IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 12 September – Tuesday 13 September 2022

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

BETWEEN:

Dr. Rachael Kent
Class Representative

v

Apple Inc. and Apple Distribution International Ltd
Defendants

A P P E A R AN C E S

Michael Armitage and Matthew Kennedy (On behalf of Dr. Rachael Kent)
Brian Kennelly KC and Daniel Piccinin (On behalf of Apple Inc. and Apple Distribution International Ltd)
Nicholas Gibson (On behalf of the Competition and Markets Authority)

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Monday, 12 September 2022

(10.30 am)

Housekeeping

THE CHAIR: Yes, good morning everyone. Some of you are joining via the live stream on our website, so I need to start with the customary warning: an official recording is being made and an authorised transcript will be produced, but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceeding and breach of that provision is punishable as a contempt of court.

So thank you very much for the skeletons, very helpful skeletons and other material.

Mr Armitage, I think the agenda seems to be to start with the preliminary issue application by Apple.

MR ARMITAGE: Yes.

THE CHAIR: I have, on my list, participation by the CMA. I don't believe there are any other applications to intervene?

MR ARMITAGE: Not that we know of.

THE CHAIR: And timetable to trial and composition of the Trial Tribunal. Is there anything else we should have our eyes on?

MR ARMITAGE: I think that covers it, sir. There's obviously Mr Kennelly's application in relation to the preliminary issue. So, subject to the Tribunal, I would suggest he opens that and I respond.

THE CHAIR: Absolutely.

MR ARMITAGE: Yes.

THE CHAIR: I think we all agree we should deal with it first, and we will endeavour

to give you an answer at the end of that argument.

MR ARMITAGE: Yes.

THE CHAIR: Although we can't promise that, of course. It may be that is on the basis that reasons need to follow later.

MR ARMITAGE: Yes.

THE CHAIR: So that would allow us then, I think, to discuss timetable subsequently, which I think is the parties' preference, to have some time to think about that. So we could do that tomorrow morning; is that the plan?

MR ARMITAGE: Certainly we had identified that as a helpful way forward, if possible, and therefore to allow some time to liaise with the other side in light of the Tribunal's decision, if the Tribunal is able to make one relatively quickly on the split trial proposal, so that would be agreeable to us, certainly.

THE CHAIR: Thank you. So Mr Kennelly.

MR KENNELLY: Thank you, sir. I echo what Mr Armitage said. We are in the same position as regards the approach today.

THE CHAIR: Thank you.

Application by MR KENNELLY

MR KENNELLY: May it please the Tribunal. I appear with Mr Piccinin for the defendants and, as you have said, Mr Armitage and Mr Kennedy appear for Dr Kent. Mr Gibson appears for the CMA.

This is Apple's application for a preliminary issue split trial under rule 53(2)(o) of the Tribunal's Rules.

Subject to the Tribunal, I propose briefly to summarise our application and then deal with the legal principles on split trials and apply those principles to the issues on the pleadings and expert evidence.

I will deal finally, if I may, with the significance of the CMA and European Commission investigations.

By way of summary, the main efficiency benefit of a split trial is: if Apple succeeds in the first trial, there will be no need to address the undoubtedly complex and onerous issues of abuse, objective justification, causation and quantum.

But even if Apple does not succeed in the first trial, even if Apple fails on every issue in the first trial, there will still be a saving in time and resources at the second trial because there will be fewer permutations, fewer market definitions and dominance permutations to consider for the purposes of abuse and objective justification.

As I shall hope to show the Tribunal, such a split, we propose, will not cause any material duplication or waste. Because from the pleadings and Dr Kent's expert evidence we can see that a clean split is possible between the issues of market definition, dominance and abuse.

The parties' cases on market definition and dominance do not depend -- they don't depend on any finding of abuse. Even where there are issues -- and there are issues which are relevant to both market definition, dominance and abuse -- once they are resolved in the first trial it will not be necessary to revisit them in the second trial.

As regards the CMA and Commission investigations, we say Dr Kent's position is incoherent. Because on the one hand, as you have seen, she does not ask for a stay. On the contrary, she urges the Tribunal to list a full trial commencing in October 2024. But, on the other hand, she argues that the Tribunal should have the benefit of binding findings from the CMA and the European Commission before a full trial. She suggests these binding findings would even help to limit the scope of disclosure required in the full trial. I will show you her skeleton later in my submissions.

But, as the Tribunal knows, for a CMA decision to be binding all appeals, if there are appeals, need to be resolved right up the appellate chain, and there is no prospect of that being completed by October 2024, still less early enough to inform the shape of the trial or the scope of disclosure.

That is because, as I shall show the Tribunal, the European Commission and, especially, the CMA investigations are at early stages and it's very difficult to predict when they will be complete. The Tribunal knows, from its own case law and from the case law of the general court and CJEU, that appeals can take even longer than the investigation process before the authority.

So Dr Kent is proposing that the parties spend huge amounts of time and money preparing to try and then, it seems, actually trying issues that may or may not be covered to some extent by potential future CMA findings which will be issued after, or become final well after, the full trial.

There was a second point, a second important point, that arises from the fact that any CMA decision would ultimately be subject to a merits review by this very Tribunal.

So we know, one way or the other, there will need to be a trial of market definition and dominance in this Tribunal. If we wait for the CMA, and if it finds an infringement, there will be a trial in this Tribunal on appeal from that decision; if we don't wait for the CMA, or if the CMA closes its investigation without a finding of infringement, there will be a trial in these proceedings. So, either way, there will need to be a trial on market definition and dominance.

So we say by splitting these proceedings the CMA can more rapidly take the benefit of this Tribunal's findings on market definition and dominance. It will have the benefit of those findings in its investigation. The CMA would benefit from receiving the Tribunal's judgment on these issues several years before it would otherwise have

been able to receive that judgment from the Tribunal.

It would find out on our proposal, late next year, what this Tribunal thinks about market definition and dominance, rather than having to wait until potentially 2026, when an appeal from the CMA decision, if one is taken, might be decided. That would be relatively quick based on our experience of other cases.

Of course, the CMA, as an intervenor, can itself make submissions to the Tribunal in the preliminary issues trial that we propose, to ensure that its views are taken into account.

So that's our application in a nutshell.

I propose, at this stage, to go on to the legal principles which ought to be applied in determining whether to order a split trial. For that it's necessary to go to the second volume of authorities and the judgment in *Daimler*, at tab 17.

The factors that we apply were set out in *Electrical Waste*. Mr Justice Bryan set them out in a list. It's easier to read in *Daimler*, so for that reason -- sorry, tab 17 -- yes, it begins at A700. The factors begin on page 704, from paragraph 27.

Mr Justice Bryan, at the beginning, cites Mr Justice Hildyard in *Electrical Waste Recycling*, a reference to the guidance provided there, a non-exhaustive list of relevant factors. If the Tribunal would bear with me, I will read them out one by one.

Begin at factor 1:

"Whether the prospective advantage of saving the costs of an investigation of" - it would say here abuse and issues that follow from that, if market definition and dominance - "is not established outweighs the likelihood of increased aggregate costs if [we fail in the first trial] and a further trial is necessary."

Factor 2:

"What are likely to be the advantages and disadvantages in terms of trial preparation and management."

Factor 3:

"Whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials."

4:

"Whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues, or place an undue burden on the [Tribunal] hearing the case."

5:

"Whether a split trial may cause particular prejudice to one or other of the parties."

6:

"Whether there are difficulties in defining an appropriate split [that's an important factor] or whether a clean split is possible."

Factor 7:

"What weight is to be given to the risk of duplication, delay and the disadvantage of bifurcated appellate process."

8:

"Generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible. Other factors to be derived from the guidance given in CPR Rule 1.4…may include whether a split trial would assist or discourage mediation and/or settlement."

The last factor is not relevant no one is suggesting this is a late application.

Then we see, at 28, the reference to a pragmatic balancing exercise. 29, if a split trial is ordered it's important that there should be a careful demarcation “of the boundary between the two in terms of the issues to be dealt with at each stage."

There's a particular reference to factor 4, one example of “excessive complexity” in a single trial is where it can lead to a “large number of possible permutations."

You have my points in the skeleton on that, and I will come back to them later.

You can put that authority away now. But, as the Tribunal has seen following those factors, a key dispute in the skeletons is whether there is a clean split between the issues of market definition, dominance and abuse. Dr Kent says no, principally because, she says, certain matters that need to be determined for market definition and dominance are also relevant to abuse.

We make two points in response to that. The first is that in the first trial -- you'll see this from Dr Kent's own pleadings and expert evidence -- it will not be necessary to determine that any of Apple's conduct is an unlawful abuse.

Where findings are made, in the first trial, that are relevant to the abuse issues -- and we'll show you some of those -- they will serve as inputs for the abuse analysis, if needed. They will not need to be revisited, reopened in a second trial.

Secondly, of course, the case for a split trial is strongest where there is a link between the subject matter of one trial and the other. This is because -- and it's common sense -- the result of the first trial should serve to narrow down the scope of debate in the second trial.

When the cases speak of lack of a clean split being a problem, that's where the same issue needs to be revisited in the second trial, and that will not be the case here.

I will show you that, if I may, first by reference to the pleadings, and I will begin with Dr Kent's pleadings and then will go to our pleadings, so the Tribunal can see the issues between us on market definition and dominance.

So before I go to the claim form, just by way of summary, you will have seen that Dr Kent's case on market definition and dominance is very simple, and we rely on its simplicity for the purpose of this application.

The first market is distribution of iOS apps to iOS device users only. I should be

clear when Dr Kent refers to "iOS apps" she means native iOS apps. She says that the distribution of web apps is outside the market.

She says the market is limited to iOS because you can only distribute iOS apps to iOS device users through the Apple App Store. You can't use Google Play, for example, to download an iOS app on to an iPhone. Because the market is the distribution of iOS apps only, she says Apple is automatically a monopolist.

Similarly, Dr Kent's second alleged market is payment processing services, again for these iOS apps only. Because as a matter of contract Apple requires payments for and within iOS apps to be made through Apple's commerce engine, the market is limited to iOS apps.

Again, it's a function of that market definition, Dr Kent's market definition, that Apple is automatically a monopolist on her pleaded case.

I will show you that, if I may, now. It's in the core bundle, the first core bundle, tab 11.

If the Tribunal would skip through the document to page 61, where the relevant markets are pleaded.

Page 61, C61.

The product markets are listed in paragraph 76. The iOS app distribution market and the iOS payment processing market.

77, there is a reference to Mr Holt's analysis, which I will come back to:

"A discrete economic market for the distribution of iOS Apps to iOS Device users."

Then 78:

"iOS App Developers require their iOS Apps to be distributed to iOS Device users. At present, and as [and this is important] a direct consequence of the App Distribution Restrictions, the only available means of distribution is via the App Store."

Those restrictions are admitted. Those are matters of contract. There's no suggestion here they need to be shown to be abusive.

“The only available means of distribution is via the App Store. In the absence of the App Distribution Restrictions, iOS Apps could be distributed to iOS devices via other channels of distribution, including… other app stores… and direct downloads from websites.” But on their pleaded case that can't happen because of contractual restrictions.

Then what's excluded, “apps which don't distribute other apps to iOS Devices”. That just means they are focusing on distribution apps only. Then this is important, 79(b): "app stores for other devices (such as game consoles) and/or other mobile operating systems [such as Google Play] are excluded because [Why?] they can't be installed on iOS devices."

That's a function again of Apple's contractual restrictions which are not in dispute.

It's very clear as to the second market -- it's paragraph 81 – the iOS payment processing market, again referring to Mr Holt, “payment processing services and app distribution services serve distinct needs” -- that's their pleaded case – “on the part of iOS Device users and iOS App developers, and [for that reason they] constitute separate functionalities in distinct markets”.

Sorry, 81 -- before that he simply pleads out a distinct relevant market for payment processing services.

83, they plead this is not the same as the approach to the sale of physical goods and services. Again, that's not in dispute.

And that is it.

Then dominance from 85. "Why is Apple dominant?", says Dr Kent:

“As set out above, [because] Apple does not permit any competition on either of the two relevant markets…(a) Due to the [admitted contractual restrictions], the App

Distribution Restrictions, Apple occupies a market share of around 100% [that's a pure function of the way the market is defined] (b) Due to the Payment System Restrictions, Apple occupies a market share of around 100%of the iOS Payment Processing Market."

Because of that we see, at 86, Apple is thus able -- it's because of those contractual restrictions and that 100 per cent market share – “Apple is thus able to conduct itself independently of both potential competitors…and it's two sets of customers. Apple is therefore dominant - by virtue of being a monopolist - in each relevant market.” Full stop.

It's very straightforward. We disagree, but it's very straightforward.

None of this depends on any contested abuse issue. None of this depends on whether these contractual restrictions on which they rely are anti-competitive.

My point here is that this is not a case where the claimant seeks to establish dominance by proving that the defendant's prices or profits are supracompetitive. The pleaded case on dominance does not make that allegation. On their approach, it doesn't need to.

I will move on to abuse. There are two headings, as the Tribunal knows, exclusion of uses and excessive prices.

I'll skip over contractual restrictions -- which are not in dispute, as I said -- and go to the issue of exclusionary abuses and foreclosure. Skip these two pages. C70. Because, as the Tribunal knows, the exclusionary abuse case involves an allegation of foreclosure, and to show that they need to examine the counterfactual to examine "but for" the contractual restrictions who would set up app stores on Apple devices? Who would distribute iOS apps in competition with Apple? What price reduction or innovations would they bring, if any? How would Apple react?

Those are the issues that arise in foreclosure and the counterfactual, and we see

that from paragraph 112 and 113.

112(a):

"The iOS App Distribution market would have developed as a competitive market [absent the contractual restrictions]. In particular, competing app distributors would have entered the market and offered alternative means of distributing iOS Apps, including generic and/or specialist iOS App Stores…at least some iOS App Developers would have made iOS Apps available for direct download ... iOS Device users [skipping down to the end of that subparagraph] would have used other forms of app distribution."

Similarly, they say:

"The iOS Payment Processing market would also have developed as a competitive market…other payment processors would have entered the market…some rival App Stores would have introduced their own payment processing solutions and/or iOS App Developers would [have been] able to choose their own payment processing provider for purchases of and within their iOS Apps."

I pause there to note that these issues, which are abuse issues, are obviously highly fact sensitive. I will come to my submissions that gives you a flavour of what will be saved if the Tribunal does split the trial and Apple succeeds in the first trial, because these abuse issues will involve far more disclosure – and this is not disputed – and witness evidence and a longer trial than the questions of market definition and dominance.

Then, 113:

“As regards the amount of commission in a competitive market: (i) third parties in both the iOS App Distribution Market and the iOS Payment Processing Market would have charged lower rates than the Commission charged by Apple; and (ii) Apple would have charged lower rates of commission to compete with those third parties.

In the premises iOS Device users would have paid lower rates of commission." Then Mr Holt's preliminary estimate about the level of commission is pleaded at the end of that paragraph.

We go on then to excessive pricing.

There are two limbs, again, as you know. If we go please, first, to paragraph 122, which is on page 74, we see how the excessive limb is pleaded. That focuses -- there's no need to read all of this -- from 122, on Apple's profits.

Dr Kent relies on Apple's profitability as part of the excessive limb and then, for unfairness, we see that from 123 there are a number of factors listed which Dr Kent relies on to show unfairness in itself. Those are the factors (a) down to (e). Go over the page to C77.

Now, none of the factors that are listed here -- persistent rate, nature of the differential, and the various other factors -- none of these arise on market definition or dominance on Dr Kent's pleaded case.

But even if some of these factual issues are to be determined in the first trial, they will, as I said in opening, be *res judicata* for the second trial. So, to the extent these factors do come into play in an abuse trial, they will already have been determined and, therefore, there will be no need to reopen them in the second trial.

Now, pausing there, Dr Kent's skeleton claims that their case on market definition is more complex and mixed up with abuse than these pleadings suggest. So it's necessary to go to their skeleton and track through the materials upon which they rely for that submission. So, please, members of the Tribunal, go to the skeleton of Dr Kent. That's in the core bundle, the first core bundle, at the very beginning, tab 1.1.

Sorry, page 1.1 is where it starts, tab 1.

The analysis starts at paragraph 27.1.

So 27.1 -- and I will begin in 27 itself -- Dr Kent says:

"The lack of a clean split between issues of market definition/dominance and abuse is apparent from a consideration of the parties' respective pleaded cases. Thus, for example, Dr Kent alleges that there is a discrete economic market for the distribution of iOS Apps to iOS Device users: -- the iOS App Distribution Market. [But, for that,] she relies specifically on the App Distribution Restrictions as establishing both the existence of such a discrete market and Apple's dominance on that market."

Pausing there, those are contractual restrictions. There's no need, and no need in the pleaded case to establish they are abusive to make good that plea.

She's relying on the existence of those restrictions, their effect, to establish both the existence of a discrete market and Apple's dominance. Those are, I should say, Apple's contractual and technical restrictions.

Similarly, she alleges that Apple's dominance on the alleged iOS payment processing market is a consequence of the payment system restrictions, again admitted contractual and technical restrictions. There's no need to make that point good to show they are actually abusive. Their existence and their effect serves to make good on her case the existence of the market and Apple's 100 per cent market share.

So when she says, next, Dr Kent's case on market definition and dominance is tightly bound up with her case on abuse, that's simply not the case at all. Even on its face, this paragraph refers only to the admitted contractual and technical restrictions, to make out the existence of the market and Apple's alleged monopoly.

Next point, 27.2:

"Similarly, Apple's defence to the abuse allegations expressly depends on its own… case on market definition / dominance."

That's not correct, but I'll show you that when I come to Apple's defence.

Then 28:

"There is also, and correspondingly, a clear overlap between the evidence (including the expert economic evidence) and disclosure that is likely to be relevant to the issues of market definition/dominance and other economic issues in the case."

So 28.1:

"In his preliminary report filed in support of Dr Kent's application for a CPO ("Holt 1"), Mr Holt emphasises that it is necessary to analyse the relevant product market by reference to all actual or potential channels through which the apps could be distributed to iOS Device users [and this is the important part] "in the absence of restrictions imposed by Apple.""

Pausing there, those are, again, the contractual and technical restrictions, which are admitted.

Then that cites, at footnote 20, Holt 1, 4.3.1, and I will ask you then to go to Mr Holt's evidence, at 4.3.1, to see if this case on market definition and dominance is bound up with abuse.

We'll need to go between the skeleton and Mr Holt now for a few passages, so keep them both open, or at least keep a thumb in one. That would probably help the Tribunal.

Please go to Mr Holt's first report. It's in the same first core bundle, behind tab 17.

We will go to Mr Holt, 4.3.1. It's on page 272.

So he is here dealing with the relevant product market. He considers how the iOS app distribution for iOS devices should be defined, how that market should be defined. He says that:

"the market should not be defined narrowly to include app stores only. The market includes all actual and potential channels through which apps could be distributed to iOS Device users [and this is important] in the absence of restriction imposed by

Apple."

If you take away those contractual and technical restrictions, they include, he says, direct downloads from websites and curated App Stores in the absence of the app distribution restriction and any other forms of distribution, but that would require further evidence. But this does no more, in my submission, than rely upon the existence of the contractual and technical restrictions which are not in dispute.

What he certainly doesn't say is anything about whether it's necessary for market definition and dominance to assess whether the restrictions are anti-competitive.

If I go back to the skeleton --

THE CHAIR: I am sorry, Mr Kennelly, can I interrupt you? Do you agree with what he says in 4.3.1?

Because I think, as I understand what you are saying, you are saying: we accept that the contractual restrictions have the practical outcome that native apps can only be distributed through the App Store.

MR KENNELLY: Yes.

THE CHAIR: So you say, to the extent that's relevant to the question of market definition, it's not a contested point and there is unlikely to be evidence that needs to be heard in part 1 that need to be heard in part 2; that's the point, isn't it?

MR KENNELLY: Yes, that's the important point.

THE CHAIR: Yes.

MR KENNELLY: The effect of the contractual and technical restrictions is not in dispute. I will show you my defence where we admit that.

THE CHAIR: Yes.

MR KENNELLY: The key point is: on their own approach, there's no need to examine whether the effect of those restrictions is not just the effect for the purpose of market definition and dominance, but also actually anti-competitively abusive.

That's no part of his case. There's no need for him, on his approach, to ask that second question.

THE CHAIR: In 4.3.1, he's saying that in the absence of the effect -- forget about whether it's abusive or not -- the market would be -- well, the market should be looked at without taking into account that effect in order to properly define it; that's what he's saying, isn't it?

MR KENNELLY: Yes.

THE CHAIR: Do you agree with that? Is that Apple's position as well? Or do you say that the market actually is defined as a result of the effect, if that makes sense, of the contractual restrictions?

MR KENNELLY: I will show you in our pleading how we approach market definition very differently.

THE CHAIR: I understand that. I absolutely understand you are saying it's not defined at all by reference to the distribution of apps generally, you say it's about a market for specific types of apps. I understand you take a different approach to it. But I suppose I am asking whether you agree with his approach, accepting you don't acknowledge this to be the correct approach.

But, logically, if you are looking at it in the way that Dr Kent does; do you carry out the exercise he talks about in 4.3.1? Is that logically right?

MR KENNELLY: The exercise is you remove the restrictions and ask --

THE CHAIR: Yes.

MR KENNELLY: -- what would happen?

THE CHAIR: Precisely.

MR KENNELLY: Logically, on his approach, that would be the next question. Of course -- and you will see this in our defence -- we say that even if those market definitions are correct, which on its face would give Apple 100 per cent market share,

we say we still don't have a dominant position because of other constraints, such as device constraints and device markets, and I will show you that.

THE CHAIR: Yes.

MR KENNELLY: But, really, the key point here, from what Mr Holt is saying, is that Apple is in a monopoly position. So one does not have to ask any of these other questions.

If his market definition is right, he says one proceeds directly to a 100 per cent market share and that's it. End of story.

We say there's a further question about device market constraints. But, on their approach, that's the end of it.

I will come to the way in which he excludes constraints in other platforms.

MR BISHOP: Before you do that, Mr Holt's report is validly a preliminary report. Now, would the approach that you are suggesting, with a split trial, wouldn't that prevent any points that might be developed in a full report after disclosure, that might then affect the factual questions of behaviour, that might shed light on how constrained Apple is and, therefore, what the proper market definition is?

MR KENNELLY: Engaging then with the question of the extent to which Dr Kent is prevented from developing her case, and somehow that Dr Kent or Mr Holt is denied the opportunity to ask further questions, more detailed questions, which are not currently pleaded, two points sir.

As you recall from the excessive pricing case, the application and from your own review of the report, where Mr Holt envisages a need to do further work, where he indicates he has an interest in asking further questions he says so, but he acknowledges he lacks disclosure to do so.

In relation to market definition and dominance he's extremely clear about the scope of his analysis. I haven't finished going through his report. I acknowledge there are

other issues -- and I'll have to come to them -- in this document, but he does not say at any stage that he needs or intends to examine, for the purpose of market definition and dominance, any of these other points which they raise in their skeleton. He just does not see the need.

One can see why he doesn't see the need to do it, on the face of his own analysis.

The second point is that this is a split trial application, and one has to examine the case on the basis of the pleadings and, of course, the Class Representative was aware of the split trial application, aware of this approach before they put in their reply. So we'll come to their reply to see the extent to which they pleaded a reply to our defence with our application for a split trial in mind.

Of course, finally, it is open to them if they want to try to amend after this hearing, even before the split trial, the first trial, we would have to see the application before deciding what to say about it. They can make that kind of application.

Even if, sir, that involves some of these factual issues which are relevant to abuse being raised for determination in the first trial, they can be determined in the first trial, once and for all.

On that last point, it's important that Dr Kent, in explaining to you why you should not split, her position is that all these other issues -- her skeleton says these issues, factual issues, which go also to abuse, will have to be determined in the first trial, if it's split. But, even then, Dr Kent says that first trial will take two weeks. Or less than two weeks.

That tells you how long Dr Kent thinks it will take, even if these other issues come into it and they would be resolved once and for all. That is material to the question of waste and duplication.

But I'll go back, if I may, to be more comprehensive in our analysis of Mr Holt, because we need to go through what the skeleton says about Mr Holt's analysis and

the propositions for which it relies.

We looked at 4.3.1. Then we go back to the skeleton. Back to paragraph 28.1. I have read the first sentence and now we are in the second sentence. Dr Kent says:

"Similarly, [this is just above the second hole punch] he regards the existence of the allegedly abusive conduct as centrally relevant to the assessment of Apple's dominance. The existence of the allegedly abusive conduct is essentially relevant to the assessment of Apple's dominance."

We see that's relying on Mr Holt, at paragraph 5.1.2. So let's go to Mr Holt, at 5.1.2. That's on page 277. Just (a) and (b), 5.1.2, this is the assessment of dominance.

He considers that “Apple has a monopoly in the iOS App Distribution Market.” Why? “This is because Apple prohibits iOS App Developers and iOS Device users’ access to alternative methods of iOS App distribution (whether via its App Store or otherwise)”.

"Apple has a monopoly in the iOS Payment Processing market” its second market, “this is due to Apple preventing iOS App Developers from offering payment processing services other than [what they call] ASPPS [Apple’s commerce engine] in respect of Relevant Purchases."

Those are the iOS app purchases.

These are just contractual and technical restrictions, again.

At (c), he says:

"For the purpose of the Proposed Proceedings, I do not reach a conclusion on whether Apple is dominant in the smart mobile device market."

He goes on to mention there may be indirect restraints in that market, but he doesn't engage with it.

But nowhere does he say that the Tribunal needs to decide for the purpose of

dominance if these restrictions are anti-competitive. It's a reprise of what we've seen in the earlier stage, the earlier stage of his analysis.

Then we go back to the skeleton, 28.2. 28.2 deals with the SSNIP test:

"Further, in relation to the question of market definition, Mr Holt makes reference to the well- known “SSNIP” test, which asks whether a hypothetical monopolist could profitably raise prices above the competitive level by a small amount…In the present case, this would involve considering whether Apple could profitably maintain a 5-10% increase in the commission level without material numbers of developers and/or consumers switching away from the App Store. It is, however, well-established that the SSNIP test needs to be applied with great care in cases where market prices are already at a supra-competitive level due to the presence of a monopolist or dominant firm, so as to avoid the so-called ‘cellophane fallacy’. Accordingly, when applying the SSNIP test to identify the parameters of the relevant market in the present case, it will be important to consider what the competitive rate of commission is, rather than simply assuming that the prevailing commission rate of 30% is the correct starting point.”

"But estimating the competitive commission rate will also be right at the heart [says Dr Kent] of the analysis of whether the commission constitutes an excessive and unfair price for Chapter II purposes."

Now, one can see that throughout that passage various paragraphs from Mr Holt are cited. In order to understand whether this paragraph is actually supportive of Mr Holt we need to read his approach as a whole. So we start, in Mr Holt, at C271.

THE CHAIR: 271?

MR KENNELLY: Page 271. We are going to begin at 4.2.2.

Again, to return to the discussion we had earlier about the preliminary nature of Mr Holt's analysis, before you read these passages, the reason why I am looking at

this in such detail is that the Class Representative relies on it, relies on it as to what they are going to do at trial.

They are not saying in their skeleton that this is a preliminary analysis, and they should not be held to it. They are relying on it as the approach they intend to adopt.

They could have filed a Holt 3 saying: no, no, this is just a preliminary view. It's a step in the right direction, but in fact I could do lots of other things and bring in considerations of abuse at the first stage.

They did no such thing.

So we look at 4.2.2, and there is a reference to the fact that the SSNIP test is commonly used as a conceptual test.

Then we go down to 4.2.4, Mr Holt says, very fairly and correctly:

"It is rarely feasible to directly implement the SSNIP test in practice. Where this is the case, other evidence of substitutability is usually used, such as comparison of product characteristics, past responses from consumers/suppliers to changes in price, or an analysis of the factors that promote or limit the extent of consumer switching."

In other words, he is saying there you don't, and you can't usually, calculate how much switching would take place if you had a small but significant increase in price.

You can't work out in practice, and it's rarely feasible to work out, a competitive level, an actual competitive level, in order to do that exercise. It's a conceptual test. In order to use it, you use it with other evidence of substitutability.

In 4.2.5, he actually goes on to say why a SSNIP test is even more difficult in the context of a two-sided market. There's no need to read that, but it gives you a flavour of his own recognition of the fact that this SSNIP test would be very difficult to apply in practice in this case, and he doesn't propose to do so for the purposes of -- he doesn't propose to calculate a commission rate for the purposes of market

definition and dominance, a competitive commission rate.

Then we go to the first paragraph the Class Representative cites, at 4.3.8, and that's on page 273. Here Mr Holt says he “does not consider it likely that a Commission [this is the Apple App Store commission] increase of 5-10% above the competitive level for iOS App Distribution for iOS Devices would cause sufficient switching by iOS App Developers or iOS Device users to render that Commission increase unprofitable”.

That's for several reasons:

"(a) iOS App Developers would lose a large amount of revenue if they exit the App Store, since this would mean they would lose their entire ability to distribute iOS Apps to iOS Device users."

So what we see here is Mr Holt using the SSNIP test as a conceptual guide. He's applying broad brush comments about the scale of prices we are talking about.

Then (b):

"iOS Device users would be highly unlikely to switch and in significant numbers to a different device using a different operating system in response to an increase in Commission of 5-10% above the competitive level.” Why is that? “Few iOS Device users would likely wish to incur the upfront cost of purchasing a new smart mobile device (which can be expensive, often £500 or more) just to avoid a 5-10% increase in Commission which are likely to amount, for most users, to a small fraction of this upfront cost."

We look at the footnote, 68, that he cites with this. He says, at the bottom of the page:

"Even if the level of spending on Relevant Purchases per iOS Device user was consistent with that in a competitive market, a 5-10% increase would amount to, on average, about £3-6 per year, based on an annual spending of £60."

So it makes no difference to his point if he's using the current commissions, which he does here, or at competitive level. If the competitive level was even half that, it would be £1.50 instead of £3, but for the point he's making, for the purpose of his analysis, it makes no difference. He does not need a competitive level to make this point and he doesn't suggest he intends to either.

Now, we say this analysis is flawed, obviously, but what he says here provides no support for what Dr Kent says in her skeleton. There's no suggestion that he needs to actually calculate a competitive price level to do the SSNIP test, and that's not surprising given what he said earlier, that it's rarely possible or desirable to try and implement the test directly. It's better and appropriate to apply a more conceptual broad brush approach, which is what he does here.

As we said in our supplementary skeleton -- there's no need to take this up -- that's consistent with the CMA's approach on market definition in their guidance, which we can come to, but there's no need to turn it up. I don't think it's in dispute.

They say, in order to deal with the cellophane fallacy, you simply take into account the risk of market power distortions when you are defining a market. That taking into account happens when one assesses all the evidence together for market definition.

There's no suggestion by the CMA that the competitive level, itself, competitive price, needs to be established to apply the SSNIP test.

Going back to Dr Kent's skeleton, at 28.3, reference here is:

"There are other aspects of Apple's conduct that need to be taken into account in considering market definition / dominance. For example, Apple's Guidelines prevent iOS App Developers from informing iOS Device users of alternative payment processing methods to the ASPPS. Dr Kent alleges that this contractual restriction is abusive, but the very same conduct will obviously affect the degree to which iOS Device users would switch away from [what they call] the ASPPS, even where this

may be technically permitted by Apple. As such, any analysis of market definition / dominance will need to account for this conduct."

But for the purposes of market definition and dominance, all that's relied on here are the contractual restrictions. There's no suggestion, in the claim form or in Mr Holt's evidence, that one needs to determine for the purposes of market definition and dominance whether these restrictions are in fact anti-competitive.

Finally, at 28.4, they say:

"In relation to disclosure, an important source of information in this case will be information relating to the profitability of the App Store. Such information will be highly relevant to excessive pricing (i.e., abuse) analysis. But such evidence will also be relevant [says Dr Kent] when considering Apple's market power."

That's relying on footnote 30. We look to see what footnote 30 says and it's a reference to an authority. It's not a reference to anything in the claim form or anything that Mr Holt intends to do.

That's because there's no need, on their approach, for them to do this analysis. There's nothing in their materials to suggest that profitability needs to be examined for the purposes of dominance.

You've seen their case. Because the market is iOS app distribution only, the main market, Apple is a monopolist simply by virtue of the contractual and technical restrictions, and in addition to high switching costs -- which it does deal with -- for a developer or user to leave the Apple ecosystem.

That is it on their pleaded case and the thrust of their expert evidence on the issue.

If I could turn now to our pleaded case, because they rely on that also to show -- they say that issues of abuse are mixed up with questions of market definition and dominance.

THE CHAIR: I was going to ask a question about your case, but maybe that's

helpful for you to develop that first.

MR KENNELLY: Before I go to the defence itself, just by a way of summary -- because the Tribunal has seen that our case on market definition is that you can't treat all these app transactions as substitutable with one another. We say a transaction to replenish your health in a game like Candy Crush, or to download Minecraft, isn't substitutable for a subscription to Amazon Prime video.

These transactions are just the means by which consumers get access to particular digital content, like a game or a TV series, and that exact same content can be purchased just as easily on an Android app as on an iOS app, and on other platforms too, depending on the transaction in question.

In addition, as you've seen, Apple relies on the fact that it's very often possible to transact for slightly different but substitutable content on other platforms.

So, for example, you might pay to download one car racing game on the iPhone, but instead you may choose to download a different, but very similar car racing game on your PlayStation 5 or Nintendo Switch. There is, we would say, clear substitutability within these transaction types, but not outside of those transaction types. That's why for each of these types of transactions Apple faces competition. We face competition from other businesses and platforms that facilitate similar transactions.

That's our first point in relation to dominance: the market for digital content transactions isn't limited to iOS.

But we have another point, which I flagged earlier on, and it relies, in fact, on Mr Holt's own admission -- there's no need to turn it up. It's not controversial – but the App Store enhances attractiveness of the device itself.

So our case is that competition on the device markets also constrains Apple in respect of transactions on the App Store. If the App Store deteriorates or becomes too expensive that will hurt sales of iPhones. So we rely on that, also, as a defence

to dominance.

For that then we turn to the defence itself, and that's in the core bundle behind tab 14. If you could take it up, please, from C179. Under the heading "Relevant markets".

THE CHAIR: Sorry, Mr Kennelly, what page is that?

MR KENNELLY: C179, behind tab 14.

Just to explain how we have pleaded this, because you will have seen from the skeletons that Dr Kent says that our pleaded case on market definition is vague or unparticularised, so I need to take this carefully to show -- well, to answer that allegation.

What we see in paragraphs 56 to 58 is the road map for the experts. It's our rebuttal of the way in which the claim form and Mr Holt approach market definition. It sets out our approach. Then we give worked examples. Really, as the experts would ultimately do, but we go further and give that in the body of the defence itself. So we'll begin at 56, where we say:

"The App Store is a two-sided transaction platform that facilitates transactions between consumers and developers. The relevant product that Apple supplies through the App Store is the facilitation of digital transactions for which Apple charges a commission when a developer imposes a positive purchase price on the purchase of digital content."

"The Commission is not only consideration for the distribution of the digital content and collection of payments", as Dr Kent suggests, "It is also consideration for Apple's provision and regular improvement of the proprietary technology through which the digital content is created and consumed…For the avoidance of doubt…[we say] "transaction" encompasses free and paid initial app downloads and in-App transactions for digital content…or similar interactions."

57:

"Apple competes with other platforms in multiple transaction markets. Not all transactions for digital content and services are substitutable. For example, there is limited demand or supply-side substitutability between transactions for different categories of digital content. Further, the competitive conditions (including the set of two-sided platforms and one-sided businesses that compete against the App Store to facilitate transactions of these kinds) vary depending on the type of app."

We will see that when we come to the worked examples.

58, and this is a key paragraph:

"The existence of separate transaction markets is reflected to some degree in the App Store's categorisation of apps by "genre". While each such "genre" does not necessarily constitute a separate market for the purposes of Article 102 TFEU or the Chapter II prohibition, the fact of subdivision recognises that consumers and developers distinguish between different types of app. Competitive conditions for transactions vary significantly depending on the type of app, which is demonstrated by reference to (among other things)…(a) the intended purpose of the app; (b) whether and, if so, how a type of app is typically monetised; [you'll see that is an important difference between subscription and in-app payments]; (c) the prevalence of free apps of that type; (d) effective commission rates paid by developers of that app type [which varies significantly depending on the transactions] and the rules to which those developers are subject;(e) specialised pricing for transactions; (f) the behaviour of developers (e.g. gaming app developers tend not to develop other types of app, and developers of different types of apps have different propensity to allow consumers to substitute between transactions on iOS and other platforms or websites or to use ad-funding."

So, from the developer's perspective, their behaviour is very different depending on

which transaction type we are in:

"(g) consumer activity across the different types of app; and (h) the alternative platforms (other than the App Store) available for app developers to transact with consumers for each type of app."

Again, that varies significantly between the different types.

Dr Kent knows exactly what Apple means by this when we speak of these genres. It's actually mentioned in Mr Holt's first report. Just briefly -- we'll come back to the defence, but just to show you that. It's in Mr Holt's report and it's, again, behind tab 17, paragraph 9.5.19, which is on page C360. 9.5.19.

I don't need to take you to the text, just to figure 9.2, where he sets out the top ten app categories across the App Store. We see them listed there. How developers describe themselves.

The Tribunal will note the great significance of games in terms of value, but also in terms of -- it's also very, very significant in terms of numbers of transactions relative to the other transaction types.

So putting that away, going back to the defence, having set out the roadmap, having set out our approach to how market definition ought to be approached, the roadmap for the experts, we then give two worked examples by way of example: digital gaming transactions and video streaming transactions. These are by way of example.

The market for digital gaming transactions, at 60:

"include those in which consumers (i) initially download a game; (ii) unlock certain digital content or features in a game (examples include buying more lives, accessories, or in-game currency) or (iii) to purchase digital game subscriptions."

We say, at 61:

"To consumers [we're starting with consumers, then we will look at what developers

think] gaming transactions on other platforms are often substitutable for game transactions on iOS. Gaming transactions do not need to be identical to qualify as substitutes. But many games that are available for download on iOS through the App Store are also available for download through multiple other platforms on other devices, including Google Play (for use on Android mobile devices) Valve's Steam platform (for PCs), PlayStation Store (for PlayStation consoles), the Microsoft Store (for Xbox devices), and the Nintendo eShop (for Nintendo Switch devices)."

"Further, many iOS Device users also own other devices on which they can download…and make gaming transactions. For those games and consumers: (a) Consumers may choose to download the game through one or more of these other platforms and make transactions on one or more of these other devices instead of making transactions on an iOS Device or vice versa."

"or, (b) Consumers may purchase additional digital content…through one of these other platforms, and then use the digital content when playing the game on their iOS Device or vice versa. In particular, many game developers link in-game content and game progression across a user's devices by providing a common user account which spans multiple gaming transaction platforms."

62:

"…consumers can also substitute between downloading or purchasing digital content for a particular game through the App Store and downloading or purchasing digital content for a different game through the App Store, or on one or more other platforms."

That's the car racing example I gave earlier on:

"To developers, digital gaming transactions on other transaction platforms are also substitutable....They (i) have the option to make their games available through many platforms other than the App Store; [They] (ii) choose to make transactions available

via multiple platforms…and (iii) they have multiple options for transactions with iOS Device users outside App Store, including for content consumed in the iOS App on iOS Devices."

"[But] In contrast, transactions for other kinds of digital content are not generally substitutable for gaming transactions, either for consumers or developers."

65:

"The digital gaming transaction market is dynamic and has been characterised by entry."

There's reference here to the fact that the Switch hybrid console, which is highly substitutable, operates in the way described in paragraph 65, but we'll address the particular boundaries, the precise boundaries, in expert evidence. But that's a detailed plea to demonstrate how, in practice, we apply the methodology set out in paragraphs 56 to 58.

We go on to the market video streaming transactions. Again, we offer by way of example, these:

"include purchases of periodic subscriptions to stream a collection of films and TV shows, video downloads for a set price, and the initial download of apps that provide video content ([such as] the ITV Hub)."

"For consumers [for this app transaction market], video streaming transactions on different platforms are substitutable with each other. Consumers and developers, like Netflix and Amazon Prime video, engage in video streaming transactions through a range of platforms that can be used on different devices (including iOS Devices, Android devices, smart TVs) and directly through the company's own website."

"Apple's Reader rule allows consumers to access within an iOS App video content purchased through platforms other than the App Store. Reader rule apps do not

have to offer in-app payments…Netflix…chooses not to do so…[So] consumers can therefore choose to purchase subscriptions for substitutable video content from a range of different developers…”

"…consumers…also substitute between transactions for a particular video streaming service through the App Store and transactions for digital content for a different streaming service through the App Store, or on…other platforms."

So you can decide whether you want to subscribe for Disney+ on iPad or you might choose to subscribe to Netflix on the Netflix website. From the perspective of consumer, these are substitutable.

Over the page:

"Developers similarly view the platforms that facilitate [the] video streaming transactions as substitutable. Video streaming services…monetise through subscriptions [unlike games]…transaction for a subscription through the iOS App is substitutable with the transaction for the same subscription made through another platform, such as the developer's website…an ITV Hub+ subscription purchased through an iOS App, is [obviously] a substitute for an ITV Hub+ subscription purchased on the ITV website.”

"By contrast neither consumers nor developers treat video streaming transactions as substitutable for other types of transactions.” A video streaming app developer doesn't normally develop game apps, and consumers, well, not many, will not view forms of entertainment content the ITV Hub, Netflix, as sufficiently close substitutes with the games that we've been looking at in the gaming transaction market.

72:

"Video streaming transactions also feature substantially different developer business strategies…"

They are described in the rest of that paragraph.

In fact, you see halfway through 72, between the two hole punches:

"[the] video streaming developer Netflix has chosen to disable in-app purchasing capabilities within iOS Apps, [so it requires its customers] to purchase subscriptions through the PC or mobile device…web browsers."

And that shows -- the fact Netflix has the power to do that shows the existence of alternative transaction platforms for developers in this market, and that would be different, potentially, from other transaction markets.

Then, if we go to paragraph 74, we see the dispute summarised in relation to Dr Kent's first market. We say that their approach is flawed for three main reasons. (a):

"It mischaracterises the relevant product. The App Store is not simply a delivery method for iOS Apps. It is a transaction platform that facilitates transactions between consumers and developers for apps and in-app content. [But] (b) It is [also] too broad [because] it combines transactions involving digital content (for example games and video streaming) that are not substitutable for either developers or consumers."

It says effectively that distribution of video streaming apps is entirely substitutable for distribution for games, and we say that's obviously wrong, from the perspective of both developers and consumers, not least because the conditions of competition clearly differ in those two -- in many of the other app distribution markets. It's too narrow, because it's limited to iOS and excludes other platforms that offer transactions that are substitutable with iOS transactions from the perspective of consumers and developers.

The second market we address at paragraph 29, Dr Kent's second alleged market. We say there is no relevant market for what she calls payment processing services for relevant purchases.

We rely on what we say in paragraph 44. If we skip back to paragraph 44 quickly,

that's on page 174, C174. We don't recognise the term "ASPPS". We think they are referring to Apple's commerce engine, which we use to enable transactions to take place. We describe our commerce engine over the page at 175. But we admit, at 44(c), that IAP, this important application programming interface that's part of Apple's commerce engine that enables content functionality and services to be delivered and made available, we admit that must be used under our contractual restrictions for relevant in-app purchases and relevant subscription purchases in the UK. That is the admission I mentioned earlier, when I was saying that this isn't in dispute, the effect of the contractual technical restrictions for this second alleged market.

Back to 84 then, on page 186. We are dealing here with market definition. Here we plead the device markets as a constraint, in paragraph 84.

That's our pleaded case on market definition.

Again, there's no need, obviously, in addressing these points to find that anything is or is not an abuse to determine these issues as between Apple and Dr Kent.

THE CHAIR: That may well be the case, but there may be some circumstances, mightn't there, that -- I think you used the word "connected" -- with the abuse of the factual matrix around the abuse that are relevant to the question of constraint.

So if you look at 74(b) and (c) in particular, I suppose the thing I am wondering about is: what are we going to have to apply our minds to in order to make a distinction between the case as pleaded by Dr Kent and the case as pleaded by Apple?

So what factors are we going to need to take into account?

Some of them, it seems to me, might well be those connected items. So, for example, profitability might help us make a judgment as to whether or not there is a constraint that's exercised in what you say is a -- or potentially a distinct market. I appreciate you are not saying it absolutely. But that might be one thing we might want to look at.

What other things might we want to look at?

I don't know if you are planning to explore that, but that is an area I am interested in.

MR KENNELLY: Indeed. I will take those in two stages. First, constraints generally, the constraints we are looking at here, such as the ones in 74, and profitability separately.

I fully accept -- I make a virtue of the fact -- that there is some overlap, that there are issues on constraint that will need to be determined in market definition and dominance that will then be fed into, say, the foreclosure analysis in the second trial, but they will be determined in the first trial, and then they will be an input into the issue, for example, of foreclosure in the second trial.

They won't be determinative of the issue of foreclosure. As I'll come to show, foreclosure gives rise to other questions also, and I will show how that's pleaded. I'll come to that.

But it will be determined. It will not be reopened, and that will be done in that two week trial.

I will come to the permutations point later. But where they are determined you will have clarity as to what the market definition is and what your findings are on constraints. The fact that is then a narrower compass will make the second trial more streamlined. It will allow you to exclude permutations that currently exist on the pleadings and focus on the findings you make in the first trial on the question of constraints.

THE CHAIR: Is that realistic, that there will be enough material before us in relation to part 1 to resolve those matters, when they have a wider relevance in the case?

Can we be confident that we are not going to get to part 2 and regret that there is an outcome that's now set in stone and we all accept it has been set in stone, but actually looks quite different when viewed in the broader lens of, say, the argument

about foreclosure? How do we get confident about that?

MR KENNELLY: You can be confident because the question of constraints is well understood and will have to be explored comprehensively in the first trial.

Once that's done there's nothing to suggest, nothing that the Class Representative suggests, or nothing we have thought of that will then encourage you to want to reopen that question of what constraints exist in the second trial.

In the first trial, you'll have to examine the question of these constraints in order to, we would hope, uphold our pleaded market definition. Then, when they are determined, they will be determined once and for all.

There's no reason why, certainly on their pleaded case. But even if issues are added on or if the Tribunal reads the pleading more generously than I am suggesting, there's no reason why any of those other points would force the constraint issue to be reopened. It's a discrete, economic and factual question which you can properly determine at the first trial.

Once it's determined that will be determined for the purpose of the second trial, also.

I think it might be useful if I show you in the pleadings when I come --

THE CHAIR: I think it will be helpful to work through an example. I can see that. I am not suggesting we would reopen the question of constraint. I think the concern I am putting to you is that the subject matter of the evidence which went to the question of determining the constraint is relevant to an item of abuse, and that it may be that the extent of evidence put forward for the purposes of constraint might lead to an outcome with incomplete evidence, but nonetheless a binding outcome.

Maybe we could take an example of profitability. If you accept that's one of them -- you may not accept that, but it seemed to us that profitability might be an important factor to consider. I am sure it will be argued to be an important factor to consider in relation to whether or not this market definition, whether yours or Dr Kent's, is

correct, and what constraints are apparent given the profitability that appears, and making, obviously, no judgment about what the implications of that are.

But if that was something that was going to be debated in the context of assessing constraints how much material do we -- how deeply do we need to get into that in order to reach that conclusion? And is there a risk that later on, where it has arisen in relation to abuse and indeed possibly in relation to quantum, we have partly explored something, but also reached a conclusion on it which is not open to reopening?

MR KENNELLY: Again, before I come on to profitability in particular, that particular example, on constraints, when one asks: what products are substitutable for the purpose of the market definition and dominance trial? One examines questions of constraints there. Realistically, what will you need? What are you likely to have?

We said in our skeleton: you are very unlikely to get anything from Apple's contemporaneous documents. It's really an exercise for the experts looking at the publicly available material and transaction data, to see how consumers behave in relation to these various -- what we say are transaction markets over time and, if possible, by reference to how consumers or third parties behave also.

At most that will involve expert evidence with some factual witness statements from Apple. I'll come to that when we come to our witnesses and convenience and strain. It's primarily an exercise for the experts, looking at competitive constraints.

So, even if all those issues that are not pleaded as part of Dr Kent's case on market definition and dominance have to be addressed, they can be done relatively neatly because of the number of experts and the process they have to undertake before the Tribunal. It's not a huge exercise involving many, many witnesses, which no doubt is why Dr Kent says that if the split is ordered and all these other issues have to be determined in the first trial, she still says it's a two week trial.

Profitability has to be viewed with particular scepticism because that issue -- which we certainly see arises on abuse side -- forms absolutely no part of their pleaded case or expert evidence on market definition and dominance.

True it is that in other cases profitability can be an indicator in relation to the market, dominance in particular can be of relevance there. But that forms no part of their case, or their proposed case. At no point has Mr Holt said that is something he thinks he needs to do to determine market definition or dominance.

So I would urge the Tribunal, in examining this application, to draw an inference from that, and not to simply assume based on what you get from counsel's submission -- because that's all it is -- that profitability will need to be determined at all, but certainly not in full in the first trial. There's nothing in Mr Holt to suggest that's required. One can see why not, because, on his approach, there's no need to look at profitability. It's not of any assistance to him. He doesn't need it.

That's why the Tribunal should be sceptical about going into that.

MR BISHOP: He may think that, or may have thought that, but how does the Tribunal, when the question comes up, whether in one trial or two, differs from that and says -- well, actually comes to the view: we are not really very persuaded by that.

Or whoever sits on this is not persuaded. He might then come to think: oh gosh, perhaps I had better talk about profitability.

Now, at a combined trial there will be evidence on profitability, probably, that would have been entered as part of the trial and which could then be referred to and considered as perhaps relevant to market definition. On your approach, such a sequence of argument and evidence could not take place.

MR KENNELLY: What you are suggesting, sir, I see, is the Tribunal itself may take a view that is different from that expressed by the Class Representative, Mr Holt.

You may be interested in profitability, at the market definition and dominance stage.

I suppose, again, I have two points to make to that.

The first is that when one approaches a split trial application one has to pay particular regard to the pleading before you and the evidence they put before you, and in view of the savings that we would lose if this trial was not split -- and will come to those, and they are really significant -- you should be slow to throw that away on the hope and expectation, or perhaps the possibility, that some unpleaded point which even their expert has not spoken to might be of utility.

That's the first point.

The second point, though -- and this perhaps is more important for your practicability analysis -- is Dr Kent says in submission that you will need to look at profitability in the first trial, but notwithstanding that, she still says it will be accommodated in a two week trial. She says that the first trial will be two weeks.

So even Dr Kent's team, on their unpleaded and unrealistic expectation of what needs to be covered, still says it can be covered in two weeks, even less than two weeks on their timetable.

The parties are very close to these issues and have analysed them and have done preliminary work, no doubt, with experts and examined what might need to be done. These are informed estimates which you have before you and some weight should be placed on them.

Of course, we are talking about profitability. Certainly, on our view, we understood Dr Kent to be saying it was relevant to dominance, not so much market definition, but as an example of market power. That's what we thought they were saying was coming in.

In any event, sir, my two points remain the same.

THE CHAIR: Is that a convenient time to take a short break?

MR KENNELLY: Yes.

THE CHAIR: Thank you. We'll just take 10 minutes.

(11.47 am)

(A short break)

(11.59 am)

THE CHAIR: Yes, thank you Mr Kennelly.

MR KENNELLY: Thank you, sir.

The point I was about to make was that -- and it's a point I think canvassed immediately before we broke -- the key point to take from Apple's defence, the abuse allegations, the abuse allegations, is the complex issues, the complex and onerous issues for the abuse trial that may be avoided if you split, as we are proposing.

To get a flavour of how onerous and complex the abuse trial will be, I will ask you turn up, again, our defence, page 192, where we deal with the question, vexed question, of objective justification. We admit that should the Class Representative establish a *prima facie* exclusionary abuse the burden to establish objective justification lies on Apple.

But we see, at 109, our plea that any *prima facie* abuse would be objectively justified because our contractual and technical restrictions are objectively necessary for Apple to produce its quality of device, platform and transaction facilitation products and in order for them to have -- and because they have efficiency advantages which benefit consumers that would outweigh any exclusionary effect.

For the reasons that we have been explaining above in this document, the app distribution and payment system restrictions, the admitted restrictions, are pro-competitive rather than anti-competitive because they are likely to, and will in fact, result in efficiencies that will counteract any likely negative effects on competition and consumer welfare. They are necessary for the achievement of

those efficiency gains, they benefit consumers through the efficiency gains, and they don't eliminate competition in respect of any part of any transaction facilitation market.

All these points are heavily fact specific. They will all require detailed disclosure and factual and expert evidence.

We see that *a fortiori* in next paragraph, 111:

"In particular, the main qualitative features and consumer benefits that Apple secures…include enhanced: performance; security; privacy and device competition."

All those benefits are disputed by Dr Kent. We see that in Mr Holt, and all of them require heavily contested issues of fact and expert evidence.

THE CHAIR: Is that a factor 4 point you are making?

MR KENNELLY: Yes.

THE CHAIR: And also, presumably, a factor 1 point in relation to costs that are saved on the assumption that if you were to win the market definition argument then that just doesn't need to be done?

MR KENNELLY: Indeed, indeed.

Then we turn over the page, 111, we again see factual issues that need to be addressed. The benefits, we say, in turn benefit developers by encouraging consumers to download and use apps which enable developers to earn greater profits, including but not limited to those through relevant purchases.

What they call the payment system restrictions give rise, we say, to substantial efficiencies in the collection of commission. It makes it easier to track the transaction between the millions of different parties that are subject to the commission.

Again, all this material is contested and will need to be made good with disclosure, factual and expert evidence.

Then we go to the relevant counterfactual. You have seen what Dr Kent says about

the counterfactual. We plead back to that at paragraph 128, on page 195.

We say that Dr Kent's paragraphs, 112 and 113, appear to proceed on the assumption that the counterfactual is to be constructed by removing the contractual and technical restrictions, but make no other changes to the structure of Apple's ecosystem.

We say that's wrong for two reasons. Again, in reading this the Tribunal will bear in mind how we'd make this next plea good by reference to disclosure, factual, and expert evidence. "It is necessary to consider, [we say,] the allegations concerning each set of restrictions separately, as well as together. It is therefore necessary to consider removing the App Distribution Restrictions while leaving what they call the Payment System Restrictions in place and vice versa."

We say that the various aspects of Apple's ecosystem are interconnected. "It is necessary to consider [in the counterfactual] what changes Apple would make to the structure of its ecosystem generally, including both non-price elements and its charging structures specifically, when constructing the relevant counterfactuals."

"In particular, if the consequence of removing one set of restrictions or the other was that many developers chose to free ride on Apple's technology by selling digital content to iOS Device users without paying similar levels of commission to those they pay in the real world, Apple would have been entitled to introduce new charges or increase the level of existing charges, in order to reflect what we say is the economic value of the ecosystem that we provide developers and end users.

Apple would not have simply left the remainder of ecosystem and the terms and conditions that apply to it unchanged."

That counterfactual analysis is extremely complex. It involves projecting what Apple would have done in any of the various permutations that are thrown up by the pleadings as they currently stand.

THE CHAIR: Just remind me, in relation to disclosure would you be providing disclosure of material relevant to that prior to the outcome of part 1, so the determination of the market and dominance, or would you leave that till afterwards?

MR KENNELLY: When you say "that" --

THE CHAIR: Well --

MR KENNELLY: -- are you referring to the disclosure in relation to how Apple would, in its counterfactual, reconstruct its ecosystem?

THE CHAIR: Any of the matters you say won't need to be dealt with if you win part 1. Because the impression I had was, as I understand it, you have a fairly significant cache of documents which has been disclosed already and the proposal is that that would be made available.

Then, presumably, there are going to be some things which Dr Kent will ask for, you'll feel you need to provide, as a result of what's specifically pleaded in this case, which may not have arisen in the same way, or at all, in other proceedings. Perhaps that's not right. Perhaps everything is going to be there.

But I am interested in how you would see disclosure working in the event that we tried part 1 and Apple loses that. Then there would be, presumably, further disclosure or had it been given already.

MR KENNELLY: You are right, sir. We have addressed this in our skeleton. Just to take it in stages, what we propose to give.

We have already offered the transaction data. We've offered that from the beginning of the year, which is very important for analysing substitution.

You have seen, from paragraph 39 of our skeleton, that we have also offered -- and we would offer this now -- the documents that we have provided in response to document requests from the CMA and the European Commission in their competition law investigations concerning the App Store.

But unless covered by that disclosure, we do not propose giving the further disclosure on abuse issues at the first trial stage. That would remove a large saving which would otherwise arise because of the split.

But we will be giving the documents in full that were provided to the CMA and to the Commission in response to their document requests.

Of course, we know that as part of their investigations they bear the burden of proof to establish market definition and dominance, and so we give those documents in order to reassure Dr Kent that nothing that they considered important was omitted from the material that Dr Kent will receive.

THE CHAIR: Presumably, if Dr Kent thought there was a specific category of document that wasn't in there, but needed to be disclosed, then she can make that application and you can either agree to it or we could consider it?

MR KENNELLY: Absolutely. On that, of course, as I said in opening, really this is a question for the experts, primarily. The experts will be examining the data and publicly available material to look at substitution. The gap between us giving them these documents and the experts reports is sufficiently large, even on our timetable, to allow them to come back and make the very request which the Chairman has just outlined.

Absolutely, we believe such requests could be made and they are accommodated within the timetable we've proposed.

If I may then go back to page -- just finished on page 196.

Sorry, I was moving on then to our point on excessive pricing abuse, which you see addressed from page 197. Some of this the Tribunal will be very familiar with, because we covered it when we addressed our strike-out application on excessive pricing. Perhaps, actually, because it's probably very familiar to you, rather than take you to this I will simply paraphrase.

The Tribunal will recall that I made an argument about the value, the economic value that Apple offers developers in particular, but also users, in relation to the App Store. We rely on that to rebut -- that's part of the reason why we say they are wrong in their analysis of excessive pricing.

But the value that we offer may vary between transaction markets. Different developers may get different value, different types of value and degrees of value, depending on the transaction market and issue. So it's possible that will also require a different analysis per transaction market. That gives rise again to permutations which have to be considered in full in the unitary trial. I will come back to this. But this could be avoided if you have clarity arising out of the first trial on market definition and dominance.

THE CHAIR: So that's an example of something which -- well, if in part 1 Apple were to succeed, then I think your argument is that's the end of the case, isn't it?

MR KENNELLY: Yes.

THE CHAIR: So then if you had succeeded, as I understand you are putting the situation to us, we would never need to do that; if you had failed, Apple had not succeeded on this argument in relation to market definition, Dr Kent's market definition and dominance analysis prevails, then would you have to do that? That's the point, isn't it?

MR KENNELLY: There are again two points in response to that.

The first is, of course, that as you say, sir, if we win on the first trial all this very difficult, complex, onerous work won't have to be done at all, if we prevail in full.

It's possible that we may win on some issues and lose on some issues on market definition.

You may agree with me on gaming, for example, and see that gaming as in the *Epic* US case, the gaming transaction market is not simply an iOS only market as Dr Kent

pleads, but we may lose on video streaming, for example. We have to envisage that possibility.

If we win on one, but lose on the other, again, the Tribunal has a narrower framework for the second trial. It won't be necessary to ask about the particular value the developers get in gaming if that market has been excluded from Dr Kent's case.

That's my second point on why --

THE CHAIR: Yes.

MR KENNELLY: -- the permutations reduce -- will be split in this way, and that will make your job easier when we come to the second trial, and a lot cheaper for the parties and, indeed, for the Tribunal, in terms of resources and time.

THE CHAIR: You may be going to come to it. I was trying to work out what permutations might be removed in circumstances where Dr Kent has succeeded, which otherwise wouldn't need to be done if she were to succeed in whole on her case. So I couldn't -- maybe you are going to come to this. There are some, but I couldn't identify -- there seemed to be some assertions there might be some, but I wasn't sure what they were.

MR KENNELLY: In order for Dr Kent to succeed, you will have made findings against us on a large number of issues relating to constraints, commercial constraints and market definition. So, on any view, if we lose on all those points, the Tribunal will have a more straightforward job in the second trial than the job you'd have to prepare for in a unitary trial, where you have to assume both the possibility of Apple winning on everything, Kent winning on everything, and something in the middle.

THE CHAIR: Yes, I can see that. I think -- so it’s very clear, I think, that if you were to succeed then there is a great deal of cost saving because there's going to be no

trial for the back end of all this. That's all very clear.

There is certainly a world in which you fail, but at least we then know what the market definition is, and therefore we don't obviously have to do that again. We've done that once and it's cost a lot of money, so I am not sure how much saving there is of costs.

It's probably not where you started with this, but if you indulge me.

So I think I am exploring, really, the question of: is there anything you don't have to do at all, ever, that's a saving by finding out the issue of market definition in favour of Dr Kent in part 1?

That's the bit I am interested in.

I wasn't sure if there was anything.

MR KENNELLY: At the very least, if Dr Kent succeeds on everything and we are dealing with iOS only distribution market, and an iOS only -- what she calls the payment processing market, it would not be necessary in the second trial -- forgive me if I don't quite answer the questions put to me -- answer the various points that Apple has raised. Because we ask you to look at a much broader market by market foreclosure analysis.

We ask you to look at foreclosure per market for exclusionary abuses. We ask you to look at value per market for the excessive price increases. We ask you to focus on these.

If I lose -- and you have to prepare in the interim trial to deal with all those, market by market, on the assumption I am right. But if we're wrong about that, you dismiss that approach and I fail at the first trial, you are very unlikely then to proceed to do a market-by-market foreclosure analysis in the second trial. That will lead to a saving. You will have already decided to approach the case in a particular way.

So I think even then, if I lose on everything, there's still a saving in terms of what you

need to do for the foreclosure and excessive pricing analysis in the second trial.

THE CHAIR: I think that demonstrates -- I think there was a point you were hinting at earlier, which is that it may not be as clean. It's not necessarily going to be binary, is it?

So you are saying, in a unitary trial the Class Representative can't just assume that if they win she has no further work to do in relation to the markets which you have won on, because you say there may well be some issues -- there may be some bits that fall in between her absolute position and your absolute position which require exploration.

MR KENNELLY: Yes, but even then we get a saving because -- again, forgive me for repeating myself -- gaming and video is a good example. It's possible, as in *Epic* US, we persuade you that for gaming transactions there really is a discrete market which is not iOS only and these other platforms are powerful commercial constraints and we win on that.

But, for video transactions, for example, you decide: no, for whatever reasons the constraints are different, but it is iOS only.

I will show you where Dr Kent pleads that as her alternative case.

Then we have to answer that at the main trial. That means we've lost on something and won on something, so has she. But the parties and the Tribunal are facing a much more narrow case if you exclude gaming transactions from this case. You've seen the value of those transactions in the figure 9.2 that Mr Holt has.

THE CHAIR: Yes.

MR KENNELLY: It's a huge value, it's a very complex market. There are lots of very unique idiosyncrasies and nuances of that market that we say demonstrate manifestly that it's not substitutable with the other transaction markets.

If you cut that out, the second trial could be much more straightforward. You are

focusing then on different transaction markets and you don't need to engage at all with the gaming specific issues. So that's a huge saving, even if we win on something and lose on something.

In fact, I am getting ahead of myself.

On questions of settlement and mediation, if something of such significance by way of value is determined in our favour in the first trial, that must have some material impact on the ability of the parties to resolve this by way of settlement or mediation.

THE CHAIR: Yes, I think you have answered my question. Just so I am clear about it, though: I think you are saying that in a unitary trial Dr Kent is going to need to prepare for, potentially, myriad different outcomes of failure or success in relation to parts of your case.

MR KENNELLY: Yes.

THE CHAIR: No doubt making some judgment about which of those she thinks is more or less likely and what the consequences are. There's going to be work that would need to be done in a unitary trial for that which won't need to be done if the position is clarified in a preliminary issue.

MR KENNELLY: Yes.

THE CHAIR: So there are, you would say, savings which are additional to the possibility of you winning completely and there needing to be no second trial.

MR KENNELLY: Absolutely.

THE CHAIR: Okay. That's helpful, thank you.

MR KENNELLY: So we turn then to their reply. It's at tab 15. Tab 15 in the first core bundle, sir. We see how they respond to this.

The key paragraph on market definition is 22(d), which is on page 215.

They are pleading back to the roadmap for the experts that I referred to at paragraphs 57 and 58. They say:

"Even if “competitive conditions…vary depending on type of app” [and they make no admission about that]…to the extent that there exists separate markets for the distribution of different types of app…the App Store would still be the only way for iOS Device users to obtain iOS Apps within each iOS App Sub-Market…Accordingly, even if it were correct, which is denied, to identify separate iOS App Sub-Markets (e.g. for digital games), Apple would still hold a dominant position in respect of each iOS App Sub-Market."

Then we see how they deal with game transactions, over the page. They say, at (ii): "Insofar as there is a discrete submarket for iOS Apps that are digital games…Apple would still hold a dominant position on any such sub-market” and (iv) the same plea for the video streaming services submarket, as they call it.

For dominance -- and this is important. It's important, and it goes to the discussion that we were having earlier about the extent to which the approach of the Class Representative and Mr Holt might be seen as preliminary and being able to change. This reply was lodged at the end of August. The questions for a split trial were well understood at this stage, and this document has to be read in that light.

So we turn to paragraph 31, and we see how they plead back on the point of dominance.

They say first, at (a):

"Apple's denial that it holds a dominant position is premised on the correctness of its positive case on market definition” and that positive case is denied for the reasons they give above. They are denying that we are not dominant on the basis of the correctness of our market definitions.

(b), it's without prejudice to that. What we've pleaded is embarrassing, they say, because it fails to specify Apple's shares of the market that it contends to be relevant markets.

So that's a point about the level of particularity in our pleading.

Then (c):

"As the various allegations…concerning the competition that Apple faces in device markets ..."

They repeat paragraph 30, above, and they deny “that any potential or actual switching by consumers to devices other than iOS Devices…is sufficient to constrain Apple's conduct in the iOS App Distribution Market.”

That's just devices.

Then (d):

"[Apple] are put to strict proof of the allegations made at paragraphs 90 and 94.” The burden of proof, of course, is on them, but the point here is they are simply putting us to proof at the points we make at 90 to 94.

Then this, 32:

"In the premises, paragraph 95 is denied."

Paragraph 95 is in our defence, you will recall. Let's just go back to that. Paragraph 95 is where Apple says:

"Apple does not occupy a dominant position..."

That's page 188:

"Apple does not occupy a dominant position on any relevant market."

Their denial of that paragraph is said to be in the premises. The basis for that denial is what's set out in 31(a), (b), (c) and (d). So their case on dominance depends on them winning on their market definitions. They have not pleaded a positive case, but if the market definitions are as we plead them we remain dominant. They've not pleaded a positive case to that effect. That's why, on the pleadings as they stand, if we succeed on market definition, that alone will be determinative of the whole thing.

So, to summarise where we are on the pleadings, they plead an alternative case for

iOS only markets for each type of app, they pleaded we are dominant on each of those iOS only markets, but not on the markets in which we are pleading, and there is no allegation -- still no allegation, sir -- that we must be dominant because of high prices or profits.

The case on dominance remains on the eve of this hearing that we are just a monopoly in the relevant market as they plead.

Now applying these factors from the *Daimler* case and *Electrical Waste* to these pleadings and the expert evidence. So I repeat the point I made. It's an important point because it is made on the basis of the most recent and comprehensive pleading, comprehensive in the sense the Class Representative is under no illusions about the issues before you, but if Apple succeeds on market definition alone that will be determinative. Therefore the savings -- if we do succeed on market definition, the savings would be very significant indeed.

That's why I took you through the complexities that the second trial would involve. There's no need to repeat them. It's obvious there would be huge savings of time and resources for the parties and Tribunal if we succeed on market definition in the first trial.

That's the first factors, the Chairman said, in Mr Justice Hildyard's list. But I also make the point, which is factor 4 in Mr Justice Hildyard's list, that even if we don't succeed in whole, even in part, if we succeed, there will be savings, and we've discussed that already.

But the truth is that the real benefit of the split, the real benefit, is this prospect of narrowing the case. I can't expect the Tribunal to assume that I will succeed on everything. The real benefit is that on any view the case will be narrowed, and that's a very significant benefit for the parties and for the Tribunal.

I have already made my point on permutations, which is the factor -- I think it's factor

4 in Mr Justice Hildyard's -- it's certainly referenced in paragraph 29 of his list, and there's no doubt permutations is a major factor.

THE CHAIR: When you talk about the case being narrowed; are we talking about permutations or are we talking about something else as well?

MR KENNELLY: Permutations.

THE CHAIR: On the analysis you've just done, the permutations, of course, aren't pleaded in any way, so you've just spent a bit of time convincing us that the Class Representative relies on a single shot which is established in the market definition. I mean, it may well be that's not the position by the time we come to trial, but I am struggling a little bit to see how those two things sit together.

Are you not suggesting to us that this case would be disposed of substantially, if not completely, by the outcome of the part 1 decision, if it was against Dr Kent?

MR KENNELLY: I mean, I make both points, sir.

THE CHAIR: I appreciate you are. I don't think that's unfair or unreasonable, I just want to be really clear about in which circumstances you are making these points.

So perhaps just start again. You are making a point that -- maybe this is a better way to put it: you are making a set of points to us which suggest we shouldn't be too bothered about alternative cases that might be run by the Class Representative because she hasn't pleaded them. But you are equally recognising that the outcome of a preliminary issue may not be so black and white that it has a clear effect. We cannot dictate now what the effect will be, absolutely. But you are saying that whatever it is, is going to be helpful because whatever effect it has short of disposing of proceedings completely can only be helpful; is that how you are putting it?

MR KENNELLY: It's a fair assessment, exactly. I make a bold point -- it's not really a bold point because you've seen the pleadings. On market definition, if we win, that's it, and that's a huge saving for everybody.

But even I am wrong about that, and even if the Tribunal goes for a halfway house and we win on market definition for some transaction markets, but not for others -- you have my point about using gaming and video streaming as an example -- even in that halfway house there is a huge saving.

It's hard to envisage any circumstance where there will not be efficiency and saving if you split the proceedings.

That's the reason why I say factor nine in the list is relevant because once you have the first trial and clarity is provided, it should help an early end through settlement or withdrawal of the remainder, depending on, for example, the value of what remains in terms of the value of the claim.

But the main point that's made against me on this list of factors is the lack of a clean split, so Dr Kent says.

You have the point: that she makes that point because of the connections that exist between the issues and some of the factual issues for market definition and dominance and abuse. You have my submission that points in favour of splitting.

The real vice which has to be avoided is that issues need to be reopened in the second trial, and we say that won't arise here.

So even if Apple's profitability were relevant to Dr Kent's case on dominance, as I said -- and we say it's not. You have my submissions -- again, if that was the Tribunal's view, that it was relevant, that can be accommodated in the first trial and the timetable that Dr Kent has advanced envisages that it must do, since she says: these are the points that would have to be addressed in the first trial.

Now we come on to Mr Justice Hildyard's factors 3 and 7, duplication and strain on witnesses. It's important to recognise which evidence is likely to be required at which stage.

As I said earlier, for market definition and dominance the evidence is going to come

primarily from economists examining the substitution possibilities based on the public domain documents and the transaction data.

Now, as I indicated, there's likely to be a couple of witnesses of fact for Apple, explaining, for example, how the App Store works and the commerce engine. There's unlikely to be any from Dr Kent. So if there's inconvenience, that's our problem.

But the abuse issues and our objective justification evidence will be extremely fact heavy, with several witnesses of fact and expert evidence. The questions of security, reliability, privacy, these are hotly contested issues and of fundamental importance to Apple, they will attract significant evidence.

As for economists, we accept, of course, they will have to give evidence again in the second trial, but only, as I said, if we lose in the first trial. They will be called to give evidence a second time on different issues. Again, the inconvenience of having one or two economists being called twice is relatively minor and it just affects Apple.

So when we come to the costs and delay points, Mr Justice Hildyard's factors 1 and 7 -- and before I get into the evidence on this, there are three key points which are agreed. They bear repetition because they throw a lot of light on this question of cost and delay.

The first key agreed point is that the issues of market definition and dominance could be tried in two weeks or less on the Dr Kent timetable.

The second agreed point is that the issues of abuse, causation and loss would require five weeks. We say potentially less if the markets are substantially narrowed. But that's a much bigger job.

Third, a single trial, the parties agree, would take seven weeks. What that means is Dr Kent is not saying that there would be any material time spent in the second trial raking over the same issues that were addressed in the first trial.

The total time for resolving them separately is agreed to be the same, or even less, as that required to address them in a single trial.

So, in those circumstances, we can't understand how, having two trials, one of two weeks and one of five weeks, will cost £2 million more than a single seven-week trial, as Dr Kent submits.

The basis for that assertion falls away when you come to look at the evidence that Dr Kent has put forward.

For that then I ask the Tribunal to go to Ms Hannah's witness statement, and that's in the core bundle, tab 10.1, in the first core bundle. It's page C36.6, paragraph 17(a).

I will read a little bit of the beginning of paragraph 17.

Ms Hannah says:

"My estimate of the approximate size of the estimated cost increases which I would expect to result from having split trial in these Proceedings as a result of [what she calls a] fixed cost element, is as follows." She says:

"It is likely that a significant portion of the amount currently budgeted for trial preparation [£1 million] would need to be incurred twice, one for the First-Stage Trial, and then again for the Second Stage Trial."

So these are the fixed costs that she outlines:

"This is because preparation for each trial would require significant economic expert, industry expert, and factual witness evidence preparation, legal team fees, bundling and document management charges, and other charges (such as transcription). This preparatory work would need to be undertaken twice." All that would need to be undertaken twice if there were two trials. "Even if a lesser amount of such costs were incurred in relation to the First-Stage Trial in comparison to a single trial, incurring the preparatory costs twice, given the "fixed cost" element within such costs, which I have described above, would be more expensive than incurring them

only once."

She estimates the cost of preparation for the first stage trial to be about £400,000 and the preparation of the second to be £900,000.

So that is, she says, the cost that would be duplicated.

But those costs that she describes – brief fees, solicitors, trial prep, expert fees, transcription costs – those are all costs that vary. They obviously vary, and they vary strongly with the length of the trial. Legal fees will vary depending on the length of the trial. There will be, of course, some incremental costs to having two trials instead of one. We fully accept there would be some incremental cost, but nothing like the cost being described by Ms Hannah, and describing these costs which definitely vary, depending on the length of trial, as fixed is simply incorrect.

If you go to the timetable, just to make absolutely clear what I am saying about the agreed time this will take, we see that on 36.18. This is a timetable that Ms Hannah has exhibited to her statement. She refers to this in paragraph 20 of her statement. This is her exhibited timetable.

Then we see, on page 36.18, that if our application is dismissed one sees, in the penultimate box, a trial of seven weeks is presumed beginning in October/November 2024, a 7 week trial. If you go over the page, the suggested timetable to trial if our application is granted involves -- six boxes from the bottom, on page 36.19 -- a trial of less than two weeks. That's what they presume, based on what they say will need to be addressed.

Then, over the page, we see what they presume for the second trial. On their timetable, a trial of five weeks in May or June 2026.

So we are going to see what Apple says about those costs, and that's in Mr Doris's statement. That's in the same core bundle, behind tab 10.3. The second witness statement of Mr Doris. Page 36.22, paragraph 5, where he addresses the fixed

costs issue.

Just to save my voice, if the Tribunal could read from paragraph 5 to paragraph 9, which goes to 36.24, I would be very grateful.

(Pause)

Even if the Tribunal takes the view that Mr Doris is being too optimistic, even if the incremental costs are higher than an amount which will be too small to be material in the light of the total cost figure at the end of the day, on any view, based on what is agreed between the length of the two trials and the complexity -- which has to be acknowledged -- in the second trial, given that splitting it offers a real chance of avoiding that second trial, and saving that money and those resources, and all the reparation that would be involved, we say that is a price worth paying, even if the price is higher than that Mr Doris describes.

But there's no support for the figure that Ms Hannah has suggested, it just doesn't make sense on the basis of the material she cites and the evidence that she gives.

We move on then to Ms Hannah's statement, please, back to that in paragraph 18.

Paragraph 18, on page 36.8, she is dealing with the question of disclosure and witness evidence.

36.8, Ms Hannah says that in addition to increased costs she's concerned about duplication and the inefficiency in the disclosure process.

She describes Apple's indication that -- she refers to documents we've produced to competition authorities, and she says, just above the second hole punch, that Apple appears to be envisaging there should be two separate disclosure processes for both trials:

"But from my experience, this is likely to be much less efficient and duplicative than having a single disclosure process, in which the documents can all be reviewed in coherent manner."

Mr Doris answers that at paragraph 11. So please go back to his statement, and that's on page 36.24. Paragraph 11, on page 36.24.

Again, if the Tribunal could read the section on disclosure and witness statements all the way to the end of paragraph 12, that will give you Apple's response to what Ms Hannah says and also explains to you what our proposal is in relation to disclosure as I outlined earlier.

(Pause)

I will move on -- sorry.

THE CHAIR: Yes. Yes, thank you.

MR KENNELLY: I will move on, if I may, then to Dr Kent's desire to avoid delay. We say the risk of delay is greatly overstated, and Mr Doris explains why.

Since you are in his statement, please go to paragraph 14, paragraph 14 on page 36.27. He says:

"The elongation in the Class Representative's timetable is due mostly to its unrealistic and exaggerated timetable to a preliminary issue trial…The Class Representative's timetable suggests a preliminary issue trial in July 2024. Apple's proposed timetable [which you've seen in our skeleton] suggests a preliminary trial in July 2023. The difference - a preliminary trial in July 2024 versus one in July 2023 - accounts for 1 year of the 1 year and 5 month elongation Ms Hannah anticipates."

I have two points to make about that. The first is, even on Ms Hannah's evidence, the impact of the split on the proceedings is one year and five months. Now that number is completely wrong, for the reason Mr Doris gives. But even if that's it, even if that is assumed to be correct, that again is not the kind of delay that ought to dissuade the Tribunal from taking the opportunity to make the savings, the savings and the efficiencies which splitting the trial will grant.

But as Mr Doris explains, that one year and five months is obviously wrong. It's inconceivable that this Tribunal would need -- that the parties would need two years to prepare for a two week trial. That's just not reasonable. It's not a reasonable projection. So that one year and five months elongation is unrealistic and the Tribunal should be very slow to rely on it.

THE CHAIR: The obvious point is an appeal, isn't it?

MR KENNELLY: And the obvious point is appeals, yes. So obviously --

THE CHAIR: That's presumably always the case when one comes to this part of the analysis. It's by no means certain there will be an appeal, but if one assumes there is one then it makes a significant difference to the timetable.

MR KENNELLY: Appeals are always a factor when one splits, and of course it's difficult to speculate as to what would be appealed and the effect of any appeal and whether the appeal would be such as to require the proceedings to be frozen pending the outcome of the first trial appeal.

It's possible that if the appeal was on a relatively discrete point steps could still be taken to progress parts of the second trial. We simply don't know. One can't assume that there will be a lengthy appeal that will freeze everything. But we can't deny that in weighing these factors in the balance there's always the risk of appeals and appeals that may lead to delaying the second trial.

THE CHAIR: Sure.

MR KENNELLY: But that can't be determinative because if that were the case, if that fear and concern were the case, one would never have a split trial.

I will move on then, if I may, coming finally to my last point, which is the implications of the CMA and EC investigations. As I said in opening, Dr Kent's position here really is incoherent because she doesn't say -- and it's not an accident, she has had several opportunities to make this point and she's definitely not made it -- she does

not say that these proceedings should await the outcome of these investigations. On the contrary, you have seen from the timetable that Ms Hannah has exhibited to her statement they urge you to order and the parties to prepare for a full trial of everything to commence in October 2024.

It seems that Dr Kent thinks we will have binding decisions even before disclosure takes place for the purposes of that full trial. But as the Tribunal knows and the parties know, to be binding one needs not just a decision of the regulator but that all appeals up the appellate hierarchy have been completed. There's no dispute about that. We explained by reference to examples in our supplementary skeleton how long these appeals take in the General Court and the CJEU and here in the Tribunal and in the Court of Appeal.

There's no need to go back to those examples. I don't think they can be in dispute. They are statements of fact, notorious fact. It's common that these appeals can take several years, in addition to the several years taken to investigate and reach a decision.

But we'll see what Dr Kent says in her supplementary skeleton, supplementary skeleton this time, and please go to that in the core bundle behind tab 4, paragraph 7.1. It's on page 4.3.

In 7.1, Dr Kent says:

"If, as a result of the CMA's investigation, certain issues no longer need to be determined by the Tribunal (because the CMA has already made binding determinations in respect to those issues) the remainder of the present proceedings can proceed to trial [proceed to trial] in accordance with an already established timetable and without any delay."

There is a point made about *Sportradar*. It's easier to disaggregate a single trial than to aggregate the parts of a split trial. Well, that's obviously true on its face, but it

doesn't go to the point that's being made in these paragraphs, but Dr Kent seems to think that we will have binding determinations even before the trial takes place.

Then 7.2:

"If, as a result of the CMA's investigation, certain issues no longer need to be determined by the Tribunal (because the CMA has already made binding determinations)" there will be a reduction in costs, costs won't be wasted.

Why is that? Next sentence:

"That is because…it is less likely that any step in litigation, for example disclosure, will have to be carried out twice if directions are given for a single trial but some issues will fall away as a result of the CMA's work."

But there is no prospect of a final binding decision in these investigations by October 2024, still less early enough to inform the shape of the trial or serve to limit disclosure. Only one of these investigations has proceeded as far as an SO, and I am going to show them to you. I will start with the European Commission, and that's in the authorities bundle, the third volume of authorities behind tab 33. It's page 1258.

This is an announcement dated 30 April 2021 and it's the European Commission's music streaming investigation into Apple. There are two important differences in this allegation of infringement to which I wish to draw the Tribunal's attention. The first is obviously that it's limited to music streaming. The second and more fundamental one is that it concerns the fact that Apple competes with other music streaming services in downstream markets. That's the Commission's concern and that forms no part of our defence case.

You see that is their concern:

"The European Commission [at the beginning of the page] has informed Apple of its preliminary view that it distorted competition in the music streaming market as it

abused its dominant position for the distribution of music streaming apps through the App Store."

Next paragraph:

"The Statement of Objections concerns the application of these rules to all music streaming apps, which compete with Apple's music streaming app Apple Music."

They are competing downstream in the music app market itself. Spotify was the complainant.

The Commissioner then is quoted, and I just go to the middle of her quote in italicised text:

"With Apple Music, Apple also competes with music streaming providers. By setting strict rules on the App Store that disadvantage competing music streaming services, Apple deprives users [she says] of cheaper music streaming choices and distorts competition."

That's the allegation: the concern is that Apple is harming consumers in the downstream market where they compete, says the Commission, with other music streaming apps like Spotify.

The Commission is investigating other aspects of Apple's App Store. The press releases are in the bundle, but none of those investigations has got beyond the initial stages and they also concern situations where Apple is said to compete with other services in downstream markets.

THE CHAIR: So the abuse is said to be the in-purchase mechanism, so the commission being imposed by Apple; that's correct, isn't it?

MR KENNELLY: That's a stepping stone on the way to or, on one view, a part of the analysis which the Commission is undertaking.

THE CHAIR: So that bit certainly coincides with this case, but you say it then goes on to consider the effect on other markets.

MR KENNELLY: It's hard to speculate because this is at an early stage. We only have the preliminary view of the Commission. But the vice that they identify is that Apple is harming competition on downstream markets.

The very last paragraph on page 1258:

"The Commission's preliminary view is that Apple's rules distort competition in the market for music streaming services."

That's where the distortion is taking place. That's where they are harming competition, says the Commission, potentially, it's a preliminary view, and that in turn leads to higher prices for consumers who want to use in-app music and have in-app music subscriptions on iOS devices. That's the abuse of dominance. That's the competition that's being distorted.

In fact, because that is very different from the pleaded case that Dr Kent has, this theory of downstream abuse forms no part of her case, it's not entirely clear that even if there were an infringement decision that her claim would be a claim in respect of that infringement decision for the purposes of it being binding under section 58A of the Competition Act.

So it's not clear, because this is so different, it would even be a binding decision, her claim as currently pleaded would not be a claim in respect of this infringement decision if it were taken in these terms.

MR FRAZER: There is some overlap, however, in the paragraph under "Statement of Objections" where it says:

"For app developers, the App Store is the sole gateway to consumers using Apple’s smart mobile devices running on Apple’s smart mobile operating system iOS."

That, I think, has some relationship with the pleadings made here.

MR KENNELLY: Indeed, it's a prior question about market definition and dominance in relation to the App Store, music streaming apps in the App Store. That's their

focus, which is why it's material that we offer the disclosure that -- the documents we gave the Commission in response to their requests, to reassure the Class Representative that they would see what we gave the Commission.

But the ultimate abuse, the ultimate dispositive part of the decision, the binding bit -- and I'm not getting into whether for certain recitals it would be also binding or not -- but there's certainly an open question as to whether it would ultimately be binding because on these terms it's not clear that the current pleaded claim of Dr Kent would be a claim in respect of this infringement decision if it were taken.

But for the CMA, I move on to the CMA, obviously the overlap is greater based on what the CMA has explained to the Tribunal in their own statement of intervention, but the CMA has not yet issued a Statement of Objections or even decided that it intends to do so. We make no criticism of the CMA at all, but it's in the nature of these things that the process, the CMA investigation, can take a lengthy period. Again any final CMA decision, if they proceed to issue a statement of objections and proceed to take a final infringement decision, will be subject to an appeal and will come back to this Tribunal, as I said in opening.

We come back then to Dr Kent's proposed approach. Where does it go? Her proposed approach is that the parties spend huge amounts of time and money litigating issues that may or may not be covered to some extent by potential future CMA findings which will be issued and certainly will not be final and binding on you until after the full trial, which is due to begin in October 2024 on her timetable. So even if we wait for the CMA and even if the CMA makes a finding of infringement, because of the appeal, the merits appeal, there will need to be a trial of market definition and dominance in this Tribunal.

If the CMA's investigation is still ongoing by the time of the preliminary issue trial next year on our timetable, the CMA would benefit from receiving the Tribunal's judgment

on those issues several years before it would otherwise get the Tribunal's views, final views, in any appeal against an infringement decision. The CMA is here. The CMA can of course make submissions to the Tribunal in these proceedings in the preliminary issue trial to ensure that its views are taken into account and its views obviously reflect its current thinking in the investigation into the App Store. So for those reasons we say the parallel investigations offer no reason at all for preferring a single unitary trial over the split which we propose.

Those are my submissions. I am just going to quickly check with my team, I think I have 2 minutes before we break for lunch, to check I have not left anything out.

(Pause)

No, those are my submissions. Thank you.

THE CHAIR: Good. Thank you very much, Mr Kennelly. We will rise now and we will start again at 2 o'clock.

(1.00 pm)

(The luncheon adjournment)

(2.00 pm)

Submissions by MR ARMITAGE

THE CHAIR: Mr Armitage.

MR ARMITAGE: Members of the Tribunal, if I can start with some preliminary remarks in relation to Apple's proposal and then take you through my submissions in detail.

We note at the outset that Apple's proposal for a split trial of issues of market definition and dominance before, potentially, a further trial on the remaining issues in the case is unorthodox and it would not be conducive to efficient conduct of this claim.

There has never, to my team's knowledge, been an initial trial of market definition and dominance in isolation from the question of abuse, in either this Tribunal or the High Court, nor has Apple identified one. We say that's not a coincidence.

In order to understand the parameters of the relevant markets and whether the defendant occupies a position of dominance on those markets, what is required is a deep and detailed understanding of the actual conditions of competition on the markets concerned.

But that same enquiry into competitive conditions is also integral to the question of abuse which involves in particular considering whether the dominant undertaking's conduct has impaired genuine and undistorted competition on the markets concerned.

Market definition dominance and abuse are all highly fact sensitive issues. They overlap with one another and they are best considered on a single occasion avoiding duplication inconvenience and unnecessary cost.

This Tribunal routinely hears abuse of dominance claims without splitting matters off in this way, notwithstanding that issues such as what the relevant markets are may well be hotly disputed.

We say a split trial would not accord with the CAT's governing principles, which include saving expense, ensuring claims are dealt with expeditiously and allotting claims an appropriate share of the Tribunal's resources. That's before one even considers the other issues to which Dr Kent has referred in written submission, including the relevance of the parallel CMA and European Commission investigations. Those are entirely freestanding reasons why having a preliminary trial as early as July next year would not, in our submission, be sensible.

With those preliminary points in mind, I propose to address the following five topics.

First, the issue of clean split, and it is common ground that this is a very important

issue in this case.

Secondly, Apple's submission that even if it loses at the first trial, this will result in a narrowing of the issues at the second trial and generate efficiencies.

Thirdly, Apple's submission that a single trial, in contrast, would be unduly complex.

Fourthly, I will develop some submissions on the costs and delay associated with Apple's proposal.

Fifth and finally, I will address you on the significance of the parallel CMA and EC investigations.

I think that broadly matches the order Mr Kennelly took in his submissions this morning.

Beginning with the issue of clean split, we've set out some of the case law on this point in our skeleton, at paragraph 13. I don't need to turn it up, and the points are common ground.

In a case called *Euronet*, Mr Justice Butcher described this as an important starting point in any enquiry on whether a split trial is a sensible approach.

In my submission, the lack of a clean split between the issues of market definition and dominance on the one hand, and abuse on the other hand, is a powerful, indeed in this case decisive factor, weighed against Apple's proposal.

To develop that point, I want to start by looking at some of the case law which emphasises the overlap between issues of market definition, dominance and abuse, especially in the excessive pricing context.

I'll then, in common with Mr Kennelly's approach, look at the pleadings to show that the lack of a clean split manifests itself here in the present case.

In so doing I will pick up another point I've made in written argument, but not touched on this morning, at least not in any detail by Mr Kennelly, as to the vagueness of Apple's case in material respects on market definition and dominance.

Then, finally, I will just sweep up some of the submissions made by Apple in relation to the clean split point.

So beginning, if I may, with the authorities.

In my submission these authorities are important because we are at an early stage in this claim. There has been no disclosure, and no factual or expert evidence, at least not in the form of final reports for trial. In considering the clean split issue at such an early stage, the CAT is necessarily engaging in an exercise of informed guesswork as to whether a split trial will turn out to be efficient or not.

So, in my submission, these authorities show they are important because they show, in actual competition law cases that have proceeded to final trials, that these issues have in fact overlapped considerably. So we say they should inform the predictive exercise the CAT is currently undertaking.

Now, Mr Kennelly, I think, accepts that there are authorities showing that the same factors can be relevant to both market definition and dominance, and also to questions of abuse, but he says: we have not pleaded our case in that way.

So essentially those authorities are not relevant in the circumstances of the present case.

Now, I will come back to that when I come to the pleadings, but in my submission the authorities are important because, as I say, they provide an indication of how matters can reliably be expected to overlap at any trial of these issues.

The first authority, if I may, is the *Albion Water* case. That's authorities 1, page 128. Sorry, that's tab 9. This begins at 124, for anyone working electronically.

If the Tribunal has that, the Tribunal will recall that this case was considered at some length at the hearing of the strikeout application in the present claim. The procedural history of the case is quite complex, but essentially, prior to this judgment the CAT had already decided that Welsh Water held a dominant position and had in fact

abused that dominant position by a margin squeeze, charging Albion a wholesale price for access to elements of Welsh Water's system that resulted in Albion not being able to compete effectively at the retail level against Welsh Water.

The matter overall was then remitted to Ofwat and it ended up coming back to the CAT on the question of whether the access price sought by Welsh Water was also an excessive and unfair price for the purposes of the Chapter II prohibition. The CAT, as I think the Tribunal knows, held that it was.

Now, fortunately we don't need to look at the CAT's analysis of matters such as the cost of sludge disposal, we can move directly to the relevant observations about the interplay between the dominance and abuse issues the CAT made in that case.

Turn to page 189, please.

I hope we there see the heading -- the second *United Brands* question:

"Was the first access price unfair?"

We see at paragraph 202 that Albion was making the submission -- and this is at (b) -- that “Dŵr Cymru was and continues to be a monopolist in a network industry protected by high barriers to entry”. So that's obviously an issue that's relevant to the question of dominance, but it was being relied on here by Albion in support of the contention that the price was unfair and hence abusive.

If we could turn to, please -- and, sorry, we'll see in a moment that Welsh Water was making the contrary submission, saying it wasn't relevant to take those matters into account at the abuse stage.

If we turn to page 192, please, can I just invite the Tribunal to read to itself paragraphs 211, 212 and 213, please, with a particular emphasis on 213.

(Pause)

So we see there, in my submission, a very clear recognition by the Tribunal, and it is rejecting, if you look at the introductory words of paragraph 213, a submission to the

contrary by Welsh Water, recognition that “factors that establish a dominant position, notably barriers to entry, may well be relevant to determining whether a price is [abusive]."

They say that's particularly true in excessive pricing cases because of the need to distinguish excessive prices that are shielded from effective competitive pressure in a case involving the dominant firm from temporarily high prices as a result of normal competition.

In fact, this is a point that this Tribunal picked up at around paragraph 74 and 75 of its judgment on the strikeout. I don't propose to turn it up, but it was a point this Tribunal recognised.

In other words, what's being said here is, the same underlying factual material can be relevant to both dominance and abuse, especially in an excessive pricing context.

We don't need to look at it, but, subsequently, the Tribunal goes on to analyse precisely that in deciding and reaching the conclusion that the prices in this case were unfair. It relies on the competitive conditions and existence of a dominant position as express support for its findings of unfairness.

I have included some other authorities in the materials which make, essentially, the same point. No need to turn it up, but the leading practitioner text, Bellamy & Child, summarises the position, and you have that at tab 39 of the third authorities bundle.

Perhaps I will briefly turn that up, because it's a helpful summary of the position.

So it's tab 39, as I say, of the third authorities bundle, page 1289.

Yes, does the Tribunal see the heading at the bottom of the page, 1291:

"Strategic barriers: conduct as evidence of dominance."

THE CHAIR: Yes.

MR ARMITAGE: So the authors say here:

"There are occasions on which behaviour may be considered in assessing

the market power of an undertaking. Although generally the issue of dominance is analysed prior to consideration of abuse, the Court of Justice has held the matters alleged ... may be taken into account in determining whether dominance exists."

Then a number of European authorities are cited in support of that proposition, which I don't think is disputed.

As we'll come to, Dr Kent's case is that Apple's exclusionary conduct in relation to the distribution of apps and in relation to payment processing is highly relevant to its dominant position on the markets identified in Dr Kent's claim form. So that is entirely in line with the proposition set out by the authors here.

Over the page, below the quotation from the *AstraZeneca* case, the authors give some examples of conduct which has been held to indicate existence of dominance. The final factor identified there is the charging of supracompetitive prices over a sustained period.

Well, that's identified there as of potential relevance to dominance. It's also obviously at the heart of our excessive pricing case in the present claim.

Now, in relation to that point, supra-competitive prices as an indicator of dominance. The authors refer to the *Phenytoin* decision by the CMA, and say the appeal, at that stage, was still pending. That's the CMA decision that ultimately generated the Court of Appeal decision in *Flynn* that was again significantly discussed at the strikeout hearing in the present claim. But, on the present point, it's the CAT's decision which is relevant and not affected by the Court of Appeal's judgment.

We've given some of the relevant extracts from what was a very long judgment at authorities 1, I think, tab 15.1, I hope.

The CAT's analysis in this case, we say, is very important in light of the way Mr Kennelly put his case this morning on the clean split point, in a way that I will come to in a moment.

So if we could pick it up at -- sorry, I have a bad reference. Sorry, I am looking at tab 15, yes. Tab 15.1. I am sorry. Yes, 594.7, under the heading:

"Other factors relied on by the CMA."

So we see, at 236, reference to the CMA relying on a number of other factors in support of its findings of dominance.

MR BISHOP: I am sorry, I am completely lost.

MR ARMITAGE: I am sorry.

MR BISHOP: Where are you?

MR ARMITAGE: We are at A1, tab 40.

THE CHAIR: You said 15.

MR ARMITAGE: Yes, so sorry. I said 15.1, but I don't know where that came from. I see. I am so sorry, for some reason the back of my 15.1 has a 40 on it. I have no idea why.

THE CHAIR: So does ours.

MR ARMITAGE: If I look at the front of the tab.

THE CHAIR: It wasn't helping us either.

MR ARMITAGE: Somebody is trying to put me off.

THE CHAIR: We are there now.

MR ARMITAGE: 15.1. Should be the final tab in authorities' 1, and it should be *Flynn Pharma* in CAT. Professor Bishop, do you have that?

MR BISHOP: Yes, I have it.

MR ARMITAGE: I am grateful. Then, if we look at page 594.7, we should have a heading:

"*Other factors relied on by the CMA*."

So the first factor identified, at 237, is market shares. That's obviously always going to be an indicator of dominance.

Then we see, at 238, the CMA was relying on Pfizer's prices and profitability as evidence of its dominant position. The CAT recognises there is a danger of circularity of logic in relying on such factors as evidence of dominance because whether prices and profits are excessive in terms of competition law is one of the key issues in the case. It's obviously one of the key issues in the present case, too:

"The CMA says it's nonetheless possible to rely on the fact the level of prices and profits to establish dominance without ascribing, at that stage, any significance to them as evidence of abuse."

Then it refers to EU jurisprudence, which essentially makes that point. These are the same authorities that were cited in Bellamy & Child.

Then, over the page, at 241, there's a key paragraph:

"We agree with the CMA and provided only objective facts are relied upon, then they may be relevant to establishing the existence of dominance as well as having to be examined to see if they contribute to a finding of abuse."

In my submission, that's the answer to a point Mr Kennelly made on a number of occasions earlier.

At no stage have we suggested that one needs to determine the question of abuse in order to decide the issues of market definition and dominance. The lack of a clean split doesn't arise because you have to determine the question of abuse at the first stage of trial. It arises because the same facts, and therefore the same evidence, including disclosure, may be relevant to both issues.

It may not be relevant in entirely the same way, but, as we see from these authorities, it's something that clearly may be relevant to both aspects of the enquiry, and that's the lack of clean split.

THE CHAIR: One of the things I think Mr Kennelly says is that insofar as dominance goes this is a different case, because if you are right, then you are straight into

a monopoly situation and dominance doesn't really arise as an issue.

MR ARMITAGE: Yes.

THE CHAIR: So I suppose the question -- these extracts you've shown us all seem to refer specifically to determination of dominance.

MR ARMITAGE: Yes.

THE CHAIR: Are you saying that the same principle applies to the exercise of market definition or is Mr Kennelly right in indicating to us -- I think Mr Kennelly is saying that dominance isn't going to be an issue if Dr Kent's case is correct.

Now, there may well be some other scenarios that come into play that we've talked about. But, just on that, and putting aside the pleading point for a minute, where are you on that?

MR ARMITAGE: Well, in order to understand whether there is going to be the same lack of clean split in relation to issues of market definition and abuse -- this authority and a number of authorities are about market definition.

We've referred in our written argument to another judgment of the CAT in which essentially the same point is made in relation to market definition. That's the *Paroxetine* case. There's a bit of a debate on the written arguments about that. It was not touched on by Mr Kennelly this morning. I was not proposing to go to it because I don't think it's essential. It's better to look at it by reference to the pleaded case.

We say once one does that, it's the case that our pleaded case on market definition overlaps considerably with the case on abuse.

It's not a matter of just reading across from what we say about monopolists and say: that's all you need to know.

Partly the reason why that's not an appropriate approach is one needs to consider Apple's defence, which also, as I'll come to, involves considerable overlaps. One

needs to think about: what is the evidence that's going to be necessary both to make out our case, but also to address Apple's case?

I think it's better to respond to that point to by reference to the pleadings.

But, actually, as I say, when we come to look at what Dr Kent says about market definition, what she says is: you need to take account of what the parameters of competition would look like absence the alleged restrictions.

That's exactly the same sort of question one needs to ask when considering what the effect of the conduct is, the counterfactual issue.

THE CHAIR: I don't want to hurry you in relation to, if you like, the Apple case. I completely see you need to come to that in your own time, and I don't want to rush that.

MR ARMITAGE: Yes.

THE CHAIR: But just on that very, if you like, narrow, first point, if you were to, for example, consider barriers to entry, now you might, ordinarily, be very interested in barriers to entry because they would help you understand what the constraints were for somebody entering the market and, therefore, what other supply side substitutability there might be, but again I think Mr Kennelly is saying: on a construct that the market, as Dr Kent argues, defined by iOS apps sold to iOS users, you don't need to get into that debate.

MR ARMITAGE: Well, it needs to be taken with some care. Mr Kennelly, I think, said this morning -- confirmed that his client denies dominance even by reference to the market definition put forward by Dr Kent.

Now, the point I am about to make might not be available to me if in fact Apple were saying: we admit, if you are right about market definition, dominance follows ineluctably.

That's not what Apple are saying, as I understand it, from their skeleton argument

and confirmation this morning.

Therefore, one needs to think about what evidence, other than essentially market shares alone, which is never anything other than a first indicator. So the fact that Apple is a monopolist, we say -- we rely on that in support of our case on market definition and dominance, but one needs to think about what evidence is realistically going to be relevant in addition to market shares. Profitability is obviously a key part of that. But then it's also obviously relevant to the abuse enquiry, particularly the excessive pricing claim.

So in order to respond to Apple's defence, i.e. the contention that Apple is not dominant, even on the markets as pleaded by Dr Kent, that's exactly the sort of evidence one is going to need to look at.

THE CHAIR: Yes. Because, actually, an awful lot of it either comes back to contractual and technical restrictions, as some -- Apple puts it, or to pricing.

I mean, I am not saying that's the universe, but those are the two we seem to come back to again and again, and I think you are saying there's a question as to -- you are saying pricing and profitability definitely comes into it. You are saying that's definitely in play.

MR ARMITAGE: Yes.

THE CHAIR: This pleading point against you. I am sure you will come on and address that.

You are also saying the exclusivity provisions can't be dealt with as neatly as Mr Kennelly would argue because of -- and this is making a compete concession in relation to dominance. There is still some relevance about the consequence, the effect that the exclusion provisions have on the markets generally that are affected by that.

MR ARMITAGE: Yes.

THE CHAIR: Have I understood that correctly?

MR ARMITAGE: Yes.

THE CHAIR: Thank you.

MR ARMITAGE: So, yes, I am just reminded that -- yes, sorry, just to complete the point on *Flynn*, 244, it just makes essentially the same point. It's looking at Pfizer's prices and findings without in any way pre-judging whether Pfizer and Flynn's prices were excessive and unfair so as to infringe competition law:

"It's possible to state, as the CMA's finding indicates, that [its] behaviour in relation to prices was not, to an appreciable extent, subject to competitive constraint from its competitors or customers."

So, again, the point is you don't need to reach a conclusion on whether the prices charged by Apple were anti-competitive, in the sense of being excessive, unfair and abusive, in order to determine the question of dominance, but you do need to look at the same factual material, or at least it's highly relevant to do so and that's what's envisaged.

So those are the authorities.

I am then going to turn to the pleadings, if I may?

You have obviously seen these at some length already this morning, but I hope the Tribunal will forgive me for going back over them in some detail because it's really central to this question of clean split.

So beginning with -- sorry, just to remind the Tribunal, the submission I am responding to here is, in the words of paragraph 21 of Apple's first skeleton:

"[A submission that] there is a clear delineation between both parties' pleaded cases on market definition, dominance and abuse."

Now, in a trivial sense, that's true. They appear under different section headings of the pleadings, but beyond that there really is not this clear delineation that is referred

to there by Apple.

So the claim form -- if I look at the right side of my tabs -- is at 11 of the first core bundle. You will forgive me for summarising, to an extent. The Tribunal now has well in mind that we complained in relation to our exclusionary case about two sets of restrictions, the so-called app distribution restrictions referred to at paragraph 63, and also the payment system restrictions referred to at paragraph 66.

Then, of course, we also have the claim that relates to the level of the commission, the excessive pricing claim, and that's set out at paragraph 70.

But let's see, in relation to those aspects of Apple's conduct -- which are obviously central to the abuse case -- how they are bound up on the pleadings with the issues of market definition and dominance.

Now, Mr Kennelly said this morning that he relied on the simplicity of our pleaded case. Well, we may rather welcome the suggestion it's simple, but it's hotly contested, as you have seen, by Apple. Apple has not, for instance, admitted that if we are dominant -- sorry, if we are right on market definition, then Apple is definitely dominant.

Still less has it conceded that if we are right about market definition and dominance, then abuse follows as a matter of course.

So that's the background.

If one turns, please, to paragraph 76, which is the start of the pleaded case for Dr Kent on relevant markets. So she says:

"By virtue of the facts and matters set out above, [that of course includes the description of the two sets of restrictions that are in issue] there are two key product markets in issue in these proceedings" that's iOS app distribution and iOS payment processing.

Then, at 77, by reference to Mr Holt's preliminary analysis, and I emphasise

preliminary, we plead the existence of a discrete economic market for the distribution of iOS apps to iOS device users. We say that it includes all actual and potential means of distributing iOS apps to iOS device users.

Then, at 78, this is essentially the particulars in support of that identification of the relevant market. It's said:

"…iOS App developers require their iOS Apps to be distributed to iOS Device users. At present, and as a direct consequence of the App Distribution Restrictions, the only available means of distribution is via the App Store. In the absence of the App Distribution Restrictions, iOS Apps could be distributed by other channels of distribution…including other App Stores and…direct downloads from websites."

So the pleaded case is that in order to identify the relevant market one needs to consider the scope of not only actual competition, but potential competition absent the restrictions. So what constraints will operate on Apple both actually and in that situation in which the app distribution restrictions, rather, are not in place.

Now, as I have already foreshadowed, that's also at the heart of what we say about abuse, and in particular the counterfactual. If I could take the Tribunal on to paragraph 112, which is at page 70, we see the pleading on the relevant counterfactual.

Perhaps unsurprisingly it begins with the words:

"Absent the App Distribution Restrictions and Payment System Restrictions."

Then there's a detailed pleading as to what one would expect to see happening in a competitive market.

Now, it doesn't follow from what I have said that the same factual issues arise in relation to both market definition, dominance and the counterfactual. That it's the same enquiry, or identical enquiry at both stages. One might expect, for instance, in relation to the counterfactual one is looking rather more precisely of the affect on

competition by reference to the counterfactual, but the key point here is on our pleaded case, which is defined by reference to the analysis that Mr Holt has said that he's intending to carry out. One is looking in both instances that same point: what would happen absent the conduct complained of?

So we say that's a very clear example on the pleadings of the absence of a clean split.

There are a number of other examples.

Paragraph 81, page 62, this is the iOS payment processing market, pleaded as another distinct relevant market, and we see two particulars, if you like, supplied in support of the relevant markets, in paragraphs 82 and 83. 82, and again a reference to Mr Holt's first report:

"payment processing services and app distribution services serve distinct needs on the part of iOS Device users and iOS App developers and therefore constitute separate functionalities in distinct markets."

So that's the first reasons given for why this is a discrete, relevant market.

But if we could turn on then to page 67, paragraph 101, this is Dr Kent's pleading in relation to an aspect of the tying claim, so one of the exclusionary abuses that's pleaded?

We see here a pleading as to the existence of separate products. So the claim here, essentially, is the App Store and the in-app purchasing mechanism are separate products that are abusively tied together by Apple.

But it's dealing in terms -- and this one of the case law requirements for a tying abuse -- with the question of whether the two products are indeed distinct products.

Paragraph 102 refers to factors that are relevant to whether the two products are distinct. Then paragraph 103 specifies the factors that we say demonstrate that these are distinct products in this case. The reference to independent demand for

payment processing systems, which should therefore be considered a distinct product from the App Store. Then, over the page, there are a whole list of factors, functional differences, other undertakings, supplying payment processing services, and distance of demand for alternative payment processing systems.

But then if you'll forgive me for flipping back to paragraph 82, well, that's essentially the same point that's being made in the context of market definition in relation to the payment processing market, so another clear overlap on the pleadings.

THE CHAIR: If you were to take that as an example, Mr Kennelly says -- he acknowledges there may be some connection between front and back end, and says if you deal with those in part 1, then you've dealt with them and that's fine. So if you were looking at this here, you have this question of whether a separate product or not, or distinct needs, if you like.

MR ARMITAGE: Mm-hmm.

THE CHAIR: Then, as you say, in 101, the analysis there.

MR ARMITAGE: Yes.

THE CHAIR: What do you say about the feasibility. Just taking this as an example of the feasibility of Mr Kennelly's approach, where you, as I understand it, you would just deal with this in part 1 and it would be dealt with when you came to part 2.

MR ARMITAGE: I have some points to make in general on his revisitation. The idea that you can just make findings, bank them, and then apply them at the second trial. That's certainly not feasible, generally.

THE CHAIR: I don't want to hurry you, but I think what's interesting and helpful is to have some examples of things and to work them through.

MR ARMITAGE: That's exactly what I am trying to do.

In relation to this point, as an example, again, we are not answering the same question at the proposed phase 1 trial.

THE CHAIR: Yes.

MR ARMITAGE: So, in relation to market definition, so paragraph 82, the point being made is that the two services, so app distribution and payment processing services, serve distinct needs and they constitute separate functionalities and distinct markets.

THE CHAIR: Yes.

MR ARMITAGE: Now, the question in relation to tying is not whether the two services are in the same market; it's whether they are separate products.

THE CHAIR: Yes.

MR ARMITAGE: So it's not the same legal question. It's just that the factual material that's relevant to answering the two questions -- in this case the sort of factors set out at 103 -- overlap, and that's the reason it's efficient to consider them all in one go.

I will take the Tribunal, at an appropriate point, to what Mr Justice Zacaroli said about that in the *Churchill Gowns* case, when considering, in that case, there shouldn't be a split trial where issues of causation were hived off to a second stage trial. He said:

"The risk is ..."

And perhaps I'll turn it up now because it's convenient, actually, because I think it answers the point quite neatly. So it's authorities two, tab 18.

At page 722, paragraph 14 of the ruling, he is here finding that “the extent of the duplication in this case” -- admittedly that's in relation to a different proposed split, so I am not suggesting it's directly applicable -- he says the extent of duplication arising from the lack of a clean split, that is in that case, points against splitting the trial:

"First, there is a risk that the preparation of the evidence, the cross-examination in relation to it, and the Tribunal's consideration of it at the first trial, if only infringement was in play, may not be as extensive, and the Tribunal's findings may not be as

extensive, as they would be if it was being considered in the context of all issues to which it related. There is scope, it seems to me, for matters falling between two stools."

The second point he makes is:

"If the evidence is all going to be given in the first trial, including expert evidence relating to infringement and causation…what would be the real saving in terms of time and cost in deferring the determination [a causation issue here] until later?"

So I think it's principally the first paragraph, but in a subsidiary way the second paragraph as well.

The point is, and this is a point that arises from the *Flynn* case which I took you to, at the first stage trial, contrary to the implication of what my learned friend was saying this morning, we are not saying one has to characterise the relevant conduct as abusive in relation to the tying claim, for example. We are not saying one has to answer the question of whether the two products are separate products, which is an element of the tying abuse. As I say, we are saying that relevant factual material overlaps considerably. But the risk is: if you consider the points separately, the Tribunal does not have as complete a picture. It's much better for these points that rely on a common factual underpinning to be decided in one go, to avoid the risks Mr Justice Zacaroli identifies.

THE CHAIR: So, just if you don't mind, coming back to 82 and 101, just to work that through here.

MR ARMITAGE: Yes.

THE CHAIR: So you are saying you would have disclosure, witness evidence and expert evidence directed to the question of whether the payment processing service and distribution services constitute separate functionalities in distinct markets.

MR ARMITAGE: Yes.

THE CHAIR: So that would all be deployed in part 1.

You say that when you come to consider the point about separate products in 101, you are looking at some common fact material, perhaps not always completely common, but there will be some common fact, but you are actually saying you are reaching a different legal conclusion in 101 --

MR ARMITAGE: Yes.

THE CHAIR: -- on the basis of that material.

So, in fact, you have not decided anything at the preliminary issue hearing about that.

MR ARMITAGE: No.

THE CHAIR: But you may have decided -- we may have decided some factual considerations which might have implications for what we then did in part 2.

MR ARMITAGE: You may decide some factual points that are relevant to the part 2. The point is you have not decided the question that arises at the second stage and, therefore, you are going to need to go back and consider the factual material again.

THE CHAIR: The factual material may or may not be precisely the same, might it? If there are separate questions, it's possible there may be --

MR ARMITAGE: It may be.

THE CHAIR: There's not a complete overlap.

MR ARMITAGE: Yes, there wouldn't be an overlap, but the point is it's efficient to consider it once, in one go, rather than twice by reference to two different legal questions.

MR FRAZER: But, in *Churchill Gowns*, the danger being pointed to was that matters may fall between two stools. What I understand you to be saying is it's not that matters are going to not be regarded properly, but they might have to be looked at twice, or the same factual matrix may have to be looked at twice; that's a little bit

different, isn't it?

MR ARMITAGE: Yes, it may not be the falling between two stools point, necessarily. That always something to be borne in mind. It's more the first aspect of the bit of *Churchill Gowns* I took you to, namely the risk that if matters are only considered by reference to the legal question, if you like, that arises at the first stage that the consideration may not be as extensive, you may miss points, you would not miss if you considered matters on an holistic basis, if you like.

MR FRAZER: I see.

MR ARMITAGE: To be clear this is one of a number of examples where this overlap point arises. We say it happens in a number of different places. You have two different legal questions and this common underlying factual point.

So, just to take another example that's been discussed, not necessarily by reference to the pleadings now, profitability.

Now, there is a pleading point Mr Kennelly has made, and I will come to that. But I think what can't be denied in terms of relevant evidence, the question of an undertaking's profitability is relevant as a potential indicator of market power. We've seen that from *Flynn*, for example.

Now, that same evidence, or to an extent that same evidence is going to be highly relevant to an excessive pricing enquiry, but that doesn't mean you are looking at it in a way, at first trial, that allows you to essentially not have to revisit it at the second stage trial. There's no conceivable basis you would not be going back and looking at the same points to determine whether that evidence supports a finding that the price is excessive and unfair for the purposes of a Chapter II prohibition.

So it's not the same enquiry, it's just an enquiry that involves looking at the same underlying material, and it's much more efficient, just obviously, to do that on a single occasion.

While we are still -- if you have the pleading to hand, that was the first reason, or first particular given in support of assistance of iOS payment processing market.

The second reason, again by reference to Holt, is the allegation that payment processing services which are available within iOS apps that sell physical goods and services are not a substitute for the payment processing services available for relevant purchases given the payment system restrictions. So the point here is in relation to certain kind of apps, as we say here, those that sell physical goods and services, so Deliveroo, as an example, the payment system restrictions don't apply. That's a matter that will need to be explored in this case.

But what is said here, and this is exactly the same point that arose in relation to the definition of the iOS app distribution market, is one has to look at the payment system restrictions in order to understand the parameters of this payment processing market, hence the words at the end of 83:

"Given the Payment System Restrictions."

So one looks at the conduct as a matter that's relevant to the question of market definition.

Then, on dominance, much the same point arises. So, at paragraph 85, we see pleaded very clearly indeed in support of the contention of the dominance:

"Apple does not permit any competition on either of the two relevant markets."

Then it's the app distribution restrictions and the payment system restrictions that are relied on as establishing a market share, in this case, of around 100 per cent.

Then, 86, Apple is thus able to conduct itself independently of both competitors and its two sets of customers. So its reliance on the effect of the app distribution restrictions and the payment system restrictions as underpinning the allegation of dominance.

I will come back to the question of what may be relevant evidence.

But what is certainly indicated is the conduct that is said to be abusive is also being relied on in support of a finding of dominance. That's an approach that's entirely consistent with the authorities I've shown you. It does not involve any characterisation of those restrictions, any necessary requirement for the Tribunal to decide whether those restrictions are abusive or anti-competitive, Mr Kennelly put it, at the first stage trial that they propose. But it would involve considering the nature of those restrictions and their effect, not characterising that effect as unlawful or not, but looking at that effect and how that affects Apple's market power.

These are not peripheral overlapping points, they are right at the heart of the claim.

So if you could just note I am about to leave the claim form.

I just want to note there's currently no plea that Apple is dominant on any other market than those pleaded here. That's significant when it comes to Apple's submission that a single trial would be excessively complex and involve multiple different permutations. That's also an important point. I am going to come to that under my second topic or third topic, I think. We say, on the current state of the pleadings, that's incorrect.

Now, there is an issue about it the vagueness of Apple's pleadings that wasn't addressed by Mr Kennelly in his submissions this morning, and I will take the Tribunal to that as we go through the defence. That's significant.

But in terms of the question of whether a split trial is a sensible approach, one has to look at the pleadings as they currently stand.

As it happens -- I am sorry.

THE CHAIR: Carry on.

MR ARMITAGE: I am so sorry.

Yes, so I was about to say: I am about to leave the claim form. In my submission, the overlap that one sees from the claim form would be sufficient in itself for you to

conclude that the issues can't be cleanly split off, because regardless of how Apple's put its defence, if it approached the issues in a way that was clean split from the issues of market definition and dominance on one hand, abuse on the other, that wouldn't matter because even if that was the case Dr Kent's approach would still need to be tried, and the overlaps would arise.

But, as it happens, one does see in a number of respects a similar lack of clean split on Apple's defence.

THE CHAIR: I actually take the point about the way the case is pleaded. There was some debate we had with Mr Kennelly about the possibility that we might end up with somewhere in between.

MR ARMITAGE: Yes.

THE CHAIR: And perhaps you are going to come on to talk about that in the context of the --

MR ARMITAGE: I was, but perhaps I will just deal with the point head on.

THE CHAIR: Well, yes, that would be helpful. I think the question really is -- well, two questions, I suppose. One is: are we entitled to think about what might unfold, as opposed to what has been pleaded? But it seems to us we probably should be doing that because we have to anticipate it may not be as straightforward by the time we get to that part of it.

Secondly, what's the world of reasonable possibility? When we get to that point, what sort of different permutations might we have in between the case as pleaded here and the case as pleaded by Apple.

MR ARMITAGE: Yes, I will deal right now with the permutations point and the possibility of a halfway house.

So, yes, in answer to the question of: are you entitled? Should you consider how things might develop?

Certainly in regards to evidence that might be relevant, that's something you should definitely do. That picks up a point that Professor Bishop made. We completely refute the suggestion Mr Holt's report is anything other than preliminary. He makes that point, I think, in paragraph 1 of the report, and it covers both market definition and dominance, and what he says about the conduct.

There's a distinction, of course, between what's pleaded -- so is this the relevant market -- and the evidence that's going to be relevant in support of that pleading. So the idea of evidence of profitability, for example, or carrying out a SSNIP test, the suggestion we've not pleaded that and, therefore, that's not going to be relevant to the Tribunal's analysis, that's just wrong.

I will come back to that specific point.

Now, on the halfway house point, can I just take this in stages?

So, as the pleadings stand, subject to what we said about the vague nature of what Apple says about market definition, there are essentially four markets in issue. So there are the two markets we identify, and then there are the two transaction markets that are given as examples in Apple's defence.

Now, obviously, therefore, we are going to be leading evidence on abuse by reference to the market definitions that we put forward, and that includes the point that was made by Mr Kennelly by reference to the reply about: well, you might have submarkets, but in our submission, if there are submarkets, they will also be iOS specific markets, so it doesn't make any difference.

Whether that actually affects the scope of our abuse evidence, I doubt.

As it stands though, on the pleadings, we don't say Apple is dominant on, or has abused a dominant position on the alleged transaction markets. So, in terms of the permutations, I think it's common ground that if Apple wins at the first stage trial on both market definition and dominance, well, the whole case goes away, and

obviously we are not disputing that would give rise to a saving. That's obviously right.

By the same token, though -- and it's relevant here -- that Apple recognises, in its skeleton argument, the cases on market definition as they are currently pleaded are mutually exclusive, so we win on both market definition and dominance on Dr Kent's primary case. Well, that has no effect on the scope or complexity of a second stage trial because we would be leading all the same evidence.

So the point arises out of a suggestion which I think was made for the first time by Mr Kennelly this morning, that one could have a halfway house where, in the example he gave, Apple persuades you there is a discrete non-iOS specific market for gaming transactions. The example he gave, I think that's because it's the biggest subset of apps by some distance. So he persuades you there's a discrete market for gaming, ie you reject Dr Kent's case, at least to that extent, and persuades you that Apple is not dominant on that alternative market, as I say, we don't currently allege that Apple is.

On this halfway house hypothesis, what we are envisaging is that otherwise you conclude that actually, save for gaming, there is an iOS app distribution market, as Dr Kent suggests, and that Apple is dominant on that market.

So that gives rise to, in that sense, a permutation point. Now, in my submission, we recognise that, I suppose, as a possibility. But what we say is: it's very doubtful why avoiding that possibility through a split trial proposal would lead to considerable savings. So Mr Kennelly pointed, this morning, to the size of the gaming market, saying: that's a very large proportion of all transactions. But it doesn't follow from that alone that getting rid of gaming would reduce the scope of the abuse enquiry at the second stage trial.

So, on the exclusionary aspect of the case, the conduct we complain of, the app

distribution restrictions and the payment system restrictions, that doesn't vary as between different types of apps on our pleaded case, and as we understand the position to be, it's the same conduct that applies to all apps, subject to some exceptions of the kind already mentioned.

So, in relation to that enquiry, we don't see why stripping out gaming would involve any lesser burden in terms of analysing the restrictions.

In relation to the excessive pricing part of the case, I have not had time to discuss this, for example, with our experts and so on, but it seems to me the fact that gaming is not in the picture anymore as a potential source of abuse, doesn't follow from that, that gaming suddenly becomes utterly irrelevant to the excessive pricing claim. You might think you have an adjacent market which, on this hypothesis, Apple isn't dominant. That might be something one needs to consider, the experts need to consider in determining the excessive pricing claim.

I am saying that essentially without instruction, without discussing it with my expert. It seems plausible, at least, that there could well be a consideration of that market, even if it's not on the table as a potential market in which a dominant position has been abused.

Now, in relation to another very important aspect of Apple's case on abuse, objective justification, which they say: one of the great advantages of a split trial proposal is that you may not need to consider objective justification, and that's going to be a very costly and time consuming issue. Actually, I will come to show you that's not right on the pleadings, on their own pleadings. But, anyway, their case on objective justification is entirely independent on the type of app.

They don't say there are particular justifications that apply to gaming apps, as opposed to different apps. They put these privacy and reliability justifications, and so on, forward, as applying across the board, so we don't see how there's going to be

a saving there.

Finally, Mr Kennelly's case was that essentially, following the first stage trial -- he put this in a number of different ways, but he said you'd essentially have inputs you require on the question of competitive constraints, on the question of foreclosure, as he described it. So, on this hybrid approach, this halfway house hypothesis, on Apple's case and on Mr Kennelly's case, your first stage trial would already have answered all the questions you need about the competitive constraints in the gaming market.

Therefore the fact that gaming then falls out of the picture in relation to abuse at the second stage trial doesn't mean there is a saving in relation to considering competitive effects on that market because you've had to consider them in relation to the question of market definition and dominance, which is also a matter of looking at competitive constraints at a first stage trial.

So we see there's any number of reasons why it's important to emphasise here there's no quantification from Apple of the savings that arise from this potential halfway house. We say that shouldn't be overstated.

We are not saying there would be no saving whatsoever, but we say it's considerably overstated and there are reasons to think it would be limited, and certainly outweighed by the increased costs arising from all the other overlap issues I have identified.

So can I then turn to Apple's defence, to show you how some of these overlaps arise?

Because, in my submission, Mr Kennelly skirted over some of the important points here.

In fact, I am sorry, could I first actually turn to look at what Apple is actually proposing in terms of its first stage trial?

We have not, I think, looked at that yet. It's tab 8 of the first core bundle.

You see, at paragraph 2 of the application:

"The defendants seek… a trial of the matters pleaded at re-amended claim form 76 to 86 and defence 55 to 95."

Now, all it's done there is pick out the sections of the pleadings, the parties' respective pleadings, so they are entitled market definition and dominance. In relation to the defence, can I make initial observation about that?

Apple's defence does not contain a set of factual allegations that are said to be relevant to the question of market definition and dominance, and then another set of factual allegations that are stated to be relevant to the abuse case.

It contains one long section, section 4, entitled:

"*Background to the alleged infringement*."

Then what one finds is that substantial parts of that factual background section are incorporated by repetition into both the market definition and the dominance sections, and the abuse sections of the pleading.

So, in actual fact, when one looks at it -- and will come to some examples -- what Apple is proposing is not a clean, hermetically sealed trial of market definition and dominance. It's actually bringing in all these factual issues which are equally relevant to the abuse case. So even on its own proposal, by reference to its own defence, there's not a clean split at all.

So could we look, first, then, at defence, tab 14, page 179.

We see, at the top of the page, the heading:

"Relevant markets."

Obviously, the Tribunal has been taken through a number of these paragraphs before, but I hope you'll forgive my returning to them with a slightly different emphasis.

Paragraph 55: “Paragraph 76 is denied.” So that's a denial not just of the relevance of the markets that Dr Kent has identified, but a denial that they are properly defined. Essentially a denial there are markets of that nature at all.

Then paragraph 56 is, if you like, the summary of Apple's positive case. So they talk about the App Store being a transaction platform. They say:

"The relevant product that Apple supplies through the App Store is the facilitation of digital transactions, for which Apple charges a commission when a developer imposes a positive purchase price on the purchase of digital content. The Commission is not only consideration for the distribution of the digital content and collection of payments, it is also consideration for Apple's provision and regular improvement of the proprietary technology through which the digital content is created and consumed."

Here is a sentence Mr Kennelly did not read out when he read from this paragraph earlier:

"Paragraphs 28, 35 and 41 to 45 above are repeated."

It's interesting to see what that then incorporates into the case on market definition.

So just to take the repetition of paragraphs 41 to 45, that's back at page 173 -- sorry, that's paragraph 41, if the Tribunal has it.

THE CHAIR: Yes.

MR ARMITAGE: We see there, in the third sentence, this is a pleading about what the effects would be if essentially the app distribution restrictions were not in place, and so “allowing iOS Apps to be distributed outside the App Store…would deprive Apple of one of its primary quality control mechanisms: app review…upon App Store submission. That would jeopardise the user’s experience of iOS Devices ... would result in a lower-quality platform and fewer transactions, thereby also reducing its value to developers. Apple's approach improves (i) security against malware; (ii)

reliability; (iii) fraud protection; (iv) privacy (v) quality of available apps; and (vi) protection of intellectual property. It is pro-competitive and increases consumer choice ..."

Now, those factual allegations probably look familiar because they are the very factual allegations that are later repeated in relation to the case on objective justification.

Now, in its skeleton, paragraph 37, Apple said in terms that the case on objective justification is only relevant to the abuse trial, if there's going to be two trials. In fact, it specifically relies on paragraph 41 of the defence when it makes that point.

Now, it's true that the legal question of objective justification is only relevant to the abuse trial, and there are any number of legal requirements that are contained within that objective justification defence.

But the point here is that through that repetition of this paragraph directly as providing support for the case on market definition, Apple on its own proposal is bringing all these allegations into the scope of the first stage trial. It couldn't be a clearer example of a lack of a clean split by reference to one of the very issues that Apple prays in aid as showing its split trial proposal would have all these efficiencies and save all this time and cost.

Paragraph 42, which is also included in the case on market definition because of that repetition as well.

A whole host of allegations about Apple allowing developers access tools for iOS for free, charging an annual fee which is very low, it says, of $99. It talks about how successful the business model option has been.

Then there's even a pleading here:

"Apple's choice of that business model constitutes “normal competition” or “competition on the merits” within the meaning of the abuse of dominance..."

I am not sure they intended to incorporate that sentence within their proposal for a preliminary issue trial. But the key point isn't really that; it's that the factual allegations here -- which are clearly at the heart of the whole case -- are again within the scope of its split trial proposal.

The point goes on: there is a whole load of detail in 43 to 45 about the payment system restrictions and the way in which they are enforced. I mean, those are the very conduct that's said to be abusive, but they appear to be within the scope of the preliminary issue trial.

Another, in my submission, compelling example of an overlap that arises on the defence, if one turns to paragraph 61, at page 180.

So this is part of the particularisation, or partial particularisation, of the proposed market for digital gaming, or an alleged market for digital gaming transactions.

61, it talks about substitutability from the point of view of consumers in relation to gaming transactions.

Then, over the page, at subparagraph (a), we see the following pleaded:

"Consumers may choose to download the game through one or more of those platforms [so non-iOS platforms] and make transactions on…other devices instead of making transactions on an iOS Device..."

Then they say:

"or consumers may purchase additional digital content of the kinds referred to in paragraph 51 above through one of those other platforms, and then use that digital content when playing the game on their iOS Device or vice-versa."

Now, that's a reference to rules that are part of the system of app distribution rules that we take issue with in these proceedings. You may have seen reference to this in the defence, the so-called reader rule and multi-platform rule. Essentially, it allows you to take digital content purchased on one platform. So say you've paid to access

a song on Spotify, you then, via the operation of these rules, are able to use that content within your iOS Spotify app without having to pay again, essentially. That's the point.

It's set out in detail at paragraph 38 of the defence, those rules.

So what Apple is saying here is that this shows that Apple faces competition from other gaming platforms and this is relied on specifically in the context of what the market definition is.

But, as we see from later in the pleadings, the multi-platform rule is also relevant to the abuse case on Apple's defence.

That's partly clear from just a general consideration of the conduct that we complain about. This is one of the rules that forms part of the app distribution restrictions. In fact, this rule is not a restrictive rule, but it's part of the contractual provisions that Mr Kennelly referred to this morning.

Then, if we look at paragraph 123, for instance, page 194, and it's in the context of Apple's response to the tying claim, so the exclusionary abuse allegation, one of those allegations. We see the second half of that paragraph:

"developers are not required to monetise their digital content through Relevant Purchases. There are numerous other ways in which developers can transact with consumers or otherwise monetise their digital content that do not involve using Apple's commerce engine."

Then, among other things, paragraphs 38 -- well, paragraph 38 above is repeated.

If one goes again -- apologies for flipping between bits of the defence. If one goes back to page 172 and looks at paragraph 38, we see again, about halfway through the paragraph, almost exactly the same point:

"Developers can choose to monetise their apps through a combination of options."

Then we see, just after the semicolon, in the final line:

"…its “Reader” and Multiplatform Services rules enable certain digital content purchased elsewhere…to be accessed through iOS Apps without a commission being due to Apple."

So that rule, multi-platform rule, is said to be relevant to the scope of the relevant market, but it's also relied on as a defence to the coercion aspect of the tying claim, so that's another very clear overlap. There are a number of others. These are by no means exhaustive examples.

I don't know if that's a convenient time? If the Tribunal are proposing to --

THE CHAIR: Yes.

MR ARMITAGE: I am about to move on to -- I am still on the defence. I want to deal with the point about the vagueness of the pleading.

THE CHAIR: How long do you think you are going to be, Mr Armitage? I don't want to rush you, just have a sense of how this is going to evolve.

MR ARMITAGE: I am not sure how long the Tribunal is able to sit today. I very much hope to finish today, but I do have a number of other points to make. I think I probably need -- well, certainly another hour.

THE CHAIR: Yes, and then Mr Kennelly will no doubt have some things to say.

MR ARMITAGE: I don't know where that leaves us today.

THE CHAIR: We can have a conversation about that when we have a break and see what we can do.

Just so I am clear, Mr Gibson, I know we have not come to your bit of it, and we are doing it in a slightly odd order. It means we won't be doing it until tomorrow, but were you anticipating wanting to say anything about this subject -- which may cause there to be some questions for your learned friends, but were you anticipating saying anything about this?

MR GIBSON: No, sir.

THE CHAIR: That's helpful. Thank you. That will certainly help with timing. Thank you.

MR ARMITAGE: I ought to have updated you. I actually checked that with Mr Gibson beforehand because I thought that may be a relevant consideration in terms of timing.

THE CHAIR: That's helpful. We'll take 10 minutes, and start again at 3.20.

(3.10 pm)

(A short break)

(3.20 pm)

THE CHAIR: Mr Armitage, I think, on timing --

MR ARMITAGE: Yes.

THE CHAIR: -- and no desire to hurry you at all. I want you to have plenty of time. I think we do anticipate it might be quite difficult to get to the point where you have finished and Mr Kennelly has done his bit, and then we are able to give you an answer this evening. So that may mean that it makes more sense to continue tomorrow, rather than go after 4.30. But we could sit after 4.30, at least until 5 o'clock, if that was helpful. But I think you shouldn't anticipate you'll get an answer from us this evening about what we --

MR ARMITAGE: That I understand. So I suspect -- well, finishing by 5.00, I think I have another -- possibly a bit less than an hour. So we could finish the submissions today. It's up to the Tribunal if it wants to make a decision tomorrow and we are here.

THE CHAIR: Let's see how you go. Maybe, Mr Kennelly, you could update us when you get on your feet and say how long you are going to be.

It does have the consequence, I think, for the purposes of tomorrow, it may mean that the parties need to be preparing two timetables --

MR ARMITAGE: Yes.

THE CHAIR: -- for discussion. I am sorry about that if that involves extra work. I rather hope it won't involve too much extra work, because I suspect you've been doing some of that already, and we have some evidence of that.

But to the extent you were planning to have discussions about what you could and couldn't agree, that obviously would be helpful if we were to do it in relation to two. If it's convenient, we can probably find some time after we've told you what we think the answer is to let you go away and have further discussions. I think we have enough time tomorrow morning to deal with this one way or other.

MR ARMITAGE: I think once this issue is out of the way, as it were, no doubt a little bit of time to perhaps circle the wagons, have a discussion about where that leaves us and what might be agreed in terms of timetable would be welcome.

As you say, we have time tomorrow. It's an important case management point, obviously. So, yes, I think, yes, that sounds entirely sensible.

THE CHAIR: Yes, I am not anticipating other items on the agenda will take very long. I hope I am not proved wrong on that.

One thing we would say just while we're on the subject of timing, and while you are thinking about that, we would like to see as prompt a timetable -- whichever path we are on, as prompt a timetable as possible.

MR ARMITAGE: Yes.

THE CHAIR: We would very much like to resolve the parties to get on with this case. We think it's been sitting around for nobody's fault and no blame being attached to anybody, or, if anybody, perhaps to the Tribunal's processes, but we feel the case needs to be pushed along as fast as it sensibly can be.

So, when you are thinking about timetables of any sort, it would be helpful if you would bear that in mind.

MR ARMITAGE: Dr Kent would certainly agree with that.

We were still in the defence, and I pointed to the number of examples in which this lack of clean split arises.

As I say, I have not purported to give you an exhaustive list, but I hope I've shown you good number of examples.

I wanted, briefly, while we are still in the pleading on market definition just to touch on the point about the vagueness of the pleading. I will explain, just briefly, why I say that's relevant to the Tribunal today. This isn't a point that was addressed in any detail by Mr Kennelly this morning.

So, in my submission, it's obvious and axiomatic that a split trial should not be ordered until the pleadings have closed and the extent of the dispute between the parties is crystallised. That's because the Tribunal needs to know what territory any split trial will need to cover, for example, when thinking about how long the first stage trial on the preliminary issue would need to last.

It's similarly axiomatic that market definition -- which is a central issue, a central element of the Chapter II prohibition needs to be clearly pleaded. It's not good enough just to say: well, we'll give you our case on market definition in our expert evidence later on.

But Apple's approach, in my submission, is contrary to those axiomatic points in a number of respects, and I will give some examples.

So, paragraph 59, this is about the relevant product markets, and we see:

"Apple identifies the following relevant markets by way of example, to illustrate the reasons why multiple transaction markets exist. Apple reserves the right to develop its case on market definition further in evidence at trial, including by defining further examples of transaction markets relating to other types of digital content."

Well, sorry, that's not good enough. If Apple are saying there are other relevant

markets, Dr Kent needs to know what they are now, so we can consider implications for disclosure and consider obtaining relevant factual and expert evidence.

More pertinently for today's purposes, you are being asked to list a preliminary issue by reference to a particular time estimate without a complete pleading as to what the relevant markets are. We say that's another powerful reason why the application should be rejected.

Note, at this juncture, Mr Kennelly has made repeated reference to what he describes as "an agreement" on our side that a preliminary issue trial would take two weeks. It's true we referred to that figure in correspondence, but the point is that estimate could increase significantly depending on the number of transaction markets that Apple says are in fact in issue.

Mr Kennelly took you to paragraph 58 of his defence, where he noted this point about different genres of app and how that may have significance and be relevant evidence in relation to potential scope of the relevant markets.

Now, we saw the figure from Holt 1 which gave, I think, ten different examples of different genres of app.

My understanding is, actually, if you look at the App Store, there are as many as 28 different categories of app, ranging from music to finance.

So this pleading appears to raise the spectre of the CAT having to consider a very large number of different alleged relevant markets once Apple has provided the further examples that it says, at paragraph 59, it reserves the right to provide in its evidence.

It gets worse. Because even the two example markets that Apple does identify in its defence are not pleaded clearly. So, in relation to the proposed digital gaming transaction markets, paragraph 66 of the defence says:

"Apple will address the boundaries of the market for digital gaming transactions

further in evidence in due course."

But what Apple means here by boundaries is, presumably, important matters, such as whether the transaction market in question covers all digital games or whether there are different markets for different types of games. That's not a hypothetical possibility. Because in the *Epic* proceedings, to which Mr Kennelly has made reference, the claim against Apple by the video game manufacturer Epic, in the US, Apple was putting forward these arguments about transaction markets and the US judge found there was a discrete market for mobile gaming transactions.

Now, if that is Apple's pleaded case here, for example, if it ends up putting forward a discrete market of that kind, well, that may raise questions about whether Apple is dominant because one might expect Apple to have a rather large market share in a market so defined.

I think there are some references in the *Epic* judgment itself to potential market shares of above 50 per cent. So, as I say, saying that Apple will address the boundaries of the market for even the two example markets that it identifies -- and there is an identical form of words in paragraph 73 in relation to the video streaming transaction markets -- is not sufficiently clear for Dr Kent and the Tribunal to properly assess what exactly will be entailed by the split trial proposal -- the first stage of the split trial proposal that Apple makes.

This is not a matter of saying that the evidence in support of a particular pleaded market definition will be provided later. That would obviously be entirely normal and appropriate.

What Apple seems to be saying is that the market definitions will be supplied later in relation to other potential markets, and that, we say, is not appropriate as a matter of pleading. You have to set out your case so that everyone knows where they stand.

There's another example of a similar vagueness, at paragraphs 84 to 86, on

page 186. That's the pleading in relation to alleged constraint from the related markets for devices. Just to note that again we see, at paragraph 85, the formulation:

"Apple will address the boundaries of those markets further in evidence."

Well, when it says "those markets", it has not actually set out what the device markets are, which devices are covered. It just gives a list of some device manufacturers, but that's all the detail we get from the pleadings. It's all left to be considered in evidence.

So how is the Tribunal to take account now of what the split trial proposal entails at the first stage trial? What will consideration of these device markets, referred to in highly vague terms here, actually involve at the first stage trial?

Then it gets worse, because in relation to dominance, paragraph 87, we see at 87(b) -- this is quite remarkable:

"Apple will address its share of each relevant market in evidence in due course."

Now, market shares, as we know, are an important indicator of dominance, and market shares above 50 per cent, in UK competition law and EU competition law, give rise to a rebuttable presumption of dominance. So, again, it's not appropriate for a defendant to say: it will provide this crucial information in evidence.

No doubt the evidence justifying or underpinning a particular pleading in relation to market shares is something that will be left for the evidence stage, but it's incumbent on a party to set out its position on enforcement matters such as this.

So, as I say, in addition to the points about the overlap this creates a real issue for the Tribunal in assessing what would be involved in Apple's first stage trial, what would be the scope, what would be the time, what would be the cost. We certainly have real doubts, having reflected further and having looked at these points, that it can be done in two weeks.

As I say, we have to do the best by reference to the material we have.

What the material we have shows, on the pleadings, are all the overlaps that I have taken you to, in both the claim form and the defence.

Just to complete the summary of the defence, I have not taken you to any of what's said about abuse by Apple. Can I just give you one example where the case on abuse also incorporates a very significant overlap by referring to what has been said earlier about market definition and dominance?

So if one looks at paragraph 101, which is essentially Apple's case on why the app distribution restrictions are not in fact an abuse of dominance; does the Tribunal have page 189?

THE CHAIR: Yes.

MR ARMITAGE: So we see, essentially, four reasons given. So, just to be clear, this is the response to the plea that the app distribution restrictions constitute an abuse of a dominant position. So the response of (a) it's denied that there is an iOS app distribution market. So that response to the abuse allegation critically depends on the market definition point.

Then (b), “It is further denied that Apple's App Distribution Restrictions have “shut out all actual or potential competition” on any relevant market”.

Then it refers to paragraphs 88 to 95, so that's part of the case on market definition and dominance, so those are paragraphs Apple wants to have heard at a first stage trial.

As pleaded in those paragraphs, Apple faces strong competitive constraints on all relevant or related markets. That includes not only competition from other sources for the facilitation of transactions for digital content… but also competition on the device markets.

So what Apple is saying here is the that factual material that it has pleaded in

support of its case on market definition and dominance is also relevant to this question of whether its conduct has shut out all actual or potential competition, which it says is a key question in relation to abuse. So it's another example where the same factual material is going to need to be considered twice, in an inefficient way, on Apple's proposal.

Paragraph (c), this is another response to the abuse allegation:

"The App Distribution Restrictions constitute competition by Apple on each of the relevant transaction and related device markets."

Then we see another repetition of paragraphs 41 to 42. Those are the paragraphs that I said were repeated in relation to market definition which set out the factual case on things like the reliability and security that is allegedly facilitated by the app distribution restrictions. So it's all intermingled, the case on abuse with the case on market definition and dominance.

Paragraph (d), this is a plea that we've had difficulty understanding about the link between the app distribution restrictions and Apple's intellectual property. We've actually covered this in our RFI. It's hard for us to say, in the absence of a response to that RFI, whether this is relevant to the market definition and dominance phase of the proposed trial.

But even if this a completely discrete point, I don't need to show there is a complete overlap, I just need to show it's sufficient to render it inefficient to adopt the split trial proposal. So I am not in a position, really, to comment on this particular subparagraph. But, as I say, what we see from the pleading on abuse is a number of further examples of this overlap.

Paragraph 105, which relates to the payment system restrictions, adopts the same structure. So it responds to the allegation of abuse by referring back to the factual material relied on in support of the case on market definition and dominance.

So there you have it.

In my submission on the pleadings, the lack of a clean split is very, very clearly made out, both by reference to the claim form and by reference to the defence. So whichever way you cut it, we say that all the issues that the lack of a clean split gives rise into relation to duplication of disclosure, factual and expert evidence, those are all going to arise on Apple's proposal.

So that is the clean split.

The second topic I said I was going to address was Apple's contention that its approach would have the result of narrowing the scope of a second stage trial. I think I have covered that point, and I wasn't proposing to say anything further about it. I particularly made some submissions on the halfway house that emerged in the course of argument this morning.

In my submission, there's no realistic prospect based on the pleadings as they currently stand that there would be any narrowing of the scope at all if a first stage trial took place and didn't altogether dispose of the proceedings.

As I say, if it transpires Apple is completely successful at first stage trial, well, obviously that means there won't be a second stage trial, but the relevant question is: what happens if there is a second stage trial? What are the savings there?

I will come back to cost and delay in more detail, but we say there's no obvious narrowing of the scope.

Topic three in the list I gave you at the outset was the question of whether a single trial would be excessively complex.

Now, again, I have largely covered this because the basis for the submission that a single trial would be excessively complex is -- and this is paragraph 31 of Apple's skeleton, its first skeleton -- is the contention that abuse is going to need to be tried by reference to multiple different market definitions. Again, that's the point I think

I covered in argument. It's not the case.

But even if there were some different permutations of the relevant markets, in my submission that would not cause undue complexity for this specialist Tribunal.

Apple accept, or rather Apple agrees, that a single trial in this case could be done in around seven weeks. That's a relatively modest trial by this Tribunal's standards, and it somewhat gives the lie to the suggestion a single trial would be unmanageably complex.

The CAT is about to embark on a trial of, I think, 27 days in the *Sportradar* litigation. That's a case where hotly disputed issues of market definition and dominance and abuse are all going to be determined and heard at the same trial.

Giving another example from another jurisdiction, the Epic claim against Apple in the United States -- admittedly a different system of competition law, but essentially raising the same factual issues, or a number of the same factual issues -- that was determined in a single trial of all the issues, including market definition, market power, and anti-competitive effect issues.

Now, Apple suggest in its skeleton that only happened because of urgency of those proceedings and the fact Epic was seeking injunctive relief, but there's no suggestion by Apple, who was after all a party to that litigation, and no suggestion by the judge who heard the claim, so far as we are aware, that hearing all the matters on one occasion gave rise to any complexity, certainly not unmanageable complexity.

We say there's nothing particularly complex about parties putting forward evidence in relation to market definition and dominance, and also, at the same time, evidence in relation to abuse, which proceeds on the basis that a party will be correct as to its case on market definition and dominance. That's perfectly normal in adversarial competition law litigation.

If I could deal briefly, before leaving this topic, with various cases which Apple refer

to in its skeleton in support of the suggestion that questions of market definition and dominance and questions of abuse have been tried sequentially on other occasions. We answered this point at paragraph 35 of our skeleton. So it may be the point has fallen away.

The basic point is that not a single one of the examples that Apple identifies is actually an example of market definition and dominance being tried before, and in isolation from, the question of abuse. As I said at the outset, we are not aware of any occasion on which that's been done.

So we say those other examples provide no support for Apple's specific proposal. Indeed, ironically, one of the cases it refers to *Chester City Council v Arriva* -- we don't need to turn it up -- that was a case in which market definition, dominance and abuse were tried in a single occasion by the High Court. Although, as it happens, abuse was not addressed in the judgment because market definition and dominance failed, but that's a completely different matter from saying it's unduly complex to hear those points on the same occasion. If anything, that case supports Dr Kent's proposal and not Apple's.

So could I move on, please, to the points on cost and delay?

Obviously, related to points I have been making on lack of clean split.

So Apple obviously rely, under this heading, on the fact that if they succeed at their proposed first stage trial that will bring proceedings to a close more promptly and at lower cost than if you have a single trial covering all the issues later on. Well, that's true, but in my submission it's not particularly interesting. If it were not the case Apple's proposal could potentially dispose of the proceedings earlier than would otherwise be the case, we probably wouldn't be having a debate at all.

Importantly, moreover, it's not as though Apple is proposing a short hearing on a point of law that could be decided without need for any factual investigation. It's

proposing a trial on market definition and dominance, and it's common ground that will involve documentary disclosure, factual evidence, and expert reports.

So, whatever way you cut it, you are still going to have to spend a lot of money and incur a lot of time preparing for the proposed preliminary issue trial. But the real question is: what this cost and delay associated in having two trials rather than one? That's the point that the Tribunal needs to grapple with and weigh in the balance.

Now, on this point, the CAT has two -- if I can put it this way -- sharply diverging witness statements from the parties' respective solicitors.

In my submission, the CAT does not need to resolve the precise disputes between them or come up with its own precise estimate of how much extra cost would be generated by a split trial proposal. As I said earlier, the CAT has engaged in an informed predictive exercise. It will obviously bring its own experience as to what these cases tend to cost to bear on that exercise.

In my submission, however, the CAT can be sure that the costs and delay occasioned by Apple's proposal will be considerable and will certainly outweigh the savings that are realisable if only one trial is to occur, covering all the competition law issues on the same occasion.

So could I start with the delay point?

So we've suggested, by reference to Ms Hannah's statement, having two trials rather than one will result in the ultimate conclusion to the claim being delayed by about it a year and five months. That's paragraph 20 (b) of Hannah 2.

Now, Mr Doris, who is the witness on behalf of Apple on these points, has a lot less to say about delay than he does about costs. It's rather telling, in my submission, that he doesn't actually say how long he estimates it would take for a split trial process to reach a conclusion, assuming that two trials are required.

In its supplementary skeleton, Apple accepts having two trials will involve modest

delay. It says that at paragraph 30 of its supplementary skeleton. But, again, Apple, in its skeleton, does not say how much. Instead Apple amounts an entirely negative case criticising Ms Hannah's estimates as to the level of delay that will be incurred.

Now, in that regard, Mr Doris takes particular issue with Ms Hannah's suggestion a preliminary issue trial could not come on until July 2024, as compared with Apple's proposal it could come on in July next year. I have number of points to make about that.

So even assuming the CAT could accommodate a trial in July 2023, something we don't know, an important part of Apple's proposal is that disclosure will be provided by 7 October this year, less than a month away, with witness statements following by 30 January 2023.

Now, in our submission, that's unrealistic. I will return to this when considering the costs that are associated with the disclosure aspect of Apple's proposal, but essentially what Apple is proposing is there should be a dump of all the documents that they have provided to the Commission and the CMA. I think it's been suggested in correspondence that may be millions of documents.

There's no provision for any involvement of Dr Kent in the process of discerning what documents are relevant to a proposed preliminary issue. What is suggested is that she should just essentially take delivery of a large number of documents and then follow up afterwards if so advised with specific disclosure requests.

Now, even if that's the right approach, there are millions of documents. We say it will take far longer than Apple envisages for the necessary review to take place and for any disputes over specific disclosure to be resolved, but we also say that it's the wrong approach. We have said what we think the right approach is in our skeleton argument, and that applies whether there is a preliminary issue trial or whether there's a single trial.

The CAT should adopt its default process, set out in rule 60, where the parties engage with one another as to the relevant disclosure categories by reference to the pleadings, produce disclosure statements and electronic document questionnaires. Then there's a further CMC at which the CAT can resolve any disputes and, after that, disclosure proper takes place.

These are obviously important, high value proceedings, and a proper disclosure exercise is critical.

Now, the existing Commission and CMA file documents, the fact they are already sitting there, ready to go, as Apple would have you think, that may well make the process more efficient than if Apple were starting from scratch. Dr Kent obviously welcomes that. But the point is it's not a substitute for a proper disclosure process in which Dr Kent is involved in the question of what the relevant categories are, and so on and so forth.

Now, it's not possible to give anything other than informed estimates, but we think that even working very efficiently you would need another four to six months to do disclosure in accordance with a proper process than is currently provided in Apple's timetable.

That, even before we get to other aspects of the timetable, would push any trial back, preliminary issue trial that is, until the end of 2023 or early 2024 at the absolute earliest.

Now, obviously there will be debate in light of the Tribunal's ruling on the preliminary issue points as to the precise timetable. We say a significant part of the attack by Mr Doris on what Ms Hannah says is based on an unrealistic expectation of how long disclosure would take. The idea it could be done by 7 October is just not realistic.

Now, Ms Hannah's estimate that a split trial approach will result in a year and five

months of additional delay also factors in around four months for the Tribunal to render a judgment after a first stage trial.

Now, in my experience, it would be no surprise if the CAT took somewhat longer than four months to produce a judgment following a substantial witness trial. But, in any case, Mr Doris takes no issue with the 4-month estimate. All he says in his witness statement is: that's inevitable in a split trial process.

Well, quite. It's inevitable in Apple's proposal, but it's not an issue that rises at all on the single trial approach.

But even leaving aside these debates over the timetable that Ms Hannah has set out, one point that Apple cannot and does not dispute, and in fairness it does not seek to, is the fact that any appeal against a first stage trial would introduce substantial delay that simply does not arise on the single trial process. It's fair to say that an appeal against the outcome of any first stage trial in this case is erasing certainty, and certainly it's prudent to assume there will be one in order to assess the merits of Apple's split trial proposal.

I mean, Apple has, at the very least, strongly implied it will appeal any CMA infringements to this Tribunal, so one would rather expect the same approach would apply here.

Now, Apple does not deny the appeal would introduce delay, and how could it? Although Mr Doris seeks to downplay the likely extent of such delay.

He says, at paragraph 16 of his witness statement, that the current position in the Court of Appeal -- he said appeals are being heard quickly, typically a year or less.

He gives no details as to how he arrived at that estimate: how many appeals has he looked at over what time period? What types of case? And so on and so forth. He talks about the time taken for appeals to be heard. So one imagines he's done so advisedly. He has factored in the amount of time taken for the Court of Appeal to

render a judgment, but it's obviously only once the Court of Appeal has done so that the CAT could realistically resume proceedings, including deciding on length of and listing any second trial, and setting down the necessary case management steps.

In my submission, the time from a CAT judgment on a preliminary issue to a Court of Appeal judgment could conceivably be well over a year. It could be 18 months, it could be two years. It's impossible to predict with certainty.

But, in any case, even a year, which it seems Mr Doris accepts is the likely amount of time at stake, is a very significant delay. It doesn't arise on Dr Kent's single trial proposal.

We are talking about delay potentially to an award of damages for the 19.5 million consumers that Dr Kent represents in these proceedings.

So, Mr Chair, you made the point a fair point that this is a point that arises in any consideration of a split trial proposal. Yes, there is always going to be the possibility of a bifurcated appeal process, essentially.

That's right, but that doesn't mean it's not an important consideration. It's particularly important in a case like the present, as I say, where there are millions of consumers being represented. You have, in my submission, very significant advantages to having -- if there is going to be an appeal, that appeal taking place at the conclusion of the proceedings, so that the Court of Appeal can consider all the relevant issues in a single hearing.

That's another point that depends, as I say, on the overlap between the issues at stake.

There was a suggestion, I think, from Mr Kennelly, and certainly Mr Doris suggests this at paragraph 16 of his witness statement, that the proceedings might continue pending an appeal against the judgment on market definition and dominance.

The idea that Apple would not seek a stay of the proceedings pending an appeal by

it to the Court of Appeal is, in my submission, totally unrealistic. But, leaving that aside, it's very difficult to see the CAT deciding it is appropriate to continue to a trial on abuse while the question of market definition and dominance was under appeal. That really would be a recipe for wasted costs.

So that's the delay issue.

We say that's a very powerful factor pointing against Apple's proposal in the circumstances of the present case.

Now, on the increased costs issue, Ms Hannah, as you've seen, has given an estimate. She's very clear in her statement it is just an estimate. In fact, her estimate, which I think is that the total costs that may be generated, incremental costs that may be generated by a split trial approach are in the region of £2.5 million. Actually, that excludes the costs associated with any interim appeal. It also -- perhaps with the exception -- I think she refers to transcription costs at trial. It's almost entirely based on costs on the claimant's side, she has not sought to estimate the additional costs that would be incurred by the defendants.

Now, it's important here to be clear about what's actually in dispute. Mr Doris, at paragraph 8 of his statement, accepts that there will be incremental costs from having two trials, but he says that these would be small and administrative in nature. Mr Kennelly reiterated today, very fairly, that they fully accept there will be some incremental costs. So the debate is about the extent of those incremental costs.

Ms Hannah says the costs will be generated in two ways. She refers to the fixed costs element she's experienced in relation to trial preparation and trial costs, and then she also talks about costs generated by overlaps in the earlier stages of the litigation, so disclosure, factual evidence, and expert reports.

Now, in relation to fixed costs, Apple's position as set out by Mr Doris is the costs she's referring to, so trial preparation and trial costs, things like counsel brief fees, all

vary strongly in accordance with the length of the trial. It points to the fact we've agreed, as they would characterise it, as having a single seven-week trial -- sorry, that we've agreed that a preliminary issue trial could be done in two weeks and that a second stage trial would take five weeks, and that's the same time estimate as we've alighted upon for a single trial.

So that's premised, his position there, on the fact the first stage trial and second stage trial will indeed occupy the same total amount of time as a single trial. I have already made the point, actually, we say the Tribunal can't be certain about that at this stage because of the vagueness of pleading on market definition. We say that two week estimate for a first stage trial could well be a significant underestimate, but let's assume, for the sake of argument, that the total length of the split trial proposal in terms of Tribunal time is the same as the length of a single trial.

We say Mr Doris misses two important points when he assumes that the costs must be the same because the overall trial length is the same.

So, firstly, although recognising this as a source of incremental costs, he underestimates the costs associated with counsel, solicitors and experts having to refresh their memories on the matters in issue in advance of a second trial, which for the reasons given may well take place many months after a first stage trial.

So, in that regard, for example, it's obviously correct for Mr Doris to say there is a relationship between counsel's brief fees and the length of trial, thank goodness. But they are also based, among other things, on the necessary preparation time.

So, in a case where you have a considerable gap between a first trial and a second trial, which could actually be years once you have the interim appeals being taken into account, the amount of time required to read back in, essentially, is likely to be measured in weeks, not days, not to mention the inconvenience of, among other things, the Tribunal members having to read back in, assuming the same constitution

hears the second stage trial. But these costs and inconvenience are avoided altogether on Dr Kent's single trial proposal.

As I said, Mr Doris accepts the existence of such costs. That's paragraph 8 of his statement. He just says without particular explanation they are going to be small.

In my submission, once they are multiplied across counsel, solicitor and expert teams, once you take account also of the costs of applying the findings in the judgment to the issues that arise at the second stage trial -- which is another category that Mr Doris accepts exists, but disputes the quantum -- one can see that those costs are likely to be very considerable indeed.

Now, that's about as far as the Tribunal can probably take it in terms of an application like this. We say they're very considerable, and don't arise at all on Dr Kent's proposal.

Now, Mr Doris, as I say, accepts there will be incremental costs of this kind. He says, in his view, they will be small. We say that's not justified.

But he also says they will be offset by savings arising from the fact the outcome of a first trial will narrow the issues at a second trial. That's the point I have already covered. In my submission, there's no real prospect of that sort of narrowing. In any event, he has not sought to particularise in any detail the savings he says will be realisable.

There's also the other category of costs that Ms Hannah refers to, what I've called "overlap" costs. The existence of such costs, if not the quantum, arises essentially from the fact that the pleaded issues of market definition and dominance and abuse are very closely intertwined. The Tribunal has indulged me for quite a long time in the pleadings, so I won't repeat those points.

We say it's very clear that in light of those overlaps the parties' lawyers and experts and witnesses, indeed, will need to look that same factual material again in a number

of respects when it comes to a second stage trial, which is much less efficient than looking at the material once on an holistic basis.

Now, I have dealt with the point about the respective estimates that have been given for a first stage trial and a second stage trial. I think I have addressed that point. We say even if it's right that total trial time is the same, it doesn't follow. It's a *non sequitur* to say that the total costs will be the same.

In that regard, Mr Doris makes a series of granular points, beginning at paragraph 11 of his statement, about the alleged lack of overlap in relation to disclosure, witness statements, and expert reports. So could we just turn up, please, Mr Doris's statement, just to quickly go through these points? I think it's 10.3 of the first core bundle.

MR BISHOP: Which tab are we at?

MR ARMITAGE: 10.3. There we see paragraph (a).

THE CHAIR: Sorry, which page are you on?

MR ARMITAGE: Sorry, 36.24. Paragraph 10, he refers to --

MR BISHOP: I think I don't have this.

MR ARMITAGE: I am sorry.

(Handed)

I am so sorry.

THE CHAIR: No, we are ready to go.

MR ARMITAGE: I thought you were still trying to identify the page. 36.24.

THE CHAIR: I am reading through it.

MR ARMITAGE: I am grateful. So, as I said, he makes a series of granular points about what Ms Hannah says about the increased costs that will arise at the disclosure, witness evidence, and expert report stages.

So, in relation to disclosure, paragraph 11(a), touched on Apple's proposal already

and explained why, in our submission, it's not appropriate from the perspective of efficiency.

Now, in relation to costs, we say what seems to be envisaged is that at Apple will make available all the documents it's provided to the CMA and European Commission in one go, and then it will be a matter for Dr Kent how she wishes to review them.

But, obviously, if this is the approach taken and there's going to be a first stage trial on market definition and dominance, Dr Kent will have to look at all of the disclosure in order to work out what's relevant for the first stage trial and what's relevant for the second stage trial.

The relevant documents are not going to be neatly marked as being relevant to market definition and dominance or, alternatively, relevant to abuse. Apple doesn't say it proposes to apply markings of this kind before it gives the disclosure.

Even if they were marked in that way, Dr Kent would obviously need to consider for herself whether they had been correctly identified as such. That's before one even considers the fact that many of the documents will be relevant because of the lack of clean split to both the first and the second stage trial.

So, if there are going to be two trials and Apple's disclosure approach is adopted, Dr Kent will be reviewing all of the disclosure in one go before the first trial.

In my submission, it's just obvious that no matter how efficiently one does that review process it's going to be necessary to re-review a very large number of documents again for the purposes of the second stage trial, not least because of the amount of time that may elapse between the first stage trial and the second stage trial, making allowances for memories fading and so on and so forth.

So that kind of additional cost and duplication in having to do two disclosure review exercises is avoided if there's just one trial, and a disclosure review is done on one

occasion. Given the scale of the number of documents that are going to be relevant -- as I say, I think there has been a reference in correspondence to potentially millions of documents -- those costs are going to be very considerable, indeed.

Mr Doris recognises, at paragraph 11(a), that there will be modest, as he puts it, additional time as a result of having two disclosure processes, rather than one. Or rather having to look at disclosure again for the purposes of the second trial. In my submission, that's a masterpiece in understatement. It will be very much more than modest.

As I have said, and as we may get on to tomorrow, Dr Kent does not accept this is the right approach to disclosure at all. But whatever way you do it, it's going to be much more efficient to do it in relation to a single trial, rather than in relation to two.

Now, in relation to witness evidence, paragraph 11(b) of Mr Doris' statement, Mr Doris here accepts -- or he doesn't accept, he puts forward the fact Apple is going to lead factual evidence at the preliminary issue trial it proposes, and that one or two witnesses may end up giving evidence at both trials.

Now, the fact a split trial would impose unnecessary inconvenience on witnesses who may be required at both trials is a factor. It's the third factor identified by Mr Justice Hildyard in the *Electrical Waste Recycling* case as pointing against a split trial.

But, further, the idea that witnesses appearing at two successive trials could simply supplement their evidence from the first trial rather than having to revisit matters in entirety is a baffling one.

What if a witness's evidence is rejected at first trial? That witness couldn't simply supplement what they've said at the first trial because *ex hypothesi* that evidence has not passed muster with the Trial Tribunal.

Even if a witness's factual evidence at the first trial is accepted, it's inevitable that witness will then need to apply the findings made at the first trial when preparing their evidence for the second trial. Either eventuality would require another proofing exercise and another statement, at substantial cost, and it wouldn't be a mere matter of supplementing the original statement.

It's not just administrative costs that would be duplicated here; it's also the substantial costs involved in working through the issues again in light of the factual findings at the first stage.

Then it's not easy to -- rather it is easy to envisage a situation in which real difficulties could arise if a single witness gives evidence in two related trials. So what if the CAT accepts, let's say, Mr Smith's evidence at trial one, whoever he may be appearing for, makes findings of fact in relation to his evidence, but then a serious credibility in relation to that witness arises at trial 2 in relation to the same issue. The CAT can't go back and unpick the findings it's made in relation to that witness's evidence at trial 1, at least not without serious costs and delay.

That may sound like a speculative possibility, but it is the sort of thing that happens, and it's one of the reasons why Mr Justice Hildyard identifies that factor.

Again, all this potential difficulty is avoided if there is a single trial. Much more efficient to have witnesses proofed in relation to all relevant issues in one go and attend trial for a single cross-examination.

As to expert reports and brief fee, Apple -- this is, sorry, Mr Doris over the page at 11(c). So Mr Doris again takes issue with an estimate by Ms Hannah that the expert costs will increase by as much as 50 per cent.

Now, it's notable here that Apple does not specify which experts it intends to call, even indicatively, and in relation to which issues. But the second sentence of Doris 11(c) says:

"There will likely be some experts who will only be required for the abuse and quantum trial."

I think it logically implies some experts will be required to attend both trials.

Dr Kent understands in that regard that Professor Hitt, who has been instructed by Apple in this claim gave evidence at the US trial in the case brought by Epic and that his evidence covered issues of market definition, market power and anti-competitive effects. Actually, we've added some of the extracts from the written evidence he gave in the US proceedings to the core bundle. I am not going to ask you to turn it up, but it's something you may consider overnight. Core bundle 2, final tab, at page 947.

I would also invite, in looking at that evidence, the Tribunal to note that when Professor Hitt gives evidence on the question of anti-competitive effects he refers in terms to the earlier analysis he's given on market power. So one sees a very clear example of the overlap, even on the evidence given by Apple's expert in the US proceedings. It's a concrete example of the way inefficiency can arise if you have a split trial.

Just a final point on costs, and it's a short point. Let's assume everything in Mr Doris's favour. Assume he's right, that having two trials rather than one will just mean the costs of the single trial are essentially divided across the two trials, none of that accounts for the costs of an appeal process. It's not addressed in Mr Doris's statement. It's not quantified. In fact, it's not quantified by Ms Hannah either.

But, obviously, any appeal on complex things such as these could generate substantial costs. Again, they don't arise on Dr Kent's proposal.

So that's costs and delay.

If I could just then deal finally with the parallel investigation points.

THE CHAIR: Yes.

MR ARMITAGE: And to take this quite quickly.

Our position, in short, is that having a trial next year on market definition and dominance alone makes it much less likely the CAT will have the benefit of findings from the CMA or indeed the European Commission on some of the very issues that the CAT is going to have to decide. Listing a single trial at a later stage makes it much more likely the regulators will have made relevant decisions.

Other things being equal, and leaving aside all the other factors pointing in favour of having a single trial, it's better to take the approach which makes it more likely, rather than less, that the CAT will have the benefit of the regulators' expertise.

That's all we are saying about the parallel investigations. It's quite a modest point, and obviously relevant developments in other investigations can be kept under review.

We propose another CMC early in the New Year to deal with disclosure issues, when at that stage any relevant developments in other investigations can be considered.

Apple takes a diametrically opposed position.

Now, what it says -- and this is paragraph 7 of its supplementary skeleton -- is that "given how long regulatory investigations take" -- and, sorry, I should say it appears to be common ground, and it's very clear from the CMA's skeleton, that the overlap with the CMA investigation is very extensive indeed. It covers almost all the issues raised by Dr Kent's claim in relation to market definition, dominance, and both exclusionary and exploitative abuse, so I don't think that's disputed.

But Apple says:

"Given how long competition investigations can take…there is no realistic prospect of [the investigation] concluding in time to produce findings that would be final and therefore binding in a trial commencing in October 2024."

Importantly, Apple doesn't suggest there's no prospect the CMA will have made an infringement decision in advance of a single trial commencing in October 2024, which is Dr Kent's proposal of when a single trial of seven weeks could occur.

The argument that such a decision may well not have become binding because there will be appeals is not a decisive argument because it assumes that a CMA decision that has not yet become binding is irrelevant to the claim, both as a matter of substance and as a matter of procedure. That's just wrong.

So we've added to the authorities bundle, overnight, a passage from the *Agents Mutual* case, a decision of the CAT in the Article 101 case about estate agents with the current president presiding. Again, I will just give you the references for now, but it begins at page 1293 of the third authorities bundle. It's paragraphs 156 to 160 of that decision.

Essentially, that is the current president of the Competition Appeal Tribunal emphasising how keenly, in that case, he felt the absence of an underlying regulatory decision. The CMA obviously has a different role. It's a specialist regulator. It has wide-ranging investigative powers. It can go out, essentially, to the whole market and reach a view on competition law issues by reference to that full body of information. Essentially, what the president says there is that's not the position the CAT is in.

Essentially, then, the idea that the CMA should benefit from the CAT decision, rather than the CAT, if possible, taking the benefit of a CMA decision is not the right way round.

Also Apple's argument assumes that everything in the CMA's decision would be the subject of appeal, but it's not all or nothing. In the context of the question of whether an appeal against a first stage trial might result in significant delay, Mr Kennelly was at pains to emphasise that one couldn't predict which issues would be appealed and,

similarly, in relation to a CMA decision, it's not inconceivable Apple would not appeal every finding. They have made it clear they probably will. But, in reality, it all depends on what the CMA finds.

If aspects of the CMA decision are made in advance of the first trial, or rather the single trial we propose, but they are not appealed by Apple, that means those issues would not need to be tried from scratch by this Tribunal, saving considerable time and expense.

Apple also fails to account for the possibility that the CMA might make findings that go in its favour. It's conceivable the CMA might agree with Apple on market definition, presumably it's running the same arguments in the CMA context, but nevertheless find Apple is dominant on some alternative relevant market. Apple presumably would not be appealing against a finding in its favour on market definition. But, again, that's something that might be highly relevant to this Tribunal hearing this claim.

We say that even if any appeals in respect of a CMA infringement decision may not have concluded before a single trial of the present claim, the fact a decision may have been made and be available to this Tribunal to consider is a separate factor that weighs in favour of a single trial at a later date, rather than a preliminary issue trial coming on in the middle of next year.

Sir, I don't propose to deal with the Commission investigations any further. We looked at those briefly earlier.

There is overlap. In fact, the music streaming investigation by the European Commission, there was a statement of objections, I think, in April last year. So that investigation, at least, seems to be considerably progressed.

So, again, the suggestion we should take an approach -- Dr Kent's suggestion we should take an approach that maximises the chances of having relevant findings

before we come to trial is to be welcomed, in my submission, in relation to the Commission investigation as well.

In any event, there is no dispute the CMA investigation overlaps considerably, so from the perspective at this point, the European Commission investigation is the less significant. The point is: better to take an approach that makes a realistic possibility that the CAT will have the benefit of findings from a specialist regulator before it hears this claim, regardless of whether those findings have become formally binding, which depends on the unpredictable outcome of the appeals process.

THE CHAIR: Is it the case -- do you say because the CMA made a decision, but let's say it wasn't appealed it automatically becomes formally binding in this case? That's not strictly correct, is it? It would depend -- sorry.

MR ARMITAGE: No.

THE CHAIR: Perhaps just to make the question a little bit easier for you: the case as put at present is avowedly not a follow-on case, it's a standalone case. Of course, that may not be Dr Kent's position in the future. But, just for present purposes, if that remained the case, then do you say that there would be a binding effect nonetheless because the CMA hasn't produced a decision?

MR ARMITAGE: Good question. I think the relevant question under statute is whether the claim is in respect of an infringement decision.

THE CHAIR: Yes.

MR ARMITAGE: So I think that raises a question -- I confess I have not considered this -- whether a claim that doesn't specifically say "This is a follow-on claim in respect of infringement decision X" is a claim in respect of -- I think probably not.

I think, possibly, it would be something that would have to be considered at that stage, whether an amendment was required.

THE CHAIR: It may be a point that's relevant to the discussion on time delay

tomorrow as well. I think you are saying -- that's not really the point you are making, I don't think. I think you are saying: having an indication of the regulator's thinking is bound to be helpful.

MR ARMITAGE: Yes.

THE CHAIR: Whether that's at the stage it has binding effect, and indeed possibly, I suppose, even if it was prior to a decision. If there was, for example, a statement of objections.

MR ARMITAGE: Yes, well, that's right. It's something that we envisage -- the CMA is here and, understandably, they may not want to go into print on these sorts of things. But its investigation has been ongoing for a while. It's done a market study recently, so it's not coming from a standing start, so at least a statement of objections, if one is going to be produced, could well be imminent.

So, in my submission, it's a fairly modest proposal. It's to keep open the possibility that relevant source of material may be before the Tribunal at the time of the trial.

But, as I say, this a totally freestanding point. We've already made extensive submissions on why the split trial proposal is not a good idea anyway, but this is another reason, in my submission.

May I just check if there are any other points?

Unless the Tribunal has any questions, those are our submissions on the split trial.

THE CHAIR: Anything else? No.

Thank you very much, Mr Armitage.

Submissions by MR GIBSON

MR GIBSON: Just one point.

THE CHAIR: Yes, of course.

MR GIBSON: It may be helpful, in light of the discussion you have just had, to refer

you to our skeleton where, in paragraph 9, we do give a very broad survey of the issues, not just in the ongoing investigation, but also the previous mobile ecosystems market study.

Just for the avoidance of doubt, that recitation of issues was intended to cover broadly what has been happening in recent investigations work and market study work, rather than specifically just the current investigation.

I think that's all. We don't want to say anything more than that, but that's what we have said so far.

THE CHAIR: That's helpful. Thank you very much.

Mr Kennelly.

Reply submissions by MR KENNELLY

MR KENNELLY: Chairman, members of the Tribunal, I will take the points in order, in the order in which they were presented to you.

I will begin, if I may, with the reference to the authorities and the suggestion by Dr Kent that we have taken an unorthodox position in asking for a split trial in this case. Reliance was placed on *Albion Water*. But, as the Tribunal saw from the judgment put before you, *Albion Water* was a case where the Tribunal had decided market definition and dominance in one proceeding, and then subsequently addressed abuse, a new abuse issue that had to be addressed, relying on the market definition and dominance points that had been resolved previously.

The point is made that that authority shows that barriers to entry -- I think reference was made to paragraph 213 -- can be relevant to market definition and abuse, and we say: yes.

I said repeatedly: we accept there are issues relevant to both market definition, dominance and abuse. My point is: when resolved in the first trial, they will be

resolved once and for all.

But moving on to a more fundamental issue, a more fundamental problem, that arises in this application and that is the extent to which Dr Kent is to be confined to her pleading. The point was put very fairly by the Tribunal to Mr Armitage, and he acknowledged, again very fairly, that the Tribunal, in resolving this application, must look -- and I am quoting from his words: look at that pleading as they currently stand. But he did say that the evidence at trial may be more extensive than the evidence before you in Mr Holt's first statement.

He made no suggestion of any intention to amend, to raise points in a pleading which are not currently raised, and no response was made by him to any lack of indication in Mr Holt's evidence of a desire to engage, for example, with profitability for the purposes of dominance.

Now, in justifying that position, he said: well, Mr Holt's evidence is produced at an early stage.

I think he was trying to suggest that in some way the application is more difficult for Apple because it's taken at an early stage. But, as the Tribunal has seen from the factors listed in *Daimler*, the factors taken from Mr Justice Hildyard, raising a split trial application at a late stage is a reason not to grant a split trial. Split trial applications are supposed to be made at an early stage, and they are supposed to be made on the basis of the pleadings as they stand before the Tribunal.

This question of what is pleaded is not some technical issue or some semantic wrinkle that I am identifying. Pleadings are of fundamental importance in cases like this. Because of the adversarial nature of these proceedings, the pleadings are critical for the fair resolution of disputes and to ensure legal certainty. It simply isn't open to the Tribunal to determine issues which aren't pleaded.

Here, there is nothing in the claim form, or Mr Holt’s report, to the effect that, for

example, profitability needs to be addressed at the market definition or dominance stage. It's really dominance we are focusing on for the purpose of profitability.

I refer to Mr Holt's evidence in particular because had Mr Holt wished to say that he intended to do further work on these issues on, for example, establishing a competitive price for the purpose of the SSNIP test or looking at profitability for the purposes of dominance, he could easily have adduced a short supplemental report to that effect. That's not, again, an unlikely or theoretical route for him.

The Tribunal will recall in our application to strike out the excessive pricing case, I placed heavy reliance on Mr Holt's first report, but Mr Holt had put in a second report specifically to address our suggestion that on their pleaded case it ought to be struck out.

He put in a second report to say: no, no, that first report is highly preliminary. By reference to the second report I wish to show the Tribunal the further work I would do, once I had disclosure, the further analysis I need to do at trial.

There was no such report in this case and no indication from Mr Holt he intended to do that work at trial.

I took you to Holt 1 not to make a forensic or jury point. I took you to Holt 1 because it's a upon Holt 1 that the Class Representative relies in order to show why there should not be a split trial, why there isn't a clean split between the market definition and the dominance issues and the abuse issues. That's why I took you to it.

On its face, it's as clear as could be that it's not necessary to resolve questions of competitive level or profitability in order to bring his arguments home on market definition and dominance.

In that report he is telling the Tribunal what he intends to do at trial. So although it's preliminary because it lacks the benefit of disclosure, his approach is outlined there for the purposes of the trial.

With that background, with that emphasis on the importance of the pleadings and the importance that the Tribunal confines itself to the four corners of the pleaded case, we turn to the pleadings themselves and the claim form.

Here, beginning with the overlap which is said to exist between market definition and dominance, and the exclusionary abuse and the question of foreclosure, and true it is that Mr Holt, for both of those, references the contractual and technical restrictions imposed by Apple.

But those restrictions and his analysis of what happens in the absence of those restrictions doesn't feed in, in any way, to his market definition or dominance analysis because he denies a monopoly as clear as could be, as you saw on the face of the pleading and on his report. He doesn't need to get into counterfactuals. He simply says: absent these restrictions Apple would not have a monopoly; with these restrictions it has a monopoly.

On the second point, the overlap which exists on payment processing. This is paragraph 81. If they fail to show that there is a separate product -- this is the tying point -- that will be the end of it, as Mr Armitage fairly acknowledged.

In any event, the question of whether it is or isn't a separate product, the two products they raise for the purpose of tying, is not a question that's likely to require huge amounts of evidence, even Mr Armitage, going through the materials, had to acknowledge it was a relatively narrow point. The primary facts are obvious. The point between the App Store, the distribution market they analyse, and the payment processing market they allege, -- whether they are different or not is really going to depend on obvious and publicly available facts.

It's a short point of characterisation.

Even if -- and I make this point more broadly -- there are factual points that arise on market definition and dominance that are relevant to abuse they will be determined

once and for all.

Reference is made to *Churchill Gowns*, and that's an important case because it revealed the flaw in Dr Kent's argument on this question of resolving factual points in the first trial for the benefit of the second. Because in *Churchill Gowns* the problem was that the examination of certain issues in the first trial risked being inadequate. The problem was that issues in the first trial would be examined inadequately, and then there would be a question at the second trial as to whether the right answer had been reached on the issues in the first trial.

But there's no suggestion by Dr Kent that once resolved in the first trial it will be necessary to change the results on those issues in the second trial. There's no suggestion that somehow the examination of the first trial of those issues will be inadequate. There were various other points made, but there was no specific example given, or any explanation, as to why the examination of constraints, for example, in the first trial would be somehow inadequate, so that one could not safely bank those findings for a second trial.

THE CHAIR: I think it's not the decision in relation to the legal issue; it's the decision, to the extent there is one, or the findings to the extent there are findings, in relation to the facts which are common to both questions.

I think that's where it comes. Maybe you are going to come on to that part. But, certainly, I took Mr Armitage's point to be not about whether the question of constraints for the purposes of market definition, for example, needed to be reopened; it's whether the same set of facts which have been looked at in relation to that point and had produced a finding for the Tribunal might fall short of what was helpful or necessary in relation to the question that was considered later.

He gave us a number of examples where the factual position appeared to be relevant both to market definition and dominance, and abuse, which is something

I think you have freely acknowledged. I don't think it's a surprising point to any of us, because you've made that point in relation to what you say is a connection.

But I think that's the sharp end of this, isn't it? What is the significance of that?

He says there's a risk, if you do that, that you are either going to get it wrong because you haven't seen the full consequences of it, or you won't do enough, or you will do too much, and that will have an impact when you come to the second question. I think that's how he put it.

MR KENNELLY: That's how he put it, but there is a problem with that. Just to be absolutely clear: I am not making this point on the basis there needs to be any findings about the effects, the abusive effects. My point is exactly the same one Mr Armitage made, which is that in the first trial questions of fact will need to be reached, not conclusions as to abuse or whether the restrictions operate anti-competitively, just the findings of fact. How as a matter of fact certain things operate, how the restrictions operate in practice.

Mr Armitage said: well, there may be some problem with how those are reached, but he didn't explain why any of those findings would be determined inadequately in the first trial; why, by reference to the disclosure or the evidence, there would be any reason why those questions, those specific questions of constraints, for example, or even profitability, could not be properly -- adequately determined in the first trial.

In *Churchill Gowns* there were reasons why because of the factual matrix, there was a risk that they might make a mistake on the questions for resolution in the first trial, but there's no explanation from Dr Kent or Mr Armitage as to why that would happen here.

It's perfectly possible, and it's the most likely outcome, that these questions of constraints, for example, which are relevant both to market definition, dominance and foreclosure, will be resolved fully and adequately in the first trial. Really if the

Tribunal is going to say: well, there is a risk that they might not be, you need more than just a submission that they might not be. We have explained by reference to the pleadings and the evidence how they can be resolved and we will be bound by those findings in the second trial. If Mr Armitage is going to say there is a risk that they will be inadequately resolved, you need something more than a submission and there's nothing in the pleadings or the evidence to suggest that they would be resolved inadequately in the first trial. That's my answer to the short point that the Chairman raises: there's just nothing from them on that critical point.

On profitability in particular, you have my first main point that there's nothing in the reply or from Mr Holt to suggest that this question needs to be determined for the purposes of market definition or dominance. Even though they knew exactly what was coming in this hearing and they knew exactly what our case was, there's nothing.

Mr Armitage then says: well, it's in play. And just to quote him, he said: you'll need to go back in the second trial to the same material, the same material which is used to determine profitability. But he never explained why. Because there's no suggestion again that a profitability analysis could not be done properly at the first trial which then would bind us in the second. If you decide at the first trial that the profit was X pounds or X per cent, that accounting analysis, that would be taken as read for the second trial. It was never put to you or explained to you how that could be reopened or why there might be a suggestion at a later stage that particular accounting analysis had been incorrect by reference to the materials that emerged at the abuse stage. There's nothing to suggest that.

Moving on then to how Dr Kent pleads dominance, again reference was made to paragraph 85 and the reference to the contractual and technical restrictions and the effect of those, but the effect of those is not in dispute. The nature of the restriction

and its effect is not in dispute, and that's all Mr Holt needs and the pleaded case needs for the purposes of their case on market definition and dominance. In particular, there was nothing on profitability.

In that dominance section he took you to, there was nothing to suggest that profitability needed to be analysed, and he did say to you at that stage, when pressed, that you must look at the pleadings as they currently stand in order to determine whether there can be a clean split or not.

The next issue that arose, even on the face of Dr Kent's pleading, was permutations. Dr Kent's submission is that even on Dr Kent's pleadings one sees that there won't be very many permutations, it's not a reason to split it as we propose.

He said, for example, he acknowledged that Dr Kent's alternative case is that there are iOS specific submarkets. He says even if Dr Kent wins on a submarket, how would that lead to a saving? Or if Apple wins on a submarket but doesn't win on other submarkets, where is the saving? The answer is obvious. Taking the gaming transaction market, for example, if, for example, Apple were to succeed in showing that for the gaming transaction market it was wider than just iOS, we win right there on their pleaded case, as Mr Armitage acknowledged. That means there's no need to examine for gaming the foreclosure analysis, so who would enter the iOS App Store in order to offer gaming apps, to what extent would they come in, how would they innovate, how would they price, how would Apple react. None of that abuse analysis for foreclosure would need to be asked by reference to gaming transactions.

Similarly on the excessive pricing case, there's no need to examine whether the particular demand side value for these type of gaming transactions outweighs whatever *prima facie* excessive pricing material Dr Kent can show.

Now on this issue Mr Armitage did say: well, Apple's case on objective justification is

pretty much the same for all of the transaction markets. Sure it is, the argument is the same. Apple's arguments as to the need for security and privacy and reliability in the App Store do apply to all of these different transaction markets. But the evidence as to the importance of these protections will vary or may well vary between the different transaction markets. The need for privacy may be heightened in certain transaction markets than in others, and the particular value that can be obtained from the technological innovations in the device itself, the gyroscope, for example, that may be more valuable to certain type of app transactions, such as games, than in other transaction markets.

If we win on games but lose on something else, a whole chunk of that kind of analysis falls away as unnecessary, and that's an obvious saving, to answer the point made by Mr Armitage.

He said by reference now, now moving on to our evidence and the submissions in our defence, the Apple defence, just to be absolutely clear, because perhaps I wasn't clear enough in opening, we've never ever said that the issues in the second trial will be hermetically sealed from the first trial. Those words were put in our mouths. It has formed no part of our argument in this case.

On the contrary, as I said in opening, the factual issues that are relevant both to determining the issues in the first trial and the second, we will benefit from having them determined finally in the first trial and there's no need to revisit them.

On market definition, on our defence, Mr Armitage took you to some background sections in paragraph 41 where we pleaded the value that is obtained from the App Store in a section that is strictly part of market definition. But we are obviously not saying that needs to be determined in stage one. Mr Armitage there was taking sentences out of context to suggest that we were asking the Tribunal to resolve at the market definition stage questions that are specific to abuse. For the avoidance

of doubt, that's absolutely not what we are asking you to do. Had that point been raised before anywhere we would have clarified that, but I am clarifying it now.

It's clear, for example, in paragraph 42 of our defence, – relied on by Mr Armitage – in that part of our defence we are making expressly an abuse denial. We say there that what we are doing is competition on the merits and it's not abusive, and that's obviously an abuse issue and not an issue that we'll be asking you to determine at the first trial.

But, by contrast, when Mr Armitage took you to our point about the multi-platform rule and the operation of the reader rule, the effects of those are relevant both to constraints, because we say we do these things because we are constrained, but they are also relevant to deny allegations of foreclosure and abuse. But those questions of fact are either completely uncontroversial or very straightforward, and if they are determined one way or the other in the first trial that will serve finally for the purposes of the second. There will be input into the abuse analysis in the second trial.

I will move on then, if I may, to the practicability issues and complexity. Now we have never said that a single unitary trial would be unmanageably complex. That's not the point. The point is the saving and the efficiency that results from splitting these proceedings.

Just to repeat the point I made in opening, the Tribunal mustn't lose sight of the complexity and difficulty involved in trying the questions of abuse, objective justification, causation for the different pleaded markets pleaded by Dr Kent and pleaded by Apple.

For a unitary trial, the parties and the experts will need to prepare, for each of those questions of abuse, objective justification and causation, analysis that is based on Dr Kent succeeding on her main market of the iOS app distribution and on each of

Apple's pleaded -- well, Apple's pleaded markets but iOS only, which is Dr Kent's alternative case.

So we have Dr Kent's main case and we have Dr Kent's alternative case that one should look at each transaction market separately but only by reference to iOS. But for each of those one must prepare to deal with abuse, objective justification and causation and prepare for the possibility that Apple may win on some and not on others within those iOS only submarkets.

The plain and obvious point here are the huge benefits that result if Apple succeeds in the first trial. Now in my discussion with the Tribunal this morning the point was raised: well, you can't be sure that Apple will succeed on everything in the first part of the first trial, the market definition section. But even if it's not certain that Apple will succeed on market definition, the size of the benefit if we do succeed means that possibility, the possibility of ending this next year, must be given significant weight.

You certainly can't assume that we will lose on everything. We say, when one looks at the savings and efficiencies that arise from Apple's success on market definition, that possibility, even if it is just a possibility, must be given significant weight because the savings are so enormous by reference to the cost of a two week trial. But, as I say, even if we lose on everything in the first trial, there are still savings. And if we win in part, there are even greater savings.

In answer to that point, Mr Armitage relied on the *Epic* US case. He said: well, that was a trial on all issues, not just market definition and dominance and it was resolved within a relatively rapid period of time. But the *Epic* case in the United States was about gaming transactions only, much more narrow than the case which Dr Kent is raising.

Here, the allegation covers the whole App Store where there are many different transaction markets, and that means that the benefit of avoiding analysis of abuse

and objective justification is much greater, which is another reason why there should be a split trial.

Now in opening I placed a lot of emphasis on the fact that Dr Kent accepts in her evidence that the first trial, even with the extra issues that she says have to be addressed, would take two weeks. I made that point by reference to the timetables that Ms Hannah exhibited to her statement.

Now it was suggested by Mr Armitage in submission that this acceptance by Dr Kent that the first trial would be resolved in two weeks, even with the issues, the overlapping issues which they say would arise, was something that was raised in correspondence and could somehow be ignored now for the purposes of this application. There's simply no basis for that.

Ms Hannah's witness statement said in the clearest terms -- and because of the way she put the point, I do need to go back to it. It's an important point. It's in the core bundle behind tab 10.1, page 36.9, paragraph 20 and 20(a) in particular.

This is not a point that Dr Kent made lightly in correspondence and which she can now resile in submission. Ms Hannah says in evidence to the Tribunal that Dr Kent has prepared two updated provisional copies of the litigation timetable for the proceedings that have been provided to Apple in correspondence, but here they are, endorsed by her in evidence and they are exhibited to her statement. That's the reference there, LJH2.

The first assumes that the split trial will be dismissed. The second assumes that it's granted. I have shown you those timetables and shown you the fact that they say in terms the first trial will take two weeks and the second trial will take five weeks.

There is nothing in this statement, nothing, to suggest that the first trial will take longer or could take longer if they had greater clarity as to Apple's market definitions.

There is nothing to say they could take longer but this is -- and I reserve the right to

expand this timetable in the event that we have greater clarity as to Apple's market definitions. She never said that. She signed a statement of truth for the purpose of paragraph 20 and those timetables are exhibited to her statement. It is not good enough for Mr Armitage then in submission to just say it can all be ignored, in preference to for what he's now saying to you.

In any event, Ms Hannah was right to say that the first trial would take two weeks. That was actually a correct estimate on her part because if you look at their pleaded case, which they don't propose to amend, their case is that there are no substitutes for any of these apps. So they have to prove that. Whatever our case is, whatever Apple's case is, they have to prove that.

We are not going to do an exhaustive characterisation for all the apps. We don't need to be precise about the boundaries between all the different app transactions because the Class Representative doesn't say that we are dominant if the market is wider than iOS. Once the market is wider than iOS in any way, on their pleaded case, that's the end of it. Mr Armitage has acknowledged that in submission to you today.

So if you find there are any constraints for games, for example, we win on the games transaction market. That's why the first trial should take two weeks or less, as Ms Hannah said. Things like market share, for example, are for evidence, but again that's not a complex issue, there's no reason why that should extend the trial beyond Ms Hannah's estimate.

I will move on then, if I may, to the costs generated by a split trial. Mr Armitage said in submission, and I quote, that you can be sure that the costs that would be generated by a split trial will be greater than the saving if the split trial is ordered.

Again it's completely unevidenced. All he has is what Ms Hannah said about fixed costs. And it also really doesn't stack up. If there's no second trial, if Apple

succeeds on market definition, it's obvious there will be savings, really, really significant savings. As I have said many times, even if we succeed in part there will be substantial savings and bring huge benefits to the Tribunal and to the parties.

The next issue was on delay. Now the extent of delay really depends on the time needed for a judgment, and we can't predict at this stage how long the Tribunal will need to give judgment in the first trial.

On disclosure, the point made here on disclosure, the submission was that this will need lots of time because a significant dump, to use Mr Armitage's word, of documents will ensue and Dr Kent needs to be involved and says six months will be needed to deal with disclosure even on market definition and dominance alone.

Now on disclosure Dr Kent has given us no indication as to what she would want for a market definition and dominance trial. It's really impossible to justify a claim that will take months and months without ever having identified what she actually needs.

But, in any event, the six-month time frame is unreal. We have offered since the beginning of 2022 the transaction data. Dr Kent has shown no interest in looking at that. It's obviously material to analysing market definition and dominance.

But, in any event, once we provide the documents that we say we are going to provide, they are our documents. If they come back with queries, we ought to be able to deal with them relatively quickly because we should be able to explain or give answers if they raise them.

But I can say, in terms of the extent of the documentary disclosure that we propose, I am instructed that to say that it would involve millions of documents grossly exaggerates the number of documents given to the CMA and the EC.

I will move on then, if I may, to appeals. The first point that was made was that if we have a split trial and one has an appeal from the first trial to the Court of Appeal several years of delay may ensue. Again that's not realistic. The delays in the Court

of Appeal now are much shorter than they used to be. The time offered in Ms Hannah's evidence and in submission by Mr Armitage is excessive and it doesn't reflect the current Court of Appeal times.

But even if one has a one year delay, our submission, as I said in opening, is that this prejudice is not significant in view of the huge potential saving and efficiency if Apple succeeds on market definition. This whole thing could be over next year if we succeed on that issue. That's an enormous prize in terms of efficiency and costs saving.

In relation to appeal and stays, the suggestion was that Apple would definitely obtain a stay if there was an appeal. As the Tribunal knows, it doesn't follow that if you appeal or you get permission to appeal that you obtain a stay in the underlying proceedings, not at all. In fact, the price for obtaining a stay from a first instance court is usually some undertaking or order that the appeal moves expeditiously. That is usually the price one pays to get a stay: there has to be clarity as to the expedition with which the appeal would be pursued.

The final point on appeal made by Mr Armitage was that the costs on appeal would be substantial, but again that's just unreal. The appeals would be on points of law and the costs would not be substantial, and certainly not substantial by reference to the savings that would ensue if these proceedings were split.

Mr Armitage's main point on costs really depended on his ability to resile from Ms Hannah's evidence about the length of time needed for the first trial. He had to say that it will take longer than two weeks in order to explain just why it will be as costly as he makes out. You have my submissions on that.

On witness evidence, he said that the same witnesses might well be needed in the first trial and the second trial. That may well be the case for Apple but that's not the point. The point is what additional witnesses of fact will be needed in the second trial

or in the second part of the unitary trial if you order a unitary trial. The cost involved in preparing those witnesses will be enormous. They are the witnesses needed on questions of foreclosure, objective justification, the justification per transaction market, possibly specialists dealing with different types of transaction market. Those are the costs that would be avoided in whole if we succeed on market definition, in part if we succeed in part on the first trial, but that's the saving that results by reference to witness evidence if you split.

On experts, as I said in opening, we acknowledge that experts will be needed in both proceedings, but the inconvenience and strain will be minimal and it's Apple's in any event.

My final point relates to the CMA investigation. On this, Mr Armitage said that by having a unitary trial commencing in October 2024 it was more likely that you would have the benefit of binding findings. He didn't engage with the point I made, the legal point, that the findings aren't binding until the appeals have been resolved. He fell back on the argument: well, it would be of use to have the infringement decision. It wouldn't be binding on you because it's very likely to be appealed but useful to have in any event. But on his approach we would have that infringement decision on the eve of the unitary trial.

Just stepping back for just a basic case management consideration, we've spent all this money, all this time and effort preparing for a unitary trial on everything and then on the eve of trial we get the CMA's infringement decision. What are we supposed to do then? To stop? We appeal that? If that's the strategy, if that's what they are proposing, then what are we doing here?

We will have wasted potentially significant sums, significant sums, and much of that may need to be reopened or re-examined if indeed we are stopping for the purpose of litigating or appealing against the CMA decision, and this is in circumstances

where Dr Kent is not proposing a stay. It's a completely incoherent approach. By far and away the best solution is to get on with market definition and dominance in this Tribunal, have it resolved expeditiously, as we say, within a year, and then the CMA will have the benefit of that for the purposes of its own investigation. That's a much more efficient and sensible way to proceed and no doubt why the CMA is here, in order to make sure that if that is what happens the CMA is able to make submissions on issues that concern it.

It's surprising that Dr Kent should complain about the situation when she chose to sue Apple when she did. She chose to bring the proceedings when she knew the CMA had begun its investigation. The Tribunal will recall in the CPO application for certification Dr Kent proposed a relatively rapid timetable. She never suggested that you would have to wait for any of the CMA's findings.

Had she said that it might be necessary to wait for the CMA, we might have said that you should adjourn the CPO application. If the whole thing depends on the CMA, why are you doing anything? We would be very concerned if Dr Kent was to obtain a litigation advantage by not raising it at certification stage and then springing it on us now when at this late stage she's not proposing an actual stay.

The suggestion that even if an SO came out that might be of some use to the Tribunal again is incorrect. If the CMA issues an SO, that is a protected document. It's a document produced by the CMA in an ongoing investigation and therefore cannot be disclosed, we can't be ordered to disclose it under paragraph 29 of schedule A, 8A to the Competition Act and so it would not normally be produced in civil proceedings. So I'm afraid the fact that that may emerge at some point is of really little assistance to you.

What you really need, what the CMA needs, what everyone needs is a final resolution by this Tribunal of these issues of market definition and dominance, and

our split trial proposal is the best and most efficient way to resolve that as quickly as possible.

I am just checking I have said everything, but those are my submissions, before I sit down. Unless I may be of any further assistance ...

THE CHAIR: No, thank you very much, Mr Kennelly. Nothing further from us.

MR ARMITAGE: I am very sorry indeed, could I crave the Tribunal's indulgence for 30 seconds to just make three points that arise from the reply, hopefully just corrections and not contentious.

First I just wanted -- may I do that?

THE CHAIR: Well, it depends whether you are -- I mean strictly speaking the answer to that is no, unless there's good reason for that. I am not sure what you are saying the reason is. If Mr Kennelly has said something that you think needs to be corrected, then I am sure he wouldn't object if there's been an error made, but --

MR KENNELLY: If it's a contextual correction, I don't object in any way.

THE CHAIR: I think if you are raising anything consequential on -- other than a new point, you need to identify what the new point was before you start telling us about it, let's put it that way.

MR ARMITAGE: Well, I hope they all fall into the category of uncontentious corrections. I will be extremely quick.

The first was just, lest the impression had been given by the first point that Mr Kennelly made that *Albion Water* was a decision in which, for case management reasons, market definition and dominance were decided separately from abuse -- that's not the case -- I am grateful. There are some references I could give you, but it was essentially a quirk of the appeals process that happened.

Secondly, just the *Epic Games* litigation, Mr Kennelly said that that was a case that was all about the gaming market. Could I just give you one reference which is 1066

of the authorities bundle, the third authorities bundle, just so that the Tribunal is aware that's where the judge sets out the market definition that Epic was putting forward. The simple point is that the market definition being put forward by Epic did not depend on the gaming market. It was essentially identical to what Dr Kent puts forward in the present claim. That's the only point I was going to make.

THE CHAIR: Thank you. Good. So we will reconvene at 10.30. We will endeavour to give you a view when we start again tomorrow morning, and it may be that you then say to us that you would like a little bit of time to consider the consequence. It's possible we might need a little bit longer than 10.30 in the morning, but we'll let you know if there's any alterations to that start time.

Thank you.

(5.00 pm)

(The court adjourned until Tuesday, 13 September 2022 at 10.30 am)