IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 20th March – Tuesday 21st March 2023

Before:
Ben Tidswell
Dr 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

Competition and Markets Authority
Intervener

_____

A P P E A R AN C E S

Ronit Kreisberger KC, Matthew Kennedy and Antonia Fitzpatrick (On behalf of Dr. Rachael Kent)
Marie Demetriou KC and Hugo Leith (On behalf of Apple Inc. and Apple Distribution International Ltd)
Nicholas Gibson (Competition and Markets Authority 'CMA')

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Monday, 20 March 2023

(10.30 am)

Case management conference

MR GIBSON: Sir, perhaps surprisingly I'm going to stand up first to make a small request. If it's convenient to the Tribunal, I discussed with my learned friends the possibility of starting with the disclosure issue for the selfish reason, if it suits the Tribunal, that the CMA would then be very grateful if we could be excused for the exciting discussion of the experts.

But only if that works, obviously, for the Tribunal. But the parties are comfortable with that, on the understanding they think they should be able to get through everything today. I will sit down.

THE CHAIRMAN: I think probably yes. Perhaps we can come back to that in a minute. I rather suspect that's not going to be the way we would like to do it for other reasons associated with the Tribunal's availability, but certainly to the extent possible, we can accommodate that.

One of the things we might be able to do is to give you a time before which you won't be needed.

MR GIBSON: That would be a very helpful alternative.

THE CHAIRMAN: Let's see where we get to with that, if we may.

I should really do this business about the live stream, I'm afraid.

MR GIBSON: I'm sorry.

THE CHAIRMAN: At some stage -- perhaps we won't need to do this, but we do have to do it, I'm afraid -- some people are joining on the live stream on our website. So, I have to state the customary warning: “an official recording is being made, an authorised transcript will be produced, but it's strictly prohibited for anybody else to

make an unauthorised recording, whether audio or visual, of proceedings, and breach of that provision is punishable as contempt of court".

That is the housekeeping.

THE CHAIRMAN: Good morning, everybody. Let's start by working out what we have on the agenda and the order of play.

As I understand it, we have the applications for permission to adduce expert evidence. Then I think we probably need to have a discussion about progress on disclosure, which is partly about the Disclosure Report and the EDQ, but also hopefully some discussion about the approach to repositories. Then we have a specific application -- Ms Kreisberger, your application in relation to the CMA documents and relevance.

Is there anything else that's live for today and tomorrow, if we need it?

MS KREISBERGER: That's the list. I'm grateful for that, Sir.

As Mr Gibson said, we are confident that we could get through that in one day. So, if the concern is about the full panel's availability tomorrow, then we think we can deal with that, even if we take the disclosure issues first and then come on to experts.

The expert applications have been well ventilated in the papers, so the points are clear and I would hope those issues could be dealt with quite crisply.

THE CHAIRMAN: Yes. Do you have a sense of how long you think the expert discussion will take between you?

MS KREISBERGER: I would have thought that the afternoon would be more than ample. I wouldn't expect it to be the whole of the afternoon.

THE CHAIRMAN: I suppose the other thing we could do is: we could start with the disclosure and --

MS KREISBERGER: See how we go.

THE CHAIRMAN: -- if we haven't finished it by lunchtime, then we will finish it and anything that needs to be mopped up will be mopped up tomorrow. It's a bit unsatisfactory.

The difficulty with that is, to the extent that I end up sitting by myself tomorrow, obviously anything I hear will have to be a discrete item that I will be producing a decision on by myself. So, we can't have an overlap between things that the Tribunal generally has heard and the things that I have heard. So, we have to be a bit careful about that.

But maybe -- I don't know, do you have a strong view about that?

Are we happy ...?

So, if it's helpful, and if you prefer to do it that way, then we are happy to give it a go.

MS KREISBERGER: I think there is a bit more to cover on disclosure because it's been quite a fast-paced set of developments, including over the weekend. So, there's more for me to put before you, before the panel, than there is on experts which -- the points have been well ventilated, so we can deal with that at a brisk pace, I would hope.

THE CHAIRMAN: You're not anticipating we're going to have any questions?

MS KREISBERGER: But, of course, I am in your hands on questions.

THE CHAIRMAN: I suspect you may get quite a few.

MS KREISBERGER: It's always a brave move to make predictions, but I would be surprised if we couldn't get all of this done in a single day.

THE CHAIRMAN: That's certainly what I thought. I suppose what I don't want to do is to find we get to a situation where we can't finish the expert material because it's just more difficult to convene the full Tribunal, and it has to be dealt with by the full Tribunal. So, I don't mind having disclosure bits. If we look like we're going to

have to deal with disclosure bits at other times, whether it's tomorrow morning or some other time, I think that members of the Tribunal are happy for me to pick those up unless it happens to be convenient for them to hear them. But we can't do that with the expert material.

MS KREISBERGER: Understood, Sir. I will do my best to take matters at a good pace, and we could perhaps review, after a couple of hours, whether we're on track to use the afternoon or most of the afternoon for experts.

THE CHAIRMAN: Good, okay. Let's do that.

MS KREISBERGER: Does that sound sensible?

THE CHAIRMAN: Let's give that a go.

MR GIBSON: I'm grateful.

Application by MS KREISBERGER

MS KREISBERGER: In that case, Sir, I will begin on disclosure.

Now, Sir, the starting point for this is that at the last CMC, which was only three weeks ago, you asked for an update on disclosure and Dr Kent was certainly very grateful for that indication because there is an imperative, now, to move things along.

Now, in directing for the second time that Apple must produce a compliant Disclosure Report using best endeavours, Sir, you expressed the concern that you would make the order and we would be in no better position as a result and, if I may say so, that was prescient.

The headline point is that Apple's second bite at the cherry has produced little in the way of meaningful additional information which would inform or facilitate disclosure requests by Dr Kent. At the same time as refusing to give what would be a useful description of the universe of documents, Apple has now made a disclosure proposal.

In contrast to the position it took at the last CMC and its previous Disclosure Report,

that proposal is essentially to dump the US and Australia repositories on Dr Kent in their entirety without any relevance review, and that's around 6 million documents.

So, here we are today, it's four months on from the original disclosure deadline, which was 18 November last year, and six weeks before Apple was due to give disclosure; that was 2 May, and I know you have that date well in mind, Sir.

Now, I think we have to accept that date is now imperilled by Apple's breaches of the orders and general lack of constructive engagement, which I will take you through. But so that you have it at the forefront of your mind, the main question for today is: what order can you make today to move matters along?

Now, I will obviously develop my submissions on that. But, just so you have it, Dr Kent's proposal -- and it's one that's made really in exasperation -- is that it is now time to give up on the Disclosure Report and EDQ process which the Tribunal ordered. This shouldn't, with respect, be a third time lucky situation.

So, the Class Representative feels that she has no choice now but to go on and make targeted disclosure proposals. What we have in mind is a Redfern schedule approach.

Now, you, Sir, observed, at the last hearing, that on the current state of information that's not an easy thing for Dr Kent to do. The phrase you used was she will be "shooting in the dark".

Now, that remains the case, but we don't see any other viable option at this stage. So, this is not an optimal outcome, but here we are; a dump of many millions of documents on Dr Kent's team is not a viable alternative.

Sir, I will put the points before you, but what that proposal would do, in fact, is it would threaten to up end Dr Kent's budget, it critically raises the risk of missing relevant documents in the disclosure process, and potentially derails the timetable.

So, that's my headline point. I will take you through the points, but it may be helpful just to summarise where we are on documents. As I said, there's been a lot of

movement.

So, the amended Disclosure Report and EDQ were served on 6 March. We then received Apple's lawyers' letter, GDC's letter, on 10 March, and that's where this document dump proposal was first made. In the same letter, Apple's lawyers say they're refusing to disclose the 7,000 CMA documents, which you will recall were the subject of discussion last time. They say they're irrelevant, so they're refusing to disclose irrelevant documents in relation to that repository.

We then had Mr Watson's first statement; that was served on 13 March. That purports to be a statement on the nature and extent of the searches that you ordered, Sir. We then, on the same day, received Mr Doris' fourth statement. That statement confirms that Apple didn't assert privilege, as we understand it, over any of the documents that were provided to the CMA, so there was no limited waiver. That is one which is not on the agenda for today, Sir, but I just mention it for completeness. Dr Kent will write to GDC about the privilege issues separately.

It may well come before you again.

Then, lastly, on -- no, that's premature. Not lastly.

Mr Doris' fifth statement was served on Friday evening. Now, that confirms Apple's position that it's refusing to provide the 7,000 documents in the CMA cache on the basis that they're irrelevant, and that statement gives their information on the relevance review. I will come back to that.

Apple also provided the US and Australian protective orders on Friday evening. That's not on the agenda today. We're looking at that.

On Sunday, Apple then served some tables in relation to the US document requests. I will show you those as we go through the material.

On Dr Kent's side, she served Ms Hannah's third statement on Friday evening; that is a response to the 10 March proposal from Apple in relation to disclosure. What

Ms Hannah does in that statement -- and I will show it to you -- is she sets out the practical ramifications of the document dump proposal and the threat it poses, Sir. You will appreciate this has been done at short notice, but it's important, given that proposal has been put on the table, that the Class Representative has an opportunity to put evidence before you in relation to the problems that approach would throw up.

THE CHAIRMAN: Sorry, and I should say we have seen Mr Doris' fifth statement and we have had a chance to have a look at that, but we haven't seen Ms Hannah's statement this morning. So, I expect it's in the bundles, but just so you know we haven't actually read that yet.

MS KREISBERGER: Understood. That's a very helpful indication. I will take it -- it's very short -- and I will show you the relevant paragraphs.

THE CHAIRMAN: Yes.

MS KREISBERGER: Now, what Dr Kent really wants to achieve today is to avoid this stasis on disclosure. That's why we're seeking directions for a Redfern-style approach. What we would like is directions for a timetable, and Dr Kent will take the initiative and prepare the first draft of a Redfern schedule.

I accept that means that the May date falls, and I will show you, Sir, the draft order. But this is Dr Kent's best attempt to inject some momentum into the process after the elapse of four months.

MS DEMETRIOU: I'm so sorry to interrupt, but I haven't seen a draft order, and obviously it's important that we see that if I am responding to Ms Kreisberger's proposal for -- could I have a copy? It hasn't been sent to me.

MS KREISBERGER: The copies are coming.

THE CHAIRMAN: I don't think we have had it yet.

MS KREISBERGER: You don't have that?

THE CHAIRMAN: No. So, I don't think any of us have seen that.

MS KREISBERGER: It doesn't contain anything that we haven't set out in correspondence. It is nothing new, but we understand --

MS DEMETRIOU: Sir, if I may, I may be able to short circuit things a little bit because Ms Kreisberger seems to be preparing to resist what she calls the "document dump". Now, if I could just say, first of all, that proposal was made really in the spirit of cooperation and to try to be constructive, given that we've taken on board the points that were made at the last hearing that they were having difficulty in identifying categories.

But given what they say, if in fact they want to revert to a position where they're identifying categories and we agree those in correspondence, we're content to do that. It's what we suggested all along. So, I don't think Ms Kreisberger needs to develop submissions on resisting the proposal that we disclose all the US and Australian repositories. We really did offer that to try to be helpful because they were saying they couldn't identify categories.

If what I apprehend is that they want to revert to the position that we proposed back in November, which is to identify categories and we then search the repositories, then we're all on the same page and we can short circuit things quite significantly.

MS KREISBERGER: Well, Sir, I'm grateful for that. It's the first time we have heard that. We're just checking when our proposal went across to -- so the proposal was sent across on Friday. Obviously, there hasn't been much time. Although we received quite a lot of material over the weekend, we hadn't actually had a response to our proposal that there be this Redfern schedule.

MS DEMETRIOU: Sir, we haven't even had an order, so that's a really unfair complaint. We haven't seen an order with what it is they're seeking, so we are trying to be constructive.

THE CHAIRMAN: Let's not get too worried about what has happened and what has

not happened. What I would like to understand is how this process is going to work. It seems like there is going to be a measure of agreement about it.

But, actually, I'm still somewhat in the dark as to what the process is, what the plan is. I think it would be quite helpful, and perhaps it's something we might need to explore with you jointly: how are we actually going to get to the bottom of what's in these documents and what needs to be looked at?

Because it seems to me the one thing that's clear and everybody agrees on, is that looking at 6 million documents on an eyeballs basis, people looking at them, is not the answer. So, we're not going to do that. It's not clear to me what the substitute for that that's being proposed is. So, for example, if you were to produce a Redfern schedule; what's that actually going to say? What is the plan for pulling out of the 6 million documents, those documents that are of particular importance?

I rather assumed that at some stage somebody is going to conduct some form of what I would call a "key word search". I'm sure there is more sophisticated terms for that these days. But, ultimately, we're talking about the electronic filtering of documents, aren't we? Rather than a document-by-document analysis. Is that where we're going, or is it more laborious than that? What's the plan?

MS KREISBERGER: Sir, I can show you a sort of work through example. The problem is -- and, Sir, I am in your hands, but I think I do need to address you on the reason why the amended Disclosure Report doesn't do what it was supposed to do. You did order that.

THE CHAIRMAN: Yes, I'm happy to spend some time on that. If you would rather come to the point after doing that -- and, again, in the spirit of short-circuiting things, it's clear that the amended Disclosure Report does give you more information, particularly about the custodians and what they do and the documents that are attached to them; that did seem to be a step forward. I appreciate that what it doesn't

do is provide you with a full, or a fuller, index of what's in the population. I think it was always reasonably clear that was not something that the Defendants were willing to volunteer.

So, it may well be that you say it's fallen short, and I'm not going to dissuade you from taking us through that.

MS KREISBERGER: Yes.

THE CHAIRMAN: But, ultimately, I would like to get to the answer of what's actually going to happen to this population of documents and what is the mechanism. I don't mean the legal mechanism, I mean actually the practical mechanism by which one identifies what documents are actually extracted and looked at, and who is going to do that, and is that the best way of doing it.

MS KREISBERGER: So, to answer that question, given that we do not have what you had proposed at the last CMC, which was -- for instance, you might recall Mr Kennelly put one of the document requests to you, it was request number 11 from one of the US productions. You said, "Okay, let's play this out. Can you tell them how many documents were in the response, and can you tell them what type of documents: board papers, strategy, presentations?" You know, we don't know. That's what we were hoping for, and we didn't get that.

So, given that we don't have that information, which we did want, the exercise would look like this: it would be Dr Kent's team preparing a document in relation to the pleaded issues and using common sense, frankly, as to what type of documents might exist that would respond to the pleaded issue.

Then how Apple go about the searches, whether they use TAR, technology assisted review, or some other process, that's really a matter for Apple. I think I do need to take you through some of my submissions on this. Because what Ms Hannah's statement does, is it explains why Dr Kent's team can't do that exercise, essentially in

the dark, because we don't have the advantage of the client explaining what the documents are, where they sit, what technical documents mean, etc..

So, if Dr Kent sets out a Redfern schedule with a sensible list of pleaded issues and types of documents that might address those, then, frankly, it's a matter for Apple to look in its repositories, look outside its repositories and identify the documents.

THE CHAIRMAN: But you accept that they're not necessarily -- they're probably not going to do that by reference to putting people in front of screens and looking at documents?

MS KREISBERGER: It's 6 million documents.

THE CHAIRMAN: It might be possible in relation to some of them, because there might be a document population of 200 identified by the parameters you set, then they might decide to do that.

MS KREISBERGER: Absolutely. But --

THE CHAIRMAN: Sorry, bearing in mind that the position that Apple, as I understand it, takes is that these documents are, on the face of it, relevant. So, they're not in contrast with the documents, the CMA documents, that went to the Commission first. They're not taking the position that those haven't been reviewed for relevance. Their position is these documents are, on the face of it, all relevant. What is the review that they're carrying out for you?

It's not a relevance review, is it?

MS KREISBERGER: It is a relevance review. Because they say, well, they have been reviewed for relevance in other proceedings. But they haven't been reviewed for relevance in these proceedings. I can show you a couple of examples in the request that shows there is a mismatch. Obviously, we're not in a position to work out every detail at this stage, but there does have to be a relevance review and that does have to be conducted by Apple. Because they're not giving us any information or telling us

how they propose to do that, they're going to have to do it by reference to a granular separation out of the issues and documents that we think might exist that are relevant to those issues.

THE CHAIRMAN: So, I can see, I'm not sure "relevance review" is the right -- perhaps it's not a helpful expression to use. Because I can absolutely see that there has to be some way of Dr Kent finding the ability to identify a pool of documents that's a manageable pool of documents that goes to a particular issue that's pleaded in the case. I can absolutely see that. That's what we're trying to achieve here.

But that is actually a filleting exercise, isn't it, of documents which on the face of it, as a general pool, are broadly relevant to the case? I appreciate that there may well be a pool of documents which doesn't overlap, with documents that are relevant and other pieces of litigation, but that's probably relatively marginal, and do we need to spend time getting to the bottom of that question?

In other words, if conceptually what you're doing is going into a large body of documents and accessing some defined corpus of documents that responds to your request, or whatever it happens to be, we might never know what the relationship between that and the rest of them is, but does it matter?

MS KREISBERGER: The position is this: Apple could have taken a different approach. I am conscious that I am sort of jumping ahead. But they said in their EDQ, the amended EDQ, "We're going to come up with some search proposals". It turns out they don't have any search proposals. The proposal was: “We're going to dump the repositories on you”.

As I say, that is completely unviable. That is not something Dr Kent's team can handle, and I will show you Ms Hannah's statement. Given that we don't have a proposal on the table from Apple as to how to conduct a sensible relevance review of the repositories, they're their repositories, their documents, in litigation that they're a party

to, given we don't have that, the question is: what alternative do we have?

THE CHAIRMAN: I think there is an alternative, which is we force you to agree some search proposals, for the two of you to -- that's what's missing here, isn't it? Actually, certainly in my experience, that's what I would anticipate would happen in a piece of litigation. One would expect there to be sufficient cooperation between the parties for there to be a sensible agreement on a set of search proposals and the recognition that those would need to be modified as the return came back. One would see that there might be -- instead of producing 200, it produces 2 million, so you have to refine it. But I would expect that to happen on a cooperative basis.

What I am nervous about -- and I appreciate we're shortcutting lots of things you want to show us. I'm not going to stop you doing that. But, just to be clear about where we're coming from on this, we don't want to end up in a position where we just have this ping pong ball going backwards and forwards. Where you say, "We're not going to do it. Apple has to do it", and Apple says, "We're not going to do it, you have to do it", and it just doesn't get anywhere.

What I would like to get to, is a position where there is a commitment from the parties to sit down -- and I actually probably do mean sit down in a room -- and work out what a sensible set of search proposals would be, using electronic searching techniques, and that's going to require some degree of sharing on your part, sharing of the things that you think you're interested in. Obviously, a degree of sensitivity, you have to do it if you're going to get this progressed. On Apple's part, a degree of sharing how these databases actually work and what are the likely consequences of the sort of requests you're making.

In other words, if they know that it's going to produce 2 million documents and no one can look at them sensibly, then they need to tell you that.

I am at a loss to understand why that hasn't happened in this case.

MS KREISBERGER: Yes, well, we share that.

Let me make two points and then I will, if I may, just take instructions.

THE CHAIRMAN: Yes, of course.

MS KREISBERGER: We don't have a list of disclosure issues yet in this case. So, we're in difficulty because we don't have a proposal from Apple as to how that relevance review might work. If we had a sensible proposal, we could engage with that.

The most effective method is for Dr Kent to step in and take the initiative that would achieve the goal, Sir, that you're proposing, which is a tightly defined request crystallising the issues in the case and making constructive proposals as to where they might lie. Because Dr Kent isn't able to come up with a relevance review, whether it's a technology assisted relevance review -- Dr Kent is simply not in a position to make a proposal as to how that might work for Apple's documents; that's not possible. So, either we have Apple's proposal, we can engage with that, or what Dr Kent's team can do is engage with the pleaded issues, to produce that document. Then the next step is how that might work in terms of the actual electronic processes.

THE CHAIRMAN: Well, I can understand that. But perhaps at the risk of repeating myself, this is not supposed to be an adversarial process.

I appreciate we are in an adversarial process. But this bit of it, the way in which the Disclosure Report is set up and the EDQ, and the expectations on the parties in terms of moving this forward is not intended to be dealt with by letters written on Friday night that are aggressive; it's intended to be dealt with by constructive discussions, which actually, in my experience, are best facilitated by the solicitors responsible getting in a room and trying to work out how they're going to do it. I don't see any evidence that that's happened.

MS KREISBERGER: Certainly, on my side, there is a great degree of frustration

because we just don't have anything to engage with at the moment. But this proposal is made in the spirit of something concrete that can be done to advance matters. But might I just take instructions on your comment?

THE CHAIRMAN: Yes, of course.

(Pause)

MS KREISBERGER: I'm sorry about that, Sir.

THE CHAIRMAN: Not at all.

MS KREISBERGER: Could I ask for a short adjournment because I think you've raised some issues which it would be more effective for me to take instructions on and see how we can get to a constructive end point.

THE CHAIRMAN: Yes, of course. What I think would be helpful is, if it was not just a question of taking instructions, but if there was a possibility of having a discussion between the parties on this. If you want to come back and tell me that it's just not going to work that way and it's not the right answer, then obviously we're prepared to hear that. But it does seem to us that there is a missing piece of this, which is there ought to have been that degree of collaboration at least which allows us to get to the sharp point of this, rather than just have this thing going backwards and forwards over the net.

So that's what I am keen to understand, whether you feel you can take that forward, Ms Demetriou?

Submissions by MS DEMETRIOU

MS DEMETRIOU: Yes, we will make every effort to do that.

Since we're adjourning for a short while, can I just ask for you to look at -- in the supplemental correspondence bundle, behind tab 17, is the letter that was sent yesterday morning that Ms Kreisberger referred to. I just want you to be aware of

what's there.

THE CHAIRMAN: That's supplemental?

MS DEMETRIOU: That's supplemental correspondence bundle.

THE CHAIRMAN: That's tab?

MS DEMETRIOU: Tab 17, and there's a letter at page 133.

THE CHAIRMAN: I don't have a tab 17, I don't think.

MS DEMETRIOU: Do you have page 133?

MS KREISBERGER: These are the tables that I referred to, Sir. I'm happy to take you through them.

MS DEMETRIOU: So, this is the information. These are tables which -- so when Ms Kreisberger says, "We have no idea what's in these repositories", this shows the requests. Then you see, in the last column, is “Response”, which shows exactly what was disclosed by category. So, for example, this defines really quite carefully the categories of documents that are in these repositories. So, it's just not right. The reason this was produced yesterday is because it took a lot of time to produce it, to put it together. It required liaising with the US team and so on.

THE CHAIRMAN: Sorry to interrupt you, can you just explain how this works? The first column is -- the request is --

MS DEMETRIOU: The “Request” is the request that was made in the other proceedings.

THE CHAIRMAN: Yes.

MS DEMETRIOU: Then you have Apple's objection. So, we provided all of that before.

THE CHAIRMAN: So, this is the document that shows to what extent you did not meet the requests. Because I think one of the points that was made at the last CMC was that Dr Kent had no idea what Apple have actually provided.

MS DEMETRIOU: That is right.

THE CHAIRMAN: You're saying here you've met that because you've provided --

MS DEMETRIOU: Yes. So, what you have here is -- the vast majority of the requests, the disclosure requests, were accepted by Apple. You see that in the table. To the extent that objections were made, what this now shows is where it landed, where it ended up, so what documents were disclosed.

What you have in tabular form is a very careful table setting out the categories of documents that are within these repositories, and then --

THE CHAIRMAN: Yes, what it doesn't show is, how many documents there are in each category, does it?

MS DEMETRIOU: No, it doesn't show that. But what you also have --

THE CHAIRMAN: Do you have that information though?

MS DEMETRIOU: No, we don't have that information. We've tried to get it, and we don't have that information.

But what you also have, in the amended Disclosure Report, is the number of documents per custodian and the type of document as well. This also shows that some of the categories are defined by type of document here. So, when Ms Kreisberger says, for example -- I mean, we can see this from the -- if you go to the core bundle, volume 1, tab 8, page 110 ...

So, core bundle, tab 8, page 110, this is the appendix to the Disclosure Report. And if you go to the top, "Request for production number 11", “All presentations to the Board of Directors Concerning the App Store…”. So, when Ms Kreisberger says we don't know what types of documents are in here, well, we have a very good idea. We see that as well from page 109, request 9, “All business plans, planning analyses… [et cetera, et cetera]”.

So, what one has is a very good idea of the custodians, the number of documents per

custodian, the types of documents and the categories of document. So, what we don't have is how many documents per category. But, frankly, that doesn't really matter at this stage because what we know is what's in there.

THE CHAIRMAN: Thank you, that's helpful. We certainly have that point.

I think what I don't want to do is to find that Ms Kreisberger hasn't had the opportunity to develop the points she wants to make, which I think you're answering.

So, let's just try -- and I don't know whether that's going to be necessary or not, because it may well be that if you have a productive conversation, then, actually, you can take it away. But I would just, again, emphasise that the thing I am interested in is: what actually does the plan look like? And that can be agreed, and that can involve cooperation, because it's not going to work otherwise.

We can obviously do it your way, which is pop the ball back over the net and see what happens. But I am pretty sure we're going to be playing the game in another two months' time and, you're right, the timetable will be affected.

What I would like to be able to assure us all is if we could have a set of proposals, and I don't see why it would take until May to produce them, I would have thought that could be done this month. What are the particular things you're interested in, and what are the search terms that best reflect the withdrawal of those from the document body? And some evidence, then, about -- or some return from that process, so that you're able to understand whether it's a feasible way of doing it or not; if it's not, there will have to be some adjustments. It will have to be an iterative process, I would have thought. I would quite like if we could just leave you with that challenge to think about for how long, do you think? 15 minutes?

MS KREISBERGER: 15 minutes, Sir, I'm grateful.

I should just say, because Ms Demetriou has addressed you on -- she's taken out a particular document that was sent to us yesterday; we don't accept anything she has

just said about the value of this document. If necessary, I will show you why. This is quite a clever way of producing a lot of paper that doesn't add any information at all. So, if it proves necessary, Sir, I will take you to these tables and show you that, but --

THE CHAIRMAN: If we have to do that.

MS KREISBERGER: -- I would like to take the opportunity first --

THE CHAIRMAN: If we have to do that, then you will absolutely get the opportunity. I will consider it to be a signal of failure if we get to that point because, at the end of the day, you're both going to be able to -- I can absolutely see that you're both going to be able to make a case. On one hand, you will say you've given us lots of information, you're going to say it's not enough. At the end of the day, I don't think we can solve that problem. The problem can only be solved, as far as I can see, by a degree of cooperation, which works on the basis the information is available and has a sensible and practical way of taking that forward. It's the practical bit I am interested in.

MS KREISBERGER: Sir, could I just give you a reference, then, for the adjournment, to Ms Hannah's statement?

THE CHAIRMAN: Yes, of course.

MS KREISBERGER: Because you haven't had the opportunity to see that. That's in the supplemental core bundle and it is at tab 6, I think. Yes, tab 6. I don't mean to give the Tribunal homework over the adjournment.

THE CHAIRMAN: That's fine. We have to have something to do.

MS KREISBERGER: I think it is important, Sir, because you will see, it's a short document --

THE CHAIRMAN: We will read that and be ready to --

MS KREISBERGER: I'm grateful.

MS DEMETRIOU: Sir, may I just say that we hear what you say about cooperation,

and that was the mindset with which we approached this CMC. We were, with respect, a little taken aback to see the visceral reaction against our proposal to give them all of the documents because we thought that was a constructive way forward.

Now, it seems like there is a knee-jerk reaction against that. That's fine, we're happy to go back to the previous position, which is identifying documents within the repositories. We want to do our utmost to cooperate, to reach a position where that can be done. We're certainly not trying to stand in the way of disclosure. We do want to move things forward and that was very much the motivation behind -- we thought we would cut through things by offering to give them all the documents. That's all there was to it.

THE CHAIRMAN: Yes, thank you. This is a parting observation before we send you off: it seems to me there are two bits to this, aren't there? There is the bit about working out -- sorry, I have lost my train of thought.

Actually, I think maybe we will just leave it. I'm going to let you go and have the discussion. Then maybe we will leave that for when we come back. Why don't we do it on that basis?

MS KREISBERGER: I'm grateful.

THE CHAIRMAN: I think we've probably said enough about it. I think you know what we think, and we'll leave it.

MS KREISBERGER: We understand.

THE CHAIRMAN: Thank you.

(11.10 am)

(A short break)

(12.00 pm)

THE CHAIRMAN: Ms Kreisberger.

MS KREISBERGER: Sir, the position is there has been dialogue and the parties are

in the process of attempting to agree a proposal.

I suggest the most time effective approach is for the parties to liaise over the lunchtime adjournment on a possible draft order that we could put to the Tribunal after lunch. So, we don't have full agreement yet, but progress has been made. If we attempt to agree some draft directions, we can either put those before the Tribunal or come back to you if there is no agreement as to what we say should be ordered and for Apple to respond.

THE CHAIRMAN: I think that's helpful, thank you. Thank you for the efforts you're making. I think let's do that.

The bit we're interested in is not so much the identification. I think not so much the identification of the issues. So, the first bit of this is working out what you're interested in, and that seems to me to be the easy bit. The tricky bit of this is: how do you then access the document population to extract the things that are going to be most likely to be helpful on that issue? That's the bit we're really interested in, and I think that is the bit that does require some degree of cooperation. Because you no doubt reasonably have some questions about who is the right person to ask about -- if the issue is, you know, "why is the Commission set at 30 per cent?", then you're going to want to know, I would have thought, whose documents are most likely to respond to that. So, who is the person who has responsibility for those decisions or discussions, and some information about, perhaps, the file type of those documents; that needs to be shared with you before you can take it much further.

Equally, one would expect, at that stage, Apple to be able to suggest some search terms or for you to discuss, some search terms that would produce a body of documents, and then you would know how big they are. If there are 2 million, that wouldn't work and you'd have to find another way of doing it. So, I just want to make sure that is the bit you're talking about and we could expect some proposals on.

MS KREISBERGER: Yes, and that's precisely the lines along which we have been thinking.

Sir, that's a very helpful indication because Dr Kent's fundamental position is the actual articulation of the search terms has to start with Apple because, as you say, it's their documents. So, if we can help on what the issues are, we then want Apple to say: well, these are the search terms that would apply.

So, we would really be looking just for directions for a timetable to achieve that.

THE CHAIRMAN: Yes. I think the moment you start trying to allocate the responsibilities like that, I think you're back into the ping pong game, though. So, I think there is really an obligation on both the parties to try to constructively find some ways to produce the right answers. So, I think that probably does involve Dr Kent suggesting some ways and Apple commenting on those and indeed testing them. So, there is going to have to be a bit of that, I think.

I don't think you can just say, "We're going to tell you what the issue is and then over to you". Equally, I don't think Apple can take a one-sided position. They're going to have to engage to have a conversation and share some more information, I suspect, about specific requests, for you to be able to volunteer that suggestion.

So that's why I think there has to be, in relation to these points, more of a dialogue, and it isn't really going to work unless -- so the system you set up has to somehow incorporate the dialogue so it works. That's a bit painful, I'm sure, for the people who have to do it, but actually I think it's the only way I think we can see this moving forward.

MS KREISBERGER: We will do our best, Sir, over the adjournment and come back to you with the product of that.

THE CHAIRMAN: If it's helpful, I am available tomorrow morning. So, if that's what ends up being discussed, then you're welcome. You may well feel you have had quite

enough of my views on it, but if you wanted more I could certainly sit tomorrow morning and we could knock out a process as well, if we haven't come to that.

MS KREISBERGER: Yes, we will update you over lunch. But that's all been very helpful for us.

As I say, the goal is to get some directions on the process, so that we can actually begin the process of engaging on these points.

THE CHAIRMAN: Good, thank you.

MS KREISBERGER: Sir, there is only one outstanding point on disclosure which I need to deal with, particularly given Mr Gibson's presence in the room, before we move to the expert applications.

THE CHAIRMAN: Yes.

MS KREISBERGER: That's the CMA documents. So, it may be best if I show you Mr Doris' fifth statement in relation to these documents. That's in the supplementary core bundle, tab 5, page 291.

Sir, so just to summarise where we are, as Mr Doris says there, 8,366 documents were provided to the CMA. They came from search string number 1, from the European Commission documents, and of those 1,086 have now been produced to the Class Representative and privilege is maintained in respect of 604 documents. So, there's been a little bit of movement since the last CMC on that.

Sir, that is a 20 per cent relevance rate, you can see just over 1,000 of over 8,000 documents.

Now, our position on this is that is a very low, surprisingly low, relevance rate. What Mr Doris says, at paragraph 8 of his statement, is that, well, it's not surprising, he says, because the European Commission string is in very broad terms and designed to be overinclusive. Sir, we don't accept that. If I can ask you to turn to that search string, that's at tab 3 of this bundle, page 272.

THE CHAIRMAN: The supplemental core bundle?

MS KREISBERGER: Supplemental core bundle. It's at the back of the fourth statement from Mr Doris.

THE CHAIRMAN: Yes.

MS KREISBERGER: Now, this is the search string itself. I won't attempt to read that out, but if I could ask you to cast your eye over it.

THE CHAIRMAN: Sorry, just locating the ...

MS KREISBERGER: Shall I give the reference again? So, it's supplemental core, tab 3. It's the last page in that section.

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: Sir, have you had an opportunity to just cast your eye over it?

THE CHAIRMAN: Yes.

MS KREISBERGER: Now, what you see there, as flagged by the three times the word "NEAR" appears, is you essentially have three groups of search terms. In order for the string to be engaged, the document would need to trigger -- this is our understanding. I'm sure Ms Demetriou will correct me if we have that wrong -- each of the three groups to come within the search string.

So, the terms are different options within each group of three.

THE CHAIRMAN: Yes.

MS KREISBERGER: So, we don't actually accept that that's very broad. We think this is quite a confined set of search terms, as we understand them. But, also, you see there that only six custodians were searched, these are very senior individuals within Apple.

So, Mr Doris bandies around these terms of over-inclusivity and so on. We don't have great visibility on that, but it's not obvious based on the information provided that that's right. We do say this 20 per cent relevance rate raises a question as to the relevance

review.

Now, if I could just show you what Apple says they did in terms of the relevance review, that's at Mr Doris' fifth statement, paragraph 15. I'm sorry, it's paragraph 11 of the fifth statement; that's at tab 5, page 293.

Just to note, in his fourth statement, you see almost the identical paragraph; that's at 15 of his fourth statement.

But what he says there is that the relevance review that Apple's lawyers conducted was a human review, conducted by reference to the CMA issues. He says the process followed was careful and appropriate. Gibson Dunn solicitors set the parameters for a first level substantive review of the CMA investigation documents in light of the issues identified; those are the CMA issues. Daily meetings were held, and quality control checks were also conducted throughout the process.

So, we're told the review was careful and appropriate, but we're not told what the parameters of that review were. We're told that Gibson Dunn set the parameters, but it hasn't disclosed those parameters. We're just to take it on trust that the review was careful and appropriate. We also don't know what the particular quality control checks were.

Now, Sir, we considered, in the light of this information, asking for more information about the nature of this review given the surprisingly low relevance rate. But given the way disclosure is unfolding in these proceedings, we think that is not the most effective way to take this forward.

This is a small cache of documents, 7,000 documents. Sir, you observed at the last hearing this is a set of documents that are susceptible to human review, and that is precisely what Gibson Dunn has performed. So rather than asking further questions to understand the level of scrutiny, how the review was performed, we say let's just have those documents, let's just cut through it.

Apple's original stance for today's hearing was they just wanted to disclose all the US and Australian repositories. So, they don't have a principled objection to handing over documents which may be irrelevant.

THE CHAIRMAN: They say, don't they, that those documents have all been subject to some form of relevance review before. Whereas I think they're saying these ones never have; that's the distinction, isn't it?

MS KREISBERGER: That is right. We say: look at the search string. The search string was tailored, it was designed to identify relevant documents. It was a search across a very small set of very senior custodians, and we're being told 7,000 of the documents identified by that search string are irrelevant. But we haven't been given very much information at all as to how that relevance review was performed or what the parameters were for that relevance review.

So, we say: look, the Tribunal will want to make an order that is proportionate and cost-effective. Let's not have any more toing and froing on this. Let's just cut through it, and we will just take those documents. What is the principled objection to providing 7,000 documents that were identified by the Commission search string, a tailored string of documents? These documents were provided to two sets of regulators.

We say let's have them.

THE CHAIRMAN: So, when Mr Doris -- and maybe there is something in this, because I see what you say about parameters. I'm not sure what it means, but I had understood paragraph 11 to be saying that Mr Doris' team had conducted a review for relevance on the basis of the issues which were in the Tribunal's order, and of course that's what one would expect to have. So certainly -- and I no doubt will be corrected if that's not the case, and we will learn if there is anything else we need to know -- if that is right, and so if Mr Doris has instructed his team to take the list of issues, they have then gone and applied those to the documents and, as you say, they no doubt

asked for some quality control. In fact, Mr Doris says a little bit about the quality control. So that exercise has been carried out.

If that has been done, notwithstanding your point about the search strings, what is the reason to think that has not been adequate? Is it, perhaps -- to test the point: are you saying that if it's a complaint about the way it's been set up, so the parameters, whether they were wrong or the quality control was not adequate or whatever, that's one thing, but I'm not sure what you're then saying about them if they had actually looked at them. There's nothing wrong with the process they have set up; is it you're saying there is some risk of human error or they are deliberately not disclosing documents that are privileged? Where does that take us?

MS KREISBERGER: No, I couldn't possibly make that submission. I simply don't know.

THE CHAIRMAN: No.

MS KREISBERGER: My submission a much more confined one. It's this: the relevance rate is surprising. It's surprising that 80 per cent of the documents provided to the Commission and then the CMA, 80 per cent were in fact irrelevant, despite the fact that it triggered these search string terms.

THE CHAIRMAN: Assuming that it's been done competently, and somebody has gone and undertaken a document-by-document analysis and has reached their conclusion, and has put that in a witness statement, doesn't that rather deal with the point that you have made? They have gone and looked at the documents, and they have said, "Actually, for whatever reason", and we can all speculate about what the search terms might produce, but they say, "That is the reality because we have looked at them all, and we have done it by reference to the issues which we have all agreed are the issues to be determined for relevance and we have done that in a way that you would expect us, as a law firm, to do it". Doesn't that deal with the point about the

20 per cent?

MS KREISBERGER: Well, as I say, all we're told is the reviewers looked at a very short list of issues and came up with the documents. We're not told whether there were any other written parameters. It looks like quite a discretionary approach to relevance and we're still left with the fact that the search string surprisingly picked up 80 per cent worth of documents that are irrelevant.

It's just the objective facts look surprising, and I would turn it around. We, of course, don't know what element of discretion there was around this. But given that we're in a situation of debating repositories of 6 million documents, we could ask for more information, but that doesn't seem to be the proportionate and cost-effective way of taking this forward.

What is the detriment in handing over the 7,000 documents, given that these are documents that were picked up by both regulators? It's right to say Apple didn't say to the CMA: you don't need these documents because they're irrelevant.

So, they have been provided to two regulators in the context of investigations that are highly overlapping with these proceedings. It's a drop in the ocean. So just proportionality suggests that rather than waste further time on understanding the process, we would rather just have the documents.

If you're not with me on that, I think we would like to understand a little more about the process.

THE CHAIRMAN: Yes. In terms of the Tribunal's ability to order the production of documents which a party says are not relevant; what do you say to that?

MS KREISBERGER: It's in the context of Apple saying, "We're just going to hand over repositories without any relevance review at all." So, we're having to be pragmatic. But, Sir, all we have is paragraph 11 on the process of this review. So, of course, the concern is that for whatever reason relevant documents may have been

missed; that's the fundamental concern.

Of course, if we had comfort that these documents are without question irrelevant, we wouldn't pursue it, but the numbers speak for themselves. The numbers, the objective fact of this very small number of documents raises a question mark. So, it seems to be the simplest way to take this forward.

THE CHAIRMAN: Yes, and just one other question, if I may: has Dr Kent had an opportunity to look at the 1,086.

MS KREISBERGER: Yes.

THE CHAIRMAN: That helps, because one might find that they provide assistance in relation to the way that documents are created and ordered and so on, but you're not saying that there are indications from that that there are documents that are missing?

MS KREISBERGER: I don't think we could, no. We're not able to make that submission.

I should say, just for completeness, there are the privileged documents as well. Now, as I said, that's not on the agenda for today. 604 documents have been withheld for privilege, but we do understand, from Mr Doris' fourth statement, that there was no limited waiver when they were provided to the CMA. So, if one steps back and says: well, there are a number of question marks over this cache of documents, including those that have been withheld for privilege, because they were just handed over to the CMA without any reservations made in relation to privilege.

So, there are a number of concerns around these documents. So, we say how to advance matters, cut through it, is that we will just look at them.

Thank you, Sir.

THE CHAIRMAN: Thank you.

Ms Demetriou.

MS DEMETRIOU: Sir, with respect, this is an inappropriate application and the

submissions are frankly outrageous. So, Ms Kreisberger is saying: if we could get comfort that this process was done correctly.

But, with respect, the comfort is provided by a partner at Gibson Dunn explaining, in the witness statement, that the review was appropriate and careful. That statement is supported, of course, by a statement of truth.

Now, Ms Kreisberger, again, throws out the idea that this looks like a discretionary approach. Of course it wasn't a discretionary approach, whatever that means. It was a careful and appropriate approach, as Mr Doris said. So, frankly, these are inappropriate submissions.

The only point that she has is to refer to the search terms -- and it's not a good point -- and say: well, it's surprising that this yielded irrelevant material.

Well, it's not surprising at all. Let's have a look at the search terms. So, we go back to supplemental core bundle and it's tab 3, page 272.

Ms Kreisberger explained how it worked. You take -- but each of the terms, each of the phrases or the words within each of the three groups -- so you have to have one word. They're separated by an "OR".

There are three categories. So, you see there is a "NEAR" -- there are two "NEAR"s, so that separates the words into three categories. You could, for example -- if you look on the first line, you could have a document which has the word "payment", the word "advantage" and the word "customer" in one document; that would be yielded by this search string. So it's just not surprising at all that this search string yielded a whole bunch of irrelevant material.

Members of the CMA are here, and no doubt Mr Gibson can confirm to you that there was indeed a very high proportion of irrelevant material.

So, really, I think Ms Kreisberger and her team are seeing something suspicious where there simply isn't. It really is inappropriate to persist with this application in

circumstances where Mr Doris has explained that the human review carried out by Gibson Dunn solicitors and reviewers, and overseen by two partners, was careful and appropriate.

As to the law, Sir, now, the Tribunal -- we say it would be contrary to legal principle and to the case law for the Tribunal to order Apple to disclose irrelevant material that has been the subject of a search and has been found to be irrelevant. If you need me to, I can take you to the case law. But it's fundamental in our system that parties to litigation do not have an obligation to disclose irrelevant material.

There is a case in the bundle I can show you which deals with the principles that apply. It's in the February's authorities bundle, behind tab 5. So, the *West London Pipeline* case. It's at tab 5 of that bundle.

THE CHAIRMAN: Yes.

MS DEMETRIOU: The case is mainly dealing with privilege. You will recall how -- it's essentially that where a claim to privilege is sufficiently explained in the witness statement or affidavit from the solicitors, then it's normally not appropriate for the court to go behind that, unless some evidence of error is actually shown.

What we see, if you go to page 49 of the bundle, at paragraph 76, at the bottom of that page, you can see that the *Atos Consulting* case is referred to, and that talks about "the appropriate course to be adopted where privilege or irrelevance is relied on is for the Court to proceed by way of stages".

The "First two stages are to consider whether the evidence produced on the application establishes the right to withhold inspection of a document and there are no sufficient grounds for challenging the correctness of that asserted right.

If these conditions are met, the Court should uphold the right."

Clearly, here, we're in that position. So, there has been an appropriate and careful review for relevance carried out by my instructing solicitors. There simply is no basis

for challenging that review. The basis that's been put forward is wholly spurious. It's simply based on the fact that a high proportion, significant numbers of irrelevant material, were responsive to the search terms. There is a very good reason for that. As I say, I'm sure Mr Gibson, who is here for the CMA, can confirm that that's so. There is, frankly, in those circumstances, absolutely no basis to go behind what Mr Doris says. The review was carried out, as the Tribunal has indicated by reference to the issues identified by the Tribunal, and it was carried out properly.

THE CHAIRMAN: Yes. On the question of -- I take what you say about *West London* and the process that's suggested there. That's a slightly different question from whether we have the ability to order it, and it may be that it's not necessary to get into that in great detail. But certainly, it seemed to me that although one might conventionally follow this process, it wasn't impossible that there might be circumstances where the Tribunal had the authority to order disclosure of material even if one party said it was irrelevant.

MS DEMETRIOU: Sir, there is a process that has to be followed, as the *Atos* case and the case that I showed you indicates. There are different circumstances. It may be, for example, in the *Genius Sports* case --

THE CHAIRMAN: Yes.

MS DEMETRIOU: That was different, Sir, because then what the Tribunal, what the president was getting at there was a process designed to yield relevant material. So, the target is always relevant material in the case.

Now, we're in a different position here because the material has been reviewed and this material has been found to be irrelevant by my solicitors conducting a proper review. So, in those circumstances, the Tribunal would be ordering the production of irrelevant material. I'm not aware of any case where that has been done in circumstances where the Tribunal knows that the target is irrelevant material, because

that just falls out with the parties' disclosure obligation.

THE CHAIRMAN: Well, of course, Ms Kreisberger would say that it's only said to be irrelevant by your client, and so there's still -- the whole point of it is the question as to whether they're right or not. I take everything you say about what Mr Doris says and the way it's been done, but just on the point of -- I suppose you can't get to the end of the process that's suggested in *West London* if you go down one path without actually making an order for the disclosure of what one party says is irrelevant, albeit that they may turn out to be right, they may turn out to be wrong. I think I am just seeking to establish that you wouldn't suggest that we're precluded from reaching that point in the right circumstances.

MS DEMETRIOU: Sir, you will see that the next step is for the court to review the material. So, the court is very, very reluctant to require one party in adversarial litigation to disclose material which is likely, if I can put it no higher, to be irrelevant. We say it is irrelevant, of course. But there is a series of steps that the court has laid down.

The first position, the first point in order for these steps to be engaged is that there has to be a proper basis for distrusting, frankly, what my solicitors have done in terms of the review process. As I say, Mr Gibson is here. You can ask Mr Gibson if Ms Kreisberger is right to say it's very surprising that these search terms yielded irrelevant material because the CMA should be able to confirm one way or the other who's right about that. If the CMA confirms, as I anticipate it will, that we are right, that there was a large amount of irrelevant material, then there is simply no basis at all for going behind the review process conducted by my solicitors.

THE CHAIRMAN: Yes, and you've obviously been invited to, and it's quite clear that you're rejecting the invitation. One way of dealing with this would be to say, "Look, you can have it", and if it didn't matter to you then you would at least resolve the issue

and you might clear the air a bit, but that's not a path you want to go down.

MS DEMETRIOU: Absolutely not, because it's been reviewed and found to be irrelevant because they're not entitled to it. It's in a completely different position to the material in the repositories which has been reviewed by lawyers for relevance on the basis of the issues arising in that other litigation. Here we're talking about material, including job applications and so on, that are just completely extraneous, and it would be wholly wrong to hand that material over.

THE CHAIRMAN: Yes, thank you.

Mr Gibson.

MR GIBSON: Sir.

THE CHAIRMAN: We're all in anticipation about what you're going to say, which may not be very much.

MR GIBSON: There are two things I would like to do. One is to give you an answer, and the second is to make a few short points.

THE CHAIRMAN: Yes, of course.

Submissions by MR GIBSON

MR GIBSON: I was wondering which would be more exciting for people to have, the few short points building up the anticipation or to spoil the story and then a few short points. I am in your hands as to which way you would like to take it.

THE CHAIRMAN: However you want to do it. I'm sure we will enjoy it either way.

MR GIBSON: I will try to make it enjoyable by dealing with the points first, build the anticipation.

In light of the points that have been made about the CMA's investigation I just would like to make, as I say, a few brief comments on behalf of the CMA. In making these comments, there are three considerations that the CMA has had in mind. Some of

these may be statements that are blindingly obvious, but it's important to understand where we're coming from.

The first consideration -- and I think this is similar to a point you, Sir, identified at the previous CMC -- is that when discussing the CMA investigation, the CMA is acutely conscious of what you described, I think, as the "knowledge imbalance", or one could call it information asymmetry between, on the one hand, Apple and the CMA, who have obviously been involved in the CMA investigation and, on the other hand, yourself, Sir, and Dr Kent, who obviously have not.

That's the first consideration.

The second consideration is the duty of the parties and their representatives to assist the Tribunal to deal with the case justly. That obviously includes ensuring that the parties are on an equal footing.

The third consideration, as Apple has rightly observed in the evidence it has produced for the CMC, is that the CMA investigation, and indeed the market study, are subject to certain requirements of confidentiality which one must, of course, keep in mind when making reference to the CMA investigation. That's particularly, obviously, a concern for the CMA ensuring integrity of its processes.

These confidentiality considerations -- I won't say "create", but perhaps might be more accurate to say they “compound” the issue of knowledge imbalance or asymmetry in as much as they limit what one can say about the detail of those processes.

Having reflected on those considerations, the CMA considers it appropriate -- before I get to the punchline -- to make the following three short points:

I should say, by the way, nothing I am saying here is intended to be criticisms of anything people have been doing in this litigation; it's intended to be observations.

The first is a point as to the extent of the overlaps between the present proceedings and the CMA investigation.

Now, notwithstanding the similarity of some of the issues arising in the CMA investigation and the market study taken together, which is the point we were making at the much-celebrated paragraph 9 of my skeleton for CMC 2.

We just want to be clear, in light of comments about "highly overlapping" and what have you, that it should not be assumed that the nature and scope of the CMA investigation is identical to the issues in the present proceedings. That is as far as we can comment, we feel, appropriately on that point given the confidentiality of the process. But we want to make that clear.

THE CHAIRMAN: I can understand that absolutely, and I don't want to press you on that. As I recall what I think are described as the "parameters" by Mr Doris, which are effectively the list of the issues that came out of, I think, the CMA's 8 August letter.

MR GIBSON: It was beginning of September, my second skeleton, paragraph 9.

THE CHAIRMAN: Paragraph 9, exactly. That's paragraph 9. So, I mean, I suppose, perhaps the point is we can all make an assessment as to the extent to which that list of items corresponds with the proceedings or not. Where the investigation may or may not be is really neither here nor there, is it? You may be suggesting that it's different from what it was; you may not be doing that. We don't need to get into that.

But, as far as your point goes, I don't think it cuts across the fact that we all know what the list was and why we used that list, therefore people can make their own judgments about whether it is an accurate reflection of matters that are relevant to the proceedings.

MR GIBSON: Yes. I think it's simply that that list of issues was derived, you will remember, from the pleadings. They were cross-referenced to each set of pleadings as a sort of a useful shorthand for the main issues one derived from the pleaded cases. We use that as a yardstick to explain why the similarity of some of the issues across the two investigations meant that there were points of interest, particular interest, to

the current, recent, and potential future work of the CMA. It's simply to make the point that we wouldn't want too much to be read into that.

THE CHAIRMAN: Yes, I understand entirely. Yes.

MR GIBSON: The second point is a point about the procedural status of the CMA investigation. There is a reference in the CMA's published timetable to its initial investigation and information gathering having been completed in February 2022. Again, just for the point of clarity, that should not be read as necessarily indicating the CMA considers, or considered, its information gathering in that process to be complete, nor does it preclude the possibility that the CMA may seek further information from Apple as its investigation continues. That, again, is to some degree just a statement of the obvious, but it's important to keep it in mind.

In a follow-on claim based on a CMA infringement decision, the CMA would have completed its investigation and it would have articulated the evidential and legal basis for the position it reached and its findings in a published decision.

By contrast again, this is a stand-alone claim and in such a stand-alone claim, even if there is a CMA investigation in relation to similar matters ongoing, it must be kept in mind that process is incomplete.

So, the third point I would like to make follows from those two, or at least is related to those two. It's a point the Tribunal will readily understand, but again bears emphasis. The CMA can provide no assurance -- and provides no assurance -- that the documents it has received from Apple would correlate with the totality of the documents that may be disclosable in relation to the claimant's claim.

So those three points, essentially, are just trying to set the parameters in terms of what we have and haven't said. Just in the interest of clarity, but conscious of the fact that there's a limit. Not wishing to be Delphic or anything, but there is a limit to how far we can go in saying that.

Against that backdrop, I'm happy to confirm that Apple did indeed provide approximately 8,000 documents from the EC investigation. When the CMA searched for relevance of those documents in relation to the CMA's investigation, we can confirm that we only found a thousand documents, around about a thousand documents, to be relevant to the CMA's investigation.

THE CHAIRMAN: That, of course, is independent from the exercise that Mr Doris has carried out.

MR GIBSON: Entirely.

THE CHAIRMAN: You're saying your own internal process produced a very similar outcome to what Mr Doris --

MR GIBSON: In that particular instance, it appears that the search terms that we applied in relation to the CMA's investigation correlates in broad terms to his numbers. We have no idea as to exactly what Mr Doris has done. But it's no surprise to us in terms of the numbers given and the numbers that we have internally.

THE CHAIRMAN: Yes, thank you, that's very helpful. Thank you very much.

Ms Kreisberger.

MS KREISBERGER: Thank you, Sir. I think on that basis we don't press the application. We didn't have access to this information before today, but we have heard what Mr Gibson has to say and I think we leave it there.

THE CHAIRMAN: I think it is quite difficult to pursue it. I think if you did you probably wouldn't get the answer you wanted. So, I think that is the position. Good.

What are we, 12.40? Shall we make a start on experts?

MS KREISBERGER: I think that would be useful, Sir. We have 20 minutes.

Application for costs by MS DEMETRIOU

MS DEMETRIOU: Sir, on the application, we do seek our costs of it. It was made

very, very late, and had it been made -- it was made well after skeleton arguments. There was no reason for it to be made so late, and had it been made earlier no doubt the clarification could have been sought from the CMA and it wouldn't have been made.

We were put to a cost of resisting it, which did disrupt our preparation for this hearing. So, we do seek our costs of this application.

THE CHAIRMAN: Thank you.

Ms Kreisberger.

MS KREISBERGER: Sir, we could have been given this information in the original Disclosure Report, or in the amended Disclosure Report. We have had to fight tooth and nail to extract information from Apple about what was and wasn't done. As you see, it's come out extremely late, so we reject that application for costs in very, very forceful terms, particularly against the background of an amended Disclosure Report which does not give the information that Apple was ordered to provide.

So, it doesn't lie in Apple's mouth to be seeking costs in a context where Dr Kent is fighting very hard to understand and obtain information about Apple's universe of documents. So, we do reject that vigorously.

MS DEMETRIOU: Sir, I'm afraid this is just throwing irrelevant mud at an issue which is a very narrow issue. There is nothing relevant in the Disclosure Report at all that bears on this. The documents were reviewed for relevance, as Dr Kent knows. They were disclosed back in January. This point could have been made at any point between January and now. All these other submissions that Ms Kreisberger has just made are completely irrelevant.

Instead, the application was made on Wednesday night after skeleton arguments. I haven't provided any further information today that couldn't have been sought and provided much earlier had the application been made earlier. It was open to Dr Kent

to seek clarification from the CMA as to these points. She hasn't done it. Instead, she filed an application with no notice after skeleton arguments and it's a cost which obviously could have been avoided.

So, we do say that we are entitled to our costs. Had she handled things differently and provided notice of this application, the whole thing would have been unnecessary. So, there is no reason why we should have to bear those costs.

MS KREISBERGER: Sir, we're being criticised. I think I just need to respond on the timing point. Mr Doris' fourth statement was served on 13 March, so it can't be said that we could have brought the application any earlier at all.

MS DEMETRIOU: That's about privilege. I don't want to bob up, but that's about privilege. The statement that Ms Kreisberger referred to was in response to the application.

MS KREISBERGER: That's incorrect, and I can show you the paragraph of Mr Doris' statement, if that would be helpful. It's in the supplemental core bundle. I will make sure I have the right reference for you, Sir. It's tab 3, paragraph ... I will just give you the correct paragraph. Paragraph 15, Sir, that's the paragraph. I showed you the same paragraph in Mr Doris' fifth statement, where he uses, essentially, a verbatim reproduction of that paragraph.

Sir, you will recall we have been asking for these documents for a long time. That's the first time we were given any information about the type of review that was conducted. So, we can't be criticised for timing.

THE CHAIRMAN: I think we probably have all we need, Ms Demetriou. Thank you. We will give you an answer to that application for costs after the lunch break.

MS KREISBERGER: I'm grateful.

THE CHAIRMAN: Thank you.

MS KREISBERGER: Sir, with that, then, we move on to experts.

THE CHAIRMAN: Yes.

Application by MS KREISBERGER

MS KREISBERGER: So now for something rather different. I think Mr Gibson is okay for the next 15 minutes.

I will press on, Sir.

You have, in our skeleton, that there is a measure of agreement on experts, happily. It's agreed that each side should have four experts, comprising two competition economists, one accountant and one IT security expert.

In dispute on Dr Kent's side is her application for one industry expert in relation to apps, app distribution, monetisation and so on, and one expert in relation to payment systems.

On Apple's side, they're asking for an expert in intellectual property, a third economist, and a second IT expert.

Now, I have agreed with Ms Demetriou I will go first on the industry experts. We will deal with that application and then move on to Apple's, if that sounds sensible to you, Sir?

THE CHAIRMAN: Yes.

MS KREISBERGER: I will begin by setting out the test, then turn to the reasons why Dr Kent's application should be upheld. Also, I will address Apple's objection. So, this is in relation to my application for industry experts.

Moving on to the test, Sir, the parties are agreed on the legal principles. There doesn't appear to be any debate there or dispute. They are the same principles which apply under the CPR Part 35 and, in the interests of saving time, there is no need to turn up the authorities themselves. If I could take you to the Class Representative's skeleton argument in the core bundle, that's tab 1 of the first volume of the core bundle,

paragraph 8.

THE CHAIRMAN: Yes.

MS KREISBERGER: Sir, paragraph 8 sets out the test for the admissibility of expert evidence. This is taken from the *Barings* case, and Apple agrees that's the relevant authority. It provides as follows:

"Expert evidence is admissible… in any case where the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues."

So, that's the test for admissibility.

Now, helpfully the authors of Expert Evidence: Law and Practice provide some commentary on the application of the test in practice. Now, they refer to the phrase used in *Barings*; that is the phrase "recognised expertise governed by recognised standards and rules of conduct".

They say:

That phrase “will have to be interpreted in a broad way if it is to reflect the modern practice of the English civil courts… It is now commonplace for experts to give evidence in fields that are more arts than science and which often have no real organised branch of knowledge but rely on an educated but ultimately subjective impression.

For example, artists, art critics, museum officials, dealers and restorers have given evidence on whether the display of a gift in a will is calculated to be for the advancement of education or otherwise for the benefit of the community or the artistic merit of a work of art."

Then they make this important statement:

"Equally, tradesmen, professionals and businessmen routinely give evidence about the practice in their trade, profession or business."

I'm sure the Tribunal will be very familiar with this practice.

Sir, we have given some examples there where industry experts have been called in, in cases before the Tribunal. Notably in the *McLaren* CPO, there's evidence from experienced executives in the automobile industry, and their evidence is really front and centre of the methodology at issue in that case. So, this is standard practice. It's par for the course.

Now, if admissible, the next condition is that expert evidence should be confined to that which is reasonably required. The parties are in agreement on that condition. The seminal authority on that is *British Airways v Spencer*. Again, I'm going to take you to my skeleton just to be efficient. This is at paragraph 11, on the same page:

"[I]t is necessary to look at the pleaded issues and, unless and until a particular issue is excluded from consideration under CPR 3.1(2)(k), the court must ask itself the following important questions: (a) the first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted. (b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it. Just as in *Mitchell* the court would have been able to resolve even the central issue without the expert evidence. (c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings."

Then he refers to the sort of questions in paragraph 63 as being relevant. They are:

"A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary … or whether it is [only] of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed."

Really proportionality is at the heart of all this:

"In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors, including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail, (particularly delay which might result in the vacating of a trial date)."

So, that's the test. So, in short, either the evidence is necessary or helpful. If helpful, the court needs to consider whether admitting the evidence would be proportionate, and it's within the Tribunal's discretion to take into account a wide range of factors on that.

So that's the legal test.

I think I can just make a start on my actual application in the few minutes available.

THE CHAIRMAN: Yes.

MS KREISBERGER: My overriding submission is that it's obvious that Dr Kent should be permitted to call industry experts in support of her case. It's somewhat surprising to see this application being challenged by Apple. There are two principal reasons why I say that, why this application should really go through on the nod, with respect.

The first is this is fundamentally, foundationally, a case about how apps are distributed to iPhone and iPad users. Dr Kent, in her claim, challenges three principal matters as unlawful, as the Tribunal will know from the pleadings.

First, the terms imposed on developers, on the app developers who distribute their apps through the App Store.

Secondly, the commission which is taken out of the developers' revenues.

Thirdly, of those terms which are imposed on developers, those which force them to use Apple's payment system.

So those are the three key foundational areas of challenge.

Now, it's hard to see how it can credibly be said that this case doesn't call for evidence from someone with experience of developing, distributing and charging for apps, and equally for someone with experience of payment systems in the context of apps.

Now, my submission is that this evidence will prove necessary, not merely helpful.

Now, Apple's objection isn't that this evidence is not relevant to the claim. So, my first reason should be common ground. That's not the basis of Apple's objection.

I just note that in the *Epic v Google* proceedings, permission was given for a payment systems expert. Of course, there I don't believe there was any application for an expert in apps, for developer expert evidence because Epic is a developer, an app developer.

That point brings me on to my second reason why I say this evidence is reasonably required within the meaning of the legal test, and that is that Dr Kent can only put in evidence in relation to the distribution of apps to users and in relation to payment systems in the form of expert evidence. That's because Dr Kent doesn't have anyone internally she can call on to provide factual evidence on these matters of industry practice. Of course, as Class Representative, she doesn't have that. Dr Kent is not an app developer; she's a Class Representative, and her class is made up of users.

Now, I just want to show you -- you may be very familiar with this -- the Court of Appeal confirmed in the *Gutmann* case that the class representative shouldn't have contact with class members in opt out proceedings, and specifically said class representatives

cannot be expected or criticised for not calling members of the class as witnesses to give factual evidence. But I want to show you precisely what the Court of Appeal said there because it's quite helpful.

It's in the supplementary authorities bundle, volume 1, tab 12, and it's at page 259, paragraph 62.

The Court of Appeal said in relation to calling members of the class --

THE CHAIRMAN: Yes.

MS KREISBERGER: "The appellants criticise the class representative for not being prepared to put up class members as witnesses to support the methodology. This is misplaced. The logic behind an opt-out order is that the representatives of the class will *not* have contact with class members at any point prior to distribution and in an aggregate damages case not only is the CAT forgiven the task of considering individual evidence, but [and this is the wording I would like to emphasise for you] the probative value of evidence from a small handful of carefully selected consumers out of millions might be strictly limited."

Sir, the same point applies here. It's an apt comment because there is no point in Dr Kent putting forward factual evidence from an individual developer who could only give direct factual evidence about their own experience. The whole point of an industry expert is that it's an appropriate individual with the right level of experience who can speak more broadly on industry practices in relation to how apps are developed, distributed, and monetised, for instance. This is industry expert 101, really.

THE CHAIRMAN: So, you're saying of course you could in principle go and find some developers to come to give factual evidence. But, actually, that would be an imperfect exercise for the reasons that have -- because they would be chosen by you to say the things you wanted them to say and it would be factual evidence.

So, you're saying that the better course is to use the expert process to accumulate

what's effectively the aggregation of some factual material and to present it in a way that's easily understood and received by the Tribunal. It's that sort of expert evidence you're talking about.

MS KREISBERGER: That's right. So, it may include factual material, because the developer would be explaining how things work in practice, but not in the technical sense, which is direct factual perception, as opposed to hearsay material.

THE CHAIRMAN: Yes.

MS KREISBERGER: So, an industry expert is the right person to explain how matters work in the industry. There's nothing radical about this. It's a well-worn path.

But also, it's right to say -- and the question of weight to attribute to the evidence will of course be a matter for the Tribunal -- but it would be someone with an appropriate level of experience with the right authority to say: well, in my experience this is how things work, this is why, these are the technical issues.

They're not simply saying: these were my experiences in working in this industry.

They speak authoritatively in a broader fashion as to how matters work. That's what industry experts do.

THE CHAIRMAN: In part I think the objection that's made against you is: we don't know who this is going to be, so there is some doubt about whether there is somebody who can do that. But I think you are saying that's a matter for the Tribunal to consider. If you turn up with someone who doesn't do that, that's your risk and results on us deciding not to give any weight to the evidence.

MS KREISBERGER: Absolutely. It goes to weight. As I say, it's really a definitional aspect of an industry expert that they have an appropriate level of experience. Certainly, it's Dr Kent's intention to put that sort of a person forward. Just like the auto executives in *McLaren*.

But what Apple says, their objection is that we haven't shown a recognised expertise.

They're taking this overly narrow approach to the question of what is recognised expertise. For industry experts it's their experience, it's their experience in the industry which qualifies them to give evidence, and it's that experience which satisfies the legal requirement for recognised expertise. That's why I took you to the textbook that says very clearly this is standard practice in the courts.

Dr Kent's app expert will have an appropriate level of experience of the app industry. This is particularly important here given they will need to speak to the technical side of app development, and the same goes for the payments industry expert.

So that's right, we say that's on our shoulders to bring forward the right person, so the Tribunal accords weight to their evidence.

But what Apple seems to be saying is: well, you haven't identified a particular qualification that these people would have to have, and if you can't identify a particular qualification, then they don't meet the legal test for a recognised expertise.

I mean, that would just subvert the selection of industry experts in a swathe of cases. It's not a question of a particular qualification. That might be relevant for regulated professions, like lawyers and accountants, but an industry expert is bringing to bear their experience and their expertise in the industry, so, it's an appropriate application for that reason.

THE CHAIRMAN: One of the questions I had was about the ambit of this, because I presume somebody sat with the app industry expert, someone who has a long experience of working in that industry and knows all about it, can tell us about the structure of how things work and about some of the drivers and incentives, and they can no doubt feed in that sort of factual basis that they have gathered information about. Actually, some of that might well feed the economic experts, in terms of their understanding of the market and for the market definition purposes.

I wonder, though, about when you get into the counterfactual, presumably the app

industry expert is somebody who you're going to want to talk about what might happen in a counterfactual.

MS KREISBERGER: Yes, that's one of the key issues in relation to the app industry expert, and also the payment systems expert; how could this work in practice?

THE CHAIRMAN: Yes.

MS KREISBERGER: That's right, Sir.

THE CHAIRMAN: Presumably, the commercial incentives that developers have to operate in a different way if the competitive landscape was different.

MS KREISBERGER: Yes. That would be core to the subject matter for these experts.

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: Sir, finally just to make the observation that of course if Dr Kent's application weren't upheld by the Tribunal, Dr Kent would then be on an unequal footing with Apple because, of course, Apple has this expertise internally as the Defendants who are dealing with app developers routinely, this is Apple's App Store business. So, what one would end up with is a position where Apple is able to bring forward evidence from its own internal pool of expertise, whereas Dr Kent would have no means of responding to that evidence.

As I said, if Dr Kent brought forward a small sample of, let's say, app developers, it would be said: well, you've cherry-picked your factual witnesses.

It can't possibly operate in that way. So, to level the playing field it's necessary that Dr Kent is able to bring forward this evidence.

Sir, that's all I was proposing to say on the application.

THE CHAIRMAN: Shall we rise? We will start again at 2 o'clock.

MR GIBSON: May I formally have the courtesy of asking if I can be excused for the afternoon?

THE CHAIRMAN: You may be. Thank you very much for attending and for your

helpful observations, and absolutely, please go.

MR GIBSON: I hope there will be another round when we get to privilege.

THE CHAIRMAN: I'm sure we will see you again. We look forward to that.

MR GIBSON: Thank you very much, Sir.

THE CHAIRMAN: Thank you very much.

(1.05 pm)

(The luncheon adjournment)

(2.00 pm)

MS KREISBERGER: Ms Demetriou is rightly prompting me just to give you an update on where we are on disclosure.

The parties are in discussions and we have sent across a draft proposal. In fairness to Ms Demetriou, we just sent that across in the last few minutes, so I understand her team are going to be looking at that proposal. We have the short adjournment this afternoon. Of course, the hope is we can come back to you before the end of the day with agreement, but that will depend on how it pans out this afternoon, Sir.

THE CHAIRMAN: Yes, well, we will wait and see whether you can get there, and if you can't, we can talk about what we do.

MS KREISBERGER: In the meantime, we press ahead on experts and we will come back to it at the end of the day.

THE CHAIRMAN: Yes, just before you get going, I want to deal with the costs order from earlier. So, I will deal with that now and we can jump back into the --

Ruling on costs(approved)

THE CHAIRMAN: So the class representative has withdrawn an application for disclosure of documents which the defendants resisted on the basis the documents had been reviewed for and had been determined by the defendants' solicitors not to

be relevant.

The class representative resists costs on the basis that there was a lack of proper description of the circumstances which should have been dealt with in the disclosure report or multiple other stages prior to the application being made. We consider the application was at the very least premature and should not have been pursued whilst the position was properly explained, so the class representative should pay the defendants' costs arising from the application.

Thank you.

Submissions by MS DEMETRIOU

MS DEMETRIOU: Sir, thank you very much. I think it's now for me to respond to Dr Kent's application in relation to her application to rely on two industry experts, which Ms Kreisberger has described.

The objection to these proposals is that they don't identify or explain the field or discipline from which these proposed experts would be drawn.

That is information that we have repeatedly sought from Dr Kent, but we have received no response and if we just look at the core bundle, the first core bundle behind tab 7, page 75.1, this is Apple's reply to the application. If you look at paragraph 4, you can see there that following receipt of the proposals the Defendants asked for details as to the field or discipline from which the proposed experts would be drawn and their qualifications.

To make clear, it's not our position that they have to have some recognised qualification; it really is that we have been trying to elicit information to establish whether or not the test for admissibility, which is common ground, is met. So, it's accepted on both sides that expert evidence is only admissible if the Tribunal accepts that there exists a recognised expertise governed by recognised standards and rules

of conduct capable of influencing the court's decision on any of the issues it has to decide.

The reason for that, we say, is obvious, because if there is not a recognised expertise governed by recognised standards then there is no value in opinion evidence to the court. The witnesses would be witnesses of fact, rather than expert witnesses giving their opinion.

The test is set out and applied in the *Barings* case. Can I just take you, please, to that? So supplemental authorities bundle, volume 1, behind tab 3. If we go, please, to paragraph 45, on page 22 of the bundle.

So, paragraph 45 sets out the principle that expert evidence is admissible "where the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question…"

If we look at paragraph 46, you see there the conclusion of the court in that case as to why there was a relevant body of expertise. So, the justice of the Court of Appeal in the *Bank of Kuwait* case found that "there was a body of expertise with recognised standards in relation to the manage[ment] of … [lending] banks":

"I am satisfied that, *a fortiori*, there is such a body of expertise with recognised standards in relation to the managers of investment banks conducting or administering the highly technical and specialised business of futures and derivatives trading."

So, that's the conclusion that the court reached.

Then you have, in the paragraphs following, the careful reasoning which led to that conclusion, including, you see at the beginning of paragraph 47, that it was "an area of commerce which is highly regulated, [in which] practitioners… [were] required to be licensed …and in respect of which … [there were] prescribed standards of ...

competence". You see, that's the reasoning in that case, but the court does very carefully reason why it reached the conclusion it did.

Now, if we turn to the Class Representative's skeleton argument -- so that's in core bundle volume 1, behind tab 1, and if we go to paragraph 18, please -- this sets out the points which were made again orally by Ms Kreisberger just before the lunchtime adjournment. So, you can see there that what's said, at paragraph 18, is that:

"This Tribunal routinely admits expert evidence from people with experience of a particular trade or industry."

And a reference is made to the *McLaren* CPO case. But that's not really an argument that establishes what it needs to establish, in our respectful submission. Because obviously there are some industries, and areas of industry, where there is a recognised expertise, as we saw in the *Barings* case. But it doesn't follow that because there are some areas of industry that fall into that category that all areas of industry will; if that were the case, then the test would be completely undermined because all you would ever need to do is say: well, this person understands this industry.

That isn't the test, with respect. It's a more exacting test than that.

Then we see, at paragraph 19, the second reason that's relied on:

"The industry experts as admitted will be giving evidence and/or expressing opinions based on their experience of the relevant industry. Their evidence is therefore properly characterised as expert evidence."

Again, that assumes what it needs to prove. So, all it's saying is -- all that paragraph is saying is: well, these people are from the industry, therefore they're experts in that industry.

But that really obliterates the test for admissibility.

Then paragraph 20 explains, as Ms Kreisberger did, why the Class Representative

wishes to rely on expert evidence. But, again, that doesn't justify its admissibility. That's what it would like to do, but it doesn't help explain why the evidence is admissible in this case.

So, with respect, we say that those arguments don't enable the Tribunal to carry out the task it's required to carry out under rule 21D of the Tribunal Rules or under rule CPR rule 35.1, which is really to understand these are two areas which are recognised areas of expertise. We have had no information on that at all from the Class Representative. Really, we don't understand why the Class Representative hasn't grappled properly with the admissibility requirements.

Now, I think that the other case relied on, as well as *McLaren*, is the *Belle Lingerie* case. But, again, that's a case where, like *McLaren*, the issue seems to have been dealt with by consent. There is certainly no reasoning explaining why the experts in that case meet the test. Perhaps they did. Both sides agree that they did in those particular cases, otherwise the issue no doubt would have been contested.

So, they don't, with respect, help in this case, where we do raise the issue and we have asked for material and for justification as to why this evidence is admissible. It may be helpful to look at the *Belle Lingerie* order that's referred to by my learned friend. So that's supplemental authorities, tab 16, that's in volume 2 of the supplemental authorities.

If we go to page 311 -- so the order starts at 308, and then you see, at 311, the heading "Industry experts":

"Permission shall be granted to each party, if advised, to rely on the written evidence of an industry expert … to explain how listings, rankings, prices and international advertising and/or shipping work on the eBay platform in the UK… and how it relays those listings to the eBay platform in the US."

So, I think the two points of distinction between that case and the present are, as I say,

it appears to have been common ground that this was an area of expertise.

But, secondly, you do see quite specific reference to what the scope of the expert evidence is going to be, which we don't have in the present case.

So, really, our submission is that the Class Representative hasn't surmounted the hurdle that she has to surmount under the court rules, under the Tribunal Rules, and has really not engaged with the primary question which arises in relation to admissibility.

There's a distinction between getting factual evidence, for example app developers -- so it's not the case that if they're not permitted expert evidence there will simply be some yawning chasm, because the question is whether they should seek factual evidence, whether this is properly an area of factual evidence, or whether it does engage an area of expertise, such that expert and opinion evidence would be of assistance to the Tribunal. We have seen nothing in the submissions made, either in writing or orally, that really grapple with that point.

THE CHAIRMAN: So obviously your client is very specialised in both of the industries, to the extent that they could be described as separate industries, which you may not accept, but they are certainly put that way, and knows probably more about it than most people.

Are you saying, as a matter of principle, you don't believe that it is possible for there to be a recognised expertise in relation to those industries or is this more, really, about: we're not going to know until we see who they are and what they say?

Of course, in *Barings*, one of the features of *Barings* was that the reports had been written and so it was possible to work out not only what it would go to, but exactly what they were going to say. Then to work out how that would fit back into the scheme of things.

MS DEMETRIOU: Yes, I'm not going so far as to say: as a matter of principle, we

absolutely dispute that this could ever be an area or these could ever be areas of expertise.

We have been seeking the information so we can grapple with that point. Because, obviously, from our perspective, as you say, that's my client's business, so we can quite see how factual evidence is relevant. But the question then is whether or not this is a recognised body, area of industry, where there's a recognised area of expertise and accepted standards, such that opinion evidence could be helpful.

THE CHAIRMAN: Then, in that context, what might this mean? Again, I don't know anything about this industry in terms of how it might be organised or regulated, or whatever it is, if it is at all.

MS DEMETRIOU: Yes.

THE CHAIRMAN: I think you're saying that just because someone works in this industry it doesn't qualify them under this test to be an expert, is the fundamental point.

MS DEMETRIOU: That is right.

THE CHAIRMAN: What are the characteristics of somebody who could put themselves in the position where there was a recognised expertise? For example, if you were an academic who studied the industry; is that the sort of thing that would qualify for a recognised expertise?

MS DEMETRIOU: So, there may be various ways of demonstrating that this is an area of expertise. So if, for example, they could demonstrate that they are people who hold themselves out to be experts and provide advice on a consultancy basis, then that might be a good way of showing that there is a recognised body of expertise. But we just haven't been handed any of that material.

THE CHAIRMAN: That would be different from where the judge was in *Barings*, because he was talking about, you know, a regulated industry in which there were principles set by the FSA at that time, I guess, or perhaps even before that. So you're

not going to have that, are you? Although there may well be some other things that happened in this industry that created either self-regulation or some degree of -- certainly in the payments. I think the payments industry might be slightly different, so we will come back to that. We're just talking about apps for a minute.

But you're not saying they have to reach that level of threshold, you're just saying there has to be some more definition around why this person might be recognised.

MS DEMETRIOU: Sir, there has to be some basis on which the Tribunal can form the view that it's a recognised area of expertise. Now, *Barings*, as you say, we're not in an analogous case to that. In *Barings*, there was heavy regulation and a whole sort of concrete set of professional standards, and so that was, in that case, the basis on which the court was able to form the view that this is an area of expertise.

Now, it might be, in another case, that there is a professional body regulating advisers in a particular industry. That would, again, be an indication that it's a relevant body of expertise. There may be others -- we don't want to be prescriptive as to the evidence. There may be all sorts of relevant evidence that can be brought to bear on the question, but really our point, at this stage, is that we haven't seen any evidence that's relevant.

THE CHAIRMAN: Yes, and I certainly am not trying to squeeze you into a corner and make it prescriptive, and obviously anything you say now is subject to -- if we ended up in that position, subject to what you might say about a particular individual, a particular background.

I'm just trying to get a particular sense of what the landscape looks like. Because part of this may be because of the stage we're at and the articulation of the expertise and the qualification for it by the Class Representative, in which case there may come a point in time where that becomes clearer. Then the question is: how does one deal with that? Do you deal with it by giving permission with, if you like, liberty for you to

restrict it or do you withhold the permission until later? I know you have made some suggestions about that.

But, clearly, if you were to be saying we shouldn't even go down that path because it's not possible in relation to the app industry for there to be such a person, then that would be a different outcome, wouldn't it?

MS DEMETRIOU: I think we're unable to form that view at the moment, but we're also unable to say that there is such a person. So, at the moment, the Tribunal is faced with an application which isn't properly evidenced, in our respectful submission. So, we say that the proper response is either to refuse the application or, if the Tribunal is not attracted to that, is to adjourn it and allow them to make it again with some proper evidence explaining why it's admissible.

If we go to the core bundle, the extent of their evidence, tab 4, page 12.

So, it starts on page 11. The first point they make, at 30, is they say -- 30.1:

"Expertise in a particular industry has been held in a number of cases to meet that test."

That doesn't answer the question in this case.

Then we look at 30.2:

"Technically… complex".

Again, that doesn't answer the question, with respect. 30.3 is the same. Then, at 31, you see this:

"As to the question of qualification, the CR will ensure that her proposed experts in both the App Industry and the Payments Industry have sufficient expertise in the relevant matters."

But that really isn't adequate, we say.

THE CHAIRMAN: Technically complex could get quite a long way from that. The moment you have a degree of technicality, then you're much more likely to find

a recognised expertise, aren't you?

MS DEMETRIOU: You may be. That may be correct. It's part of the picture, but it doesn't go far enough. It may be a relevant contextual point, but what they need to do is persuade the Tribunal of the test as set out in the case law. Just saying it's technically complex doesn't meet that threshold.

THE CHAIRMAN: Well, I think you do have to come back to this point, don't you, as to whether you're encouraging us to refuse permission because it is not an area where there could be a recognised expertise or whether it rather depends on whether they turn up with somebody who is able to establish that.

It does seem to me we are talking about a type of expert evidence which is -- perhaps the emphasis is going to be more on the accumulation of what otherwise might be gathered by a lot of factual evidence which could be very, very difficult and time-consuming to obtain, but it's aggregating a set of contextual circumstances to provide a picture in a way that's reliable and, you would say, because of the recognised expertise. I understand you're saying that.

MS DEMETRIOU: Yes.

THE CHAIRMAN: But you could argue that somebody was in a position to do that simply because they had spent a very long time in the industry and knew an awful lot about it, couldn't you?

MS DEMETRIOU: Sir, we say that's not the approach the case law has taken, as you will see in *Barings*. So, there is a more exacting standard. There has to be a recognised body of expertise because otherwise opinion evidence is not admissible because it's not helpful to the court. So, we do say that's a point that needs to be grappled with at the outset, now, either today or if the application is adjourned. But we don't think it would be right on the basis of the evidence that so far has been adduced, which, as you have seen and which we submit, doesn't meet the threshold

to grant permission, then say it's all a matter of weight, because it does go to the question of admissibility rather than weight.

THE CHAIRMAN: Is there any difference in your approach in relation to the app industry and the payments industry or do you treat them the same?

MS DEMETRIOU: No, because there's just been a sort of gaping hole on both fronts. We have raised this in correspondence several times and we have frankly been rather surprised why the Class Representative hasn't grappled with it and engaged with it. Instead all we have had, really, is a response to say: well, this is done in lots of industries and it would be unfair if we weren't able to adduce expert evidence, neither of which point actually meets the points we have raised.

Sir, those are my submissions.

THE CHAIRMAN: Ms Kreisberger.

Reply submissions by MS KREISBERGER

MS KREISBERGER: Thank you, Sir. If I could just deal with Ms Demetriou's objections. The first point she made is: well, you have seen this has been done in other cases, but the applications weren't disputed in those cases.

That objection is unprincipled. It's wrong in law, because it's not right to say that some different threshold applies to the admission of expert evidence according to whether it's disputed or not.

The Tribunal has a jurisdiction to control expert evidence and it must be limited to that which is reasonably required and must be admissible. The test applies irrespective of whether the matter is disputed, a higher threshold doesn't emerge in the face of a dispute. So, it's incorrect, those are good authorities. They are simply a couple of examples of the widespread approach in the courts.

Now, I took to you the textbook which said it is perfectly usual, it is standard court

practice to admit industry experts. They have the recognised expertise by virtue of their experience. There's not some additional requirement for some qualification. That couldn't possibly be right. One can imagine there are a plethora of different types of trades, jobs where evidence will be required in all sorts of cases, negligence cases and so on. It doesn't require a particular qualification. The app industry is not that kind of industry, it's not regulated in that way. There's no qualification that I can point to and say: well, our expert will have that.

What Dr Kent is going to do is to select the right person based on their experience within the industry.

That is utterly conventional standard practice, so there's no threshold that's not being addressed. By definition, that person's evidence is admissible by virtue of their experience. That's the relevant expertise.

Now, so that addresses --

MR FRAZER: Ms Kreisberger, just on that very point, is the submission you're making then that we should understand the word "recognised", as in "recognised body of expertise", as recognised by the court rather than recognised by some third-party industry body? In other words, you don't need a qualification or a profession; you only need an area of expertise which is recognisable, as it were, by the court?

MS KREISBERGER: That's exactly right, Sir. I think that articulates the point very crisply.

Again, I come back to the authoritative textbook on this issue.

If I could just remind you of how it's put there. That's in the supplemental authorities bundle, volume 2. That's at tab 19, in response to Mr Frazer's question.

The editors of this textbook, at page 614 of the bundle, say very clearly that:

"…recognised expertise… [must be] interpreted in a broad way … to reflect the modern practice of the English civil courts."

"[Earlier] references… to “matters of science” and… “organised branch of knowledge” are too restrictive. It['s] … commonplace for experts to give evidence in fields that are more arts than science and which have no real organised branch of knowledge, but rely on an educated but ultimately subjective impression."

They give some examples, like “artists”, “art critics”:

"Equally tradesmen, professionals and businessmen routinely give evidence about the practice in their trade, profession or business."

The reason one might imagine they're not disputed in these other cases is because this is a really unusual application that one is confronted by from Apple. It's generally recognised that industry experts assist the court in relation to matters concerning the industry, which is the subject matter of the proceedings. It's a really unusual application to make.

Sorry, I am corrected. Yes, objection to my "application", "submission", I should say. So that's not right. Let me just show you. Again, this is just by way of illustration. I refer in my skeleton to the *Euronet* proceedings. Sir, if I could just show you the reference in my skeleton, and then I will take you to the order.

THE CHAIRMAN: Yes.

MS KREISBERGER: So that's at core bundle volume 1, tab 1, page 1.3. I showed you *McLaren*, automobile industry. Ms Demetriou took you to my third example, *Belle Lingerie*, where you saw that an industry expert was admitted.

I would like to show you *Euronet*. This is a close example because it relates to the ATM industry. So, if I could ask you to turn up tab 15 in the supplemental authorities bundle, volume 1.

THE CHAIRMAN: Yes.

MS KREISBERGER: That's page 305. The order begins on the preceding page, from the High Court, and then paragraph 6(a):

"The parties shall: agree a list of issues, by reference to the List of Issues or otherwise, to be addressed by the Defendants' experts on the ATM industry."

So permission was given for the ATM industry expert before any list of issues was agreed for those purposes, for the purposes of 6(a). So, permission wasn't contingent on having a list of issues that the expert would speak to.

It's actually not practicable, at this stage of the proceedings, to set that out. It's self-evident that the industry experts are going to cover, as you said, Sir, the counterfactual, how these industries do operate, the effect of the restrictions on participants in the industry, it's the app developers, and how they could operate in a competitive scenario.

Now, as I said in opening this application, Sir, the question of whether the expert has the relevant expertise will of course correctly go to the weight of the evidence, but it's not a matter capable of operating as a knockout blow now as Apple seeks to deploy it. The evidence will be tested at trial in the usual way. But this is not an industry where I can point you to -- either of these two industries, where I can point you to a qualification. It doesn't work like that. If one simply picks up one's iPhone, you see a whole host of apps that exist, all sorts of players in this industry; it's not regulated in that sense. This is business, commerce, digital commerce.

My final point in reply, I'm going to come on to Apple's application for an IP expert. But it is really striking that Apple is criticising Dr Kent for not identifying any particular qualification, which it says is necessary for that industry expert to have recognised expertise.

But that's precisely what Apple is refusing to do in relation to their intellectual property expert.

I will take you to it, Sir. I won't pre-empt that now. But it simply says: “oh, there are lots of different types of professionals that operate in this space. We will pick one of

them".

No information is advanced at all in relation to that. But, here, it's not possible for me to say to you there's this accreditation that will be met. It's not that type of industry expertise.

THE CHAIRMAN: I don't know whether Ms Demetriou actually agreed with me. It does seem to me that there are two quite separate questions.

The first question is: is it an area where there could in principle be a recognised expertise, in the sense, as you would say, in the extract from the text? Then there is the question as to whether the person you select and what they actually say in their expert report meets the requirements. So, actually, admissibility could come back in later, as it did in *Barings*. There was an admissibility argument with the report having been written.

I think the Defendants are maintaining as a threshold point that this is not an area in which it is obvious there is a recognised expertise. But I don't think they're necessarily saying that -- I think they're probably saying it's not for them to exclude it as a possibility. They're saying you haven't established it.

That's the first question.

The second question is: once you've accepted in principle, how do you get the right person, and do they say the right things?

I don't know whether you have any views on that, but if I am thinking about it in that way; is it the right way to think about it or not?

MS KREISBERGER: Sir, can I ask you to repeat the last point you made? I didn't catch the second --

THE CHAIRMAN: Let me do it again, the whole piece.

So, the first question on admissibility is: is it an area which, by its nature, could lead to a recognised expertise that would make an expert's evidence admissible?

If the answer to that is yes, there is still a question as to whether the person who provides that evidence and what they actually say in the report falls within the scope of admissible expert evidence. So, they're different questions. I am putting to you the way one should be looking at this question, at this stage, bearing in mind that you're not -- for no doubt all sorts of good reasons -- in a position to be telling us who this is and exactly what they're going to say.

MS KREISBERGER: Sir, if I could put it like this: Apple has constructed an argument on recognised expertise that's fundamentally unprincipled, and that's why I showed you the textbook on law and practice and expert evidence.

Imagine if it were said that only particular types of regulated professions are such that industry experts could be put forward in litigation. That cannot be right. As the editors make clear, in principle any area of commerce or trade is susceptible and apt in principle for expert evidence, whether it's a medical expert or a plumbing expert. The question is: will you, the Tribunal, be assisted by evidence from a person with relevant experience within that sector, within that space.

THE CHAIRMAN: Aren't you effectively abolishing the admissibility test?

MS KREISBERGER: Not at all. The admissibility test bites on the individual.

THE CHAIRMAN: So, you say there is no --

MS KREISBERGER: There is no principled objection on the basis of their field of operation, the area of commerce.

THE CHAIRMAN: That's quite tricky, isn't it? Because how can a court ever satisfy itself that it should be giving permission for expert evidence unless it therefore knows exactly who the expert is? Obviously, there are lots of situations where we don't know that.

MS KREISBERGER: Because there are two elements to the test. So, admissibility may not be satisfied later down the line if the person doesn't have any expertise. So,

if we were to put up, you know, for argument's sake, a doctor who has never operated as an app developer, it could be said at that stage: the individual you have advanced to provide expert evidence is not qualified. This isn't admissible evidence.

So, it becomes operative at that stage. You see that in all these orders. You don't see in *McLaren*, in *Euronet*, in *Wacoal*, you don't see a requirement for a particular qualification; that would be far too restrictive.

THE CHAIRMAN: I don't think I am necessarily talking about a qualification, though. I take the point about qualification, but I think it was a different question as to whether it is a subject which could give rise to accumulated, recognised expertise. I think that's the point that's being made, and not necessarily (inaudible). It probably -- it feels more like an ancillary point. I'm sure that Ms Demetriou doesn't intend to put it that way, but actually I suspect that the real question here is who you do turn up with and what they say.

MS KREISBERGER: Yes.

THE CHAIRMAN: But, in terms of getting past the gate post now, she would say: at least you have to persuade us that as a matter of principle this is an area in which a recognised expertise could be developed.

MS KREISBERGER: So --

THE CHAIRMAN: If you're saying the bar for that is very low, I'm just wondering if you're saying there is no bar at all.

MS KREISBERGER: I don't make that broad a submission in relation to every possible permutation. But, in these particular circumstances, there is a lively industry of app development, very important, and we're all familiar with it. Very important to the economy.

The proposition that an individual with experience of the app industry doesn't have some recognised expertise, it's a really extreme proposition. So, of course, Dr Kent

will bring forward evidence from an appropriate individual with that experience.

The same goes for the payment systems industry, which is a highly technical sector.

What isn't appropriate here to do is to say that expertise must take a particular form.

That's for the litigant and if, ultimately, you're not satisfied, well, that will be a matter for another day.

But I wanted to come back to your question, Sir, unless you would like me to pause here?

THE CHAIRMAN: Yes, keep going, please.

MS KREISBERGER: I'm grateful. You very fairly posed the question: well, what are we doing here?

The control that you do have to impose at this stage, which I will be urging on you in relation to Apple's applications, is that the evidence is reasonably required. Now, that's not the objection that Apple is advancing before you today.

If it were being said, "Well, practice in the app industry is just not relevant to the issues", at that point the Tribunal could step in and say, "Well, we're not going to give permission because it's not been shown to be evidence that's reasonably required". That can't seriously be suggested in a case about the App Store and a case about payment systems' restrictions. It's self-evident, and that's why Apple hasn't advanced that argument. So, all that's left for Apple to say is: well, you haven't described their expertise.

If they want to have a go at that, they can have their shot at a later day. But it's not an objection capable of being operative at this stage, in those circumstances.

THE CHAIRMAN: Thank you.

MS KREISBERGER: Sir, those are my submissions.

THE CHAIRMAN: Good, thank you.

I think we will deal with all these and then we will reserve our decision on them and

provide you with an answer in writing at a later stage.

So, let's get on with part 2.

Application by MS DEMETRIOU

MS DEMETRIOU: For Apple's application can we pick up the core bundle, at volume 1, and page 72? Sorry, I'm just trying to find a tab for you. So it's tab 5, thank you. 5C, I think it is.

So this is the draft order that sets out the expert evidence on which Apple seeks permission to rely. The Class Representative's objections are as follows:

So, in relation to 1a and 1b, Dr Kent says that Apple should not be permitted two competition economists as well as Dr Hitt, who is the expert in the economics of digital markets, whose evidence we contemplate relying on under 1b.

So, the Class Representative says that Apple should be restricted to two of the three, so either Dr Hitt and one competition economist, or two competition economists and no Dr Hitt. So that's their position on that.

In relation to 1c, they say that Apple should only be permitted one expert on IT and mobile and internet security, addressing issues as to performance security and privacy arising in the distribution of apps. So, they say you can have one, but not two.

Then the further objection that's made arises under e, over the page. So, the Class Representative says that Apple should not be permitted an intellectual property expert.

So those are the objections.

I'm going to start with the last one, the intellectual property expert, because that's the point on which they place the most emphasis in their skeleton argument.

The objection appears to be made on the basis that there is no properly pleaded issue to which this evidence is relevant.

Could I ask you to turn up Mr Doris' third statement? So that's in the same bundle

behind -- so it's page 47, so it's tab 5A.

THE CHAIRMAN: Yes.

MS DEMETRIOU: You can see the heading "Intellectual property", and it sets out -- so this witness statement sets out the basis on which this evidence is admissible and relevant by reference to Apple's pleading. I'm going to show the Tribunal our pleading in a moment, take you back to the pleading. But there are three key issues, just to foreshadow what I am going to show you. There are three key issues in Apple's defence to which this evidence in relation to intellectual property is relevant.

The first is that it's relevant to the assessment of economic value for the purposes of the excessive pricing allegation.

Apple licenses its technology, which is subject to IP protection, to third party app developers. That's valuable to those developers and therefore needs to be accounted for in the assessment of economic value.

So that's the first point.

Second and relatedly, the Class Representative, in her pleading, puts forward various supposed comparators for the purposes of the excessive pricing allegation. Apple contends that it's in a different position to those comparators precisely because it does license its technology and provides that value to third party app developers that isn't provided by the comparators relied on by Dr Kent.

The third point is separate. It relates to the exclusory abuse pleaded by the Class Representative. So, Dr Kent pleads that the imposition of app distribution restrictions allows Apple to foreclose competition on the iOS distribution market, and Apple contends that the app distribution restrictions only concern the terms on which Apple permits developers to use IP that belongs to Apple.

So, in other words, we say that the competition that the Class Representative says is foreclosed would be competition in breach of Apple's intellectual property rights.

So those are the three points.

I just want to show you where they appear in the defence. So, if we go to the same bundle, the defence is behind tab 14, and if we pick it up at page 325, please, of the bundle.

So, paragraph 15, which has a number of subparagraphs, pleads the technology to which Apple grants developers access. So, you see that at the main body of paragraph 15:

"Apple thereby grants developers access to (amongst other things) ..."

You have, at a, “The iOS operating system”, at b "Apple's proprietary Software Development Kits", and it goes on.

So, you see, at c:

"Apple's programming language, Swift."

d:

"Apple's TestFlight and Sandbox Environment systems."

e:

"Apple's mandatory app review process."

Then, if you go over the page to paragraph 16:

"Apple also provides DPLA developers with, amongst other things, app build support services to build their apps, spotlighting and curation services through the App Store that advertise developers' apps to consumers, and complaints handling services for all iOS apps."

So that's the technology to which Apple grants developers access.

Then if we go forward, please, on to paragraph 42, on page 332, you see there what's pleaded:

"Apple allows developers to access the basic suite of developer tools for iOS for free…

[and it makes certain] charges [to] developers who wish to distribute apps using Apple

software, a very low annual fee … making app development accessible to all innovators with an idea."

Then, if we move forward, please, to paragraph 56, on page 337, we see in the middle of that paragraph:

"The Commission is not only consideration for the distribution of the digital content and collection of payments. It['s] also consideration for Apple's provision and regular improvement of the proprietary technology through which the digital content is created and consumed."

Then you have a reference to previous paragraphs in the defence.

Then moving on in the document, please, to page 347, 101(d), at the bottom of the page, this concerns the third point that I foreshadowed, the market foreclosure point. So, you see the app distribution restrictions, which are the basis in Dr Kent's pleading for the market foreclosure allegation:

"Only concern the terms on which Apple permits [the] developers to use intellectual property that belongs to Apple, (i.e. the technology that['s] licensed under the DPLA). The “actual and potential” competition that the CR alleges is foreclosed by the App Distribution Restrictions would be competition in breach of Apple's intellectual property rights… I[t's] not anti-competitive for a dominant undertaking… to impose limits on the use of its intellectual property."

Also, just pausing here -- perhaps I will come back to this point while we are on the defence, so we're not going between bundles, between tabs.

But one of the points that we say that the intellectual property expert will address goes to this point about market foreclosure and the point that's pleaded here, and relates to the circumstances in which it's usual for undertakings to impose limits on the use of their intellectual property.

Then, if we move forward, please, to paragraph 133(b), which is on page 355, this is

in response to the excessive pricing abuse allegation. You see, at 133(b), again, the commission “is not a mere fee for the distribution of software or processing of payments…not intended to reflect Apple's costs in running the App Store. Instead, the Commission… reflects the economic value of the ecosystem that Apple has built and continues to build. The economic value that Apple provides to developers and consumers is substantial… and will be subject of evidence in due course."

You see a reference in the defence to the previous paragraphs, including paragraphs 15 and 16, which, as you have seen, refer explicitly to the technology that is licensed to the app developers. So that's why that is relevant to economic value and it's clearly pleaded there.

Then we see, at paragraph 143 of the defence, page 359, the comparator point. So: "The CR's analysis of comparator app store commissions is inadequate. It is admitted and averred that none are perfect comparators for Apple, because none provide the unique combination of hardware and software innovations and intellectual property that Apple makes available to developers in exchange for the Commission."

So that was the second of the three points that I foreshadowed.

The point that I said I would come back to is that Apple developed some of these points in a response to requests for further information made by the Class Representative, and that response was served in October 2022.

If we go to tab 17 of the same bundle, page 405, please -- so the same bundle. It's core bundle volume 1, tab 17.

DR BISHOP: We have a different --

MS DEMETRIOU: I'm so sorry, mine must be organised separately. I'm so sorry about that.

Apologies, I don't know what's gone wrong there.

So, this is the response to the RFI. If you look at request 9, on page 405, you can see

the request in bold:

"Please identify, with precision, the alleged “intellectual property rights” to which reference is made in paragraph 101(d)and explain the precise basis for the allegation that competition in relation to the distribution of iOS Apps would involve a breach of the alleged intellectual property rights so identified."

Then you have the response:

"Apple has hundreds of patents and patent applications in the United Kingdom, Europe and United States relating to iOS, the App Store… These will be the subject of evidence in due course."

Then, at 12:

"Apple's work is subject to copyright and/or trademark protection…including for the term App Store as well as many of Apple's developer tools."

Then you see at 13:

"Apple currently grants app developers limited licences to the Apple intellectual property they use in connection with the iOS Apps that they develop, test, and offer for use on Apple products".

So when we come to the objections made by the Class Representative in this case about the pleading, what we say in response is that this is all pleaded out, but, in any event, they did send a request for further information about the intellectual property rights that were covered, this is the response that we gave them, and they never came back at that stage to say: well, that's not good enough. We don't really understand your case.

So, to the extent they're saying there's a problem with the pleading, we say that isn't right.

Now, let's have a look at what they do say.

So, just pausing there, in terms of the relevance of expert evidence from an intellectual

property expert, we say it goes to those three points that I drew out. I have shown you now where they appear in our pleading.

In terms of what the Class Representative says about this, let's take it from their skeleton, please. So, again, we're in core bundle volume 1, behind tab 1. If we start with -- so page 1.7 of the bundle.

So they address, at paragraph 30, the point that Apple makes its technology available to developers and that's valuable, which, as you have seen, we say it goes to the question of economic value in the context of excessive pricing. They say:

"These paragraphs contain little more than a series of bare assertions that Apple licenses IP and technology to developers with no particularisation."

When you look at what they're saying, I think really their criticism is the one at (c), “No IP is identified”. But, with respect, that's a point they did explore through the RFI. They have received the answer, which is that all of this is covered by hundreds of patents, and they didn't come back and say: well, we want specific details for the patents.

It's not relevant at this stage to identify precisely what the patents are that cover this technology. The point is this is technology that is covered by intellectual property protection and it is valuable. So, a key part of Apple's defence is to address that value.

THE CHAIRMAN: So, the expert might be doing at least two things, I suppose. Well, maybe three. The first exercise of valuing the IP, so that presumably would be from the point of view of the developer because of the nature of the claim that's made.

MS DEMETRIOU: Yes, what value the developer gets from the IP.

THE CHAIRMAN: From usage of the IP. That, you would say, is a classic IP valuation exercise, which would be carried out by whom? What sort of person would carry that out?

MS DEMETRIOU: Well, there are -- in the framed context, for example, it's very common to have intellectual property valuation experts. That may be one such

person. But, at the moment, I'm loath to tie up his hands as to how he goes about it. We have neither side. So, we have a very scant pleading from the Class Representative on economic value. Obviously, this has been the subject of debate, but we don't know how they're going to plead or advance their case on economic value. But what we do know -- and we have pleaded -- is that the licence to use these technologies, which are covered by IP rights, is of value to developers and that needs to be factored in to the question of economic value. One can't just look at the commission and say: “well, that's X above the cost of running the App Store”. That's not the right approach.

THE CHAIRMAN: Then, when you get on to the second and the third, I think you're doing something quite different as the expert, aren't you? Because you're making an analysis of features of -- I suppose you're looking at the factual situation, to see what features of the IP do and don't exist in certain circumstance and what their implications are. So, in a way, it's quite a different exercise, isn't it?

MS DEMETRIOU: I think the second and third points that I was seeking to make -- the second point is a point relevant to excessive pricing again, which is: on the unfair pricing limb the Class Representative has said, these are comparators, and Apple's pricing above these comparators. So, the point that we want the expert to address there is to look at those comparators and compare them to Apple and see whether the comparison is apt. As we say, then it's not apt, because unlike Apple, those comparators don't license technology.

THE CHAIRMAN: So, if a particular comparator didn't have intellectual property licensing, then I'm not sure we would need an expert to tell us what the answer to that would be, because presumably the answer would be, there would be no value attached to the intellectual property. But you're saying there might be a degree of intellectual property that requires a valuation exercise similar to -- in this case. Is that

the position?

MS DEMETRIOU: Well, I think that the IP expert may be able to help us with whether or not the comparators are licensing intellectual property. They may be able to help us with that question because I'm not sure that's a question that Apple can address factually. I'm not sure, because it's not necessarily within Apple's knowledge. So, they may be able to help us with their opinion on that question.

Then, opine on the value to Apple's developers and customers, of Apple licensing the use of its technology to them. So, whether or not the comparison is apt can then be assessed by the Tribunal.

THE CHAIRMAN: Yes, I think the question I am driving at is how far the expert in these cases assists the Tribunal. So, we're on to the question of whether it's reasonably required or not.

I suppose the third -- I think you've dealt with that in relation to the second.

In relation to the third situation, it's going to be what the implications of the intellectual property rights are for the developers to behave in a different way, if they were to comply with their legal requirements.

MS DEMETRIOU: Yes, so what's been said in terms of the market foreclosure abuse is: the terms of these agreements are abusive because they foreclose competition.

What we have said, at 101(d)of Apple's defence, is -- well, no, because all these terms do is regulate the use of Apple's technology by the app developers. So what we would like is for the intellectual property expert to opine on whether that is usual in the industry. Because it seems to be -- so our position, Apple's position, is it can't be abusive to place constraints on the extent to which third parties use your IP rights; that's not an abusive thing to do. So, I think given that it’s pleaded – the plea is that it is abusive, then that's, we think, a matter on which an IP expert could usefully provide evidence to the Tribunal because that’s going to be a matter in contention.

THE CHAIRMAN: So, the question is not so much about whether the restriction or what the nature of the restrictions are, which is perhaps more of a legal question based on whatever the law is and whatever the documentation says, the question is more about whether that's consistent with market practice.

MS DEMETRIOU: Yes, I think that's the primary point. I think that's the primary point on which they could be expected to give helpful evidence under that head.

THE CHAIRMAN: Thank you.

MS DEMETRIOU: So, returning to the skeleton argument of Dr Kent, the first point is: well, this is not properly particularised, you haven't told us what the IP rights are.

But we have said, as you have seen, that the technology is covered by intellectual property rights, and you see that in the response to the RFI. Nobody ever came back saying: we want more detail.

Then, if you go to paragraph 34, over the page, "Mr Doris also relies on paragraph 143 of the defence as demonstrating that IP "is relevant to the assessment of whether Apple's pricing is "unfair". But that paragraph merely contains the further assertion that none of the comparator App Stores relied on… are perfect comparators. No particulars in support of that averment are given".

Again, we can't understand what the difficulty is that Dr Kent has here. So, the point is pleaded that these are not apt comparators because they don't provide the same as Apple is providing. We have explained what it is that they don't provide. So, I'm not sure what further particulars are necessary in order to understand the pleaded issue.

Again, we say if they did have difficulty understanding the pleaded issue, then that's something they could have sought further information about.

Interestingly when we served the response to the request for information that I showed you, the Class Representative did come back seeking yet further information and points of clarification on some of the points, but nothing in relation to this and IP rights.

So, we say, it can't really be a concern about some lack of clarity in the pleading. It just seems to be an opportunistic point that's taken now in response to the application to rely on this expert evidence.

So, pausing there, the technology licensed by Apple to developers will have to be assessed in these proceedings in order to determine the points raised by the excessive pricing allegation for the two reasons that I have given you. Those are plainly issues on which it's appropriate for an IP expert to opine.

The third issue is the one under 101(d) of Apple's defence, and I have explained the basis for that, too. So, we say that the two limbs of the legal test are met. The evidence is admissible. Expertise and the valuation of IP rights is a recognised field of expertise and Ms Kreisberger took to you where Mr Doris says that, but let me just take you back to that. So that's C, core bundle volume 1, page 49. So that's at tab 5, back at Mr Doris' third statement.

Paragraph 43. So, "there are various professions and recognised activities where an expertise in valuation of intellectual property rights may be obtained…[and] there are …[also] professional bodies and programmes that assess the expertise of such persons."

So, we meet that threshold requirement and we say that the evidence is reasonably required really for the key three reasons that I have given. It's not only relevant, we say, but it's necessary to determine the pleaded issues because how else is the Tribunal going to get an idea, for example, as to how the value of the licensing of this technology, which we say, we have pleaded, feeds into economic value.

So, unless you have any questions, those are our submissions in relation to that part of our application.

THE CHAIRMAN: Good, thank you.

MS DEMETRIOU: Thank you. So, I will go on to the expert economists and Dr Hitt.

I have summarised what the area of dispute is.

Professor Hitt is, I think, veering between professor and doctor, probably both. Professor Hitt. It's probably both, I'm going to stick with Professor.

Professor Hitt is an expert in the economics of digital markets. The Tribunal will recall that he provided an expert report at the CPO stage of these proceedings, so he's already familiar with these particular proceedings and, of course, he has given evidence in the related proceedings in the US as well as Australia.

The Class Representative doesn't contest the admissibility or relevance of either evidence from the expert economist on competition economics or of the proposed evidence from Professor Hitt.

As I say, the objection that she raises is one of proportionality. She says that we should have two of the three, but not all three. We say that objection should carry no weight, and we make four points.

The first point is that the Class Representative herself is proposing to call two competition economists, and her argument proceeds on the basis -- her proportionality argument proceeds on the basis that Apple is seeking to call three competition economists to cover the same material. But that isn't right because Professor Hitt's role is distinct from the two competition economists.

He has specialist expertise in the economics of digital markets. In other words, how in an economic sense digital markets operate, and its expertise which he has built up over many years. The work he proposes to conduct that will relate to that particular specialism will no doubt be used, but not duplicated by the competition economists. We anticipate that his evidence will be very helpful precisely because of his specialist expertise. We referred in our skeleton argument to an excerpt from one of the *Sainsbury*'s judgments. I will just pull up the relevant paragraph.

So supplemental authorities bundle volume 1, tab 8, page 137.

Paragraph 36. This is under the heading:

"Weight to be attached to the economists' evidence."

Paragraph 36 says:

"Mr von Hinten-Reed and Dr Niels were, as we['ve] said, expert economists. Neither of them is an expert in the field of payment systems whether generally or specifically in relation to the MasterCard Scheme. Inevitably, they were very dependent upon an accurate account of the factual basis and context within which these complex and sophisticated systems operate."

Then, at 37:

"In other words, in contrast with the position normally encountered by an expert witness, their expertise was engaged once removed. It could only be deployed in relation to substantial and complex factual material about which they were not expert."

So, what we're saying here is that precisely -- here, Professor Hitt is someone who is not one stage removed because he has a precise specialism which accords with the subject matter of this dispute. So, it's extremely likely that his evidence is going to be of great assistance to the Tribunal, precisely because his specialism is so tied in with the subject matter of this case.

THE CHAIRMAN: In terms of what he's actually doing, though, it is very similar to what the other two economists are going to be doing, isn't it? He may have a particular depth of knowledge of the subject, but he's basically doing the same thing, isn't he?

MS DEMETRIOU: I think he's not, no. There's not going to be any duplication. But what he's going to be doing is -- he's going to be opining on how this market works, and then that will be no doubt used by the two competition economists who are going to be covering different areas of the wide areas of competition economics that are engaged.

THE CHAIRMAN: That sounds dangerously like an app industry expert.

I thought it was being suggested he would cover market definition and dominance issues.

MS DEMETRIOU: Yes, so he will do that. So, he will cover market definition, and he will approach that from his position of specialism in these markets.

THE CHAIRMAN: But it is the same subject matter as the expertise for the other two experts?

MS DEMETRIOU: Well, the other two experts are competition economists more generally. So, what we will ensure is that there's no duplication between the three of them. So, it's not the case that you're going to get duplicative material, so we will ensure there's no duplication. That's really one of the key reasons why we say that none of this is disproportionate.

THE CHAIRMAN: Duplication is not the only problem, though, because, if, for example, we were to give you permission for Professor Hitt, then I'm sure that Dr Kent would ask for somebody to respond and if we add in another two experts, of course, in this particular area we are very likely to want to ask the experts to go to a hot tub. So suddenly it becomes more difficult to manage that process, and particularly if there is a sense that Professor Hitt and his counterpart are at a different level, if one can put it that way, not of the market, but on a different level of food chain, or at least understanding of the food chain.

So, there are quite a lot of knock on consequences that come from making four economic experts into six.

MS DEMETRIOU: Sir, let me address -- there are a number of points there. They're all good points, if I may respectfully say so.

THE CHAIRMAN: Yes, of course.

MS DEMETRIOU: Can I take them in turn?

So, first of all, Professor Hitt's evidence is going to be, as you say, as you've picked

up, relevant to market definition and dominance, et cetera. But what he will be doing is conducting a specific form of analysis.

Now, it doesn't follow that because he's doing that the Class Representative will then have to have someone analogous, so it's obviously open to each party to establish their case however they wish. It's not unusual in a case. One can think of cartel damages cases where you have one claimant and a whole array of six or seven defendants where there is, if I can put it this way, not an equal number of experts on each side.

So really the question is -- so it may well be that the Class Representative considers that her two competition economists can cover the same area, but we have someone who has a specialist expertise, we think his evidence will be useful, and he has given evidence in the related proceedings in the US and Australia. So, there is a cost efficiency in using his evidence again.

THE CHAIRMAN: The difficulty with that submission is that if his evidence is distinct and covers something different from what an ordinary competition economist might cover, then it is presumably something the Class Representative would want to deal with, otherwise it's unanswered.

If it's the same, then it begs the question why we need Professor Hitt as well as the other two. Indeed, Professor Hitt may be called as one of the two competition economists. Why do we need three people to do the job of two? So that seems to me the problem with that.

MS DEMETRIOU: Sir, I guess I can't -- there's a limit to what anyone can say at the moment as to what the Class Representative might want to do until they have seen Professor Hitt's evidence. So it may be, having seen Professor Hitt's evidence, that they think that it can be responded to by one or both of their competition economists, or it may be that they say: well, this is very specialist, we want someone else.

So they're not saying we shouldn't be allowed to have Professor Hitt; their objection is a numerical one, rather than a substantive one.

So it may be we just don't know what their response is going to be. It may be, having seen it, one of their competition economists feels perfectly able to respond to it. We just don't know at the moment. All I'm saying is we can't assume that they are going to have a third one themselves if we're allowed three.

But we do say, generally, that this is a very substantial case in which a very substantial award of damages is sought, and in which the competition issues are varied and complex. Not only varied and complex, but, at the moment, certain key parts of Dr Kent's case, notably economic value, are very sketchy. So we don't have a clear view as to how Dr Kent is going to approach the important issue of economic value, so we do think that it's important to retain flexibility. We think that if Apple is confined to calling Professor Hitt and one competition economist, that wouldn't give us the flexibility required to deal with these difficult and wide-ranging competition issues.

We also say, really, given the size of the proceedings, it's difficult to see really why a serious proportionality issue arises, particularly since we're going to ensure there is no duplication.

We also say that it is important to bear in mind what's happened in the other proceedings. So, you have proceedings -- and this is dealt with in Mr Doris' statement, perhaps we can take it from there. So, if we go back to the core bundle, core bundle volume 1, here we are, tab 5, page 44, and it's paragraph 23.

So you can see from that, in the *Epic* litigation in California, there were “three competition economi[sts]… separately from Professor Hitt… three on behalf of *Epic*”. Class litigation, two competition economists separately from Professor Hitt. Australia, two competition economists separately from Professor Hitt.

So, there is a further point about saving of costs, which is that's how Apple has done

it in the other proceedings, and it obviously would be cost efficient, if possible, to use as much as possible the same experts given that a lot of relevant work has already been done. So if we were told now, "Actually, you can't have that because you can have Professor Hitt and one competition economist", not only is there a concern that the one competition economist wouldn't be able to cover all the material they need to cover because of the varied issues that are engaged, competition issues that are engaged, but it would lead to a cost inefficiency because that's not how it's been done in the other proceedings. So, it would really make it much more difficult to use the same people and to use some of the same work. So that's another reason why this would not be disproportionate, and in fact quite possibly a cost saving.

MR FRAZER: Can I just ask you a question now?

MS DEMETRIOU: Of course.

MR FRAZER: It's not merely in relation to cost savings. I have looked, briefly, at the *Epic* US case and also the opinion that Professor Hitt gave in that case. The nature of his opinions, both in the summary and in the body of his opinion, and also the references in the judgment, of which, as you've already said, there are many; I am still unclear as to how Professor Hitt can be regarded somehow as upstream of the other competition economists.

It seems to me this is not some abstruse econometric modelling that the other economists might not be capable of. The other economists, it seems to me, also would have to be at least familiar with if not leading experts in digital markets, otherwise they wouldn't be able to engage in what I think Professor Hitt is also engaging in, which is: definition of the market, is it a two-sided platform? Can the conduct be regarded as abusive? Is there dominant market power? Et cetera. From my kind of quick review of Professor Hitt's contributions, valuable as I'm sure they are, I couldn't get the feeling that they were somehow distinct from what one would expect ordinarily of

a competition expert in a case such as this. Can you help me with that?

MS DEMETRIOU: Yes, Sir. So, I perhaps think I misspoke when I said he's slightly upstream of the other economists. I think it's more accurate to say he's a specialist in the economics of these markets.

I think by contra-distinction to other competition economists, so, for example, Mr Holt is the expert economist that we have seen so far on the other side, and I don't think he would hold himself out to be an expert in digital markets. He's an expert competition economist, and he gives competition expert evidence in competition cases.

MR FRAZER: Professor Hitt went kind of blow by blow with him in his opinion in the certification opinion. It seemed to me that they were talking the same language.

MS DEMETRIOU: What we're saying here is that Professor Hitt is a specialist, so a sub specialist, if you like, in these markets, how these markets operate, so he's going to conduct a particular type of analysis in relation to market definition. So that's an analysis on which Apple would wish to rely in response to the allegations made on market definition and dominance, and Apple thinks that his evidence would be of assistance to the Tribunal.

That's not disputed, so that's not objected to by itself, by the Class Representative. But they say: “well, that's all right, but then you can only have one competition economist”.

I think the overriding point is these are very big proceedings seeking a vast damages award which turn on, to a great extent, these points of competition economics. It's not disproportionate to allow Apple to have two competition economists in addition to Professor Hitt given (a) that they're not going to be duplicating each other's work and (b) that that's what's happened in other proceedings and may well therefore give rise to cost efficiencies.

I think the real question is: is it going to be disproportionate to have an additional economist or, perhaps, as the chair indicated, an additional two economists in a hot tub?

We say, given the size and complexity of these proceedings the answer is it's not. That's really, I think, what the question comes down to.

I think there is one remaining issue, which is the IT and mobile and internet security expert. So, again, Apple seeks permission for up to two expert witnesses --

Is now a good time to take a break?

THE CHAIRMAN: It depends how long the point is because we should take a quick break. It does seem to be quite a short point here. Is this a practical point that you can't find somebody who covers both of them?

MS DEMETRIOU: Yes, because they're different things. For example, privacy issues are related to but distinct from security issues. So, privacy issues might arise where the operation of a particular app means that more private information is being given up by -- and security issues might arise -- I'm not very technical -- if something is breached. So, they're overlapping and related, but separate areas of expertise, and it really is a question of flexibility.

THE CHAIRMAN: So, you're saying that there is a distinction to be made -- well, maybe not saying that. But there are two subjects here which are sufficiently unconnected that you may need to have somebody to do them separately.

MS DEMETRIOU: Exactly.

THE CHAIRMAN: But they will be treated as being separate in the case.

MS DEMETRIOU: Yes, again, we won't overlap, so it's not having two different experts saying the same thing. We just want to retain flexibility because we do think they are distinct areas. Both are pleaded -- and I can take you to the pleading if necessary -- it's all there in the pleading, and it really is a question of flexibility. We're

concerned we won't find one person to cover these areas, which are distinct. That's really the point.

THE CHAIRMAN: Do you want to just quickly go to the references -- not go to the pleadings, but if you can just give us the references.

MS DEMETRIOU: If I can give you the reference to where it's summarised in Mr Doris' third statement. So, it's core bundle volume 1, tab 5, page 46. It's paragraphs 30, 31 and 32 really summarise where we are at.

THE CHAIRMAN: Yes. We will look at those. I think it would be quite helpful just to perhaps see what Ms Kreisberger has to say in response to that. Then obviously we can come back to you if there is anything else. So, is this a convenient time? Shall we take a break for ten minutes and then come back?

(3.23 pm)

(A short break)

(3.35 pm)

THE CHAIRMAN: Ms Kreisberger.

Submissions by MS KREISBERGER

MS KREISBERGER: Thank you, Sir.

Sir, I will respond to Ms Demetriou's applications in the following order, slightly altering her order.

I will begin with the IP expert, I will then deal with the IT expert quite briefly, and that's the second IT expert, and then, lastly, the third economist.

To begin with the intellectual property expert. If I could ask to you bring up Apple's draft order, which is at core bundle volume 1, tab 5C, page 73. The relevant provision is over the page, at subparagraph e of paragraph 1, on page 73.

THE CHAIRMAN: Yes.

MS KREISBERGER: This is what Apple is asking for. With all these applications it's important to focus, I think, on the terms, the precise articulation in the draft order:

"an intellectual property expert, addressing issues as to the intellectual property made available by Apple to developers, and the protection and value of that intellectual property."

Now, here is the problem in a nutshell: if the Tribunal were to make that order today, Dr Kent would essentially have no idea what points the expert is going to make or what kind of expert is going to be making them.

What are these issues as to the IP?

You see immediately that this draft order is not restricted to questions of valuation. That's just posited as one subset of the pleaded issues. Now, obviously that's not how litigation is intended to work. I would just remind the Tribunal -- I'm sure you always have the governing principles well in mind, but the governing principles provide that the parties must be on an equal footing, and that's relevant to my application addressed before you earlier in relation to the industry experts. You have my submissions on that.

Also, that each party's case shall be fully set out in writing as early as possible.

So, in short, Dr Kent needs to understand Apple's defence in relation to its application for an IP expert, so that Dr Kent can bring forward its own expert were that to be allowed.

Now, Ms Demetriou took you to the defence and she said, essentially: it's all there in the passages of the defence.

But none of the passages that she took you to -- and I'm going to go back to them -- amounted to a properly pleaded and particularised IP defence. In fact, it's just a small number of references to the fact that Apple has IP. There's really nothing more granular or more detailed or particularised than that.

I just want to address one point before I turn to the defence that Ms Demetriou made. She said: “well, you haven't complained about the lack of particularisation in the past”. She referred in particular to an RFI. But I'm not here before you asking you to strike out parts of the defence; I am responding to Ms Demetriou's application for expert evidence. In order to make that good she needs to show you that there are pleaded issues in the case for which expert evidence is reasonably required. So, this is framed by this application that she brings before you; it's not a wider application to strike out.

Now, I will take you back, as I said, to the defence, which is at tab 14 of core bundle volume 1.

Now, Ms Demetriou's skeleton relies on paragraph 6, which I don't think she took you to. But it is relied on in her skeleton, so that's my starting point. So that's over the page, at page 323. Perhaps if we just have Apple's skeleton to hand as well, which is at tab 2 of the bundle, which makes navigating between them a little difficult.

Just so you have it, it's paragraph 25, at tab 2, page C2.9. You see there she lists a number of paragraphs, I'm going to deal with all of them. They're just cited.

So, if we go to paragraph 6, on page 323, it says there, at the third sentence, which is what the skeleton relies on, it begins by saying Apple is innovative:

"It fundamentally changed the cellular landscape… It thereafter decided to license its technology and intellectual property to third-party developers for specified uses and created a suite of tools to enable them to create native iOS Apps."

So that is just a bare assertion that Apple licenses its IP. It's nothing more than that. That's the first provision on which they rely. Of course, it's not disputed that Apple has IP.

She then took you to paragraph 15. Now, paragraph 15 -- this one was left out of the skeleton, but Ms Demetriou relied on it today.

Paragraph 15 describes the DPLA as “A portfolio licensing agreement that offers

a limited licence to develop iOS apps “using the Apple Software” and distribute them, if accepted by Apple, “via the App Store”… Apple thereby grants developers access to… the iOS operating system [and, at (b)], Apple's proprietary Software Development Kits.” It gives a little bit of a flavour about these SDKs.

What you see, at paragraph 15, is there is actually no mention of any form of IP. One can imagine that some of this is underpinned by IP, but it's not pleaded; there is no particularised case here.

So that's paragraph 15.

We then go forward to paragraph 29, at page 328, and Ms Demetriou relies on the first sentence, which says, at paragraph 29:

"Apple's ecosystem consists of hardware, software and services, and the integration between them."

Again, the reference to ecosystem doesn't speak of IP at all. It's notably absent.

We then go forward to paragraph 42, which is at page 332. That says:

"Apple allows developers to access the basic suite of developer tools for iOS for free. [It] charges developers who wish to distribute apps… the annual fee of US$99, making app development accessible to all innovators with an idea… [They] enjoy a variety of app monetisation strategies… Apple charges a commission. That business model has been very successful by every measure. It['s] contributed to the development of an innovative and vibrant app transaction platform that attracts consumers and developers alike."

None of that is in dispute in broad terms, but no particulars of Apple's IP are detectable in this passage, so we're not assisted.

We then go forward to paragraph 56, which is at page 337. Apple relies on the third sentence, which says this:

"The Commission is not only consideration for the distribution of the digital content and

collection of payments. It's also consideration for Apple's provision and regular improvement of the proprietary technology through which the digital content is created and consumed."

This is in the section on relevant markets.

But all that says is that Apple's commission pays for it to improve its technology. There is no detectable pleaded case on IP here. It just says that the commission is consideration.

That's completely unparticularised. If Apple wanted to plead a case seeking to justify its commission by reference to IP it would need to plead some particulars. Which part of the commission is said to pay for IP? Which IP is Apple referring to? How is Apple measuring value in order to justify the IP?

Now, I don't have any insight into how that might be put, but it's certainly not sufficient for Apple to simply assert, in the barest language, that the commission is consideration for Apple's provision and regular improvement of the proprietary technology.

That's not a pleaded case in relation to pricing by -- it's not an IP defence to pricing. It's a hint that there might be one coming, but it's not a particularised case.

THE CHAIRMAN: I don't think any of us doubt that there's one coming. We had all this in Technicolour in the strike-out application, didn't we? It is plain, isn't it, that Apple intends to rely on the value of its intellectual property as being a benefit to developers, and they may not have pleaded it in the way you think that they should have, but I don't think we're in any doubt that that's a point they're going to take, are we?

MS KREISBERGER: Well, they haven't pleaded it at all but the point I'm putting to you, Sir, is not that. I am only addressing you today in relation to their application for an IP expert.

Now, if they want to persuade you that IP expertise is required, they need to tether that to the pleading. It's not sufficient to simply say: “well, we have a case coming.”

Because --

THE CHAIRMAN: So, I mean, I don't want to characterise it as a pleading point because you're saying you need to know the case you need to answer and it hasn't been dealt with. But if there is a problem with the pleading, let's deal with it as a problem with the pleading. If we're all clear there is going to be a case made on the IP valuation; are you suggesting we should just wait until we see that written down and then we reconvene and have a discussion?

MS KREISBERGER: Yes.

THE CHAIRMAN: In which case you would concede the point; is that what you're saying?

MS KREISBERGER: We would have to look at it then. But if they want to maintain there is a properly pleaded or particularised issue at this stage, so as to support the application for expert evidence. If they want to have another crack at it, if they want to have another bite at the cherry, they can do that, but they will need to come forward with a particularised case by reference to which they can show you and persuade you, and it's for them to persuade you that there are proper particulars.

I'm going to take to you *Le Patourel* where a similar issue came up, although albeit already particularised in far greater detail, but this is not the way this works. A party to the litigation can't say: “well, don't worry, we have hinted at the point, we have made a couple of bare assertions, a couple of references, it's coming and we're going to instruct an expert to support it”.

We need to understand it, not least because we need to know who to instruct and what we're instructing them in relation to. At the moment, it's entirely unclear what the actual issues which arise in relation to IP are, because it's deficient for the purposes of this application.

THE CHAIRMAN: Well, I'm not sure -- certainly I'm not sure that they would agree

with you. They do -- it may be a fair point that it's not articulated completely and fully, but it is there in some respects, isn't it? Paragraph 56 does talk about the commission being consideration for the provision that we're going to improve proprietary technology. I don't think that's so far away from saying: we're providing something to developers that we are, and they are entitled to use.

Is that really not what we're talking about here?

MS KREISBERGER: That's well below the standard required. So, their position is: "we are now able to show you that we need a particular flavour of expert to support the allegation by way of defence that the commission is consideration for our IP".

How is Dr Kent to instruct its own expert to respond to that if they haven't given any particulars -- and this is a sort of basic question about how litigation unfolds -- how can Dr Kent instruct her own expert if she hasn't been given any particulars as to how it is said, why it is said that the commission is in fact consideration for IP? How that IP is measured, how is value being attributed to the IP, how is it tethered to the commission?

Dr Kent is in the dark.

THE CHAIRMAN: You can ask for those particulars. Indeed, you've asked for some and you have had some answers.

MS KREISBERGER: But they need to persuade you today that there are particulars there to which an IP expert can speak. That's the order.

THE CHAIRMAN: Is that really right? They need to persuade us that there is an issue which --

MS KREISBERGER: A properly pleaded issue, Sir. I will show you *Le Patourel*, which I hope will assist, given it's a very recent decision.

THE CHAIRMAN: Yes, okay, let's look at that.

MS KREISBERGER: I will come to that in a moment, but I think it's more helpful if

I just take you through the rest of the defence to show you.

THE CHAIRMAN: Yes.

MS KREISBERGER: So that was paragraph 56. Paragraph 133(b).

THE CHAIRMAN: Do you want to just pause? I know it's not in the skeleton, but Ms Demetriou did take us to 101(b).

MS KREISBERGER: Yes, I am coming back to that. I apologise, it's out of order, but I think it's because it's the order --

THE CHAIRMAN: That is right, yes.

MS KREISBERGER: -- that it was addressed in their skeleton.

THE CHAIRMAN: 133(b).

MS KREISBERGER: 133(b) is at page 355. Now, this is what Ms Demetriou said was Apple's defence to unfair pricing. She relies on the prefatory wording:

"In summary, however, Apple denies that any Commission it has charged is excessive or unfair. In particular, the CR's case fails to account for demand-side factors when assessing the value of the product that Apple invented. Consequently, it does not measure the real economic value that developers and consumers derive from the App Store and the wider iOS ecosystem."

Then she relies on subparagraph (b):

"Apple's commission is not a mere fee for the distribution of software or processing of payments. It['s] not intended to reflect Apple's costs in running the App Store. Instead, the Commission, (along with the various other charges that Apple sets) reflects the economic value of the ecosystem that Apple has built and continues to build. The economic value that Apple provides is substantial, far in excess of cost … and will be the subject of evidence in due course."

Then some paragraphs are referred to. There is no mention of IP. This is the core paragraph, she says, on pricing. It doesn't refer to IP at all.

Now, her skeleton cross-refers to paragraphs -- as does Mr Doris' statement, to paragraphs 29 and 42. Neither of those refer to IP either. Ms Demetriou, on her feet, referred to different paragraphs that are cross-referred there, which were 15 and 16. Well, she took you to paragraph 15. I have taken you back to that, that paragraph does not identify IP.

Now, let me show you what Ms Demetriou says about this in her skeleton, which moves us back to tab 2 of the same bundle. That's at paragraph 26. She says this:

"The technology licensed by Apple, supported and protected by its intellectual property, and its value, supports Apple's denial of the allegation of abuse of dominance as set out in 113 and 133(b) above."

So, as put in her skeleton, this is the high watermark of Apple's pleaded case on unfair pricing. Paragraph 133 doesn't even contain a reference to IP, doesn't tell us anything about the way in which Apple is proposing to deploy arguments about its IP to rebut the allegation that its commission is unfair. This is new.

She's not entitled, she cannot persuade you that expert evidence from an IP expert is necessary in relation to unfair pricing if this is the best passage she can rely on, and it doesn't refer to IP.

The next one she relies on is paragraph 143, so we go back to the defence.

Now, Ms Demetriou took you to this paragraph. This is the paragraph on comparators. It's the first two sentences. It pleads:

"The CR's analysis of comparator app store commissions is inadequate. It's admitted and averred that none are perfect comparators for Apple because none provide the unique combination of hardware and software innovations and intellectual property that Apple makes available to developers in exchange for the Commission."

Now, again, it's nothing more than a statement that Apple is more innovative than other App Stores. It's not a hook for expert evidence.

THE CHAIRMAN: It is a pretty clear statement, isn't it, that part of their case is the intellectual property that's made available to developers? I think it is pretty plain, isn't it, that that's what they're saying? It's in the context of comparators, so you may be right that it hasn't been put as plainly as it might have in the primary response to your case. But she's saying in terms here, isn't she, that when you come to look at other comparators they don't have the same features of providing value through the provision of intellectual property to developers?

MS KREISBERGER: But she's going to have to explain why it's said that she needs an expert to make good the factual proposition that comparators aren't as innovative, don't have such a unique combination of hardware and software and so on.

THE CHAIRMAN: I think she says if you have intellectual property that you're providing it can be valued and taken into account, and if somebody else has different intellectual property that can be valued and taken into account, and an expert is helpful in understanding those two things. I think it's as simple as that, isn't it?

MS KREISBERGER: Sir, you have my submission that there isn't a sufficient hook here for that proposition. To simply say we're entitled to an expert to look at comparators, I mean, it needs to be explained why that goes beyond --

THE CHAIRMAN: I think paragraph 143 could hardly be clearer, could it?

MS KREISBERGER: Well, it's an assertion. But the expert economists will address the relevant comparators. We had some debate about this at the CPO stage.

What kind of an IP expert? We will come to that. But, at the moment, the way Ms Demetriou put it to you was that really, it's about valuation. Well, it can't be said that they're going to go through a process of valuing everyone else's IP. So, what is it that's being proposed here? It's not clear at all.

I think we need something more for you to be persuaded that expert evidence from an IP expert is required to assess other comparators.

I may come back to that, if I may.

THE CHAIRMAN: How are we going for time?

MS KREISBERGER: Yes, that's a good question.

THE CHAIRMAN: I'm conscious that I'm distracting you, which is not very helpful.

MS KREISBERGER: Very fair questions, Sir.

THE CHAIRMAN: If we're going to give Ms Demetriou a chance to reply we will move on a bit.

MS KREISBERGER: Yes. Is there any prospect of sitting late today? I hesitate to ask.

(Pause)

THE CHAIRMAN: We can manage a bit extra, but not an unlawful lot more. I think probably half an hour, possibly a little bit more than that.

MS KREISBERGER: I understand Ms Demetriou is in difficulty.

MS DEMETRIOU: I think I can manage half an hour, but I am in difficulty after that.

THE CHAIRMAN: How long do you think -- I know you haven't heard everything that Ms Kreisberger has to say, but how long do you need to respond?

MS DEMETRIOU: I think I can be reasonably short in reply because the issues are fairly defined now.

MS KREISBERGER: I am making good progress, Sir, so I will take it at a trot.

THE CHAIRMAN: Thank you.

MS KREISBERGER: Sir, if I could then move back to paragraph 41, which Ms Demetriou addressed you on, that's at page 331. That's at the bottom of the page. This, again, it's a paragraph relied on by Mr Doris in his statement. Again, all we see there is a reference to the protection of IP as a matter which improves Apple's approach. That's right at the bottom of the page, subparagraph 6(vi).

Then paragraph 101(d), Sir, which you fairly pointed out I mustn't skip over. Now, you

see there the pleading says:

"The "*actual and potential*" competition that the CR alleges is foreclosed by the App Distribution Restrictions would be competition in breach of Apple's intellectual property rights."

That looks like a legal proposition, legal assertion that it's a breach of IP rights.

Now, Ms Demetriou made a different submission which we have not heard before. She said to you that it's usual for IP holders to place restraints of this sort and that's why she needs IP evidence. Well, Sir, it really is unsatisfactory for these points to be being made for the first time, being developed on Ms Demetriou's feet. We haven't been told that before. You see there a straightforward proposition of law, competition would be in breach of IP rights. That can be dealt with by the lawyers, frankly.

Ms Demetriou's words were:

"This goes to the circumstances in which it would be usual for undertakings to limit the use of their IP."

I will also deal briefly, given the time, with the point about the RFI. She took to you the fact that we did ask questions about this passage and criticised us for not coming back again. So, I just want to -- just so it's clear, I am making this point now in relation to the application for expert evidence. The point needs to be properly pleaded, it's not a strike-out application. So, it can't be said against me: well, you didn't ask for more. We had a go. We didn't get a satisfactory response, but that doesn't justify expert evidence on these vague points.

Now, I want to turn to the reason which Apple gives in its skeleton. So if we could go back to tab 2, paragraph 28.

Apple submits: "For these issues to be determined the Tribunal will need to hear expert evidence on the value of the technology and software protected by intellectual property that's made available to developers. This raises complex questions of a technical

nature as well as financial analysis."

But we're not told what those issues are, and in fact the pleading is completely silent on this reference to complex technical and financial questions. We don't know what they are.

Now, Sir, you've expressed some scepticism about "this is how it should work" and I said I would take you back to *Le Patourel*. So, if I could turn to that now, that's in the supplementary authorities bundle and that's at tab -- it's the second volume, tab 17.

If I could ask you to go to page 379.

In that case the Tribunal gave permission for the class representative to adduce expert evidence from a behavioural economist on the question of whether people within that class -- that's BT customers -- which had particular characteristics -- those are people who are older, vulnerable, disadvantaged in some way -- whether those class members made an informed choice to stay on their existing BT tariff.

If I could ask you to just read paragraph 27 to yourself you will see that was the point on which expert evidence was being adduced.

(Pause)

THE CHAIRMAN: Yes.

MS KREISBERGER: So that was the pleaded issue, whether class members with particular characteristics made an informed choice to stay with BT as their provider, and that was upheld as a pleaded issue suitable for expert evidence from a behavioural economist.

Now, if we go forward to page 385, the class representative made the submission that permission shouldn't be restricted to class members with particular characteristics. In other words, the behavioural economist should be permitted to put forward evidence generally on whether these users were in a position to give informed choice, to make an informed choice to stay with their provider of land lines. That submission is at

paragraph 2, the permission shouldn't be restricted by virtue of their particular characteristics.

So, you see there the submission at paragraph 2, that the point is more general about users in the class.

THE CHAIRMAN: Yes.

MS KREISBERGER: So then, over the page, this is the provision, the passage in the ruling on which I rely, the Tribunal said at paragraph 4:

"If, and we say "if" advisedly, the class representative wants to make a separate point which is not pleaded, which is to the effect that whether they have these characteristics or not they are susceptible to inertia or other tendencies as a matter of behavioural economics, we would want to see a pleading to that effect and there would have to be a separate application for expert evidence in relation to it. We are not going to rule on that now as it is not for today."

So, what you see there is a real level of granularity and precision as to the pleaded issue for which permission is given.

So, I ask you, Sir, to contrast that with what we have here, where we have a number of assertions, unexplained assertions in relation to IP and hints as to how Apple might deploy its IP based arguments.

Now, if Apple wants to bring forward expert evidence and seeks permission for expert evidence on these points it needs to plead its case first. So that is the Class Representative's principal objection.

Then turning briefly to the type of expert, if you could turn up Mr Doris' third statement, at core bundle volume 1, tab 5C, paragraph 43 – I think that should be tab 5A, I'm sorry, Sir.

THE CHAIRMAN: Yes.

MS KREISBERGER: Paragraph 43. He says this:

"I note there are various professions and recognised activities where an expertise in valuation of IP rights may be obtained. For example, licensing professionals, accountants and financial analysts may specialise in …dealing with questions as to their procompetitive value, transfer and licensing terms, and realisation. There are in turn professional bodies and programmes,,,."

He lists a couple, and then just asserts Apple's expert would have appropriate expertise and recognised qualifications.

You will remember that this precise point was made against the Class Representative in relation to industry experts.

Simply listing different types of professions is not helpful. If this evidence were admitted Dr Kent would need to know what type of expert Apple has in mind. Is it an accountant, or is it a licensing professional, or is it a financial analyst? These are not animals of the same stripe.

Otherwise, how is Dr Kent expected to engage her own expert on IP matters? I showed you that the order is not tied to valuation; it refers to IP issues generally, yet that's not what Mr Doris is talking about here.

So, the pleaded case can't satisfy you, in my submission, that IP evidence is reasonably required.

Sir, that's all I was going to say on IP.

Moving on to IT experts, I think, Sir, you have my submission that two IT experts is disproportionate.

Now, let's turn up paragraph 21 of Apple's skeleton, that's tab 2 of the core bundle. The reason for seeking up to two experts is to ensure -- sorry, this is paragraph 20, on page 2.8:

"... is to ensure that all the issues on IT security, mobile security and internet security can be addressed. A single expert may not be in a position to address all these

matters."

Then it sets out a number of issues. Perhaps in the interests of speed I could just ask you to look down paragraph 21.

THE CHAIRMAN: Yes.

MS KREISBERGER: Sir, this is not the exercise. The exercise is not to say: well, two might not be enough. The exercise is to persuade you, the Tribunal, and the burden is on Apple to do so, to show you why two experts are reasonably required.

To say one expert may not be in a position is not sufficient.

Now, Ms Demetriou said today: “oh, well, privacy is a discrete aspect, separate from security”.

Well, her order does not say: we need one expert for privacy and one for security.

It's the first time we have heard that point being explicitly put.

I will just give you the reference again with time in mind. Mr Doris' third statement, at paragraph 31. That's core bundle volume 1, 5A, page 46. This simply refers in broad terms to two experts in referring to these topics.

It's the first time we have heard that point on privacy.

Now, the Tribunal will be alive to the issue that this is a defendant with exceptionally deep pockets, the most valuable company in the world, exceptionally deep pockets when it comes to paying for experts. That's precisely why the Tribunal needs to exercise stringent control on the number of experts because, of course, the more experts there are, the higher the costs, the longer the trial. With respect, it's not enough to say: well, we might need two not one.

They have to make out their case.

Just for completeness, I note that in the *Epic v Google* proceedings in this Tribunal permission was given for only one security expert for each party; there wasn't a second expert in relation to these topics.

THE CHAIRMAN: In principle, if it turns out that there are different things for an expert to cover that properly would require different experts; would you object to that though? That makes sense, doesn't it, if they're actually talking about different things as long as there is no overlap?

MS KREISBERGER: We will look at that. But the exercise is not to work this out on our feet, hearing material for the first time.

THE CHAIRMAN: Your question is: what exactly is it that each of them is saying?

MS KREISBERGER: Absolutely.

Sir, that's all I was going to say on IT experts. So, my overriding submission would be it's one of proportionality and needing to control.

Finally, on economists, again, Apple has to satisfy you that three economists are reasonably required and that it's proportionate to have three.

I have five short reasons why we say it's disproportionate.

The first is that the three experts would be traversing the same ground. If we could go back to Apple's draft order, again, it's very important to focus on what they're actually asking for. Paragraph 1a -- and this really picks up the point Mr Frazer in particular was making.

THE CHAIRMAN: Sorry, sorry, 5C, is it?

MS KREISBERGER: 5C, page 72, core bundle volume 1.

THE CHAIRMAN: Thank you, yes.

MS KREISBERGER: Paragraph 1a:

"Up to two expert witnesses with expertise in competition economics, addressing issues of market definition…"

And then very interestingly:

"The economics of multisided platforms, dominance, abuse, causation and quantum;"

Those are the competition economists. Then at b:

"An expert in the economics of digital markets addressing empirical data analysis relating to market definition, the operation of transaction platforms and dynamics within the relevant markets;"

It's quite hard to see any difference, any material difference between the topics of the economics of multisided platforms, which the competition economists are apt to address according to this draft, and Professor Hitt, who will address the operation of transaction platforms and dynamics within the relevant markets. It sounds a lot like the same thing.

We simply say we have no objection to Professor Hitt, of course, we just say three is disproportionate. They can have two, but not three.

That's my first reason.

The second reason, we have heard today Professor Hitt will be addressing the discrete task of empirical data analysis, is how Ms Demetriou has put the point.

Now, we haven't been given much by way of insight as to what that exercise is intended to consist of, what would be its parameters. But I think one could assume workably that it means analysing real world data, empirical data, to reach a view on questions related to relevant market, questions of substitutability and competitive dynamics within the market. As you pointed out, Sir, that is competition economics bread and butter. It's a standard element of the usual analysis.

Now, I was very grateful to Mr Frazer's question here and that you have had a look, Sir, at the US report. We did the same. I'm going to briefly put that in front of you. If I could ask you to pick up the supplemental authorities bundle, volume 2, tab 18.1. That's the expert evidence in the US Epic proceedings.

I will just point you, if I might, to the relevant paragraphs and ask you to read them to yourself, but I know Mr Frazer has seen this.

But just by way of example, if you go to page 591.35, could I ask you to cast your eye

over the paragraphs underneath the heading "Real world examples of the ease of substitution for non-game apps"? If you could just read down to 109, much is redacted.

(Pause)

Then if you move forward to page 591.51 under the heading "The structure of the market for digital game transactions…". “Apple's market share …is inconsistent [one would expect them to say] with market power”. If I could ask to you read through the paragraphs just on that page.

(Pause)

So, this sort of analysis is very familiar to those of us who read a lot of competition economist reports for a day job. So, my submission here is that Apple hasn't given you any good reason to persuade you that its own decision to carve out the empirical data analysis to Professor Hitt means that it should be entitled to two further competition economists on top of that analysis.

My third reason is a brief one. Professor Hitt is experienced in competition litigation and, as you pointed out, it was his evidence alone which supported Apple's strike-out application at the CPO stage.

If you go to volume 2 of the core bundle, please, tab 21, page 602, paragraph 7 of Professor Hitt's report. Now, Ms Demetriou said he's one removed from antitrust. Well, he gives his experience here:

"I have been retained as an expert witness on matters involving smartphones, tablets, laptops, other mobile devices and personal computers, as well as the underlying technologies within these products, such as microprocessors, LCD displays, memory devices and communications chipsets. I have also worked on issues related to pricing and competition in a variety of software products [which he lists]. Some of my more recent work has also addressed issues related to the value of information security and privacy. I have been previously involved in antitrust litigation related to an alleged

price-fixing conspiracy in LCD displays and the effects of such conspiracy on wholesale and retail prices, and an antitrust case against Microsoft in which I evaluated competition and operating systems and complementary products prior to and during the period when smart phones were first introduced."

So, he has a very respectable competition antitrust heritage. So simply asserting that Apple wants yet another economist to perform an empirical data analysis shouldn't be enough to persuade you that three analysts are required and the attendant costs of that are reasonable.

Sir, that was my third reason.

My fourth reason is really one you've already picked up. Ms Demetriou sought to persuade you that there won't be duplication, but I think we have well in mind, Sir, the issue is not merely one of duplication; it's costs, racking up costs, using the deep pockets to buy in additional experts where it's not justified and it's not proportionate.

Finally, my final point, Sir, is again coming back to *Epic v Google* in this Tribunal. In those proceedings Ms Demetriou gave you some other references in other jurisdictions. In those proceedings permission was given for one expert economist on each side. So, it's a good litmus test for three being disproportionate.

Unless I can be of further assistance those are my submissions on their experts.

THE CHAIRMAN: Thank you very much.

MS KREISBERGER: Thank you, Sir.

Reply submissions by MS DEMETRIOU

MS DEMETRIOU: Thank you, I am going to be quite brief in reply. So, I will start with the IP expert.

Ms Kreisberger started by looking at what we were seeking and commented on the breadth of the draft order, the relevant paragraph in the draft order. But, of course,

the key question, as the Tribunal said in exchange with Ms Kreisberger, is: is there an issue, an IP issue, which everybody is alive to, to which this expert evidence is relevant?

We say there plainly is on the face of the pleadings.

Just as, for example, the Class Representative has sought permission -- and we haven't objected -- for two competition economists because everyone appreciates that competition economics, that evidence is going to go to issues in dispute in the case.

The fact that the Class Representative hasn't, for example, explained or pleaded what their case is on economic value doesn't cause us to say: well, there is not a pleaded case on economic value, you can't at this stage have permission for an expert economist opining on economic value.

It's just not the way that this works.

So, we say that the question for the Tribunal is you have to form a view on whether the evidence is relevant to any pleaded issue. It plainly is, as I showed you in our pleading.

The point that Ms Kreisberger sought to make in going through the pleading, she kept saying, "Well, there is no reference to IP here, there is no reference to IP". That seemed to be her point.

But if we go back to our defence briefly, so it's in the core bundle, core bundle volume 1, behind tab 14. She took you, you will recall -- I'm not going to go through it all again, you will be glad to hear, but one of the key points she made is at page 355.

So, she went back to paragraph 133(b), where we have pleaded that “Apple's Commission isn't a mere fee for the distribution of software… [and it] reflects economic value… [including, as we have said elsewhere and here, the economic value] to developers”.

You can see her point here was: “oh, well, there is no reference to IP, but there is

a reference back to other paragraphs of the pleading".

Those include, you see there at 27 to 32, so they include paragraph 28, so let's go to that. So that's at page 328, it's a paragraph that's referred to in our application.

You see here:

"The technology and associated services, (such as technical support and app review) and intellectual property through which the apps are created and consumed is invented and provided by Apple."

There is a cross-reference, again, to paragraph 15, which sets out all the technology which is licensed to the app developers.

So, it's just not right that there's no reference to IP. Then, of course, you have the response to the request for further information, which explains that there's hundreds of patents underlying this technology. So insofar as the point is, well, you haven't used the words IP right in your pleading, it's wrong, and insofar as a broader point is made and at some point Ms Kreisberger I think sought to make a broader point. She said, "What's here is just assertion and one would expect particulars, for example, in relation to --" and I have written down what she said, she said, "How much of the value is comprised by intellectual property and how is Apple going to measure that?"

Well, that's precisely the kind of point that the expert evidence is going to deal with; it's an evidential point that doesn't need to be set out in the pleading, nor could we set out in the pleading at the moment exactly how it's going to be valued. That's why we require an expert to address that.

There are all sorts of points in this case, it may be all sorts of points where there's doubt on both sides as to what the other side's expert is going to do. As I say, we have no idea at all how Dr Kent's expert is going to address economic value.

But the proper response is not for the Tribunal to say you can't have expert evidence in relation to this, it may be that there are directions down the road to try and avoid

ships passing in the night.

THE CHAIRMAN: It was certainly a subject on my mind, and it probably isn't the time to spend a lot of time on it now. It probably would be helpful, to take this as an example, for there to be a clear articulation of what the issues are at a reasonably high level that the experts are going to cover. Then if Ms Kreisberger wants to take a pleading point on it, she can. But at least she's clear where the expert is going.

I wonder whether we might , if we were minded to grant permission, whether we might attach to that permission a condition which is what you would expect to happen at some point anyway, which is that we're satisfied with the list of experts. Not that that's a controversial point; it doesn't feel like it ought to be.

MS DEMETRIOU: Sir, yes, that may be -- I'm not seeing any massive objection to that behind me, so that may well be appropriate. It may well be appropriate in respect of other issues in this case. Perhaps we should come back and talk about that more broadly because one can see, in Dr Kent's case, there are areas where we're just not sure at all how they're planning on proving their case. So, it may well be a broader discussion for another day, I put it no more --

THE CHAIRMAN: Quite. It would be entirely normal for us to sit down at some stage and work out whether there is going to be a compendious list of issues. In some cases, it’s done with more rigour than others. It may be that this is a case that demands a bit more rigour than perhaps we have currently given it. Anyway, we can park that for a minute.

MS DEMETRIOU: Sir, yes. But the real point, when it comes down to it, is: are there issues to which this evidence is going to be relevant, and we say: plainly, yes, for all the reasons I have given.

As I say, it doesn't come as any surprise to anyone because it's all been traversed already in these proceedings, including at the CPO stage. So, there may be an issue

for clarification later. There may be steps the Tribunal can take, case management steps the Tribunal can take in relation to the expert evidence more broadly that may help the parties address these things efficiently and understand what each other's case is. But the answer is not to exclude expert evidence in relation to issues which plainly arise on the pleadings.

So, Sir, that's what we say in relation to the IP expert.

On *Le Patourel* the point is different because there the point, the permission that was being sought cut across the pleading. So, the point that the Tribunal made in that case was: well, if you want to do something different to your pleading you will need to come back with a different pleading.

That's different to what we have here.

In relation to IT, what's been said in relation to the IT expert is: well, we need to do more at this stage to justify the flexibility that we need.

But, with respect, this is a very early stage of the proceedings. We haven't yet had disclosure of factual evidence. The point now is to obtain, to give us the flexibility we need to go and explore who's out there, who could give expert evidence in relation to these matters, and we do apprehend that the matters covered are broad and different and that it may well be difficult to find one expert to address everything all together. So that's why we say it is appropriate to be given that, to be afforded that flexibility at this stage.

THE CHAIRMAN: Again, a list of the issues the experts were going to cover would give quite a lot of clarity to this, not least in making it plain who was dealing with what.

MS DEMETRIOU: Yes.

THE CHAIRMAN: This may not be the appropriate time, or maybe it is, but certainly if we were to proceed by allowing you to have more than one expert in the space it would have to be abundantly clear that there could be no overlap and no duplication.

MS DEMETRIOU: Of course. Of course, we accept that. We would ensure that there was no overlap. The point is not to have two people saying the same thing or some of the same things, but really to make sure that everything that's pleaded is covered, that all the issues are covered. As I say, we're not confident that could be dealt with by one person given the range of matters that are raised on the pleadings.

THE CHAIRMAN: It's possible you might find somebody who could.

MS DEMETRIOU: It's possible.

THE CHAIRMAN: It's possible the Class Representative might find someone who could, even though you couldn't.

MS DEMETRIOU: That's possible. But at this stage we're not confident that that's the case, and so that's why we require flexibility to take this forward.

In a sense, there is a sort of vicious -- potentially a vicious cycle, because in order to take forward expert evidence and perhaps provide further particulars on both sides, one does actually need to have discussions with the experts. So, if there is not permission, then it's quite difficult to take forward that process of perhaps discussion and refining issues in the case. So that's why it is appropriate, we say, at this stage, to be accorded that flexibility.

In relation to economists, again the point is a short one. Professor Hitt is a specialist who is going to carry out a discrete area of analysis, as we have said in our application. We do, with respect, say that it will be of help and assistance to the Tribunal because of his specialism, because he's very experienced in the issues raised by these proceedings because he's not a generalist. So, given that Apple wishes to rely on his evidence, which is relevant and we think will be of assistance, the real question then is: is it possible for one competition economist to cover all the rest?

Again, we don't think that is possible, because of the range of issues that that competition economist would have to cover.

So the issues in this case are complex, wide-ranging and serious, and the other competition economist, or economists, would have to cover -- for example, they would include all the different abuses, causation and quantum. So there is a lot to cover. In circumstances where Apple is proposing that Professor Hitt deals with one discrete area in relation to market definition, we do think that it's difficult and would not be sufficient for the remaining broad areas of common law and causation and quantum to be addressed by just one expert economist. We just don't think that would work.

In relation to the overall proportionality Ms Kreisberger says it's all about costs. But you have my point that what we are seeking to do is rely, insofar as possible, on work that's been done already, and that will reduce costs. So, if we are confined to fewer expert economists than we have used in other proceedings, then that obviously will impact Apple's ability to utilise work that's already been done. We think that's liable to rack up costs rather than to save costs.

Sir, those are my submissions in reply.

THE CHAIRMAN: Thank you very much.

So, we will take that away and we will let you know as soon as we can.

MS KREISBERGER: Sir, could I just make one response? Not to Ms Demetriou, to your proposal that one way to address the problem might be a list of issues.

THE CHAIRMAN: Yes, of course.

MS KREISBERGER: Sir, if you were against me on my primary case that there needs to be a particularised case on the IP defence.

THE CHAIRMAN: IP, yes.

MS KREISBERGER: If you're against me on that, then we would invite you to provide for that at the same time, if you were so minded that permission was given for an IP expert. Because there is a genuine, practical problem at the moment for Dr Kent, in that she doesn't know what areas an IP expert would need to address or what type of

expert would be required. So, I would urge you that if that is the approach that you're thinking about, that permission be contingent upon or linked to the provision by Apple of a list of issues, so that Dr Kent simply has visibility on what the expert is going to address, so she can instruct her own expert.

THE CHAIRMAN: I think it must be right, mustn't it, at some stage we should be making sure there is real clarity about the expert issues? That would ordinarily come in due course, but it rather feels it ought to be coming sooner rather than later, given the discussions we have been having, yes.

MS KREISBERGER: Yes, that is our position. Clarity is clearly of assistance here.

THE CHAIRMAN: Thank you.

MS KREISBERGER: I'm grateful.

MS DEMETRIOU: On disclosure, so I have been taking instructions on the draft order. I think that we're quite close to agreement, but there are some points on which my clients need to take further instructions from some of their colleagues, including overseas. So, what I am proposing that we do is send my learned friend a marked-up copy of their draft order this evening and we can take it from there.

I think it would probably be advisable to -- we will then of course update the Tribunal. It may well be sensible for us to provisionally say that we're back tomorrow morning, at least to be able to update the Tribunal. But it may be that's not necessary and that you can stand us down. But can we take it in stages? Does that sound --

THE CHAIRMAN: Absolutely fine. So, I will be available tomorrow morning, and if you can let us know as soon as you sensibly can. But certainly, I would have thought if you could let us know by 9.30 that would be helpful. If we need to reconvene to talk about anything, then I'm very happy to do that.

MS DEMETRIOU: Thank you very much.

THE CHAIRMAN: Otherwise, if you think you have reached a conclusion, then

obviously you will let us have the draft order. If there are things you think could be resolved on the papers and you would rather do that, that's fine. It's quite possible I might have observations on what you propose, particularly as to timing because I am really very keen that it should be -- for all the reasons we have talked about and the impact on the trial date and so on. So, I may well have some things to say about whatever it is you do propose. But I'm sure we can manage that one way or the other if we're not actually here tomorrow morning.

MS DEMETRIOU: Thank you very much.

MS KREISBERGER: Sir, I just had one small point. In relation to your ruling as to costs in relation to the CMA documents, I just wanted to put before you: our understanding is that costs to be summarily assessed on the papers, if not agreed, should be the correct order.

THE CHAIRMAN: Yes, that is right. You're absolutely right to point that out. Actually, if you wanted me to deal with that -- I am assuming that they're not huge costs, but if you want me to deal with that with a statement of costs, I could deal with it tomorrow morning. Otherwise, it can be dealt with on the papers.

MS KREISBERGER: I will take instructions on that, if I may and let you know, inform the Tribunal, Sir, if that's convenient?

THE CHAIRMAN: Yes, of course.

MS KREISBERGER: I'm grateful.

THE CHAIRMAN: Good, well done.

Good, thank you very much.

(4.42 pm)

(The hearing adjourned until Tuesday, 21 March 2023)