to supply, which made a big difference. There is nothing like that here. Nothing like that here in relation to --

MR BISHOP: Fair enough. Analogies always break it down. I am just trying to understand why it is we have different -- I think these are utterly different cases *Albion Water* and *Attheraces*.

MR KENNELLY: I respectfully agree. They are utterly different. That is why *Albion Water* isn't authority for the use of that kind of analysis here. *Attheraces* is much closer to

the PCR's claim against Apple and, in my case, if I may say so, is a fortiori because if one asks what is the prospect -- because, remember, it is a strike-out -- is there a prospect of substantial value on the demand side? Is there something that will be ascertainable, is there something to ascertain? For us, we say plainly yes. If there was a need to look at economic value in the *Attheraces* case, it sure has to be analysed here because, what was BHB doing? It was spending £5 million a year gathering information it had to gather anyway and it was the exclusive supplier -- it had its own regulatory obligations to gather the material and Attheraces was being asked to give 50 per cent of its profits to the supplier, who was incurring no risk and much lower costs. But that was not excessive pricing.

What it tells you is that, however that may seem, and this is what Lord Justice Mummery was trying to say when he said it may feel intuitively wrong, but the law on abuse of dominance in relation to excessive prices is not designed to turn the court into a price regulator to right intuitive wrongs. It allows you to intervene only in extreme cases where the price is not just above the competitive level, but bears no reasonable relationship to its economic value including from the demand side. That is why we see so few excessive pricing cases, it is so difficult to satisfy.

On the Claim Form, if I may move on to the claim form, again, I will be brief on this. You were taken through it, but, again -- this is why it is still a strike-out point. There is no need to go to paragraph 123, you have seen it twice. Various things are set out to explain why there is no additional economic value to be ascertained beyond costs plus, cost plus profit. None of those factors refer to demand-side value. The only reference to the demand side is the passage that describes how some developers, not all of them, have complained the commission is too high. That is it. On the comparators, the relevance of the comparators that Ms Kreisberger said is that, "[i]f there was competition" -- I am quoting -- "the rate would fall", and that would -- that is the relevance of comparators, it shows that, by analogy, if there was more competition, the commission would fall. But the idea that prices would tumble towards Apple's

WACC if there is more competition, again doesn't tell you anything about the demand-side value. If there is more competition and Apple was forced to reduce its commission, that still doesn't tell you what is the value to developers and end users from their interaction on the App Store.

THE CHAIRMAN: Would you not accept that a comparator analysis does provide you with demand side evidence?

MR KENNELLY: It does but it tells you -- the relevance of comparators, it tells you what people are paying in other comparable markets. It doesn't depend, necessarily, on the degree of competition. That is why, for example, in the copyright cases in *Tournier* and in *Latvian Copyright*, the court said it is legitimate to look at other -- in those cases, other monopolists and look at how they were charging for its supply of music. Remember, these collecting societies were all monopolists in their own countries and it was legitimate, in an excessive pricing case, to say, 'this monopolist is charging too much, because it is much higher than the same product that is being charged for by other monopolists in other member states'. It is really there to ask what are people paying in comparable markets.

THE CHAIRMAN: That would be pretty good evidence, wouldn't it, of what a purchaser valued a comparable product for? That is precisely what the demand side is.

MR KENNELLY: Yes.

THE CHAIRMAN: So if you had -- and I appreciate here everybody accepts there are no perfect comparators, there has been a lot said about it on both sides, but just as a matter of principle, if you are finding somewhere in your analysis of economic value through the tests you apply to bring in the demand side, one way of doing that would be through comparator analysis, wouldn't it?

MR KENNELLY: Yes. Exactly.

The answer to your question, Sir, in terms of what you get from proper comparables is precisely as you say. But that then brings us to whether here the comparators are selling the same product as Apple. In those comparators' cases, it was the same

product that was being sold, a collection of the same songs being sold by one collecting society in one country compared to another. If you look closely -- there hasn't been time to go through it -- really, in terms of the law, it doesn't add to what I told you. If you look, there are two things: first of all, the demand side means looking at the value to end users, it is not wrapped up in the revenue or costs of the supplier; also, the comparators need to be genuinely precise comparators. It is not a rough and ready exercise.

They don't come close, Xbox, Play Station, Epic, these aren't comparators to the product that Apple is providing. The idea that PC platforms are comparable to the App Store isn't sustainable, still less obviously the payment processors. That really is hopeless and should be struck out.

Mr Piccinin says, even then, when one looks at what they do offer, even these companies that offer less than Apple offers are still charging 30 per cent. That is the point I made yesterday as well.

THE CHAIRMAN: Yes.

MR KENNELLY: These comparators that have been offered by Mr Holt aren't offering what Apple is offering, they are offering far less. That is just obvious. Even they are charging as headline rates -- not all their prices, but some of their prices, are exactly the same as the one that is said to be abusively too high.

Just to finish that comparator's point, though, I wanted to address the three different points of Steam, Epic and Microsoft. This is the last point I make about comparators. These are the ones that were put forward and it is true this is something that requires some analysis of the evidence. I am in summary judgment territory, I accept that. But this really is so weak that you can summarily determine it now when you recall that the question is, does this tell you that Apple's commission is abusively excessive under the EU and UK competition law? The standard is not the standard being applied by the CMA in the interim report or the standard being applied by the US judge in the *Epic* judgment. Those references don't help you because they were applying a different

test. So whether these comparators work or not depends on whether they help you in applying the much stricter excessive pricing test that you have seen under the law. Steam, as you have seen, still has a headline 30 per cent commission and has, again, recently, been applying that much more broadly. Epic is unprofitable and Microsoft, until last year, applied a 30 per cent commission to its games business which is where, as you have seen, the vast majority of the revenues were earned in this market.

In relation to its Xbox, where it has a strong position, it continues to charge 30 per cent. You have seen that Mr Holt's answer to this is, well, where 30 per cent is charged it is because they are likely to be, and I paraphrase, using -- read abusing -- significant market power. Which just tells you how hopeless the whole approach is.

Even though you know in a case like this that a certain degree of generosity needs to be allowed to the respondents' evidence, the burden of proof is on them to establish an abuse.

The Court of Appeal in *Attheraces* warned against becoming a price regulator. If you let this part of their claim go through on the basis that it has been argued by Ms Kreisberger, this Tribunal will be facing many many similar claims where the grounds will be there is a dominant undertaking, that it is charging prices above a competitive level over a long period, and that is prima facie evidence of an abuse by way of excessive pricing.

This Tribunal risks becoming a price regulator, just as the Court of Appeal deprecated in *Attheraces*.

The clue as to why that hasn't happened so far arises in two ways. First of all, the legal test, properly construed, is a strict one. It is not enough simply to say prices are charged on a persistent basis, appreciatively above a competitive level in situations of dominance, because that is not the test. You need to show a lack of relationship to economic value. There are cases few and far between.

It is striking that when they do arise, when the allegations are rejected, the Commission or the court hasn't sought to estimate a maximum lawful price. That is not an exercise that this Tribunal or courts enter into readily at all. It is a matter for regulators, not for

Tribunals and courts, who really are faced by normally a fairly arbitrary collection of evidence, a function of the parties before it. You are not well placed to become a price regulator, which is your fate if you adopt the propositions advanced by the PCR today.

To be absolutely clear -- and I will conclude on this point -- this is not to say that dominant undertakings can price however they like. The argument I am making to you, it is not a price gougers' charter. There are techniques, we have seen them in the case law, that can be used, if proven, to warrant the court's intervention. For example, if Apple's commissions were far in excess of proper comparators; if there was evidence that downstream market was being stifled or throttled, to use the expression of Lord Justice Mummery; or, for example, like the collecting society cases, Apple was charging different commissions for the same service in different countries and couldn't explain why. All of that would warrant, or could warrant, the Tribunal's intervention.

But the idea that the Tribunal should, in a normal case like this, where a dominant undertaking -- I am assuming it for these purposes -- has invented a product that is obviously extremely valuable, has come up -- the fact that the Tribunal should, in a case like this, then come up with methodologies to measure that value and set a maximum lawful price for a dominant undertaking in that scenario, that is just not how the law expects the Tribunal to function. It is not something that has happened in any of the cases we have looked at, and it is the opposite of what the Court of Appeal said should be done in *Attheraces*. It is the very proposal that the judge in *Attheraces* advanced and that the Court of Appeal rejected.

What you heard today, really, from Ms Kreisberger was very close to the approach that Mr Justice Etherton advanced in *Attheraces*, and it was comprehensively rejected by the Court of Appeal in that case.

Unless I can be of any further assistance, those are our submissions.

THE CHAIRMAN: Thank you very much.

No, that is very helpful indeed. Thank you.

Housekeeping

THE CHAIRMAN: So we will, I am sure it is no surprise to you, reserve our judgment in relation to the strike out and summary judgment application.

In relation to the CPO, I think you probably already anticipate that we intend to certify and grant the application for the CPO. Hopefully, that is no surprise, on the basis that it wasn't opposed. Of course, we will provide proper reasons for that at the same time as we provide our judgment in relation to summary judgment and strike out.

We thought it would be helpful to give you that indication now.

There is just one residual point, which we raised yesterday, about the consultative group, it would be quite useful to have. That can be in correspondence if that is more convenient, but it would be useful to know what their view is on the funding arrangements, or at least that they are content with them. I don't think we need to know any more than they are aware and content with the funding arrangements we discussed yesterday.

Subject to that, it seemed to us that you might let us have an amended order. I think probably the Tribunal would like that in Word -- the Registrar would like that in Word, if that is possible.

There is the cost point, which we might just talk briefly about.

Then the other thought we had was that it might be sensible to think about a case management conference sooner rather than later, to see if we can get our timetable going for the rest of this case. I know that was something that you raised in your skeleton, and indeed indicated there might be some applications you have in mind. Obviously, we express no views on that at the moment but we were thinking, if it was convenient, we might look at a date some time in July to perhaps get back together and talk about the future conduct of the case.

MS KREISBERGER: I think what we would want, and I think this is probably common ground, is to see the defence before that CMC.

THE CHAIRMAN: Yes. Actually, you are quite right. I meant to raise that.

I think you indicated that you were hard at work on that and were planning to put that in. Are you happy to commit to a date for that?

MR KENNELLY: I can't commit to a date now but the Tribunal can rest assured that we are anxious to do it as quickly as possible, because plainly it may assist in the applications we wish to make. We certainly do agree that the CMC should be listed as soon as possible.

THE CHAIRMAN: Good. I mean, there is a practical point, which is no doubt you will want to see our judgment on the strike out and summary judgment before the CMC as well. So, I imagine we are looking at July and not earlier. Possibly even quite late in July, depending on people's diaries.

It would be helpful to know if you think that is a feasible timeframe for to you have the defence in and for the PCR to have a good look at it.

MR KENNELLY: I am not going to volunteer dates but I don't want to give up this opportunity, so I will quickly take instructions on it.

(Pause)

Before July, yes, in terms of our defence. Yes, we can do that. I can't commit to a particular date but, yes, that should facilitate a CMC.

THE CHAIRMAN: It might be helpful if the parties could liaise, not only about a date for the CMC but also in the course of that, make sure there is a timetable that incorporates the defence in a reasonable time before the CMC could be agreed. Let us know about that. If you can't agree it then, of course, we can deal with it in correspondence.

MR KENNELLY: Of course. Yes.

MS KREISBERGER: Sir, just two points to raise.

THE CHAIRMAN: Yes.

MS KREISBERGER: On the domiciled date for the order, we would suggest a domiciled date of today, given your indication. I don't see any reason of principle to await reasons for the decision to certify. As we ventilated yesterday, current practice is the date of the decision.

THE CHAIRMAN: I don't know if Mr Kennelly has any views on that?

MR KENNELLY: Happy to have that today, Sir.

THE CHAIRMAN: It is as good a date as any, isn't it.

MS KREISBERGER: Quite. I think, if that is common ground, that is --

THE CHAIRMAN: I suppose time runs from it, and I suppose -- so time for people to opt in and opt out. So I suppose if people don't have visibility, is that a point we should be concerned about?

MS KREISBERGER: No. I think, in the interests of the class, we would like to have the domiciled date set down for today. Then the period for opting out can be adjusted accordingly.

THE CHAIRMAN: That doesn't matter, the domiciled date won't affect the period which they have? I see.

MS KREISBERGER: Exactly.

Secondly, would there be a particular date by which you need to hear from the PCR in terms of confirmation from the consultative group? The PCR is obviously keen to do this as quickly as possible.

THE CHAIRMAN: Look, I am -- it is relevant, obviously, to the judgment. I have another case next week and then something else after that, so I don't think the judgment is going to emerge in a matter of days.

MS KREISBERGER: Understood.

THE CHAIRMAN: I am hopeful that we could get it to you some time in June comfortably. If that is helpful in terms of --

MS KREISBERGER: I am very grateful for that.

THE CHAIRMAN: -- managing that process.

MS KREISBERGER: Those behind me will spring into action on this point. It couldn't be done overnight because of confidentiality issues.

THE CHAIRMAN: No, that is absolutely understood.

One other thing in relation to this is the CPO notice as well, which I suppose we ought to dust off and look at again. Perhaps if that can be sent into the Registry in its current format, that would be helpful.

Just on the costs point, in the interests of shortcutting that, I would have thought that costs for the CPO application would be in the case?

MS KREISBERGER: We agree.

MR KENNELLY: We agree.

THE CHAIRMAN: Then, obviously, the costs of the summary judgment/strike out will be to be argued about once we know the answer to that.

MS KREISBERGER: That is our position, yes.

THE CHAIRMAN: Good. Let's proceed on that basis.

Is there anything else we need to deal with today?

MR KENNELLY: Nothing else from our side.

MS KREISBERGER: Not from our side.

THE CHAIRMAN: Thank you very much for your skeletons and your arguments, and for the time everybody else has put into this. We very much appreciate it and have found it extremely helpful. It is a very interesting discussion.

We will produce our judgment as soon as we can.

Thank you.

(4.20 pm)

(The hearing concluded)