IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1527/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 7th June 2023

Before:

Ben Tidswell
The Honourable Lord Richardson
Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Alex Neill Class Representative Limited

v

Proposed Defendants

Sony Interactive Entertainment Europe Limited; Sony Interactive Entertainment Network Europe Limited; and Sony Interactive Entertainment UK Limited

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A P P E A R AN C E S

Robert Palmer KC, Fiona Banks & Antonia Fitzpatrick for Alex Neill Class Representative Limited (Instructed by Milberg)

Daniel Beard KC, Charlotte Thomas & Gayatri Sarathy for Sony Interactive Entertainment Europe Limited and Others (Instructed by Linklaters)

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Wednesday, 7 June 2023

(10.30 am)

Housekeeping

THE CHAIR: Good morning, everybody.

MR BEARD: Good morning.

THE CHAIR: I will do the usual warning, Mr Beard. Some of you are joining us on our website, the livestream, so I should start with the customary warning. An official recording is being made and an authorised transcript will be produced but it's strictly prohibited for anyone else to make an unauthorised recording with audio or visual of proceedings and a breach of that provision is punishable as a contempt of court. Mr Beard, good morning.

MR BEARD: Good morning.

THE CHAIR: A few housekeeping matters maybe, is that worth spending time on?

MR BEARD: That's what I was going to pick up on first, with timing, but if the Tribunal has issues that it wants to raise.

THE CHAIR: I suggest why don't I run through my list, and then I expect that you will have -- hopefully, they correspond but you'll let me know if there is anything else, if that's helpful.

MR BEARD: Thank you.

THE CHAIR: Just in terms of running order, I think probably the fact that you are on your feet suggests that you were happy with the suggestion we made. We did not want to impose that on anybody but it seemed to us to be a sensible way.

MR BEARD: No, if it assists, Mr Palmer and I have had a discussion. Precisely as you anticipate, I am on my feet because we were going to start with my dealing with what we refer to as the summary judgment/strike-out application issues. That will

probably take much of this morning. Then Mr Palmer would then reply on those and open his position in relation to the certification matters, various.

We will then respond to those. We are anticipating -- Mr Palmer was thinking that probably he would be much of this afternoon and tomorrow morning. Although we have time through to Friday, it's a hope, not a promise, but we were hoping that it might be possible, depending on where we get to, to try and deal with most of these issues within the two days but that obviously depends on questions, issues that arise and so on and so it's very helpful to have a third day. But that was our intention. I would then, after Mr Palmer had dealt with his submissions, respond on the certification matters which would take us well into the afternoon and reply on matters to do with the first two applications.

Then Mr Palmer would have a short sweep up at the end. But since issues such as funding, for example, and confidentiality, depending on where the Tribunal is on things, will be, we imagine, shorter than anticipated, we are trying to tailor the submissions to see whether we can get done in two days.

In terms of, for instance, admissibility of evidence and so on, I anticipate the sensible way of dealing with this, insofar as it becomes relevant, is to deal with it in the course of the relevant submissions rather than detaining ourselves at this point. For instance, in relation to Mr Steinberg (audio distortion) cases it wants to deal with, questions of admissibility during the course of today, my intention was to set out our case and deal with Mr Steinberg's position in the course of that and then that can be picked up later.

Obviously, the Tribunal will have seen that material. We are not trying to stop the Tribunal seeing it de bene esse and so I don't think it makes any difference and it's probably more sensible to do it in context than to divert at this stage.

THE CHAIR: What about the Caffarra reports? How is that going to work then?

Because you've presumably -- you won't necessarily get to them because they are really methodology points.

MR BEARD: No, they are in methodology, so I won't deal with those. If Mr Palmer is going to continue to object to the second Caffarra report, then, obviously, he can make submissions on that in the course of his submissions about methodology and so on and I can pick those up. Experience tells that if you start off having admissibility arguments, they can end up taking an awful lot of time and not necessarily being all that productive, so I have not actually discussed this with Mr Palmer but I am sure --

THE CHAIR: He's nodding vigorously, and I think we'd probably add too I don't think we have much enthusiasm for a set piece admissibility discussion.

MR BEARD: (Several inaudible words due to overspeaking) going through the case, so it seemed to us get on with the issues and then we can pick these things up along the way.

THE CHAIR: Yes, good. Okay. That's sounds very helpful. Mr Palmer is nodding and happy with all that. That makes sense.

I am afraid I'm going to have to make a small complaint about the skeletons and the extension of the length of them. Not so much about the fact of that but the way it was done. I think I saw the application about two hours before the skeletons actually arrived and that's, obviously, probably a function of the bank holiday but not really very satisfactory and I appreciate -- I had a moment of irritation, where I thought about sending them back but I think at the same time, you were both in the Tribunal, doing something else quite important, so I didn't do that.

But it would be helpful, I think, if any applications for extensions were made a little bit earlier.

MR BEARD: First of all, noted, we apologise that it was delayed and we are grateful

that they weren't sent back, so thank you very much for that.

THE CHAIR: I also just wanted to pick up a point about confidential information. There's a relatively small amount of it.

MR BEARD: There is.

THE CHAIR: I suspect there are a couple of things that will come up quite a lot. I just wondered whether it might be helpful -- it may be you are going to do this -- but to deal with it by way of just a hypothetical that we could all work on rather than having to worry about --

MR BEARD: Yes, I have had a discussion with Mr Palmer because I think it's to do with questions in particular with target margins and target commissions and so on. What we've made clear is that, of course, Mr Palmer can refer to what he says is reported but what we are not doing is confirming what the actual level of target margin is.

In those circumstances, Mr Palmer and his clients have written, saying that there can be a further application in relation to confidential matters that will be made, that will be put before the Tribunal and can be adjudicated upon on paper rather than detaining us today. But we don't need to actually resolve all these issues today, at the outset, because Mr Palmer and I both think it's workable to make the submissions we are going to deal with today, without trespassing into confidential information.

So, obviously, if the Tribunal wants to ask us questions about confidential information or if, inadvertently, we refer to something confidential and, therefore, we need to make a retrospective application, we'll do that. But we're both anticipating that today, it won't be necessary and we are trying to organise things so that we don't need to get into the details of specific confidentiality redactions today, because all of the material, certainly that I am intending to rely upon, is open.

THE CHAIR: That's helpful and certainly there's probably a necessity to at least talk at some stage about a hypothetical of some sort.

MR BEARD: Yes.

THE CHAIR: Actually, if we can treat it as a hypothetical and you can choose whatever number you want to put it, then we can all work on that basis and we all understand what the position is.

MR BEARD: Yes, we are content with that. We are obviously not trying to prevent these sorts of matters being discussed at all. It's what we will and won't confirm about our business position because there is a degree of sensitivity about those matters.

THE CHAIR: Yes, that's understood and it certainly does not seem to us there's any need to resolve that. We're really more concerned about putting our feet in it and saying the wrong thing at the wrong time.

MR PALMER: That's our position. We don't accept the claim for confidentiality but we don't seek to press that be resolved today, that's a waste of time. The confidentiality order allows for applications to be made and except in exceptional circumstances, they will be dealt with on paper. So we'd hope any application that we do make can be resolved by the Tribunal, in advance likely, of the Tribunal actually giving judgment on this matter and so then the terms of the judgment will reflect whatever is or is not confidential at that point.

But for the purposes of this hearing, we are entirely content to proceed on the basis outlined.

THE CHAIR: Good, thank you. Good, I think that was the end of my list, Mr Beard. I don't know whether you had anything else you wanted to touch on?

MR BEARD: No, I was going to touch on just making sure you had the 10 bundles.

THE CHAIR: Yes, I think we do. There has obviously been a bit of updating. I think

we're in a bit of a hybrid state. So we have some hard copies. I think we have main bundles and hard copies but we have the additional and the authorities on here and so you might just have to bear with us if the navigation gets a little bit complicated from time to time.

MR BEARD: We'll try and navigate by page numbers as much as I have, because I think they are probably easier for the electronic bundles. But there are one or two additions, as you say. I am not sure how relevant they are going to be to today's submissions. There are one or two potential additional authorities that you don't have electronically but I'll pass a hard copy up of those. We'll obviously let the other side know about those other authorities.

So beyond that, I don't have any further housekeeping. So I will move on if I may.

THE CHAIR: Yes, thank you.

Application by MR BEARD

MR BEARD: Thank you. So before I turn to the particular arguments in relation to the allegations of abuse in this case which have been referred to under the rubric of strike-out/summary judgment, I think it's important just to take one or two moments to think about the position in context.

Because first and perhaps a critical concern here in terms of the context, is that unlike many, though of course not all collective action proceedings, there is in this case, no prior regulatory finding. None that is relied upon here. This isn't a case, for instance, like FX, the O'Higgins case, where there was some sort of regulatory finding and then there was a more expansive claim being brought. Here there is none at all.

Of course, we are not remotely saying that that precludes a collective action claim being brought but it does mean, we say, that the proper framework of analysis needs

to be properly and carefully developed and that the Tribunal needs to be cautious in scrutinising what is being put forward as the allegations of abuse and the methodology by which they are going to be ascertained at trial, fulfilling that gatekeeper role that has been recently emphasised by this Tribunal in relation to questions of certification more generally. We'll be coming back to it but if I may, can I just turn up the Meta case which is in authorities bundle 1 at tab 31 -- I will pick it up at page 1453.

One member of this Tribunal will be painfully familiar with this case but it concerns certification of a claim against Meta in a class action. The details of it don't particularly matter for these purposes.

But what I would just emphasise is that under the heading of the "Pro-Sys test" on 1453 -- do you have that?

THE CHAIR: Yes.

MR BEARD: Where, obviously, one is talking about the certification test more generally, a couple of observation are made which are germane not only to the more general certification test but the exercise that the Tribunal is engaged in more generally. If I pick it up just down at 37:

"Pleadings are the traditional way in which courts have exerted control over the issues they try and the evidence that's needed in order properly to try those issues. Pleadings are of critical importance in competition cases because the issues that arise tend to be rather more wide ranging and less easy to nail down than in conventional litigation. Evidence needed to determine such issues is similarly difficult to identify."

Then 38:

"Properly articulated pleadings have nothing to do with the merits of the case, they simply enable an arguable case to be properly tried."

Then:

"That's also the purpose of the Pro-Sys test."

And then it goes on to say why are there further considerations in the Pro-Sys test.

We'll be coming back to Pro-Sys test more generally. The observation I make there, however, is the importance in the Tribunal's role as a gatekeeper which, of course, is picked up at paragraph 40 in that judgment, just over the page at -- sorry, 1455. This is being emphasised by the Tribunal, at 40(2):

"The Tribunal bears a heavy responsibility as the gatekeeper in collective proceedings. As we've described, this role reflects the Tribunal's management responsibilities in all cases."

I won't go through the Saint Augustine fallacy and the not my problem fallacy. Those are issues which we'll come back to, I think, in due course.

The point I make is a much more simple one, as I am moving on to deal with the strike-out and summary judgment issue. That the importance in competition cases, particularly, of ensuring that, essentially, the nature of the cause of action is properly specified and properly pleaded and, therefore, the way in which the Tribunal is going to grapple with things is clearly set out in accordance with the legal framework we have from the relevant case law, is of particular importance.

Just to put these matters in further context. We are not trying to carry out some sort of scattergun attack on the approach that is being put forward in these proceedings. We are not trying to argue about every proposition put forward by the proposed class representative but we think many of their key points are wrong and will be shown to be wrong and, indeed, the case overall is misconceived.

But in dealing with matters at this stage, we've tried to focus on points that are important, to ensure in particular, the Tribunal can properly fulfil its gatekeeper role.

There are broadly four topics, I am sure you have this from our skeleton argument,

which our submissions go to. There are three ways that the PCR puts its case on abuse. Now leave for a moment the fact we say that the market definition analysis, we say, is deeply flawed. But we have focused on how abuse is put against us here. The first two allegations of abusive conduct are said to be exclusive dealing and tying which is what I am going to focus on this morning, because we say that pleading of those allegations is misconceived. They are not viable allegations of abuse on the basis of exclusive dealing or tying. As I will explain, that's a misunderstanding of the relevant law. The relevant law would require them to plead other elements and ingredients, in order to make out an abuse in this case. That's what we refer to as the refusal to supply case law.

Furthermore, even if one element, say, could be characterised as exclusive dealing, what we say is that it doesn't give rise to any actionable claim here because what would be required is mandated access to Sony systems and wider, mandated wider licensing in particular of publishers, even if, for instance, in relation to customers, you might say: well, I might see this as some sort of exclusive dealing arrangement. We say it's not and I'll come on to that.

But the point is they have not properly pleaded what are required ingredients, in order to show that there is an abuse and that it could give rise to anything more than nominal damages, if there were.

THE CHAIR: Is that point about mandated access, are you taking that as a factual point or is it also a legal point?

MR BEARD: It's both.

THE CHAIR: I am sure you'll come on to --

MR BEARD: (Overspeaking) strike-out and summary judgment is there isn't, actually, I think, any substantive dispute about the underlying factual structure of how the arrangements exist. What we say is that it's clear that you couldn't have a third

party store on the PlayStation without us licensing that store and, therefore, it is, as a matter of law, an access arrangement.

As a matter of fact, we would also have to make substantial changes to our arrangements, in order to facilitate that access. So that's why we take it both as a matter of law and a matter of fact. I am only focused on one element of third party store, I'll come back and deal with each element, but I am just giving that as an example, so you can see where we are focused on here. Because if you don't have the third party store, this theory that somehow publishers are going to be able to supply gamers through alternative mechanisms -- when we talking about gamers on PlayStation, it doesn't really exist as a central story at all and, therefore, it doesn't work as an abuse story in this case.

But I will deal with both the third party store issue, the licensing for publishers issue and, indeed, the licensing and permission for customers, so there are three elements.

I will deal with that in relation to exclusive dealing and tying which is the focus of this morning. But just to put things in context, the third abuse is obviously the excessive pricing allegation and there, what is being said is that because of the way Sony sets commissions with games publishers, effectively the arrangements mean that prices to customers, gamers, are higher for games than they otherwise would be because that's the excessive pricing claim. As I'll come on to explain when I respond to the methodological issues that Mr Palmer is dealing with in relation to certification, what we say is remarkable about what is suggested by the PCR is that it seeks to argue for this excessive pricing claim in relation to customers and it asks for damages in relation to those excessive prices to customers, without taking into account the fact that when you are assessing pricing for a platform which is the target of the accusation here, you have to think about pricing on both sides of a two sided market

and that's what's missing from the methodology.

The methodology also ignores who sets the retail prices but I'll come on to deal with that tomorrow. The fourth substantive point is a rather different one which is on the issue of whether or not you can include future claimants in a class and I will come back to that because the ontology of having a class with non-existing claimants in is going to be an interesting one for Mr Palmer to grapple with. We say it's plainly not right that you can imagine claimants at this point and certify in relation to imagined claimants.

So we think those are the four issues we are really focused on. As I say, other issues, confidentiality, funding and so on, we'll pick up briefly but I think we've broadly resolved between the parties, various issues in relation to funding. Obviously, the Tribunal still has to satisfy itself in relation to these matters but that's a separate issue.

So with that general introduction, let me go on to what, as I say -- for the reasons I have articulated, I will just refer to this as the application but it's the strike-out and/or summary judgment application.

THE CHAIR: Yes.

MR BEARD: Focused on those two allegations of abuse, exclusive dealing and allegation of tying. So what I was intending to do was to do it in stages, if I may. I want to just take a moment or two to look at some of the factual background because this may be of use to the Tribunal. I don't think these factual matters are controversial. Then I will look at the characterisation as exclusive dealing in the pleadings briefly. But then I'll look at the law on exclusive dealing and the law on refusal to supply and explain why it is that characterising the alleged abuse as exclusive dealing is just the wrong approach and applying the wrong tests.

Then I will obviously come back to the overall legal test, briefly, on strike-out,

summary judgment and so on. Then without repeating myself, I will then deal with the tying, but I am going to deal with it in relation to exclusive dealing first and then come back to the tying, if I may. It will become obvious why I am doing it that way, when I come back to the tying points.

If I may, let's just pick up with one or two of the factual issues here. This is perhaps most easily done by reference to the witness statement of Mr Svensson which is in a hearing bundle and that is at -- I have it referred to in tab 15 and that begins at page 274. He sets out his extensive and continuance experience in relation to matters in relation to gaming and his involvement with Sony.

Then if I could pick it up at 279. You see under the heading "Development of the PlayStation" -- I am sure the Tribunal has seen this, I won't go through it all but if we could see over the page 280, paragraph 13:

"SIE's business is centred around PlayStation products and services. When I refer to PlayStation, I mean the PlayStation console and associated peripheral devices, such as headsets and controllers, ie the physical hardware which can be purchased by consumers on which to play video games from their home."

I was tempted to have a console here but I am sure you are all broadly familiar with the nature of the thing, the nature of the controllers and then what occasionally are worn by people playing these games, the enormous Vietnam helicopter pilot-style earphones and so on. The PlayStation software is the second element he pulls within the reference of PlayStation:

"Ie, the operating system and associated software that enable players to interact with the console."

Now in the documents there are references to firmware, as well as operating systems. Firmware is underlying code that is effectively within the hardware itself and one can see the operating system as sitting on top of that but these are various

layers of software here.

Third:

"The PlayStation Store, a digital media store on which SIE and third party publishers can sell and PlayStation players can purchase digital games and add-on content to be played on consoles, as well as digital services, such as PlayStation subscription service, PlayStation Plus and third party services, such as EA Play. These three elements are the primary components that interact to make up PlayStation."

Just so you understand -- again, I am sure it's familiar to the Tribunal -- Sony is a games publisher, as well as supplying the PlayStation system, having developed PlayStation and all the software associated with it. So that's sometimes referred to as first party games. Third party games are provided by third party publishers, amongst whom are people like EA Games, who make the FIFA game or Activision Blizzard, who make Call of Duty. Myriad others:

"PlayStation plus are a subscription service."

Just to be clear what that is. That's a service provided, whereby essentially, on a monthly basis, you subscribe and you get access to games rather than purchasing individual games which has always been the traditional way of dealing with these access arrangements. So you can still, and the majority of people do, who are PlayStation players, and indeed on other consoles, purchase games digitally through the stores and play them natively on their consoles but you can subscribe and have access on your consoles on a monthly basis to a range of games. That's PlayStation Plus.

I won't go through too much more but if I could just turn over the page to 282, paragraph 25. This is key competitors:

"PlayStation and SIE competes with other console manufacturers, like Microsoft, who produce the Xbox and Nintendo which produces the Nintendo Switch."

So those are console manufacturers. The Xbox console is, I think everyone accepts, the closest competitor to PlayStation. Nintendo Switch is a portable console device. One thing I would mention in relation to this, because it's something that perhaps gets lost, certainly in some of the PCR's evidence, each of these systems is what the PCR would call closed. In other words, on Xbox, there isn't a third party store, there's only the Microsoft Store. On Nintendo there's only the Nintendo digital forum through which you can get games. You don't get a PlayStation Store on an Xbox, you don't get a PlayStation Store on Nintendo, you don't get any third party stores on any of these consoles. And that's important and it will be important if this case continues because, of course, the dynamics of competition between these systems is itself important but it is systems as a whole that we are focused on there.

If we go over the page, Mr Svensson provides more detail, 283, on the integrated nature of the PlayStation. If we could just pick it up at 28, he says:

"SIE has made significant investment, ensuring the PlayStation Store operates seamlessly with the console. It needs to be available in 70 plus countries, where the PlayStation Store is currently available and have the ability to operate in dozens of languages within the regulations and laws of those countries. The introduction of an alternative store would require major technical changes to the PlayStation system and would result in an increased risk and degradation in player experience in various areas, for players and partners alike. It would require significant time, resources and expense on SIE's behalf, not to mention by the provider of the alternative store, all resulting in a negative impact for user experience described below. This process would present serious challenges for SIE. For example, introducing an alternative store would present significant privacy and security risk for SIE, its players and its partners. For example, if there was a cyber attack on an alternative store run by a third party. The current PlayStation is designed with security in mind. It would be

a significant challenge to allow third parties to provide an alternative store and this would have to be subject to rigorous assurance and approval checks. However, it would be impossible ever to eliminate these risks entirely, particularly given the global nature of the system."

So there he is just focused on this alternative store idea and talking about the integrated nature of PlayStation which he has explained earlier and why having a third party store would pose all sorts of significant problems.

Just to be clear, Mr Svensson is not here talking about the fact that it would be necessary for any alternative store provider to have access to the systems, the software that's Sony proprietary software. It is Sony's property -- it's intangible property but it's Sony's property. He is just talking about the further practical issues here.

Then you'll see over the page he goes on to talk, particularly in 30, about a number of the problems and the degradation issues that would arise. He picks this up in paragraph 30. I won't go through it all but just one point that he picks up in 32 is issues to do with making sure accounts work -- sorry 30.2 -- the way in which various accounts work.

Then just over the page at 31, he mentions in passing the fact that to the best of his knowledge, he's never been approached by any third party seeking to offer this alternative store. I should say PCs are different but this is in relation to PlayStation.

Then if we go down to the bottom of the page 285, you see:

"PlayStation relationships with third parties."

So that section of his witness statement is dealing with this idea about the third party store. Then he's going on to talk about third party developers or publishers, so these are the game creators, obviously apart from Sony, who is a major game creator, and the PlayStation players.

As he says at 33:

"These two groups are related in the sense that PlayStation cannot operate without strong relationships to both. Ultimately, PlayStation players want to access the best content and 85 per cent of sales coming from third party developers and our third party developers and publishers want to maximise access to players who will play their games and pay for content. Sony has, therefore, built a system that serves both of those constituencies well. Sony's ultimate goal is to surprise and delight players. We want them to be happy about their purchase, to trust the operation of the system and, ultimately, to buy more games produced by us and our partners."

The reason I just highlight that is obviously that's an encapsulation in simple terms, as we'll come on to deal with later, of the two-sidedness of the platform we are dealing with here.

Then if we just go on to look at what he then says about PlayStation and its players, you'll see at 34, he's talking about the players' side, so this is the end consumer, the customer, the gamer side and how it's defined. Then at 35:

"The relationship between Sony and PlayStation players is governed by a number of different agreements. I am not expert in the detail of agreements but I have set out my understanding below."

First of all, he refers to the software usage terms that govern a PlayStation player's rights and obligations when using PlayStation software.

Now he's perhaps -- I realise that, electronically, this is hard, to put your thumb in a page, keep this open and go elsewhere, but if I may, I will move just to show you some of the software usage terms. So it's bundle A at 398.

THE CHAIR: Have you got that right? That's Mr Harman's report, I think.

MR BEARD: No, that's not the right reference. I apologise. It's hearing bundle A, 938.

THE CHAIR: 938.

MR BEARD: If you are in hard copy, it's the second bundle. There are numerous copies of various of these documents in but for these purposes, I only need to refer to one or two of them.

THE CHAIR: Is that page number or tab number?

MR BEARD: 938. I don't know if that helps. That's what it looks like. This is only an extract from the usage terms but it's picking up a key clause in ...

So this is what, essentially, you as a gamer, sign up to when you are wanting to play and use the PlayStation system. You see at 6.1:

"Your licence to use software is a non-exclusive, non-transferable personal licence to use the software for private use only, on the applicable authorised systems, as indicated on the box for disc based software in the product description for digital software, otherwise notified from time to time and only in Europe, the Middle East ..."

So as a customer, you are given a limited licence in relation to the use of PlayStation software. If you go down to 6.5:

"To the fullest extent permitted by law, you must not reverse engineer, de-compile, disassemble or copy any portion of the software or create any derivative works or otherwise attempt to create source code from software object code."

6.6:

"You must not use any means to bypass or disable any encryption security or authentication mechanism of the authorised systems or any software or gain unauthorised access to or interfere with any account, service, hardware, software or network connected to the PlayStation."

So what you are getting as a customer is access to use the software, the property that Sony has created, in order to make the console somewhere you can come and play games but it's a limited licence that is being granted to use Sony's property in

relation to that.

Whilst we are here, Mr Svensson, at paragraph 37, also refers to the system software licence agreement. So that was the usage terms. If you go back a page, you'll see at 937 the system software licence agreements. You'll see in particular there -- this is just an extract, it's a longish document -- but the restrictions that apply in relation to your software licence agreement.

Then the third set of arrangements that, as a player, you enter into, in order to get access to Sony property, intangible property and use the software, are the PlayStation Network terms of service because they govern a PlayStation player's rights and obligations in relation to their account on the PlayStation Network.

If we could just go to that. That's at page 948 in this same bundle.

You'll see there, PlayStation Store in particular being dealt with:

"Access and use. PlayStation Store is where you can buy digital game subscriptions, virtual currency and other digital content. You can pay for purchases on PlayStation Store using PlayStation Network wallet funds or any other payment we may identify as acceptable on the store."

So the system has a wallet function, where you can load up money in order to make purchases on the store:

"You must be signed into your account to complete any purchase. If you delete or close your account, you may lose access to it."

Then you've got the restrictions on use that apply in relation to the PlayStation Store and the purchase terms which can be used but what is being identified here is a permission that enables you to use, again, Sony's property in the form of the PlayStation Store as a forum to go and get the content.

If you just turn back to 944, you'll see under the heading "Code of conduct", there is a description of the importance of a range of conduct being abided by any customer

engaging with the PlayStation system. I am not going to go through all of the clauses but if we skip across to 5.12 on the next page. So 5.10 is don't cheat; 5.11, no viruses, worms, bugs and so on. 5.12:

"Don't use, make or distribute unauthorised software or hardware, including non-licensed peripherals, cheat codes, devices that circumvent security features or limitations included on any software or devices or take or use any data from PlayStation Network's design developer update, unauthorised software or hardware."

So this is saying to customers: these are things you must not do. We are giving you licence to take advantage of this system we have created but these are things you cannot do. It's a limited licence. That also goes for 5.14: don't hack or reverse engineer.

THE CHAIR: So just so I get the structure right. So you've got three agreements, one of which deals with -- second one deals with the software on the system.

MR BEARD: Yes.

THE CHAIR: First one deals with the software that you're purchasing to install, effectively.

MR BEARD: Yes.

THE CHAIR: Then this thing deals with your interaction with the PlayStation Store and more generally, your interaction with the system.

MR BEARD: Yes, exactly. But the point I am making is that in relation to the software usage terms and software licence agreement, what essentially it is is we are saying: you can use our property to the following extent and no further. We built it, it will offer you benefits if you use it but you are not allowed to just use it any way you want. You can't re-engineer it, you can't install other things on the system, you can't play with our software. That's not permitted. You can use our land but only in the following way.

In relation to the PlayStation Network terms, that's essentially saying: there's this whole network which involves you having accounts, so you can play with other people and, essentially, interact more generally through the PlayStation system because these consoles are linked with one another -- can be linked with one another, so you can have multi-player playing and so on.

THE CHAIR: Some of the points we've seen are actually points which the PCR puts forward as part of the exclusive dealing.

MR BEARD: Absolutely.

THE CHAIR: But you are saying -- the point you are making is the linkage with the software right, the IP right?

MR BEARD: So the reason why I say there's actually not necessarily, on a factual basis, a huge gap between PCR and Sony is because what the PCR is saying: well you've got these arrangements in place and these amount to exclusive dealing or tying and we are saying: no, actually, you are mischaracterising them. What we have are limited licences we grant to the use of our property.

The reason that's important, as I will come on to show, is what they are effectively saying is: we want wider licences. We want access to your property in a different, more extensive way. We say: okay, we understand that that broadly is what you are talking about but that's not what you pleaded and if that is what you are asking for, it's a different set of criteria in the case law you have to meet.

At the moment I am only just focusing -- I have talked about third party store and the reason that the third party store is so important is because that is the key mechanism that is being identified by the PCR in this case. What we are saying is: look, we've never been approached by anyone who wants to open a third party store and we wouldn't allow someone to open a third party store because we have built this integrated system and in order to open a third party store, we would have to grant

a licence that we do not grant. We would have to allow you to use our land in a way that we do not countenance. We built this. This is how it's going to be used. You are not going to use it in a different way.

If you are going to come along and say: competition law says you must permit people to use it in a different way, that's a very, very high hurdle they have to get over and they've not pleaded it properly. I don't want to lose sight of third party store. It's dealt with more briefly because to some extent there isn't anyone that's come along and, therefore, if it were a publisher, as I'll come on to, the publisher terms wouldn't permit that. If it were a customer, you've just seen there's no way those customer licences permit someone to do that sort of thing.

So if I may, I go back to Mr Svensson's statement just at 286. So this under "The PlayStation and its players." Essentially, paragraphs 36, 37 and 38. They don't include the cross-references but I have just been taking you to the underlying documents to flesh those points out. He's not a lawyer and it was important, I think, that I just showed you broadly, some of the key terms, not all of them.

If you go over the page then to 287, you can see from the non-lawyer point of view, he explains the reasons for these arrangements. They are not just arbitrary:

"All of these agreements are vital in protecting the integrity of the PlayStation system. They're designed to restrain bad actors, who may attempt to cheat or reverse engineer the PlayStation system. This, in turn, protects the user experience for our other players, who want to access a safe and secure system and our partners, who want their content to be appropriately protected and distributed fairly."

So they all contribute to that goal. Then he moves on to the PlayStation and third party developers and publishers. You'll see he explains how PlayStation has close relationships with third party developers and he refers to some of the well known developers, like Rock Rocksteady and Rockstar North. I've already referred to EA

Games and Activision. There are vast numbers of this developers making big games. The publishers, as he explains, are responsible for bringing the game to market and making it available to players:

"Some companies combine both function, development and publishing within one organisation."

And he refers to EA for FIFA and Ubisoft for a game called Assassins Creed. He explains the first party/third party distinction. But it's 44 that's perhaps most important:

"SIE, Sony's relationship with our third party partners is generally governed by the Global Development and Publisher Agreement, GDPA. This is the key overarching agreement governing the relationship between Sony and third party publishers. At a high level, this agreement -- "

I know in this text it's marked as red but this is all non-confidential now, it's been treated as non-confidential:

"This agreement, amongst other things, grants publishers a non-exclusive licence to develop and publish games and add-on content for PlayStation, in accordance with the terms of the GDPA."

Essentially, it's saying: you, as a publisher, can have access to our software in order to run your games on the PlayStation for the purpose of running your games on the PlayStation, so gamers can play them. It's a narrow licence again. But it does other things. It grants access to SDKs. That's software development kits and other developments kits, to allow third parties to develop content for PlayStation.

Again, this is important because when you are building a game, you don't just start from scratch completely, with a blank computer screen and start writing the code. In order to be able to make your game interact with the underlying operating system, the software that actually runs the PlayStation, what you need to do is use the

software development kits that are provided, in order to build your game, so that it will run on the software.

Now whether or not it's imperative, in theory, that people could create code differently without a software development kit that could run on any operating system, we leave to one side. In practice, it's vital for game companies and publishers and all of them take the software development kits, in order to be able to develop the games, the software in their games, to be able to run on a Sony system.

THE CHAIR: So is there any difference then between (1) and (2), because I think you put (1) as being access to the software. In practice, it sounds like the software is accessed largely through the provision of the SDKs. I am trying to understand --

MR BEARD: No, the SDKs are software development kits, so what they do, they are actually pieces of software and pieces of --

THE CHAIR: Like a template, presumably?

MR BEARD: A template but they are much, much more sophisticated than that. There is very, very valuable intellectual property in the SDKs themselves.

THE CHAIR: The point I am exploring really is what, in addition -- when you say access to the software, what do you mean by that, other than being given the kit which tells you how it all works.

MR BEARD: Because the formal access to the software, in other words, even if you didn't have an SDK, if you built something, you'd still require access to the software in order to run it on PlayStation --

THE CHAIR: It has to interface with the operating system.

MR BEARD: It has to interface with it. The best way and the only practical way you're going to be able to do that is by using the SDKs that we've built. So the point is, you don't just have one piece of property that you need access to, in practice, as a game developer, which is the software that's actually running on the PlayStation

where you put your game in, you actually need access to other proprietary software and material which we provide which are the SDKs. Otherwise, in practice, you are just not going to be able to build these games. What Sony is doing with this GDPA is actually providing developers with the software tools that it, Sony, has built, in order to facilitate the game developers building their games, that can then be run on and access the system software on the PlayStation.

The reason it's important is because when you are thinking about this as an integrated system and you are talking about the licence arrangements being put in place, what Sony is doing is saying: we will facilitate you in developing these games by enabling you to have access to our proprietary information in the SDKs, as well as, in the end, once you've built the game, using the SDKs and gone through a whole range of other processes that I'll come back to, then you can run your game on our system, such that you can sell it to customers who are players on our system.

Then 44.3 sets out the commercial terms of that agreement, such as distribution of content on PlayStation Store and then 44.4 covers confidentiality, non-disclosure terms between SIE and the publisher.

So you've got a whole infrastructure here of, essentially, limited licences being granted to developers, in order that they can develop the games which Sony wants them to develop, in order to make the system that it has built valuable to customers. But it's a limited licence. It's saying to developers and publishers: you can use our property, our SDKs, et cetera, to build your games and you can use our property, our software and so on, to provide those games to customers, but you will do it through our system because we have invested, we have built that and that's why it's a limited licence.

It's worth, perhaps, just turning the other version of the GDPA up. I think it's the more recent version or -- anyway, it doesn't matter for these purposes because the

relevant clauses are materially the same. If we go back to bundle A that we were in, hearing bundle A at 856. So it starts at 856. You see it's headed "GDPA." In that elegant way all legal agreements do, it has the emphasis in block capitals up at the top, saying:

"You have to click at the bottom to consciously accept the relevant terms here."

You are therefore bound by these terms if you click through. We can leave definition of terms for the moment, the identity of SIE group, but if we go down just to clause 3: "Conditional licence grant."

That's what you are getting through the GDPA:

"If a publisher completes and submits a publisher application in a form that SIE group provides and if an SIE group company gives written acceptance of the publisher's application, the publisher is then a licensed publisher and SIE grants to the publisher for the term as non-exclusive, non-transferable licence without the right to sub-licence as follows, to use SIE group materials solely to develop PlayStation compatible products."

Those group materials include things like the SDKs I was referring to.

(2):

"To publish, distribute, supply, sell, rent, market, advertise, promote digitally delivered products to end users through each applicable company through PSN and to provide PlayStation compatible products to other licensed publishers for exploitation under a licensed publisher agreement. Where a publisher has exercised rights under 3.2 to have equivalent physical media products ... "

"3.4. To publish, distribute, sell, market, advertise, promote, physical media products, to use the licence trademarks, to sub-licence end users the right to use licensed products for personal, non-commercial purposes, in conjunction with the applicable systems only."

In other words, what you are getting, albeit in a slightly tortious form, is the ability as a publisher, when you have been approved by Sony, to publish and distribute your games through the PlayStation Network which involves the PlayStation Store. That's the only licence we are giving you, to use our systems, our software, our kit.

Then 4 is compliance with Guidelines. Now we don't have all the Guidelines. Many of them are confidential. But these are very extensive and detailed conditions, on the basis of which a developer can develop a game and then a publisher publish it.

Then you'll see in 5:

"Other limitations on licence rights."

And I am not going to work my way through all of these but limitations on the use of the development tools. So that's the sorts of tools I was already referring the Tribunal to.

5.2:

"Reverse engineering prohibited."

You can't go in and try and reverse engineer the underlying code in our systems. That's absolutely prohibited.

Then you've got limitations regarding ownership, protection of group materials and 5.5, a reservation of rights.

If we go over the page, we essentially see the concomitant which is:

"The right to develop, the right of access to develop a support website and assessment and quality assurance of PlayStation compatible products."

Now that's actually an obligation rather than a liberty. In other words, Sony is controlling quality of the games on its systems. You have to comply with those quality assurance protocols.

I won't go through the rest of that but if we just move on to 866 because this is to do with distribution. You see at 9, "Distribution":

"Distribution of any licence product is subject to SIE group's assessment, testing and approval pursuant to section 6.3. Licence product must be distributed in accordance with 9.1 or 9.2 as applicable, unless approved otherwise in writing."

Then the key issue here is obviously 9.2 which the PCR fixates on, 9.2.1 now. It wasn't, I think, initially referred to explicitly but it is now:

"Distribution channel for digitally delivered products. Unless expressly approved in writing by all SIE companies in relevant territories, digitally delivered products, any subscriptions or services associated with licensed products shall be distributed through PSN only, in accordance with this section 9."

So Sony makes absolutely no bones about the position. We grant licences to publishers only so they can develop and publish for PlayStation gamers in relation to games that are distributed through the PlayStation Store on a digital basis. And that's the limitation of the licence that's been granted here. That's how we exercise our property rights.

There are obviously numerous other clauses in nine. If we go over the page at 868, 9.2.7 talks about the products submission that has to be made in order for products to be cleared. As I say, I am not going to go through all of it but if we could move on to 886, you also have a whole section on data security and confidentiality and those protections being put in place.

So I shall put that agreement away for the moment.

If we could just go back to Mr Svensson's statement. That is in hearing bundle volume A, part 1, at page 287. That digression into the GDPA was essentially just setting out what's set out in paragraph 44 of Mr Svensson's statement. His statement then goes on and talks about PlayStation costs, revenues, pricing and so on.

You'll see over the page at 290, on revenues, it explains how Sony earns revenues

from three main sources: hardware sales, games sales and subscription services.

Just so that you note it, on 292 at paragraph 56, for digital retail, PlayStation is the retailer. We'll come back to that when we come back to pricing issues, probably tomorrow.

Then there are considerations --

JUSTICE TWO: May I interrupt you. Where is that last reference you picked up?

MR BEARD: Page 292, paragraph 56, just under the heading "Pricing", sir.

JUSTICE TWO: Thank you.

MR BEARD: It's explained in 56. I can just make these references in passing, they are not for this. I also, for the same reason, I just refer in passing to page 294, "Impact of a reduction in margin." So this is about what happens to retail prices if there's a reduction on the margin which publishers would achieve. Sorry, that would be a reduction in Sony's margin, as compared with the present situation in relation to games being supplied by publishers. But, again, we'll pick that up tomorrow.

Then you'll see from paragraph 67 onwards, that's on 296, he actually deals with the suggestions that these arrangements amount to, as the PCR puts it, digital distribution restrictions. Well whether or not they are characterised as digital distribution restrictions or not, is not material for how they're properly to be characterised for the question of whether or not there's an abuse here. He explains how the various accusations or the various statements made fit within the framework of the integrated system that exists for PlayStation.

But if I may, I will come back to those when I look at the pleading. But if you could just turn on to 297, you'll see paragraph 74 through to 77, those paragraphs are not confidential, you'll see a description by him of what I was already trailing when I was going through the GDPA.

Then just picking up at 80, he returns to the issue to do with alternative stores,

emphasising that a restriction on the ability to install an alternative store is, as far as he understands, the industry standard for consoles.

But he also reverts to the points he made earlier in the statement, about the issues that arise in relation to a potential third party store.

So I hope that gives a slightly clearer picture of how the PlayStation and the PlayStation Network works but also how the licensing scheme operates, in order to facilitate the engagement of publishers and developers and gamers and to bring those two sides together through the PlayStation platform, through the platform and the property that Sony has developed.

As I say, that integrated hardware and software system involving the operating system and/or the other arrangements, including the store which is the mechanism by which you can acquire games digitally through the PlayStation Network, we say there is no basis for anyone other than Sony to be re-engineering these matters.

As we also say this is a common approach for consoles for Xbox and Nintendo. Just while we are in this bundle, it's perhaps just worth noting, just so you -- I am sure, again, you will have read it but page 302 is the witness statement of Mr Hirano from Sony, Vice President of Corporate Planning at SIE, who has been there for 30 years. I don't really think I need to go through it in any detail now but it sets out Sony's approach to business planning and the PlayStation business model.

If we go over to 305:

"We have invested billions of dollars in the development of PlayStation consoles. Each new generation of console represents years of investment in development and innovation, in turn delivering significant enhancement of the user experience."

He goes on to explain when he's talking about consoles, he's talking about the whole ecosystem here. That's what the investment is in. That's the property that Sony has developed and it's a valuable property. We don't make any bones about that. As

a system, it's valuable.

He explains at 17:

"The different elements of the PlayStation system are all linked and while we are focused on making each of these elements successful, we take business decisions by looking at our business in the round. Our goal is to ensure that we are reasonably positioned so that our total profits balance out across the PlayStation system, in order to achieve sustainable long-term profits."

So yes, Sony does want to make profits, absolutely. One would hope so. Otherwise the system is not working.

THE CHAIR: Is that a convenient time to give the transcript writers a break?

MR BEARD: Yes, and then I'll move on to the pleading. I am sorry it's taken a little time.

THE CHAIR: No, no, that's very helpful. We'll take 10 minutes.

MR BEARD: I am grateful.

THE CHAIR: And we'll come back then.

(11.43 am)

(A short break)

(11.53 am)

THE CHAIR: Yes.

MR BEARD: I was going to move on to the law. It's worth just having in mind, I think, how the exclusive dealing allegation is pleaded. Here in bundle A1, page 82. Just so you have it. You will have seen this, so reference to Chapter II and Article 102:

"Prohibits a dominant undertaking, adopting practices which have an exclusionary effect or strengthening a dominant position, other than by competition on the merits. An exclusive dealing obligation but prior to restricts customers of the dominant

undertaking from accessing alternative sources of supply. It forecloses actual or potential competition from other suppliers."

And there is a footnote there to the Hoffmann La Roche case.

Structure of Sony's ecosystem set out in detail. I am not going to quibble about that:

"As a result of Sony's conduct, it's ensured it operates as a digital gatekeeper to the PlayStation ecosystem."

One wonders whether they have been reading the DMA, the new European legislation that uses that terminology but I leave that to one side:

"The digital distribution restrictions are not a method of competition on the merits."

And as set out in -- I think it should actually be paragraph 56 above -- I am sorry, I may be being unfair. It may be 57. 56 sets out the digital distribution restrictions is to require publishers to distribute digital games and add-on content exclusively via PlayStation Network and in particular, the PlayStation Store.

But, of course, there's something funny about that sentence to begin with. We don't require publishers to do anything. We don't make them write games. What we do is we make available a system that we have hugely invested in, that they can develop games for and publish them on. We don't require them to do anything. What we say is: if you are going to do that, there are limits to the access to that property we've developed you can have:

"Publishers are not permitted to distribute digital PlayStation games by any other means or channels of distribution, including via an electronic webstore, direct from the publisher's website or other third party websites. The PlayStation users are denied other means of accessing digital games or online content."

We say we built a system to facilitate developers and publishers being able to bring games to customers. We shouldn't be required to licence our property more widely.

Then it's said that this shuts out all actual or potential competition.

Now in looking at the law, I am just going to start in the Hoffmann La Roche case. It's very old but it's found in authorities bundle 2, page 81. So if you just pick it up at 82, under the heading "Facts and procedure." This is one of the old judgments where they used to summarise the facts. You'll see in the first paragraph, under "Facts and procedure", the allegation by the Commission in its decision was that the applicant, Hoffmann La Roche, had committed an infringement of what was then Article 86, obviously now 102:

"... by concluding agreements which contain an obligation upon purchasers or by the grant of fidelity rebates, offering them an incentive to buy all or most of their requirements exclusively or in preference from Hoffmann La Roche."

It was about vitamins. There were lots and lots and lots of suppliers of vitamins. There was no intellectual property in the production of vitamins. Hoffmann La Roche was the dominant supplier of those vitamins. What it was doing was requiring customers to take all of their requirements for particular vitamins from them, exclusive dealing or putting in place what we refer as to fidelity rebates. In other words: if you buy X percentage of your vitamin B13 requirements from us, you will get a discount but you won't get that discount until you've triggered that fidelity threshold effectively. Very, very familiar and well known in competition law literature. Those fidelity rebates we know about because what they do is they have what's euphemistically referred to as a "suction effect." In other words, they effectively pull the customer's demand up towards the fidelity trigger and, therefore, alternative suppliers that are sitting out there have to really offer very, very low prices, in order to compete, is the theory. If we go on to page 156, 157.

This is the finding of infringement or the articulation of the relevant law. At 89:

"An undertaking which is in a dominant position in a market and ties purchasers, even if it does so at their request or an obligation or promise on their part to obtain all

or most of their requirements exclusively from the said undertaking, abuses its dominant position --"

THE CHAIR: Sorry to interrupt you, I am slightly struggling here. Which page are you on?

MR BEARD: Page 156 on the external numbering, I am sorry.

THE CHAIR: 156 of the external numbering.

MR BEARD: Yes, 539 on the internal. I would have thought your search system, Lord Richardson --

THE CHAIR: It's 159 on the electric bundle.

MR BEARD: I am sorry.

LORD RICHARDSON: I am using PDF to navigate. So page 159, paragraph?

MR BEARD: 89.

LORD RICHARDSON: Thank you, I have that.

MR BEARD: I am grateful. I am sorry, I will try and take into account -- we will try and give hard copy and electronic references.

LORD RICHARDSON: It's fine.

MR BEARD: I am sorry.

LORD RICHARDSON: Paragraph 89.

MR BEARD: So 89. I was just reading the very familiar articulation of Hoffmann La Roche, obligation to obtain all or most of their requirements exclusively from a dominant undertaking would abuse dominant position:

"The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies either under the terms of agreements or unilaterally. System of fidelity rebates is (audio distortion) all or most."

So, again, very familiar:

"Obligation of this kind to obtain supplies exclusively from a particular undertaking,

whether or not in consideration of rebates or granting fidelity rebates ... to give a purchaser an incentive to obtain supplies exclusively from the undertaking in a dominant position, are incompatible with the common market and the undistorted competition. They're not based on an economic transaction which justifies the burden."

Then there's a distinction drawn between fidelity rebates and quantity rebates and the fact that fidelity rebates apply to similar conditions. And finally:

"These practices by an undertaking in a dominant position, especially on an expanding market, tend to consolidate its position."

So there are a range of concerns, all very familiar, that have been explored. But it is completely different from the current situation. This is exclusive dealing arrangements being put in place where you have a range of suppliers in the market and what is essentially being said is: you can't, as a dominant undertaking, impose exclusivity rebates or very powerful suction effects of fidelity rebates, in order to foreclose the other suppliers that exist.

Of course, this case has been further clarified in the Intel judgment, page -- I am going to say page 791 in the bundle but it may be 793. 792, I am grateful.

LORD RICHARDSON: As a general rule, I understand if you add three to the hard copy page numbering, you end up with a PDF page.

MR BEARD: I am very grateful. I was going to pick it up at paragraph 6. So I am guessing that's 794 on that basis, sir.

LORD RICHARDSON: Thank you.

MR BEARD: So this concerned Intel, you see at paragraph 6:

"US based company that designs, develops, manufactures CPUs, as well as platform solutions."

Then what was being alleged is down at 11:

"The Commissioner's decision at issue described two types of conduct by Intel vis-a-vis its trading partners, namely conditional rebates and so called naked restrictions, intended to exclude a competitor, AMD, from the market, for what are called X86 CPUs [just a type of CPU]. The first type of conduct consisted in a grant of rebates to four original equipment manufacturers [so this just chips into computers for Dell, Lenovo, HP and NEC] which were conditioned on these manufacturers purchasing all or almost all of their X86 CPUs from Intel. The second type of conduct [so this is the naked restriction] consisted in making payments to manufacturers so they delay, cancel or restrict marketing of certain products equipped with AMD CPUs."

Now this is the refinement that we see of the Hoffmann La Roche case law in relation to exclusive dealing. The important issue here is you have a market in relation to which you are talking about Intel, AMD and, indeed, there are other rivals out there that produce CPUs. We are not talking about whether or not AMD or any other producer could demand access to Intel's own fabrication facilities silts or anything of that sort. What you are dealing with here is an exclusive supply arrangement that is being alleged to be anti-competitive because it has, essentially, a suction effect in relation to these manufacturers, which means that AMD, the extant competitor, is unable to supply these people on an economically viable basis.

The consideration of this, because Intel turned up and said: no, no, no, these deals, these fidelity rebates, actually any as efficient competitor could meet the pricing we were offering and, therefore, actually what we were doing was offering good prices in the market to these OEMs and there wasn't any issue here, there wasn't exclusive dealing, we weren't foreclosing this rival that's out there.

That's considered at paragraph 129 onwards, so that's 805 in the hard copy, 808, I am guessing, electronically. There, what is said is: well when you are considering

these sort of exclusive dealing arrangements, you need to consider all of the circumstances with what Intel were saying and instead, what had happened was the Commission had applied a rather formulaic approach and it had just said: well, these deals are to do with all or most of the demands of these manufacturers. That means that they are to be prohibited as exclusive dealing. What the court said was: well we need to clarify what was said in Hoffmann La Roche.

We see that over the page at paragraph 137, where the relevant parts of Hoffmann La Roche, paragraph 89, are quoted which I have just taken you to. And then there's the wonderful judicial euphemism:

"However, that case law must be further clarified in the case where the undertaking concerned submits during the administrative procedure, supporting evidence that its conduct wasn't capable of restricting competition. In particular, of producing the alleged foreclosure affect."

So it's dealing with a situation of how are you actually foreclosing the rivals that are out there?

And then at 139, it talks about the importance of considering all the circumstances in assessing whether or not an exclusive dealing arrangement really is anti-competitive. But as I say, what you are dealing with there is a situation where a dominant undertaking imposes an arrangement or offers prices to customers so as to keep out existing suppliers. You are not talking about a situation where, in order to have the supply, somehow the supplier needs to change the terms on which it deals, alter the way that it offers its property and so on. That's just not what exclusive dealing case law is concerned with. Essentially, what is pleaded in the PCR's proposed claim is not a viable or valid basis on which to assert that there is an abuse in this case because what you see in the case law is a different strand of authorities which explain why it is that you need to look at circumstances where you are effectively

mandating someone to enable access to their property and to their infrastructure.

This is what is known as the refusal to supply case law.

LORD RICHARDSON: Just before you leave Intel. In a nutshell, I understand you are submitting clearly that this, as you put it, clarified the Hoffmann La Roche case law. What's the key point for present purposes you are taking from this case?

MR BEARD: The key point here, these are the key authorities relating to exclusive dealing arrangement. So Hoffmann La Roche is the old one; Intel clarifies it. That case law is not concerned with the phenomenon we are dealing with here which is an accusation that we don't allow someone access to our systems.

This is concerned with arrangements you put in place in terms of your dealings in a market where there are existing rivals and you essentially try to attract all of the demand by your pricing mechanism or an exclusivity term, as was considered in Hoffmann La Roche.

Now we take no issue with that case law at all. We completely understand that that exists as a potential abuse but that's not what is going on here because the accusation here is: you should have allowed the third party store. You should have allowed the publishers not only to publish their games through your system but through other mechanisms to be played by gamers and you should have allowed customers not just to play through your network and your system but to be able to play through alternative stores or alternative download mechanisms. It's just a different phenomenon you are dealing with and that's why we say the case is wrongly pleaded in relation to exclusive dealing.

But I want to go to refusal to supply case law because it explains so clearly what it is that is different about the sort of situation we are dealing with here. If I may --

MR RIDYARD: Before you do that, I think the common element is these cases are all about exclusion. In Intel and it was AMD, which was competing but arguably

wasn't able to compete properly because of the way Intel organised its discounts.

MR BEARD: Yes.

MR RIDYARD: But if you carry that analogy over to this case, the alleged exclusion is that the entity that's excluded is a third party retailer of Sony PlayStation games and here the situation is they don't exist. They are not sitting round like AMD saying: it's hard for us to compete because they don't even exist. The reason they don't exist is because the Sony system, as you just described earlier, is integrated and it's extremely well integrated, so it's very hard -- it's impossible for that third party to exist unless some intervention takes place.

MR BEARD: Yes, that's all true.

MR RIDYARD: It's arguable that the Intel and the Hoffmann La Roche cases, the restrictions were much less effective by the dominant company in those cases, whereas here, the restrictions are completely effective which is why the AMD equivalent isn't standing there, sitting -- existing at all.

MR BEARD: Let's assume there is a putative third party retailer and let's assume that's the case. The difference is in order for that third party retailer to exist on PlayStation, it has to be found that it is abusive not to licence that third party retailer to operate on the system.

Therefore, you are talking about an issue to do with the infrastructure and property that Sony have built and saying: you must allow that alternative access. What I am going to come on to say is that in relation to a situation of that sort, it is a different test that has to be applied in competition law because you are dealing with an intrusion into property rights in a way you are not doing in the traditional exclusive dealing case law. There's no intrusion on anybody's property rights in relation to the Intel situation or, indeed, in relation to the Hoffmann La Roche situation. None of that occurs because you are not saying that there is a need for Intel or Hoffmann La

Roche to licence, for instance, its technology in relation to X86 chips to somebody else. That would be the equivalent in this -- if you are comparing it with Intel.

What you would be saying is: I want to come along and I want a licence to make the same sort of X86 chips you do and, in practice, I'd like to use your massive fabrication facility you've spent billions of pounds building, in order to make those chips so I can supply them. No, no, you are not allowed to do that unless you pass the refusal to supply threshold and that's not what's pleaded here.

I am not for a moment demurring. We are dealing with exclusive conduct abuse but what is recognised in the case law is when mandating access to property, there are different criteria that apply and that's what we are dealing with here.

THE CHAIR: What is the nature of the licence that would need to be granted to the third party store?

MR BEARD: Well --

THE CHAIR: Just in general terms. I think perhaps -- so you've got, obviously, the licensing framework here, the licence -- we've looked at the arrangements with gamers, we've looked at the arrangements with developers.

MR BEARD: Yes.

THE CHAIR: I don't think you are saying -- one way of looking at this, and I don't think you are saying this, is you could say: it's our property and we are not going to let people use it for anything other than suits us, so therefore you couldn't, if you were a developer, go and use it for some other completely different purpose.

MR BEARD: Yes.

THE CHAIR: In other words, you could use your licence imposition to prevent an Intel style competition situation, if that makes sense. I don't think you are saying that. You are not saying: I am leveraging the effect of my property and my entitlement to licence somebody to impose contractual conditions on them that inhibit

competition, you are going further and saying: the competition that's going to be imposed brings with it the need to access another licence, a separate access to my property.

MR BEARD: Part of the difficulty is, although Mr Ridyard hypothesises that it's because of the GDPA terms (inaudible) (audio distortion). If, genuinely, people thought there was some sort of case that said: well, actually, these GDPA terms were unlawful, given the nature of the gaming market, you would have expected someone might well have come along previously and actually asked about these things and the evidence of Mr Svensson shows that isn't the case.

But leave that to one side. Let's just say we are thinking about the publisher, for example, deciding they are going to run -- they want to run a third party store, either for their games or their games and other third party games but in parallel to the PlayStation Store. At that point you would have to take the publisher licence that we see under the GDPA and you have to completely transform it because you would be then saying: yes, you can use the SDKs, you can have access to the software but not just for you supplying the games through our network, you can have it, in order to supply your games through a different system that you might construct. And as Mr Svensson indicates as well, what you'd be doing then is also saying: you are entitled to run some sort of other store which actually goes beyond anything to do with particular games.

So you ask about what the licence would look like, and all I can do is say: well if you take a publisher as a particular example, you not only have to massively broaden all of the terms that apply to the publisher's use of the games but you have to change the licence in order to allow the publisher not only to take the SDKs and access to the software systems for games purposes but also to build the parallel distribution system that sat on the PlayStation, on top of the operating system. So you are

looking at a very different licensing arrangement.

THE CHAIR: I think it slightly confuses the analysis if you treat the publisher as the subject. It's better if you start with someone completely different. I dare say someone who's not, at the moment, in a contractual relationship with Sony, comes along and says: right, the terms are now put to one side because the Tribunal has ruled whatever and now I want to sell -- developers are providing me with games and I want to sell them into your system, so what is the licence that they will be --

MR BEARD: That entity which doesn't exist and, therefore, would not have to build any --

THE CHAIR: I understand.

MR BEARD: (Inaudible due to overspeaking) -- licence for, would have to have access to the Sony software systems, so that includes the operating system, the firmware, access to install on a hardware, the ability to deal with PlayStation customers, the ability to deal with publishers who are building the games using Sony tools and so on. You would have to have a situation where all of those parameters were dealt with in a licence. So you'd be, essentially, radically changing the way in which Sony's property -- which, as I have said, we are not allowing someone else to do that to -- would be used which is why we say it's an access issue here. It's an access to the infrastructure of the Sony system, the hardware and the software that exists.

The ramifications of dealing with that for someone completely new would be potentially huge. Because it's entirely different. Of course, in doing that, and I've touched on it in referring to Mr Svensson's evidence, you have all of the issues to do with security, data protection. You've got the issues to do with how customers' accounts run, for example, in relation to particular games and so on. And so how it's imagined that licence conditions would be built in order to accommodate

arrangements that have been structured within the integrated system, is well beyond something that I could properly give a view about.

But as soon as you start even beginning to think about these things, the extensive nature of the different permissions of access to property that would be required are radical, as compared to a publisher and a customer.

THE CHAIR: Yes. I don't know whether -- you may tell me this is not a helpful distinction but it does seem to me to be a helpful distinction to think about the point you just made which I think is effectively your second point about mandated access, which I asked you about earlier, and the nature of the restrictions that exist at the moment and whether or not -- and maybe it comes to a question of justification, but whether or not they actually are proper restrictions for the purpose of protecting the property or whether they actually are anti-competitive and are being used in a way to prevent proper competition. Maybe that's not a useful way to think about the distinction.

MR BEARD: In a way it is. I would ask you to pause because I think we need to look at the case law because you don't just jump to objective justification (audio distortion). If you are saying: you must grant access, in other words you're refusing to supply the putative third party with access, what are the conditions that the case law requires you to meet?

THE CHAIR: I understand that point.

MR BEARD: Objective justification --

THE CHAIR: Comes after that.

MR BEARD: What I am stressing here is none of the others are pleaded in that case.

THE CHAIR: Understood.

MR BEARD: What we are saying is that's the case -- if you are going to bring

a case against us, that's the case it has to be here, you can't just talk about exclusive dealing because that's not the right analysis for what's going on, for the reasons that we've already been canvassing.

THE CHAIR: Yes.

MR BEARD: So, yes, in short order, I suppose what is being asked of Sony, effectively, is to positively allow a third party store on the PlayStation and enable licensing for that and as I say, vary or create a whole new intellectual property licence in relation to that situation but it also vary all the intellectual property GDPA licensing terms for all the publishers because unless you do that as well, the fact that you've got the third party store doesn't enable any games to pass to customers, so you have to modify all of the game publishers' and developers' licences.

In addition, you also have to modify the customers' licences because at the moment, as I showed you, customers can only access the games through the PlayStation Network, so they would have to be separately permitted to get the games that came through the third party store that were subject to the variations in the publisher licences that enabled them to come through the third party store. So there are, effectively, three levels of access. You were focusing, sir, on the central third party store but I don't want to lose sight of the fact that there would have to be variations in relation to access to our property in relation to all of those dimensions.

THE CHAIR: Yes, and I see that and I think, again, just to come back to the point, it seems to me that you have a set of contractual restrictions that exist --

MR BEARD: Yes.

THE CHAIR: -- and you are going to say that there's a certain test. You may or may not be right about that. But whatever the position is in relation to those, as Mr Ridyard suggested, all of the answers to those is that if you are behaving anti-competitively, then they need to be set aside if the test is met. But you are

saying even when you get to that point, you've still got a further question which is absent those contractual restrictions, there are some practical mechanisms which require the imposition of further licences.

MR BEARD: Yes, well, there are two issues there, essentially. One is we are saying: look, we recognise that you can turn up and say: those restrictions you've got in use for your property are anti-competitive. We recognise there is a strand of case law that says that. But that requires you to meet the series of tests I am going to come to.

THE CHAIR: Yes.

MR BEARD: So we accept that, in theory, you can put that case forward. If you put that case forward, we will meet it but it has to be explained to us because we are confident that what we are doing is not anti-competitive but we don't know what the case is, applying the correct criteria.

There's a further issue which says: look, what is required here would involve all sorts of modifications and changes that are, practically, very, very significant. That again means that there wouldn't be a basis for you meeting any of the criteria. Now, in practice, when it came to a trial, the two things would fold together but at this stage, what we are saying is: you are not applying the correct legal thresholds and there are these issues that are plainly there, not only in principle, that are requiring us to grant access more broadly but, in practice, that would have real ramifications. Because we thought turning up before the Tribunal and saying: well in principle, access is required, the immediate response is: that doesn't matter because it's so easy. We say, no, actually, you can't assume that in the slightest.

THE CHAIR: Yes.

MR BEARD: I am actually going to start with a case that's not in the bundles, notwithstanding that we do have extensive bundles or more exactly, I am going to

start with the opinion of the Advocate General in one of the cases that is in the bundles. I'm going to go back to Advocate General Jacobs in the Bronner case. If I might just pass -- it may be.

THE CHAIR: We do have it.

MR BEARD: I think they were supplied to the Tribunal (Overspeaking). I am not going to go through all the refusal to supply case law but it's instructive because the reason I am going to go to this is that it explains why it is that competition law, in broad terms, imposes more onerous tests when you are requiring access to infrastructure or requiring someone -- mandating someone to use their property in a particular way or allow others to use their property in a particular way.

Now this case was actually about home delivery of newspapers. The Tribunal may be familiar with it. I will deal with the background briefly. Paragraph 1 in the judgment which is at -- I am sorry, it's paragraph 1 in the opinion which is at page --

THE CHAIR: 116, I think. We don't have pagination.

MR BEARD: Yes, 116. I am grateful. This is a preliminary reference. So this is the European Court of Justice in relation to a reference from the Austrian court that says: "Ask the court whether the refusal by a newspaper group holding a substantial share of the market [inaudible] in daily newspapers, to allow the publisher of a competing newspaper access to its home delivery network or to do so only if it purchases from the group, certain additional services."

So what was going on was Mediaprint, major newspaper supplier in Austria and an alternative, Bronner, wanted to essentially use their delivery system. So access to the distribution system was being considered.

Question one, paragraph 28, so page 123. This is just framing the paragraphs I am going to come to. Question one for the reference:

"In order to determine whether an undertaking has abused a dominant position on

the market contrary to 86, it's necessary first to define the relevant market, secondly to determine whether the undertaking concerned is dominant and if so, finally to determine whether its conduct amounts to an abuse of that dominant position."

We are just interested for today's purposes in the abuse issue which was framed from paragraph 33 onwards, so that's page 124. Following on from paragraph 33, there is then a consideration by the Advocate General of various of the prior case law about refusal to supply cases, including United Brands and Magill, which actually involved intellectual property issues which I'll come back to.

But where I wanted to go to was actually at paragraph 56 on page 132. This under the heading "Appraisal of the issues." So it's the Advocate General first:

"It's apparent that the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of member states, in some cases with constitutional status. Incursions on those rights require careful justification. Secondly, the justification in terms of the competition policy, for ...(reading to the words)... allowed too easily, there would be no incentive for a competitor to develop competing facilities. Thus, while competition was increased in the short term, it would be reduced in the long term. Moreover, the incentive for a dominant undertaking ...(Reading to the words)... will be reduced if its competitors were, upon request, able to share the benefits. Thus, the mere fact that by retaining a facility for its own use, a dominant undertaking retains an advantage over a competitor, cannot justify requiring access to it."

I know these principles are familiar but they are important. Property rights matter. Competition law should only make intrusions upon them when it's truly justified:

"Secondly, there is a complicated balancing exercise that needs to be recognised if competition law is going to make those intrusions because you can undermine long term incentives and investment incentives in relation to infrastructure.

"Thirdly, in assessing this issue, it's important not to lose sight of ...(Reading to the words)... on a downstream market in a final product, to focus solely on the latter's market power on the upstream market and conclude its conduct in reserving to itself downstream markets, automatically an abuse. Such conduct would not have an adverse impact on consumers, unless ...(Reading to the words)... is sufficiently insulated from competition to give it market power."

It then goes on. At 59, it considers the Commercial Solvents opinion from Advocate General Warner. If I pick it up at 61:

"It's, on the other hand, clear that refusal of access may in some cases entail elimination or substantial reduction of competition, to the detriment of consumers in both the short and long term. That will be so where access to a facility is a pre-condition for competition on a related market for goods or services, for which there's a limited degree of interchangability."

So here is the Advocate General explicitly recognising there may be cases where you breach competition law by not allowing access, by refusing access. In 62:

"In assessing such conflicting interest, particular care is required, where the goods or services or facilities to which access is demanded, represent the fruit of substantial investment. That may be true in particular in relation to refusal to license intellectual property rights. Where such exclusive rights are granted for a limited period and that, in itself, involves a balancing of the interest in free competition, with that of providing an incentive for research and development and for creativity. It's therefore with good reason that the court has held that the refusal to licence does not, of itself, in the absence of other factors, constitute an abuse."

So here the Advocate General is explaining the rationale for restrictive abuse to refusal to access and particularly doing so in the context of intellectual property, where you'll have to have invested, invested time, money and creativity, in order to

generate the product.

Then it talks about the ruling in Magill and moves on to consider issues as to what sort of threshold should be applied and a high threshold should be applied. That's 65.

I would just in passing, so I won't need to come back to it -- when I took you to the outline in paragraph 1, the main issue was about access to the network but it's also interesting at 73 that there was an allegation that, actually, there was some sort of tying of services going on that was inappropriate. I just invite you to read paragraph 73. Because, essentially, it's saying tying doesn't add anything to this analysis.

THE CHAIR: It seems to be saying it doesn't add anything because it has not actually sought to tie in, so it's essentially saying there isn't a tie, isn't it?

MR BEARD: I think, no, it's saying it doesn't make any difference in relation to this but I will come back to that in relation to the tying issue. I was only referring to it in passing since we were here.

The point it's making is if you are refusing access to something and you don't reconsider it as some sort of tying allegation because the refusal of access is the key that prevents you getting involved in a service, here the service and the fact that Mediaprint have also said: well, actually, if you are going to use our system, then you'll have to take a whole bunch of other services, just didn't matter because the refusal to access was justified and, therefore, no issue in relation to tying separately arose.

THE CHAIR: It's just I found that a bit hard to reconcile with the last sentence:

"It has not, in its relation to Bronner, sought to tie access to the supply of other services."

Anyway --

MR BEARD: I don't think it matters, I was only referring to it in passing.

THE CHAIR: I understand the point you are making but, of course, that depends on what the tie is said to be. If the tie is correspondent with all of the refusal to supply, then that must be right, mustn't it?

MR BEARD: Yes, if the tie is correspondent with the refusal to supply, no issue arises. Actually, here, the alleged tie in wasn't correspondent with the refusal to supply. But, there, the Advocate General is saying: it doesn't matter because it's the refusal to supply is the critical issue that matters. But I don't take it further than that. Can we then go to the judgment in Bronner, just to pick up where we are in the history. So this is authorities bundle 2, tab 4. Page 208 is the judgment.

THE CHAIR: Yes.

MR BEARD: I can deal with this briefly, having been to the Advocate General's ... opinion. So if we could pick it up at page 221, paragraph 37. So this is picking up the analysis of the abuse point:

"It would need to be determined whether the refusal by the owner of the only nationwide home delivery scheme which uses that scheme to distribute its own daily newspapers, to allow the publisher of a rival newspaper access to it, constitutes an abuse of dominance under 86 on the ground that such refusal deprives the competitor of a means of a distribution judged essential for the sale of its newspaper."

So that's the test that it says is relevant here. Then it considers Commercial Solvents and then Magill which was to do with licensing television listings. At 40, it says I am sorry -- I should really pick it up at 39:

"In Magill, paragraphs 49 and 50, the court held the refusal by an owner of an intellectual property right to grant a licence, even if it's the act of an undertaking holding a dominant position, cannot itself constitute an abuse of a dominant position

but the exercise of that exclusive right by the proprietor may, in exceptional circumstances, involve an abuse."

So this is essentially taking the underlying reasoning from Advocate General Jacobs as to why it is you need high threshold, referring to the case law, taking the reference in Magill to exceptional circumstances and then if you go on to paragraph 41:

"Therefore, even if that case law and the exercise of intellectual property right were applicable to the exercise of any property right whatsoever [because, of course, here we are talking about access to a system, not an intellectual property right because it's newspaper distribution] it would still be necessary for the Magill judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article 86 of the treaty, in a situation such as that which forms the subject matter of the first question. Not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also the service in itself be indispensable to carrying on that person's business, in as much as there's no actual or potential substitute in existence for that home delivery scheme."

So this is the court taking the rationale and setting out the first version of the relevant test to be applied here. If we then briefly move on to page 305 in this bundle which is the IMS case. So this is IMS Health. IMS, if we pick it up at 308, paragraph 4. This is very much more in intellectual property territory, albeit it's a funny sort of intellectual property. What happened is IMS provided pharmaceutical sales data, according to what was referred to as a brick structure which identified particular areas within which pharmaceutical sales were counted and a rival wanted to be able to use that brick structure in order to produce rival sales consultation documents to sell to people. IMS said: no, you can't use our brick structure at all.

Here the relevant paragraph -- well it can be picked up at paragraph 21 on page 313 or possibly 316. So it's asking the question there.

Then if we go over to paragraph 31, 316 in hard copy, 319, you'll see this is consideration of the first question. Then we move on to paragraph 34 which is the reply of the court:

"According to settled case law, the exclusive right of reproduction forms part of the rights of the owner of an intellectual property right, so that refusal to grant a licence, even if it's the act of an undertaking holding a dominant position, can't itself constitute an abuse of dominance."

Then it cites again at 35, the exceptional circumstances test of Magill. Then if we go over the page, having discussed Magill and then at 37, Bronner, 38 says:

"It's clear from that case law that in order for the refusal by an undertaking which owns a copyright [and, of course, we would be dealing with copyright in relation to software] to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it's sufficient three cumulative conditions be satisfied, namely that the refusal is preventing the emergence of a new product for which there's potential consumer demand that is unjustified and such as to exclude any competition on a secondary market."

Then if I may, I will just move on briefly to Microsoft because Microsoft which is in the next tab, starting at 325, essentially sets out the test most clearly. If we could pick it up. Microsoft concerned or there were two elements of the Microsoft case -- I won't go through it in detail, given time but two elements of the Microsoft case. One was to do with permitting access to interoperability information. One can see this at paragraph 36 on page 340, hard copy, 343, electronically.

This is merely providing information to third parties so they can interoperate with Microsoft systems. Not running things on Microsoft itself, just enabling

interoperation. Microsoft said: no, we don't have to allow and enable interoperation because we have intellectual property rights in relation to the software and other components that will be required to interoperate.

But the key consideration is at paragraph 331, page 432 hard copy, 435 electronic:

"It follows from the case law cited above [which includes various of the cases I referred to] that the refusal by an undertaking holding a dominant position ...(Reading to the words)... It's only in exceptional circumstances that the exercise of the exclusive right by the owner may give rise to such an abuse."

So language we've seen before:

"It also follows from the case law that the following circumstances in particular must be considered to be exceptional."

So this is the identification of what constitutes exceptionality for these purposes in the Microsoft case:

"In the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market. In the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market. In the third place, the refusal prevents the appearance of a new product of which there is potential consumer demand."

333:

"Once it's established that such circumstances are present, the refusal by the holder of a dominant position to grant a licence may infringe Article 82 [as it's now become, still 102], unless the refusal is objectively justified."

It was for that reason, sir, I referred to it as the fourth component when you raised it. You have these other three requirements and they are significant, each of them. They would need to be spelt out in order to be able to make out an allegation, put forward an allegation there was abuse in relation to refusal of access.

That is what we say is patently missing from the pleading because they have distracted themselves with a focus on exclusive dealing arrangements. They needed to plead to these components. By not doing so, they do not have a valid allegation of abuse against us in relation to access by a third party store, access by publishers to use of third party store or alternative mechanisms and access by customers to games via a third party store or otherwise circumventing the PlayStation system. That's what needed to be pleaded.

One more case I do need to go to, Google Shopping, because in the skeleton argument it's been suggested that somehow Google Shopping is the secret source that means, actually, all of this case law I have referred to that sets out very clear threshold tests, is somehow not pertinent to what is required here.

This in authorities bundle 2 at tab 12, 832 in hard copy, 835.

Now let me just make one observation. Google Shopping is not an exclusive dealing case at all. Google Shopping is a case where the Commission came along and said: Google, you run general search. There are a range of people that provide what are called comparison shopping services. In other words, if you put a search into a system for a new pair of shoes, that comparison shopping service will find you a range of places where you might get the sort of shoes you might want.

One of the people that does that is Google itself. What the Commission was saying was: if you, Google, as the person that runs general search and has dominance in general search gives particular prominence to your own comparison shopping results and relegates other people's comparison shopping results, that amounts to an abuse of a dominant position by you in relation to your general search. Okay. It's just nothing to do with exclusive dealing.

So we don't understand on what basis this justifies going back to the exclusive dealing case law as the relevant case law. It does not help at all. If what is being

said is: oh, well the categories of abuse are not closed in relation to Article 102, which is the cri de coeur of people trying to come up with novel ideas in relation to abuse, it doesn't assist either because what is absolutely clear from Google Shopping is it does not seek to overturn any of that other case law, Bronner, Microsoft, IMS, that I have been referring to.

If we pick it up -- I am not going to go through it in detail, but if we pick it up at paragraph 1 through to paragraph 20, there is an entertaining history of the development of comparison shopping services with diagrams and screenshots. All very interesting but it goes to Google effectively being accused of relegating others.

Then in paragraph 56, which is at page 843, there is an allegation of the broader discriminatory abuse, which is what is really going on here, a discriminatory abuse by Google, as being alleged by the Commission.

If we could then go on to paragraph 177.

LORD RICHARDSON: What page is that?

MR BEARD: Page 862, 865 electronically.

THE CHAIR: I am sorry, give me the paragraph number again.

MR BEARD: 177.

THE CHAIR: 177, yes.

MR BEARD: So what is being said here is, 177:

"The infrastructure at issue, namely Google's general research pages which generate traffic, including those of competing comparison shopping services, is in principle open, which distinguishes it from other infrastructures referred to in the case law consisting of tangible or intangible assets, press distribution systems or intellectual property rights respectively whose value depends on the proprietor's ability to retain exclusive use of them."

So, just to be clear, this case is all about Google running its search services openly,

allowing other comparison services to operate on them and then relegating them. It's a completely different situation from the one with which we are dealing with here.

I am not just going to leave it at that. If we go on to paragraph 199, which is at page 866 hard copy, 869, this is essentially I think what the PCR relies on. Google turned up and said: aha, but this is a Bronner case. This is actually requiring access to essential facilities. That's what is really going on here.

LORD RICHARDSON: Sorry, Mr Beard, which paragraph are we on?

MR BEARD: 199. It's under the heading "Arguments of the parties". I am just giving you context as to why (inaudible).

The Commission made a completely different finding and Google turned up and said: no, no, this is a Bronner case, even though, as we've seen at 177, there is a very different issue here. What is then argued is that Bronner should apply in relation to it.

If we go on to page 868 hard copy, 871 electronic this is where the findings of the court begin. What you see there, if you go over the page to 869/872, is a description from paragraph 214 through to 217 of the case law from Bronner running through to Microsoft, referring to a number of the cases I have taken you to, explaining the nature of that case law. But I don't think we need to detain ourselves significantly there. The point I am making is none of this is being overturned by Google Shopping.

If we then go on to page 873 hard copy, 876 electronic, to paragraph 236:

"In that regard, as the Court of Justice has held, it cannot be inferred from paragraphs 48 and 49 of the judgment of Bronner that the conditions to be met in order to establish that a refusal to supply is abusive must necessarily also apply when assessing the abusive nature of conduct which consists in supplying services or selling goods ...(Reading to the words)... independent form of abuse [now not

exclusive dealing but an independent form of abuse].

"It should be noted in that regard, as is apparent from section 723 ...(Reading to the words)... internal discrimination between Google's own comparison shopping service and competing comparison shopping services through leveraging from a dominated market characterised by high barriers to entry, namely the market for general search services."

In other words, you let these people in and then you prejudice them. In those circumstances, you could just have a discrimination abuse. But that is not remotely suggesting that the Bronner case law is somehow inapplicable in relation to access to intellectual property rights which was referred to at 177.

Indeed, if we go over the page to 875 hard copy, 878 -- I am sorry, I should probably go back, just the preceding page, paragraph 244, so 874/877, you'll see:

"The obligation for an undertaking which is abusively exploiting a dominant position ...(Reading to the words)... criteria set down in Bronner. There can be no automatic link between the criteria for legal classification of the abuse and the corrective measures enabling it to be remedied. Thus, if in a situation such as that at issue in the case giving rise to the judgment in Bronner, the undertaking that owned the newspaper home delivery scheme had not only refused to allow access to its infrastructure but had also implemented active exclusionary practices that hindered the development of the other scheme or prevented the use of alternative methods of distribution, the criteria for identifying the abuse would have been different. In that situation, it would potentially have been possible for the undertaking penalised to end the abuse by allowing access to its own home delivery scheme."

So it's saying it depends on what you are talking about as the abuse.

"That would not, however, have meant that the abuse identified would have only been a refusal to access. In other words, it's not because one of the ways of ending

the abusive conduct is to allow competitors to appear in the boxes displayed but the abusive practices must be limited to the display of those boxes, and conditions for identifying the abuse must be defined by having regard to that aspect alone."

In other words, they are saying: look, you can have situations where you have a different type of abuse and the solution is access but that doesn't mean that you somehow attenuate, qualify or otherwise change the Bronner/Microsoft criteria when you are talking about access to intellectual property rights.

So we say there is nothing in Google Shopping that changes the analysis we've put forward, and we've set out why it is that the Microsoft criteria have not been pleaded here, and that is the essence of the problem in relation to exclusive dealing. That is also the essence of the problem in relation to the tying issues, because of course what is being said here in relation to tying is in essence that what you are doing is tying together the PlayStation Network, the software and the hardware and you are not allowing people to take parts of it separately.

But what you are doing is essentially saying: you shall not have access to any of the property we have built. It's the same situation. It's the same issue that arises and re-describing it as a tying infringement does not progress matters.

I am conscious of the time. I have about 15 minutes or so more.

THE CHAIR: I think we should take a break. It's a little bit after 1. But just before we do that though, am I right in saying you are recognising that you can have a situation where you might have an argument about refusal to supply.

MR BEARD: Yes.

THE CHAIR: And you might have a separate abuse, and you are accepting that the separate abuse would have the usual threshold test and you don't necessarily apply the refusal to supply. But you are saying that if the alternative to this is effectively a refusal to supply, then you have to apply the refusal to supply.

MR BEARD: You still have to apply the refusal to supply.

THE CHAIR: Does that bring us back to analysis of to what extent it can be said that the exclusive dealing and the tying are independent of the intellectual property right? Does that make sense as a question?

MR BEARD: It certainly makes sense as a question. The tying and exclusive dealing are the extent to which we have granted the intellectual property right. That is what is really the case. What is being said is: you must grant a wider right.

Now calling that exclusive dealing, calling it tying, doesn't get away from the fact that they have to show that competition law requires us to provide access and that is why you need to meet the criteria in Microsoft, because essentially what is being alleged is that we must provide that access.

THE CHAIR: So you say it doesn't really make any difference. As long as there is intellectual property right, it doesn't make any difference as to the extent to which the restriction protects, validly protects that -- and obviously within the construct, you would say within the construct of Bronner or IMS -- it does not make any difference as to whether it validly protects that or it was being used -- there's no exercise of distinction between a valid and an invalid use of the intellectual property right.

MR BEARD: It's a valid intellectual property right. These intellectual property rights are valid and we have -- it is our property. It's not being said that we can't do these things with our property, save for competition law.

As I say, save for competition law means competition law requires the intellectual property licensing that we provide to be wider. That is the allegation that is being made against us.

LORD RICHARDSON: I have a question on this point as well but I am conscious of the time. I don't know if you are about to move on after lunch.

MR BEARD: No, I was going to make some other points so perhaps now is a good

moment.

LORD RICHARDSON: In the Google cases that we've just been looking at, as you say that pre-supposes that Google were allowing access to the general search.

MR BEARD: Yes.

LORD RICHARDSON: Now I don't know, perhaps you do, whether that relationship, as in between Google and the people who were gaining access to the general search facility, was governed by the licensing agreement. I rather suspect it probably wasn't in the sense that it was just open access in some senses.

But my question would be: had it been, then -- in other words, had Google, let's suppose, the first time one opened up the browser it required you to click through and say, "I accept Google's terms and conditions in using the Google website", how is that different from the situation you took us to this morning and the various sets of arrangements that are in place, no doubt, the players/the gamers clicking through and agreeing to the terms and conditions or the developers signing up to a more formal agreement.

In other words, you are distinguishing, as I understand it, the Google case from the present case and I wonder to what extent is that a question of formality rather than substance.

MR BEARD: It's not just a matter of formality, that's certainly incorrect. I think if you are thinking about the proper analogy, it's not the click through that you hit when you are the searcher that you have to focus on, it would have to be the terms of licensing by which other people were providing returns on the Google system.

So if Google had a situation where -- I mean this is where it becomes difficult because Google Search is inherently open. But if you had a situation where essentially you could only be returned on the search if you had entered into some sort of agreement with them, then I guess the situation might end up looking

different. But it's very difficult to see how that operates here because the inherent investment in Google Search is to make an open platform which you draw people into rather than a closed one which people only are licensed to come into. Indeed, if Google Search was only -- if it was only when you had agreed a licence with Google that you would appear on Google Search, I imagine no one would ever use Google Search because it doesn't do what's it's functionally intended to do.

But if you had a situation where you only appeared on a particular search system, I guess an analogy might be closer with some sort of job board or whatever, where you actually had to obtain permission to be posted in a particular way. Then, yes, the situation inevitably becomes different because as soon as you are essentially saying: well, I've got a closed system that people have to buy into. I will permit them to be in for these purposes, but I am not going to permit them to be in to try and circumvent the system I use for overall monetisation, then, as a matter of substance, you are moving away from the position.

So I think the difficulty is it's hard to run an easy analogy with Google Search because it's so much dependent for its value upon being open and you have to be able to posit different systems. That's why I say if you invest in the infrastructure and you build a system and it's a closed system, you have those rights that you have created through the intellectual property and that's why it becomes a refusal to supply and refusal to access case, not any of these other variants, no matter how open the doors to 102 may be.

THE CHAIR: We'll start again at 2 o'clock.

(1.05 pm)

(The luncheon adjournment)

(2.00 pm)

THE CHAIR: Mr Beard.

MR BEARD: Right, I will try and be fairly brief in dealing with the remaining matters. Just before I do, it actually picks up on a question that, Lord Richardson, sir, you asked. Ms Sarathy rightly pointed out that in the Google Shopping judgment itself, after paragraph 177 that I took you to, there is a description about what is saliently different in relation to open infrastructures as compared to closed systems. That's at paragraph 178 and in the electronic bundle, it's page 865.

LORD RICHARDSON: Can you give me the reference again or are you going to go there?

MR BEARD: I was just giving you the reference for these purposes.

LORD RICHARDSON: That's helpful, thank you.

MR BEARD: Let me just finish up on a couple of matters outstanding. I don't want to belabour the point much further. We are not saying we are immune from competition law. We are saying you have to plead it properly in relation to the relevant requirements of the refusal to supply case law. That has not been done. That is the flaw here.

In relation to the points made by the PCR more generally, they say: well none of this matters, this is an exclusion, all this is a tie in and we say: no, that's missing the key access element. There are three other points they make. First, they say: you've not focused on the customers, the gamers, they are the ones that are subject to the exclusive supply. I hope I've explained the position is that what's being requested is access for a third party store, access for publishers to be able to use the third party store and not use the network. And I should say when we talk about a store, essentially it's a piece of software that enables the games to flow through, I think the Tribunal understands that, and that even if you were to say: well it feels like a PlayStation, gamers can only play PlayStation games which perhaps wouldn't come as a shock to most people. In those circumstances, even if you were to

say: we have a concern about that element of it, it does not solve the fundamental problem that what is being required is this much more extensive access for a third party store or for publishers which do require the refusal to supply case law. That's essentially the points we make in our skeleton argument at paragraph 33 onwards.

So we are not ignoring users at all. Absolutely not, they are vital to the way in which we consider these issues but the essence of the case, their counterfactual, is that you have to have these alternative delivery mechanisms and alternative extensive rights provided to publishers.

Another point they seek to make but we don't understand the basis for it is that, somehow, enabling a third party store or allowing developers is just not any kind of fundamental reworking of the system. It is plainly a very fundamental reworking of the PlayStation system. It is completely contrary to the way in which the whole system has been established and as I said earlier, it's requiring us to make available our property in a very different way for the store, as we were discussing, but also for publishers.

That is a much more extensive engagement licence would be required for the software, for the firmware but also to deal with matters that we touched upon in relation to the evidence of Mr Svensson, the encryption dealing with malware security issues, data protection and also, of course, in relation to gaming, where you have an account through the PlayStation Network that records your progress, your engagement with other people, all of those arrangements would have to be modified in order to deal with games supplied through third party stores in addition.

So it's obvious that there are very significant issues here, both as a matter of law but also as a matter of fact, if one is considering this as a summary judgment issue.

The third point made by the PCR is that: well there can't be any refusal to supply because no third party has come forward and asked for it. We say that doesn't

change the basic criteria that must be applied under competition law as to whether or not access should be granted. Indeed, it would be perverse if it were any other way round. We say the fact that people haven't come forward suggests, actually, they recognise that the hurdles they would have to overcome to require us to provide them with that sort of access, are not ones that would ever be justified if such people exist. But as I say, if the PCR's case is that the restrictions we have can't be justified, then that is the case they need to set out by reference to refusal to supply case law.

The last matters I need to deal with briefly are the Steinberg report. I have obviously been able to put my case without any reference to Mr Steinberg's material and it stands without any reference to Mr Steinberg's material. We are arguing about how the legal framework works. He obviously has nothing to say about that, quite rightly. I have been talking about intellectual property licensing. He does not make or purport to make any findings in relation to intellectual property licensing or the need for wider access licences in his report or the scope of those wider licences.

He seeks to pontificate about various matters pertaining to gaming but, with respect, we do maintain our opposition to Mr Steinberg's report. You will have seen the exchanges of correspondence that have occurred in relation to Mr Steinberg. We do not accept that the criteria set out in the Kent v Apple case that Mr Steinberg has relevant expertise, a recognised expertise with some identifiable rigour in relation to his knowledge and approach, we do not think that threshold is made out here. We consider that the material he relies upon are a range of extracts from various websites. He puts himself forward as an expert in a vast range of fields, as we set out in annex 2 to the letter of yesterday.

We've had a response this morning, saying that we shouldn't be questioning his expertise and referring to cases he has testified in, it says. We want to see the

details of what was actually said in those cases and what those cases related to. We have very substantial concerns about Mr Steinberg's knowledge and expertise in relation to any of these matters.

We leave aside the fact that he cut and pasted articles from a namesake into his CV. That was apparently an oversight. We leave aside the fact that he primarily puts himself forward as a futurist in relation to his expertise. He does refer to matters of gaming elsewhere but we do not consider he has any expertise in the video gaming industry that is sufficient to make him an expert for these purposes. Certainly he appears to have no knowledge of PlayStation, PlayStation software or the way in which PlayStation operates technically.

In those circumstances, we are content of course, for the Tribunal to see his report but we do not accept that his assertions about his involvement in the gaming industry at paragraphs 13 to 15 of his witness statement sufficiently evidence a basis for expertise. This morning's letter placed emphasis on the fact he had been involved in Intel's AppUp store. It says, notably, that he had been involved in consulting on Intel's AppUp store. We are looking into this further. It appears that the AppUp shut down in 2014, so insofar as he was consulting on matters relating to it, this was a long time ago. I am not going to rehearse further of the details but we continue to oppose Mr Steinberg as a proper expert in these proceedings.

But for the purposes of today, we can take it fairly briefly because Mr Steinberg is not saying that changes to software or IP licensing won't be required. He makes various speculations about how you can come up with solutions to security problems at paragraph 48 in his witness statement. Indeed, at 49, he thinks that Sony can almost magically create solutions to problems created by more extensive access licensing on its system. If only that were the case. But he is in no position to speculate as he is doing, in relation to those matters.

This is precisely the problem, that Sony would have to modify its systems in order to meet a wider access condition.

He makes assertions about what is and isn't possible to run on PlayStation software, paragraph 51 of his witness statement. He appears to have no expert knowledge at all about PlayStation systems and we don't understand on what basis he can be saying that.

In relation to further assertions he makes in his statement concerning the way in which the systems can be operated, dealt with and run, we maintain that he is not in a position to deal with those sorts of issues, particularly at paragraph 73 of his statement. And of course, a large part of his statement is concerned with issues related to the interpretation of restrictions, where we don't understand on what basis he has any particular expertise in relation to the interpretation of the scheme to which I took you earlier.

In dealing with all of this, it's obvious that from the start of his report he looked at these matters, focused on the idea that closed systems are problematic and doesn't recognise explicitly, although he does refer to other console manufacturers, the fact that all of the three console producers, the three major competitors in this industry, all operate on the same basis in relation to these matters. That's a vital component of any analysis which is not considered in his report.

In those circumstances, we say he doesn't advance matters in any event in relation to the case we are putting, both on the law and on the practicalities of licensing.

I won't go back to the case law in relation to strike-out summary judgment. It's dealt with in our skeleton argument. We refer to it. The Tribunal will be familiar with it.

Then in relation to the tying and bundling issue, I touched on that earlier, relabelling it doesn't change the obligation to deal with these matters by way of a refusal to supply analysis. But there's a further point there we've highlighted in our skeleton

argument, that we do not accept that there is any proof of demand for the PlayStation Store, separate from the PlayStation or the PlayStation software, separate from the PlayStation system. If there is not separate demand, there is no case for tying in the first place to be articulated. We say that those matters have not been properly dealt with.

There is some limited evidence that's been adduced by the PCR in Mr Harman's report but none of that properly addresses the factors that are actually set out by the European Commission in its relevant guidelines. I will just give you the reference it to. That's authorities bundle 2 at tab 14 and that's at, I think, page 390. Let me just double-check that reference.

The simple point is that the PlayStation system is a single integrated product, as the evidence I took you to earlier articulated. There are no stand-alone suppliers of electronic stores outside the context of PCs. Neither Xbox nor Nintendo offer separate stores. There is no demand from customers we are aware of for a separate store but none of this matters, in light of the fact that you cannot re-label a refusal to supply abuse, a tying abuse and, therefore, attenuate the criteria that need to be pleaded to and met in relation to this claim.

I will provide the reference to the Commission material --

LORD RICHARDSON: The reference is 1046 in the electronic bundle.

MR BEARD: I am grateful, Lord Richardson, 1046. It's paragraph 390. My apologies if my notes are poor, I am grateful to Ms Sarathy.

Unless I can assist the Tribunal further. I am grateful for the short indulgence.

THE CHAIR: Yes, just one question, Lord Richardson may have a question as well. I want to ask you about the summary judgment strike-out hurdle.

MR BEARD: Yes.

THE CHAIR: So just to be clear, what you are saying about that, I think you are

largely putting this as a strike-out point and saying as a matter of law, the case can't be put other than as refusal to supply and has to be pleaded that way.

MR BEARD: That's why we put it as a strike-out.

THE CHAIR: Yes.

MR BEARD: Insofar as it's being said: oh but there will be no issue in relation to the scope of licensing and so on, we say: no, it's plain and clear that there would be a requirement for more extensive licensing and in those circumstances, that licensing would be substantial.

THE CHAIR: That's the thing I wanted to ask you about. So isn't it the other way round, don't you need to show that there's no prospect of there being a reasonable factual dispute about that?

MR BEARD: Well in relation to those issues, we've set out our position in relation to our factual evidence and we say that there is no good evidence that is provided against that, that --

THE CHAIR: Yes.

MR BEARD: -- relates to the PlayStation system. Mr Steinberg doesn't purport to know anything about the details of the PlayStation system. There's no other evidence out there but we do emphasise the fact that this should be seen primarily as a legal issue.

THE CHAIR: Yes, no, I understand that, I just wanted to be clear about when we get to the summary judgment bit, what falls within that.

MR BEARD: That's what we say.

THE CHAIR: (Several inaudible words) when you do get to that summary judgment bit which is largely about the feasibility of mandating access to the system, you say you put up evidence that says it can't be done, which is largely Svensson.

MR BEARD: It would be highly intrusive and extensive.

THE CHAIR: Says Mr Svensson and Mr Hirano, I think, isn't it?

MR BEARD: Yes, exactly.

THE CHAIR: You say to the extent it's been answered, it's been answered by Mr Steinberg and (inaudible) -- and you say we shouldn't be paying regard to his evidence because of largely -- you didn't mention the point about admissibility in relation to the timetable and responsiveness, you are still taking that point.

MR BEARD: I am so sorry?

THE CHAIR: The point about whether it's responsive evidence or whether it's new, the point about the timetable I understand your point --

MR BEARD: We've set it out in the skeleton, I was trying to deal with things briefly.

THE CHAIR: I was wondering whether it's still live.

MR BEARD: All of those points are still in play because we say: look, if you are coming forward with this case that you are saying, somehow, we are mandated to licence, we say that's wrong in law and you haven't pleaded it out properly, but if you were going to make that case, you needed to put evidence to it which we could answer. You didn't do that. You've come up with this character who provides a report. His evidence doesn't amount to anything but in any event, it was far too late to be putting this in, in the context of these proceedings.

What you have not done is answered the factual material which is from people that understand these systems and the sort of expert evidence you are putting in here, so-called, doesn't deal with those issues.

THE CHAIR: There is a point, isn't there, about this being quite early in the proceedings?

MR BEARD: Of course.

THE CHAIR: I understand you are entitled -- (Overspeaking).

MR BEARD: There are a number of problems that arise because it's early in the

proceedings. One of the problems that arises is experts are coming forward without actually having a proper factual (inaudible) and it's one of the concerns that arises in relation to both Mr Steinberg and Mr Harman. But if one looks at the citations from Mr Steinberg, he's selected all sorts of magazines and Investopedia and YouTube and so on, as his citations but that's a self-selected group of references and that's, in part, problematic.

We recognise it's early. We recognise there isn't full evidence to be dealt with but the Tribunal needs to be acutely concerned about that perspective when it's thinking about what weight, if any, to be placed on that sort of material, particularly when it is adduced late in this process.

THE CHAIR: Thank you very much.

MR BEARD: I am grateful.

THE CHAIR: Mr Palmer.

Submissions by MR PALMER

MR PALMER: Yes, thank you, sir. Well like Mr Beard, I am going to begin my remarks by providing some contextual points, context which I hope will be relevant, not only to the argument which I will then develop in response to the strike-out application but also the subsequent arguments relating to the Pro-Sys test and so forth which I'll go on to deal with, no doubt tomorrow morning.

So this is an application, obviously, as the Tribunal knows, for opt-out collective proceedings on behalf of the class of an estimated 8.9 million PlayStation gamers in the UK and the PCR believes that they have overpaid for digital games and in-game content because Sony has been able to extract monopoly prices by requiring that all such content be purchased exclusively through its PlayStation Store.

Now let's start with some real basics, much of which I know the Tribunal already knows but just to provide that context. Obviously, a console plays video games, we

know, but it's essentially a specialised computer. Its component parts: processing units, graphical processing units, memory and so forth, but it's a computer put to a specialised use, dedicated for use to play video games. There's been various iterations. The first one came out in 1994. The PlayStation 2, 3, 4 followed, 4 in 2013. Most recently, PlayStation 5 in 2020. The (inaudible) on those, that Sony develops and publishes some games itself but most games are developed by third parties, such as Electronic Arts and Activision, as you heard earlier --

We'll look in a moment at some of the evidence relating to the balance of third parties versus third party games and the revenue that generates for PlayStation. We say that's going to be a critical part of the context in which the consideration must be given to the issues before the Tribunal.

Now, originally, the only way to play a game on the PlayStation in those earlier models was by inserting a disc into a disc-drive. Physical media: CDs, DVDs, then Blue Ray, as time developed. But since PlayStation 3, it's been possible to download games without a disc digitally and store them on an internal drive. It was pretty niche in the days of PlayStation 3 but, obviously, since then, there's been massive growth in the sale of digital games, as firstly, residential broadband capacity has increased and become more widely available, greater bandwidths and so forth and secondly, to take advantage of that, PlayStation 4 and 5 had increasingly bigger internal storage capacity, internal drivers, to store digital games, rather than having them on external Blue Ray discs.

So there's now no need for a disc-drive at all. So much so that the PS5 came in two different models. The cheaper model, known as the digital edition, having no disc-drive at all and the only way to play a game on those virtual consoles is by downloading. So the purchasers, the cheaper model (audio distortion) limited to buying any game through the PlayStation Store.

Those with the disc-drive, the more expensive model, can still, obviously, and generally do still use that. The main purpose of the disc-drive can often be backwards compatibility. They have old games from the PS4 with a disc, they can still play that game without having to buy it separately again digitally. So that will be the main advantage but the steer and the trend is towards digital growth.

It might be helpful to take out one figure in bundle A at tab 19, page 366. Mr Harman's report. Am I right in thinking in this bundle that the electronic numbers match the page number? No, is it different again?

LORD RICHARDSON: Additional three pages, add three.

MR PALMER: Is that consistent across all --

LORD RICHARDSON: No, in A it's add three.

MR PALMER: Thank you, that's really helpful. I will try and get the hang of it. It should be 369 electronically. In any event, you should see paragraph 469 with a figure 42 at the bottom of the page, where you can see the trend over time, this is just in the last six years, of games sold via physical and digital channels. So growth from 27 per cent in 16, most recent data and 21 per cent and 66 per cent. That bar is shown lower than the one for 65 per cent which I think is an error but you can see the trend has been developing towards digital games over time.

Originally, games were sold for a single purchase price. Typically, on a physical media, you simply buy to play the disc or buy to download the digital game and now many games also sell in-game content. Again, in the case of many well known games, such as Fortnite, the game is given away free but the monetisation of that game comes from that in-game content because you buy outfits to distinguish yourself from other players, get kudos in the game or special skills, weapons, whatever it may be, using internal currency, a virtual currency which you buy again on PlayStation, only through the PlayStation Store.

Now when PlayStation games are sold on physical media, they are distributed by publishers and available to customers from a wide range of retail outlets. There are specialised video game shops on the high street, such as Game. There's larger retailers, like WHSmith or supermarkets who will stock a section dealing with games, physical games, as well as you can get online, obviously, from the likes of Amazon and limitless sources of supply. So there's vigorous competition between these outlets who often compete either on price or with special issues of the game which might include bonus content: buy it from us and you get some upgrades which you can use in the game, is another dimension in which that competition operates.

But when it comes to digital games, the position is entirely different. There's only one place from which this can be bought and that's the PlayStation Store and that's accessible on the PlayStation itself or it's accessible on Sony PlayStation's own website. You can carry out a transaction there and that then gives you the permission to download the game on your PlayStation. But either way, it's through the PSN, the PlayStation Network which is the proprietary online network operated by Sony.

As you've heard, Sony sets the retail price in each case for those digital games. On every such transaction it takes a percentage. There is a figure which has been widely reported. I say no more than that. The Tribunal will have seen Sony's evidence as to the percentage it charges.

The upshot, therefore, is there's no retail competition at all for those digital games and that has a consequence, we say. The price of digital editions are, on average, 41 per cent higher than the same game in its physical edition. You can see that if you still have Mr Harman open at paragraph 4.6.17 on page 368, hard copy or 371, electronic. Where Mr Harman there describes, based on a sample of 50 games comprising the 30 best selling PS4 games and 20 best selling PS5 games currently

available on the PS Store, "On average, digital editions of games are priced 41 per cent higher than physical editions."

There is a further reference to page 394 or 397, electronic. Those figures are broken down a little bit more. In table 6.2, you see that comparison of digital and physical game prices. First party games are split out. Sony's own self-published games split out from the third party games. You can see the numbers of games. The average digital price in each case, the average physical price in each case, and therefore the average price premium for digital. 29 per cent premium for Sony's own games, 44 per cent premium online for third party games, averaging out at 41 per cent.

It will be a matter for us to prove at trial, obviously, but we say this is a consequence of the limited competition in retail for digital games as against physical games.

THE CHAIR: Just to be absolutely clear, to make sure we are understanding what you are showing us there in this comparison, I think it follows, doesn't it, we are talking about a single game which is sold digitally and physically and then comparing the price and then doing that on eight occasions or 42 occasions?

MR PALMER: If you buy God of War on a disc, I don't know specifically that game but a specific game on a disc, you can also buy it direct digitally --

THE CHAIR: Same game and it will, according to this, be --

MR PALMER: It's a different price and we say that is a direct result of Sony's limitation of the means of distribution of digital games.

MR BEARD: To be clear, we don't accept the comparison or these numbers, but that's obviously not for today.

MR PALMER: No, that's for trial. No, this is our case.

THE CHAIR: Understood. Yes, thank you.

MR PALMER: That's despite the fact that, of course, when you are supplying a game digitally, you are removing the cost of the third party retailer from the

process, as well as the costs of providing that physical media. In other words, the other costs, the server capacity. To deliver that game digitally and that, obviously, will also have to be looked at. But the expectation has been that the move to digital games rather than physical games would tend to drive the price down rather than up. That hasn't happened, we say because of this restriction on distribution.

So too when it comes to in-game content on the PlayStation. Sony also had a near monopoly for PlayStation games. With only very limited exceptions, all transactions go through the PlayStation Store. If I take you to page 336 of the same report, that's 339 digital, you just have a screenshot based illustration of what the process of buying in-game content actually is. This is taken from Fortnite game and you can see screenshots from the PlayStation, figure 3.4. The first step, the consumer selects the currency purchase from within the game. So he's buying a number of V-Bucks which can be exchanged within the game for various game items but they have in each case, beneath the V-Bucks, a price expressed in GB pounds.

This is all within the game. Over the page, step 1(b), you select the currency purchase from within the game again. On pressing purchase, you get into step 2, it takes you into the PlayStation Store which you see in that second screenshot on that page, where the transaction is done through the PlayStation Store, 1,000 V-Bucks for £6.49. That then gets processed by PlayStation and they take that commission figure which I've mentioned from that transaction.

Figure 3.5 and 3.6, you can then spend your virtual currency within the game. Also there is a Fortnite in-game item shop in the virtual currency, where you can go. Also, you can buy, sorry, through a real world currency, as an alternative within the game. That's figure 3.6. Again, as you see over the page, 3.7, that leads you again into the PlayStation Store to complete that transaction, even if you avoid the virtual currency.

So at a limited exception is something called cross play or cross commerce, where

it's possible if you play Fortnite on another device, such as an Xbox or a PC and you make a transaction for the currency in that form, you can, to a limited extent, carry that through to use on your PlayStation but that is limited. There are various hedges and limits on that ability which are detailed in Mr Harman's evidence. I won't take time up with that now but the basic point is almost all in-game purchases operate through the PlayStation Store.

Now it's right to note that formerly also, it was possible to buy digital download codes from third party retailers and publishers but since 1 April 2019, Sony withdrew that facility.

So this restriction of both games and in-game content is achieved in part through the terms of the GDPA, as you've seen, and in part through the restrictions on the user agreements. I am going to start with the GDPA. Now there are various versions in the bundles that you have. You were taken by Mr Beard to the version at tab 28, page 856 or 859, electronic, onwards. That's the 2022 version -- the version which postdates the bringing of this claim.

I have no doubt Mr Beard's absolutely right in saying there's not going to be a material difference between the terms he showed you and the earlier versions of agreements which govern this claim but I am a cautious man and prefer to refer to the terms which were actually in effect at the time, even if there are some differences of wording.

Some of these versions are marked as confidential in part but the confidential parts are not shown on the versions you have in this primary bundle. There is still a dispute as to what is or isn't confidential amongst them, so I am going to play extremely safe. When we make this application about confidential material, I hope one of the products of that will we'll be able to give a definitive, agreed version of a single GDPA which the Tribunal can work from for the purposes of producing

a judgment, of which you are confident about what is confidential and what is not confidential. I am going to be extremely cautious and use the version at tab 23, page 637 or 640, electronic.

This is a 2018 version which you'll see at the top of page electronic 640 has some redactions within, marked with a triple star because it was produced for the purpose of a Securities & Exchange Commission request. So matters which were then considered confidential which is not identical with what is now considered confidential, were redacted and this is a publicly available -- this is the version we first worked from in bringing the claim because it was a publicly available document.

Should the Tribunal be intrigued by the presence of asterisks anywhere and want to see the full version, then of course there's one at tab 27 which is a 2020 version. That's page 800 electronic which is unredacted. I think for the purposes of my argument, I can do it entirely from this redacted version but if there's something of which you want to see more, then that's the way to do it.

Can I start then on page 639 or 642 electronic and cover some of the same territory that Mr Beard covered but perhaps just going in a little more detail. One of the concerns that we have which I think perhaps is reflected by some of the questions that the Tribunal put to Mr Beard, is that the reference, in slightly arm waving terms, to intellectual property rights is not always that precisely defined. Actually, it's important to disaggregate various IP rights of various references to licenced trademarks which appear in this and to understand what is, in fact, a licence to use intellectual property and what is not and the extent to which, if at all, as Mr Beard claims, the restrictions on the distribution of digital products are somehow part and parcel of that granting of access to intellectual property which we do not accept.

I will come, obviously, to the arguments on refusal to supply but no surprise to the Tribunal to learn that where I end up with is it's not a case of refusal to supply at all.

What we are asking for is the removal of a restriction on existing supply, and not for a further supply from Sony. Alternatively, if and to the extent there's any element of supply being requested, that does not transform it into a refusal to supply case, as the authorities demonstrate.

That is going to be the significance of the Google case to which I will come in due course.

So looking at electronic 642, the preamble, this wasn't a click through agreement. This sample was actually with a specific game publisher, EA, as it happens, but nothing turns on that. Similar wording which notes that under the first paragraph -- the second paragraph reading:

"SIE [which I will refer to as Sony] design and develop certain core technology relating to its systems and operate proprietary network services through PSN, including PlayStation Now. "

PlayStation Now has since been superseded and forms part of what's now called PlayStation Plus or PlayStation Plus Premium, I believe:

"Publisher desires to be granted a non-exclusive licence to develop, publish, have manufactured, market, advertise, distribute or sell ...(Reading to the words)... provisions of this GDPA and Sony is willing to grant such a licence."

That's the preamble. Then at paragraph 3 on the next page, electronic 643, The conditional licence grant which Mr Beard referred:

"Subject to the terms of this GDPA, Sony grants to publisher for the term, non-exclusive, non-transferable licence ...(Reading to the words)... as follows."

Now it's important we start looking separately at these elements to try to identify at this early stage of trial, of this litigation, what is actually being referred to. Like Mr Beard, I am going to ask you to keep a digital finger in this page as we flip to the definitions section which is at 691 or electronic, 694, contained in schedule 1. So

that's going to involve a little bit of toing and froing. I don't know if you want to have a hard copy or one or other open as well, if that's easier.

But the first grant is to use the SIE materials solely to develop and test PlayStation-compatible products. What are the SIE materials here? They appear in the definitions at 697 electronic. They are defined to mean "The development tools, the terms of this GDPA, Guidelines, all the information obtained from the developer website", and other various things all listed there, including four lines down, "SIE intellectual property rights relating to the development tools."

Development tools are defined at 694, electronic, to mean the hardware tools and software tools. They are both individually defined. Hardware tools is defined in electronic 695 to mean "The hardware components of the development systems used for development of PlayStation-compatible products or portions thereof, that Sony may provide to licensed publishers or licensed developers", and software tools appears at 698 electronic, 695 hard, which means:

"Software [including various matters, including firm ware] and documentation relating to any systems that are supplied by Sony to publisher for the development of PlayStation-compatible products."

Now, of course, almost every other definition leads to further definition. I am not going to go through every single one, you will be able to refer to that in your own time but you will see SIE materials are specifically limited to, including insofar as intellectual property rights are concerned, to development tools, specifically what it takes to build a game to be compatible with the PlayStation.

Now just pausing there, bear in mind the importance of third party publishers to Sony. We'll come to the two sided video game market arguments tomorrow but a sneak preview, we say it's important to distinguish the different markets which have been defined in this case and you will have seen, the Tribunal will have seen in this

case, they are particularly focused on what has been defined as the digital distribution market which we say is not identical with the video games market which is not a market we have defined but is referred to by Dr Caffarra and referred to in my learned friend's submissions loosely and generally without definition.

Loosely and generally without definition, I can well accept that insofar as consoles are concerned, they operate on a two-sided basis. They want to attract gamers, they want to attract publishers. Attracting more publishers makes the platform more attractive to gamers and attracting more gamers makes the platform more attractive to publishers. That's well established in the literature, we don't argue with that proposition at all. We say you can't just read that across into the digital distribution model and say the same somehow applies.

That is an argument we'll come to tomorrow. But the point I take for today's purposes is, of course, on Sony's own case, they are absolutely right to say they need publishers and they need and want to encourage publishers to develop games for their system. We can see an extent of that in this bundle if you turn to Svenson at paragraph 51 which the Tribunal will find at electronic 293.

Just to understand the scale of this, paragraph 51, where he's discussing the various margin commissions which are charged. The final sentence:

"Third party games are the great majority of Sony's games sales by units, 84.6 per cent ...(reading to the words)... 2021 and gross revenue, 86.9 per cent in financial year 2021."

So it's important just to have that in mind, although it certainly is a first party publisher, the business model, as described by the two factual witnesses from Sony, depends on third party publishers coming forward and making these games and Sony actively wants them to do so. Mr Beard takes a point nobody makes them. Well, of course, on one level that's true but this is the basis upon which the business

model works.

That licensing of IP rights to the development products is entirely discrete from what happens later because it applies both, of course, to games which are disputed later, physical, as well as digital. It makes no difference. It's the product itself, the game which Sony wishes to be developed.

So going back to 643 and returning to clause 3, the GDPA, the second thing which is licensed here at 3.2 is to:

"... publish, distribute, supply, sell, rent, market, advertise and promote digital products to end users, to reach appropriate SIE, its own company, through PSN and to provide PlayStation ... products to others for exploitation."

Again, digitally delivered products, we may need to look at the definition for that, the Tribunal will understand, but through PSN, the definition of which is at electronic 696 and it refers to what's described as:

"The proprietary online network operated by Sony, accessible via the systems, including services provided as part of or through that network, such as PlayStation Store".

So this is a licence to do all those activities, publishing, distributing, supplying and selling, through the PlayStation Store, as part of the proprietary PlayStation Network. It's because it's described as proprietary, no doubt, that this licence is given to use it. But the grant of that licence, as Sony wishes, we'll come to that in a moment, does not necessarily entail a refusal of the ability to deliver via other means, other than through the PSN. Outside the scope of 3.2, this is pro-activity licensing distribution through, specifically, the PSN PlayStation Store.

You'll see the priority that Sony gives to its PlayStation Store at 3.3, where the publisher has exercised its right to distribute digital products through PSN under 3.2 or:

"... where the requirement of such exercise is expressly waived, to have the equivalent physical media products manufactured by designated manufacturing facilities, according to those facilities' terms."

So, again, that ability to produce physical media is linked, unless waived, to that right to distribute digital products through the PlayStation Store.

3.4, where they do produce physical media products, of course not all games necessarily will, but they then have the licence to do that directly to end users or to third parties for distribution to end users. Those are the shops, supermarkets and so forth that I mentioned earlier:

"To use [3.5] the licensed trademarks in connection with the manufacturing, packaging, marketing, advertising, promotion and sale and distribution of licensed products."

And, indeed, as we understand it, Sony requires the use of those trademarks and the PlayStation logo, the typeface and so forth, the design of the jacket, for example, of a physical media in which you find it, the marketing materials around the digital products, that is all the subject of a licensed trademark.

So there again, it's specific reference to a form of intellectual property in the shape of licensed trademarks but that, of course, is not a necessary grant. I supplied some further materials yesterday to Mr Beard and his team and asked whether or not specific reliance was being put on this provision, 3.5, to use the licenced trademarks. Didn't receive an answer to that enquiry.

At this stage I just make the broad point that even in the absence of a licence to use licenced trademarks, there is nothing to stop a publisher from marketing a product as a matter of IP law, as being PlayStation compatible. And I will give you some materials on that. Even if you don't have the right to use the trademarks. Just as a coffee pod producer can sell products which he says are Nespresso compatible,

a games manufacturer could market a product as being PlayStation compatible, without using licenced trademarks. There are some authorities on that which I will deal with a bit later.

But those are the relevant rights in terms of IP. Development materials, access to the proprietary PlayStation Network and use of the licensed trademarks.

Now when you come to the restrictive provisions, because section 6 deals with -- that's at page 646 electronic. There is a section entitled "Development of PlayStation compatible products, product assessment and quality assurance". That creates the right to develop, 6.3, "Assessment and quality assurance", which requires licensed products to pass Sony's assessments and format quality assurance testing, set forth in the Guidelines, before distribution.

Pausing there, as Mr Steinberg points out, there'd be nothing to stop Sony requiring such a process, even if there were an alternative digital distribution avenue. Bearing in mind that Sony would wish to distribute a game through its PSN, that would be a necessary step in respect of that software but regardless of whether that software was also distributed via another means. So all the points about compatibility with the PlayStation style, X means accept, all this sort of thing or the security standards of the game, can still be applied if that game is to be marketed through the PSN. It doesn't mean suddenly there is a problem being introduced if it's also sold through another platform, so far as that software is concerned.

We note at 6.6:

"Third party tools. If a publisher uses any third party tools to ...(Reading to the words).. for its use."

So the Sony development tools are not exclusive in any way. We have had various evidence given by Mr Beard this morning about the use of SDKs which doesn't appear in any evidence before the Tribunal and at section 9 which is at electronic

654 onwards, we have a section dealing with distribution and you have paragraph 9(a):

"Distribution of any licence product is subject to Sony's assessment, testing and approval and unless otherwise mutually agreed, shall be distributed ...(Reading to the words)... 9.2 as applicable."

9.1, on the next page, relates to physical media products. 9.2, digitally delivered products and 9.2.1 is the specific provision, GDPA, which restricts the digital distribution through the PSN only. And this is the prime part of the GDPA of which we complain. There's been various suggestions over the course of the litigation, including by Mr Beard this morning, that we didn't mention this in our claim. That is incorrect. It's specifically pleaded. Our complaint was distribution through the PSN only and referred to 9.2.1. We can go to it if necessary but “unless expressly approved in writing, digitally delivered products, any subscription services associated, shall be distributed through PSN only, in accordance with this section 9”.

Our essential point is striking that point through on competition law grounds does not amount to a request for a further supply. There may be consequences as to what alternative, if required, if Sony were required to strike that through, there may be consequence as to what alternative arrangements are put in place and the degree to which Sony would facilitate various digital distribution alternatives or not. Some of those might involve contractual arrangements between Sony and third party distributors. At this stage we don't know.

But striking that through does not amount, in itself, to a supply.

At 9.2.7 which is on electronic 658, you see that there is further provision:

"The publisher shall provide digital products to Sony for supply on or through PSN by submitting it through a process described in Guidelines or otherwise communicated."

And there's various provisions in relation to that and product submission and there is

no obligation on Sony to supply any digitally delivered product until it has accepted the relevant product submission.

So that is, again, a means by which Sony exercises control on what is sold through the PSN. It's part and parcel of that system.

THE CHAIR: So just to understand what you are saying. You are saying that the only restriction that really matters for present purposes, nothing to do with any of the things in paragraph 3, it's actually this paragraph 9.2.1, that's the offending principle, so therefore you are not saying --

MR PALMER: Granting licences in paragraph 3, restriction of doing anything else for any other third party, is in 9.2.1.

THE CHAIR: So you say that simply puts aside the refusal to supply point because that's not what it's about. I know you are going to come on to that.

MR PALMER: Yes.

THE CHAIR: But then you say you accept that there may be some consequences of that. In this case, the consequences are going to be counterfactual consequences, aren't they? Then we get into the question what is the competitive position likely to have been absent the restriction and then Mr Beard (several inaudible words) difficult and you say that would still likely give rise to some form of solution, no doubt you are going to argue.

MR PALMER: Yes, that's a matter for trial, not for summary judgment.

THE CHAIR: He says he's popped up the point that it's just too difficult and then there isn't anything against that, other than Mr Steinberg and of course the --

MR PALMER: (Inaudible due to overspeaking) the evidence before the Tribunal is rather more limited, and I am going to come to that.

THE CHAIR: Yes.

MR PALMER: Just before I leave GDPA, can I come on to section 15 at electronic

665. 15.2, "Digitally delivered products", which makes clear that publisher revenue, consideration of rights granted under 9.2.2:

"Each applicable Sony company shall pay to the publisher the applicable wholesale price and/or mutually agreed revenue share ..."

That latter will, of course, be applicable to in-game content, not necessarily exclusively:

"... for the digitally delivered products covered by products submission, accepted by Sony ..."

And final sentence there:

"... other than the wholesale price and or mutually agreed revenue ...(reading to the words)... not entitled to any other fee in connection with that."

And then over the page:

"... unless otherwise expressly stated or mutually agreed."

Then at 15.2.2, as you've seen and you see it:

"Each same company has the sole and exclusive right to set the retail price to users for digitally delivered products sold or otherwise made available for purchase on or through PSN, unless any ...(reading to the words)... them and the applicable Sony company may modify any digitally delivered products' retail price at any time without notice to publisher and the publisher shall not interfere with the applicable Sony company ...(reading to the words)... as much prior notice ... "

And so forth.

THE CHAIR: I don't think -- just looking at it quickly, I have not studied it -- if you go back to 15.1, we are talking about physical media products, there's no reference there to pricing, is there, or to revenue?

MR PALMER: No.

THE CHAIR: So on the assumption you've got a game which is going to go through

PlayStation Store, so that's therefore permitted to be distributed physically, there are some constraints about physical distribution but they're quite different, really, from these provisions about revenue sharing and pricing.

MR PALMER: Entirely different.

THE CHAIR: Yes.

MR PALMER: So that's what happened on the GDPA publisher side but, of course, meanwhile, Sony also prevents users technically and contractually, through user terms, from installing other software to purchase games and add-on content in any way other than through the PSN. So again, if we turn to electronic 941, albeit tab 31/938 for hard copy users.

THE CHAIR: Sorry, can you give me that reference again?

MR PALMER: Sorry. Electronic 941.

THE CHAIR: What's the hard copy one, sorry?

MR PALMER: Sorry, hard copy 938. Hard copy 938. Tab 31.

THE CHAIR: We are making you work for it, I am sorry.

MR PALMER: I am beginning to sound like Prince Harry. 938, tab 31. That is, we were saying this earlier, this is in connection with 6.6, you must not use any means to bypass or disable able or to gain unauthorised access or interfere with any account or network connected to the PSN, so no way round that, as Mr Beard proudly showed you earlier.

At page 953 or 950 --

LORD RICHARDSON: The first reference you used Mr Palmer which was -- did you say 6.6?

MR PALMER: 6.6, on page, electronic, 941. 615, Mr Beard showed you both of those paragraphs earlier. Again, the short point is you are not allowed any way round this PSN lock-in.

Then you were shown also at tab 32, 939 or electronic 942, PlayStation's Network terms of service and user agreement. So this isn't a grant of IP rights but an ordinary service and user agreement; the small type that you say you've read the terms and conditions and you click yes when you haven't but it's one of those. At 10.6 on page 950 or 953 electronic, at 10.6, again you may not bypass or get round this in any other way.

I mentioned the only alternative for buying in-game content earlier. I just want to give you a reference for that as well. The relevant provisions set out in our claim form tab 2, page 74, electronic 77, which sets out -- sorry, I have given you the wrong reference. Let me give you a better reference. 77, 56(e), is what I am after, so that may be 75, sorry, and that's electronic 78.

Sorry, even that's wrong. Sorry, 74 or 77 electronic at (e) at the bottom of the page, where the restrictions on cross-platform distribution include (ii), placing a number of restrictions on cross commerce which are then listed over the page, 1 through to 5. I won't take time on those now but that's where those matters are set out. It's a minority use in any event.

LORD RICHARDSON: Mr Palmer, just an issue with, sorry, something you mentioned some time ago but I've been wondering about it. Am I right in understanding that until -- I think you gave us a date of April 2019, was it possible for someone to buy, as it were, a digital product from some other source rather than the PlayStation Network and then you would get a code or something and download the product itself from the --

MR PALMER: My understanding is that would still ultimately go through the PSN because of the download function. It's pleaded, if you look on page 73 or 76 electronic 56(a) you'll see that reference.

LORD RICHARDSON: Yes.

MR PALMER: (Several inaudible words) codes by third party retailers and publishers.

LORD RICHARDSON: I am just interested in how you'd characterise a download code, in the sense that is that something that is requiring distribution through the PSN, would you have it or was it not, in the sense that if I understand correctly, I am buying my code from someone else?

MR PALMER: Yes, you can buy the code from (several inaudible words) check out on a range of cards that you can buy --

LORD RICHARDSON: Yes.

MR PALMER: Yes, you can buy it from someone else, and that will entitle you, having paid your purchase price to WHSmith, to use that card to enter a code on the PlayStation and download the game digitally.

LORD RICHARDSON: Yes.

MR PALMER: Now the precise contractual arrangements between the various parties in that transaction we don't have detail of.

LORD RICHARDSON: No.

MR PALMER: I assume, unless told otherwise, that that was all obviously Sony approved and still taking a commission but it allowed at least a prospect, I don't know how widely it was used, for retailers to compete on price by reducing the margin that they took, (several inaudible words).

LORD RICHARDSON: Leaving the finer points to which you are not in a position to help me with anyway, leaving that to one side, I am just interested as a matter of characterisation really, would I be right, therefore, that you would say that that did represent an alternative means of obtaining a digital product which has now gone?

MR PALMER: Yes.

LORD RICHARDSON: So, yes. No, that's helpful. So you see that as being -- that

is an alternative source of obtaining a digital product?

MR PALMER: Yes, it's somewhat hybrid because it still uses the PSN.

LORD RICHARDSON: Uses PSN for distribution but not for sale. That's helpful.

MR PALMER: I don't know, of course, what conditions Sony placed on the sale of those and whether there was contractual freedom for retailers to reduce the price on those offers or chuck them in with something else or whatever. I don't know but, of course, having that sort of avenue creates that sort of potential for competition but that has been academic since 1 April 2019.

These are the digital distribution restrictions, as we plead them to be, in that paragraph 56. Since you have it open, you'll see at the top of 74, electronic 77, our complaint was (ii) through the PSN, that carries on from (c), imposing the contractual restrictions in the GDPA by which digital games and add-on content may only be distributed through PSN. Obviously, a reference to 9.2.1 as pleaded on the previous page specifically, so that's that point. So those are the digital restrictions on which we claim and we claim those amount to an infringement.

So let me now come on to legal characterisation of those matters.

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

MR PALMER: Yes.

THE CHAIR: Is that a convenient time?

MR PALMER: Yes, that would be a good point.

THE CHAIR: Yes, so we'll come back at 20 past.

(3.10 pm)

(A short break)

(3.20 pm)

THE CHAIR: Mr Palmer.

MR PALMER: I am grateful, sir. I am going to proceed now with the basis upon

which we pleaded these complaints, the pleading of course being the focus of Mr Beard's attack, and the relevant part of the pleading begins at page 77 or electronic 80, behind tab 2, with the market definition. Market definition, Mr Beard has made plain, is not accepted by Sony but it's not the focus of the strike-out or summary judgment application so it has to be assumed as things stand.

We see at paragraph 63 there are four key product markets relevant: console market, PlayStation system software market, the PlayStation games distribution market and the PlayStation add-on games or add-on content distribution market and the abusive conduct relates to those latter two markets. Those markets are then set out in the ensuing paragraphs. The geographic market is defined as the UK and then dominance is at page 81, electronic 84, where again, that is not the focus of any summary judgment or strike-out application so it needs to be assumed.

We assert that Sony is dominant in each of those markets and, indeed, has a monopoly or near monopoly in respect of three of them, all but the console market in which it has over a 50 per cent share.

Then that is all, as you can see, footnoted there, supported by Mr Harman's first report. Market definition in section 4, dominance in section 5. I won't take time over those references which are there set out.

So then we come to the pleaded abuses, three heads of claim: exclusive dealing, tying and excessive pricing, each well established heads of abuse. Only the first two, obviously, the subject of this application to strike-out.

So let's deal first with the refusal to supply challenge. The test for strike-out, first of all, though. I won't turn it up because it's familiar ground. The reference we've given is the Wolseley case, paragraphs 14 to 15, which you'll note in authorities bundle 1 at page 355. It might be 358 electronically, I am guessing. Really to summarise well known principles, I am sure there will be no difference between us on this.

There must be grounds for bringing a claim and its prospects must be more than fanciful. The Tribunal must not conduct a mini trial. It can look at uncontradicted accounts and documents. It should take the facts and the law at their highest in the PCR's favour. If a decisive short point of law or construction is suitable for summary determination, then the Tribunal should grasp the nettle and decide it. But if disclosure or testimony is needed to decide a point, there should be a trial on that point. Those are the familiar points in relation to summary judgment and, of course, strike-out is pursued principally as just being a short legal basis for saying it doesn't get off the ground at all.

We say each of these abuses, exclusive dealing and tying, are properly pleaded and disclose a reasonable cause of action, with realistic prospects of success. Let me deal with exclusive dealing first. I am going to turn to paragraph 16 of our skeleton argument. I don't know if the Tribunal has those in hard copy or is using electronic copies of the skeletons as well.

THE CHAIR: I think they are in the supplemental bundle.

MR PALMER: They are. If you don't have them separately, already.

THE CHAIR: I have them separately.

MR PALMER: They're in the supplemental bundle, respectively, tabs 1 and 2, so our skeleton argument is from page 1 onwards, happily. So if in the supplemental bundle, whether that translates into electronic bundle page 1 --

LORD RICHARDSON: It's five, interestingly.

MR PALMER: Interesting, my mental arithmetic and agility but I will do my best to add five to references to the skeleton.

So paragraph 16 will be on electronic 11, where we summarise the basis upon which this complaint is brought. We rely on Hoffmann La Roche, 89 to 90, for the proposition that:

"Abusive exclusive dealing obligations are those which ...(Reading to the words)... of the dominant undertaking from accessing alternative sources of supply and deny other potential suppliers access to the market."

We say that arises from the (inaudible) facts, see the content of digital distribution restrictions which I have shown you and their effect, with the result that PS users are deprived of any choice as to their means of accessing those products.

Now we go on after that to see what the counterfactual position would be and I will turn to that in a moment and obviously acknowledge that Sony seek to raise a defence of objective justification, the burden being on Sony in that respect.

Now Hoffmann La Roche came under attack in terms of its appropriateness to describe this alleged abuse from Mr Beard. Mr Beard had a number of points about Hoffmann La Roche. He said it was very old and about vitamins and he said it was not about IP. That's not a proper basis upon which to distinguish it. It might be helpful to turn it up again. It's in authorities bundle 2 at tab 2, 156 which -- it might be 159 in that bundle. It's paragraphs 18 and 19. Sorry, 89 and 90 rather:

"An undertaking which is in a dominant position in the market and ties purchasers by an obligation [in this case] to obtain all [in this case] of their requirements exclusively from the said undertaking, abuses its dominant position within the meaning of the treaty, where, as here, the obligation in question is stipulated without further qualification."

We don't need to deal with rebates. That's an apt description of the conduct, summarised by reference to -- in summary, referring to 9.2.1 of the GDPA and relevant provisions of the user agreements. At 90:

"Obligations of this kind to obtain supplies exclusively from a particular undertaking are incompatible with the objective of undistorted competition, unless objectively justified. They are not based on an economic transaction ...(Reading to the words)...

designed to deprive the purchaser of or restrict his possible choices of source of supply and to deny other producers access to the market."

We say that's a wholly apt description of this form of restriction, limiting supply to the PS Store and allowing, therefore, Sony to avoid normal competition by setting the retail prices in its sole discretion.

Mr Beard went on to look at Intel which I am not going to turn up. He said this old case law has moved on. All Intel does was to develop one particular limb of that test and added nothing of relevance for our present purposes.

The impact of this abusive conduct is to foreclose any competition in the market for the distribution of digital content to PS users and this is a scenario in which the Commission recognises that it is likely that consumers as a whole will not benefit. I am going to take you, if I may, to the Commission's enforcement guidelines to which Mr Beard referred, although I don't think he turned them up.

They are in authorities bundle 2, tab 14, page 1043 or 46 if ... I just want to show you four paragraphs of that document, starting at 1043/1046 electronic. Paragraph 6, just to look at this from the high level. First of all to ensure we don't lose sight of the big picture:

"The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring undertakings which hold a dominant position do not ...(Reading to the words)... competing on the merits of the products or services they provide and in doing so, the Commission is mindful that what really matters is protecting an effective competitive process, not simply protecting competitors and this may mean others leave the market."

That's at six. Paragraph 19 which is found on page 1045 or 1048 electronic, under the heading "Foreclosure leading to consumer harm":

"The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that ...(Reading to the words)... effective competition by foreclosing their competitors in an anti-competitive way, thus having adverse impact on ...(Reading to the words)... or reducing consumer choice.

"Anti-competitive foreclosure is used to describe the situation where effective access of actual or potential competitors to suppliers or markets is hampered or eliminated as a result of the conduct of the dominant undertaking, whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers."

Then at paragraph 34 which you may want to place in context, looking at page 1048, electronic 1051, you can see here, we are in a section headed "Specific forms of abuse", (a), exclusive dealing and at 32, by way of general introduction:

"A dominant undertaking may try ...(Reading to the words)... referred to as exclusive dealing. This section sets out the circumstances most likely to prompt the Commission to take action."

Then in respect of exclusive purchasing, 33:

"Exclusive purchasing ...(Reading to the words)... dominant undertaking."

And then at 34, if I can direct your attention to the final two sentences:

"The Commission will focus its attention on those cases where it's likely the consumers as a whole will not benefit and this will in particular be the case if there are many customers and the exclusive purchasing obligations of the dominant undertaking taken together have the effect of preventing the entry or expansion of competing undertakings."

We say our situation exactly. At 36, first sentence:

"The capacity for exclusive purchasing obligations to result in anti-competitive foreclosure arises in particular where, without the obligations, an important

competitive constraint is exercised by competitors who either are ...(Reading to the words)... obligations are concluded or who are not in a position to compete for the supply of the customers."

Again, we say that is our position. The final sentence:

"If the dominant undertaking is an unavoidable trading partner for all or most customers, even an exclusive purchasing obligation of short duration can lead to anti-competitive foreclosure."

There is some reference in my learned friend's skeleton to the idea that reference to an unavoidable trading partner is somehow a give away. We are not really dealing with exclusive dealing but that's not the position at all.

So here the entire demand, obviously digital PS content is being satisfied by Sony alone, with that very limited exception of cross commerce to which I have drawn your attention. So, to put it another way, given that Sony is dependent on quality content from third party publishers, we say it's a product of its market power to be able to restrict publishers to its own distribution channel. We say that's not competition on the merits.

We reject the submission that what we want is a wider licence to IP. We just want to remove the unlawful restriction. That's the focus of our claim.

Turning back to the way that is pleaded out takes us to the next and important section of the pleadings which is at page 87, electronic 90, which is applicable to both of the exclusionary abuses but including our present concern, exclusive dealing, and here is where we plead the counterfactual. And, of course, this is important because the entirety of Mr Beard's focus was on one particular form of counterfactual. This is what we've pleaded:

"Absent the digital distribution restrictions, the digital distribution markets would have been contestable which would have resulted in increased competition. In particular,

competing games distributors would have entered the market and offered alternative means of distributing PlayStation games and add-on content, including through alternative electronic stores. Moreover, at least some publishers would have made digital games and add-on content available for direct download by PlayStation users, directly from their websites and PlayStation users would have used those other forms of distribution to purchase PlayStation games and add-on content."

Then at 105, we say the introduction and entry of alternative distributors would have led to competition in the amount of competition which would have placed downward pressure on the rates of commission and we give an estimate based on Mr Harman's evidence that the commission would have been in the range of 12 to 20 per cent, instead of the present commission understood to have been typically applied. And that, of course, will be a matter for further refinement upon disclosure and the upon expert evidence being developed further.

So that is the counterfactual. But you'll note this is not pleaded to be the single use case of an alternative distribution app being placed on the PlayStation Store to which Mr Beard's submissions were exclusively directed.

That is certainly one of the possibilities which we say could arise in the counterfactual scenario and there will be questions to consider as to what level of agreement, if any, would be required specifically to do that. The PlayStation hosts a number of apps, not just games. You can download apps, for example, to use Spotify, Netflix, Disney Plus, to stream content in that way through your PlayStation, through apps which are placed on the PlayStation. We see at this stage no technical impediment why a similar app could not be downloaded either to effectively allow the download of games in a way that the PlayStation Store does or to allow the streaming of games, similar to the way one can stream video content from Netflix or audio content from Spotify.

As the Tribunal may know, there is a cloud gaming industry which operates on that basis. There are a number of alternatives and Mr Steinberg's evidence explains what those alternatives might look at. I will look at that in a moment as well but paragraph 104 is broadly drafted and is not limited to an alternative electronic store on the PlayStation itself, although it certainly includes that.

In the pleading -- we go on to complete the pleading points. I don't think any point is taken against me so I'll just give you references. Paragraph 129 which is page 94, we plead the loss (audio distortion) and quantum by reference to benchmark, counterfactual commission rates, recognise the potential effect of pass-on which can only be assessed following disclosure and we plead at paragraphs 136 to 137 as to the basis upon which distribution of damages would occur. Because each purchaser of digital content from Sony has a unique PSN number identifying their account. We say that the distribution of damages can be done directly, calculated by reference to each individual user on a fairly precise basis later on down the line. Again, that's set out, sir, 136, 137 and in Mr Harman's reports.

So what was Sony's response to this? They say, looking at paragraph 104 again, to 105 specifically. Which is for your reference, their response at paragraph 13, they seek to paraphrase that by saying in other words, Sony would have been obliged to make other distribution methods available by making its system interoperable with such methods. It introduces the notion of obligation on Sony to act.

It says at paragraphs 14, we can see that the claimant’s claim is "really one of refusal to supply", and alternatively, such a claim is necessary in order to recover anything other than nominal damages.

I just want to look at that response. You've heard from Mr Beard this morning but, again, I want to look at the way it's pleaded. It's in Sony's response at tab 3 at paragraph 22 at page 121, electronic 124.

LORD RICHARDSON: Mr Palmer, the references you covered, 13 and 14, was that also to the response?

MR PALMER: It was the response, sorry if I wasn't clear.

LORD RICHARDSON: Thank you.

MR PALMER: Looking at electronic 124, paragraph 22:

(Inaudible) is to reframe that complaint. So “the substance appears to be an allegation that Sony prevented the launch of any other digital PlayStation Store or prevented any other means of distribution from being made available by imposing technical limitations which would make it impossible."

“The implication is that Sony should reverse a decision it's taken to use only PlayStation Store”, yes?

But (b):

"... give access to its system to a competing store front and/or competing distribution mechanisms by fundamentally altering its software in order to offer interoperability to such competing mechanisms” and “fundamentally altering its IP licensing arrangements with game publishers, in order to facilitate their using a putative alternative store. In essence, the allegations are that Sony's unlawful refusing to supply access to its hardware and software and furthermore, refusing to alter its IP licensing arrangements with game publishers."

So that's the point, of course, at which Mr Beard has focused. At paragraph 24:

"The technical changes which the PCR envisages would entail a fundamental reworking of the PSN and require Sony to completely re-architect and re-engineer its software, in order to make it accessible to other distribution mechanisms and undermine the selling point."

So that is the pleading. I ask rhetorically, where's the evidence on this? You see the footnote there, footnote 14. You see there's a reference to Mr Svensson's evidence

at paragraphs 76 and 82. Bearing in mind the claims being made here, fundamental reworking, re-architecting or re-engineering and fundamentally altering IP licensing arrangements with game publishers. Svensson 76 and 82, that is at tab 15 and 76 is at 297, 300 -- sorry, that's not the right reference. 76 is at -- 297. Sorry, electronic 300. 76, marked as confidential but no longer maintained, that claim. So the requirement that games are only distributed with Sony's approval:

"It's important for ...(Reading to the words)... user experience on the PlayStation system that all games and other content submitted by third parties go through rigorous approval process before going live on the store. This is crucial because players expect consistency. For example, when they press the X button, it means confirm and not another function and that approval process allows Sony to identify and address such inconsistencies. Secondly, this approval process is also an important protection against malware ...(Reading to the words)... PlayStation system would be threatened."

But, of course, the objection isn't to any of the checks at all. As I said earlier, the assumption would be not that the PlayStation Store would not be able to continue to operate but simply it would have competitors. So all the software which would still be available through the PlayStation Store, would still go through the user quality experience checks and technical safety checks. None of that supports the sweeping claim made in the pleading.

Then the other paragraph is 82 which is over the page at 299, 302 electronic:

"Content sold must pass the rigorous quality assurance process, including security and privacy. An unmoderated alternative store would present new and unwelcome risks to PlayStation players ...(Reading to the words)... would in fact be running unsigned code."

Again, pausing there, just to ask why? Supposing the alternative store distribution

solution was an app on the PlayStation Store. Then that would be itself subject to precisely the same quality control and safety security checks which Sony applies to any other app which goes on its store because this initial app would have to be downloaded initially through the store itself in order to install it in the first place, on this hypothesis. Equally, the games available through it would be the same games, the same software as available through the PSN. No explanation given there as to the broad claims made in the pleading.

One other paragraph not referred to but which I assume the pleaders had in mind which is paragraph 28, which is page 283, or 286 electronic. There it's asserted, and this is the high point five lines down:

"The introduction of an alternative store would require major technical changes to the PlayStation system and would result in an increase in risk and degradation in player experience in various areas for players and partners alike."

That, I think, is a reference to what comes later, security risks and user experience. It's said this would present serious challenges for Sony because of those privacy and security risks for Sony, its players and partners and the current PlayStation system is designed with security in mind:

"The significant challenge to allow third ...(Reading to the words)... and this would have to be subject to rigorous assurance and approval checks by Sony."

So, again, it's limited to this idea of the app on the Sony system. It's simply asserted there by way of evidence to seek summary judgment in respect of these matters in that single paragraph, in effect, saying major technical challenges and no reference at all in the evidence anywhere to the particular IP arrangements, the nature of the licences which Sony contends would have to be granted and so forth. And for the reasons I developed earlier, we just simply don't accept that's so.

That is the limit of the evidence. We heard other evidence from Mr Beard earlier

today, who said there is a retailer, third party retailer, alternative distributor would require access to Sony software systems, to the firmware, he said. Access to install matters on hardware, deal with PlayStation customers and deal with publishers, all of which he asserted would require access to Sony's intellectual property, all of which is entirely unevidenced and not consistent and certainly not borne out by the terms of the GDPA, where the IP rights referred to are limited to development tools, the use of the PSN and to the trademark provisions in relation to the advertising promotion and selling of the resulting products.

So we say that if that evidence is to be maintained, it is to be an issue for trial and not suitable for summary judgment.

MR RIDYARD: Mr Palmer, just a question that occurs to me here. In your counterfactual, do you envisage that, let's say with a third party retailer, that Sony would have the right to charge some sort of royalty to that third party retailer?

MR PALMER: Yes, no difficulty at all with Sony continuing to take whatever royalty it takes. That's quite distinct from the level of the commission that it charges for the service of distribution. So the royalty which it earns on the sale of games will apply equally to physical media games. One would anticipate the royalty is no different. We can see what the evidence is on that but that would be the working assumption. What we are concerned with is not Sony's ability to earn royalty on sale of games which are compatible with the system it's invested in and developed, we are concerned with it charging a higher price than would pertain at competitive conditions.

MR RIDYARD: So the royalty would need to be controlled in some way.

MR PALMER: Yes, there would have to be a distinction between the royalty and the distribution charge but one would expect to see pretty clear contractual provisions as to what that royalty is. We would certainly look at that.

Again, it's a matter for evidence in due course.

So what's our answer to the idea that this is, in fact, as is asserted, a refusal to supply case? The answer is, in part, legal and, in part, evidential and I am going to start with the legal answer. First point: an exclusive dealing obligation is a discrete stand-alone head of abuse. It's not necessary to support it with any allegation of refusal to supply. Even if, which we don't accept, the abuse is liable to constitute an implicit refusal to supply, I'll develop that in a moment, and on Sony's own evidence, there has been no refusal to supply because there's not been any express request for such a supply, a point which Mr Beard is keen to minimise the significance of but you'll see direct authority for the proposition that such express request and refusal is required.

So if we turn in the skeleton argument to paragraph 20 which is on page 29 or 14 electronically, of supplemental bundle 1, you see there the allegation made against us, that it's necessary to PCR to plead a refusal to supply and satisfy conditions originally laid down by the Court of Justice in Bronner. It says we can't do and certainly hasn't pleaded and it's in this context that we refer to the case of Google.

Now the Google case is in authorities bundle 2 at tab 12. Mr Beard was very keen to distinguish it and say it has no significance at all because it does nothing to cut down the conditions which are applicable on a refusal to supply case. We don't suggest that it does in any way cut down the conditions which are applicable in a genuine refusal to supply case. But what Google does is provide a valuable explanation as to circumstances in which an independent abuse which might happen to include an element of physically refusal to supply, still can be established by reference to that abuse alone, without bringing in the conditions of refusal to supply, the Bronner conditions.

There's good intuitive reason why that would be so. Let me start by just dealing with

Bronner before we look at Google. I don't need to turn it up because the Tribunal has seen it already and will recall the facts, that a newspaper producer wanted to access its own competitor's delivery distribution network to distribute its own newspaper and that refusal to allow it to do so was found not to be abuse.

You were taken through the Advocate General's opinion and the sort of policy considerations which justify the imposition of a relatively high test, in circumstances where the complaint is one of refusal to supply.

But that particular form of circumstance is very far from what is complained of here. In fact, it's almost the precise opposite of what is complained of here. The reason why a high test was imposed in Bronner was because the complaint was that an undertaking should facilitate the distribution of directly competing products, in that case newspapers, using its own system against its will. It didn't want to distribute its competitor's products and it could have been made to be or an (inaudible) which refused to distribute its competitor's products. We're in precisely the reverse position here.

Our complaint is not that we want access to a distribution system as in Bronner, it's that we don't want to be locked into Sony's own distribution system. We want the freedom for publishers to establish or third parties to establish their own distribution systems and not be required to use Sony's.

THE CHAIR: I understand why you say that but isn't the difficulty that if you follow through the process, you still have to get access back into the system to get to the consumer, so you can't -- you can argue about where it sits in our ecosystem but if, just for argument's sake, you said the console is the essential facility, let's say for argument's sake that's what it is, if you are a consumer, you can't actually get access to a game of any sort unless it somehow comes through your console and so, ultimately, there is a point there about having to use the Sony system in order to

deliver a competing product to the thing that Sony is selling into that console.

MR PALMER: We are concerned with users' ability to use their PlayStation to buy games they have bought through a different route other than the officially sanctioned PlayStation Store. So to that extent, yes, there still has to be a nexus with the PlayStation. The game they have digitally bought has to be delivered somehow to the PlayStation environment, so you can pick up the PlayStation controller and play it.

But that doesn't require supply, we say, by PlayStation of IP which is the point that Mr Beard emphasises. It rests its entire case on the assertion that IP is different. What is being sought here, he says, in other words, is interoperability which requires the delivery of an agreement of IP rights.

THE CHAIR: Well I think there may well be a point about how different IP is from other property but I certainly think Mr Beard was putting it at both levels. That he was saying there is a property right that's been developed here which is a bit like Bronner because Bronner is not about IP either, it's about having built something and somebody else using it. Obviously, as you get into IP, you perhaps run into different considerations as to why you can justify a different test. Obviously, there will be lots of questions about whether having a different test at all is a sensible thing, but given we seem to have one, I do think Mr Beard is saying: even putting aside the IP, and I take all the points you've made about why this may not be about IP, but there's something here that belongs to Sony that it has built. In a sense it's saying: we've built a closed system deliberately and now you are forcing us to open it up, in order to give access through it to a consumer and therefore you are, by definition, using our property to do that.

MR PALMER: Yes, again, this loose terminology being used my learned friend talks about "using our property" or "get off our land", and various other phrases which

were being deployed. We simply say we are not in that territory. Of course, there has to be interaction with the PlayStation for someone to play a game on PlayStation but that association, that contact point does not automatically trigger conditions of refusal to supply. I will show you that in Google in a moment.

So, yes, they have developed a system. Yes, we are talking about use of that system. The fact that they have (audio distortion) to be a closed system, as Mr Beard emphasised when he took you to Mr Svensson's evidence that it was a closed system, introduces an entirely circular proposition. It begs the very question: yes, we know you've done it on purpose and not by accident, we know you see some advantages to you for doing so and you claim various advantages for your users, the ultimate consumers, for doing so, but we say you've overstated those. Other mechanisms can be used to do this and that simply saying: oh this is closed so, therefore, we are entitled to exclude competition in relation to the distribution of digital products in the way we can't in relation to physical products, doesn't come close to satisfying any level test.

Let me show you the Google because its helpful in understanding this interaction between the different forms of complaint, in particular our complaint.

You were taken within that to various passages explaining how the Commission had put its complaint in that case. In particular, you were taken to the allegation at paragraph 56. That's at page 843 or 846. We are in authorities bundle 2, 53.

LORD RICHARDSON: Fifty three did you say?

MR PALMER: Sorry, paragraph 56, page 843 or 846 electronic, where the Commission, you were shown, described the abuse that Google was alleged to have committed as follows and, essentially, the complaint was of preference, saying its own shopping service above others. And you were also taken then to 199 which is at electronic page 869, where Google argue:

"The Commission was not entitled to require Google to give competing ...(Reading to the words)... case law."

Being the Bronner conditions. So Google argued what was being complained of here was a refusal to supply, so you were taken to that.

But you weren't taken to 212 on electronic page 871. The reference given at the time was 214 to 217, so we didn't look at 212 but let me take you there anyway. We can see it's caught there under "Findings":

"The Commission concluded that the conditions set out in Bronner were not applicable, for three reasons in particular. The Commission found in the first place, abusive ...(Reading to the words)... In the second place, that the practices at issue did not concern a passive refusal of access to Google's general results page but active favouring and in third place, it was not necessary to transfer an asset or enter into agreements in order to bring the abuse to an end."

Then 219 at page 873, you weren't taken to:

"Contrary to the Commission's contention, what is at issue in the present case are the conditions of the supply by Google of its general search service by means of access to general results pages for competing comparison shopping services, such access being as is ...(Reading to the words)... generating traffic on the services' websites and, therefore, ultimately revenue."

So the court did not agree with all respects in which the Commission had described that practice and it did require access. Then it came on to analyse what the consequences of that were and if we go to paragraph 230 which is at page 875 electronic -- sorry, just for completeness, at 874 electronic, perhaps just deal with that first, paragraph 223:

"It must be noted that faced with that issue of access, as is apparent, the Commission did not refer, at least not expressly, to Bronner in finding abuse to have

been established. On the contrary, it relied on the case law applicable to ...(Reading to the words)... in order to conclude anti-competitive practices at issue were established and found there was leveraging."

So making clear that access issue that was in play was not analysed by reference to Bronner. So then the question is: well should it have been analysed by reference to Bronner? We get that discussion from paragraph 229 on 875, where that point is introduced.

“The practices at issue, as Google maintains, are not unrelated to the issue of access, they can nevertheless be distinguished in their constituent elements from the refusal to supply at issue in the case of the Bronner which indicates the Commission's decision to consider them in the aspect of criteria other than those specific to that judgment."

At 230:

"Not every issue of or partly of access [like in the present case] necessarily means that a condition set out in Bronner relating to the refusal to supply must be applied. That is so in particular, as the Commission indicates, where the practice at issue consists in independent conduct which can be distinguished in its constituent elements from a refusal to supply, even if it may have the same exclusionary effects. A refusal to supply that warrants application of the conditions set out in the judgment of Bronner, implies that it's express. That is to say that there is a request or in any event, a wish to be granted access to consequential refusal and that the trigger of the ...(Reading to the words)... lies principally in the refusal of such and not in an intrinsic practice, such as in particular, another form of leveraging abuse.

"Conversely, the lack of such an express refusal to supply precludes practices from being described as a refusal to ...(Reading to the words)... might ultimately result in an implicit refusal of access, they constitute, in view of their constituent elements

which deviate, by their very nature, from competition on their merits, an independent infringement of Article 102."

"As confirmed by the Advocate General, all or at the very least most ...(Reading to the words)... of exclusionary practices are liable to constitute implicit refusals to supply, since they tend to make access to a market more difficult.

"Nonetheless, the judgment of Bronner cannot be applied to all of those practices without disregarding the spirit and the letter of Article 102 TFEU, the scope of which is not limited to abusive practices relating to indispensable goods and services within the meaning of that judgment."

235:

"It must, moreover, be observed that in a number of ...(Reading to the words)... in relation to margin squeezing and tied sales", a point to which I will come back to when we get to the tie in complaint.

So the core point here is that, yes, you may well require access in the counterfactual. The abuse complained of may well implicitly amount to refusal to provide that access, that interaction with the PlayStation system in our case. That doesn't transform it into a refusal to supply case where you have an independent form of abuse, as established under Article 102 which leads, again going back to the big picture, to innovaton of competition and prevention of competition on the merits.

LORD RICHARDSON: Just before we move on. Two questions. The first one is why do you think that the explicit refusal is so important? It just seems a bit odd, and it may just be me. In the sense that the fact that should a party -- is the court to be understood to be saying that simply because a party regards a refusal as automatic or inevitable, and they don't make a request, that somehow they are able then to sidestep the requirements that are laid down in Bronner? That just seems odd.

MR PALMER: I think that's what Mr Beard was trying to hint at. I think the answer is

that what's being referred to is a more sort of structural complaint or can be more structural than that behaviour which is being complained of. There may be nothing structurally put in place for that that's happening, but in the case of newspaper distribution, for example, an actual case of refusal to supply, you know, there's nothing in principle preventing them from doing so or threatening the integrity of their system or anything like that. It's just that they didn't want to because they didn't want to promote a competitor's product.

So the only thing which created that nexus with a claimed abuse was that request, was that refusal. In our case we have a different form of abuse, exclusive dealing, which results from the inclusion of that contractual term implicit as part of what is described as the magical closed system which is invoked to justify any practice complained of.

But it's there in black and white as, you know, this system cannot be accessed, not just by virtue of 9.2.1 but all the other provisions that Mr Beard showed you saying you can't get round this, you can't do this, we are limiting this and so forth.

So the complaint is the introduction of that series of hurdles or barriers -- barriers rather than hurdles, to competition on the merits, and that doesn't turn on whether or not there has been an express request or not.

If there were no such barriers -- sorry, just to complete the point -- in writing which were complained of, so someone did say: oh, well, I see there's nothing to prevent -- then that would require express refusal potentially, but this is a discrete abuse in its own right.

Mr Beard's attempt to distinguish the case, he is saying: well, this all turned on a different form of abuse. But that is to misread Google. This is not something which is confined, as the paragraph just shows, the particular form of abuse which was alleged and established in that case, preferential, self preferencing treatment.

As the rationale for that expressly explains at 230 through to 235, the concern is much more general and it's applicable to any other well established abuse under Article 102, including inter alia margin squeezing and tied sales. There's no reason in principle why that shouldn't relate to exclusive dealing as well.

Just to complete that point -- I am sorry, the points are coming out in a bit of a rush but they are all sort of linked and need to be understood together -- if we were to go back to the Commission Enforcement Guidelines in authority 2, 1054, 1057 electronic -- sorry, the same bundle at tab 14. I am sorry, I am getting lost in my bundles.

It's the same bundle digitally, but physically I have it in a different bundle. Physically, authorities bundle 2, tab 14, Commission Guidelines. If you look within that to paragraph 75, which is on electronic 1057 I think.

LORD RICHARDSON: Yes.

MR PALMER: Under "Refusal to supply and margin squeeze", the two dealt with together there, at 75:

"The Commission starts from the position generally speaking the undertaking, dominant or not, should have the right to choose its trading partners and to dispose freely of its property ...(Reading to the words)... the existence of such an obligation" --

(The stenographer requested Mr Palmer move closer to his microphone)

MR PALMER: I am sorry, I will do better, and I will slow down as well; that will help I know as well. I am sorry.

"The existence of such an obligation, even for a fair remuneration, may undermine the undertaking's incentives to invest and innovate and thereby possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant undertakings not to invest or to invest less in the activity in

question and competitors may be tempted to free-ride on the investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interests of consumers", points familiar from the Advocate General's opinion in Bronner, you'll recognise.

Then at 77 -- sorry, 76 is the typical competition circumstance in which it arises. Then 77:

"Other types of possibly unlawful refusal to supply in which the supply is made conditional upon the purchaser accepting limitations on its conduct are not dealt with in this section. For instance, halting supplies in order to punish customers for dealing with competitors or refusing to supply customers that do not agree to tie-in arrangements will be examined by the Commission in line with the principles set out in the sections on exclusive dealing and tie in and bundling.

"Similarly, refusals to supply aimed at preventing the purchasers from engaging in parallel trade ...(Reading to the words)... are also not dealt with in this section."

So there is an acknowledgment there as well that the mere fact that there is a refusal to supply as part of the conduct which is complained of, whether that's expressed or implicit, is not enough to trigger the full extent of the refusal to supply conditions, and that's what explained in Google and it's reflected in these guidelines which go back to 2009.

Now what Mr Beard wants you to believe is that if you point to something that he asserts would be required to be supplied -- that, as a matter of fact, is in dispute, that's the first point, we'll come to the evidence on that in a moment -- but, secondly, he says the mere fact that anything needs to be supplied is enough to bring it in to a refusal to supply category, a very high test required, we can do what we want with our property, and we say that simply is not made out. It's enough to establish on the authorities an abuse in the form of exclusive dealing or, indeed, as I'll come to in

a moment, tie in.

THE CHAIR: How do you draw the line though? Because you can see at one end of the possibilities you might have a completely independent abuse, and then of course he may say this is their case, but Mr Beard saying at the very least there are elements here where the logic is that at some stage it's going to be necessary to connect to the console and therefore use the facility.

MR PALMER: That's the access requirement. That's the access. That's like Google.

THE CHAIR: So you are not saying -- my question I think is: is this a matter of judgment as to which point you flip over? There is a sufficient correspondence, if you like, between the said -- the alleged independent abuse, in fact it's not independent, the alleged abuse and the need to access the facility, that you make a judgment that there is a refusal to supply case. Is that how we are supposed to decide these cases?

I know you are saying this is not one of these cases, but surely there has to be some rule or mechanism by which one can draw a bright line.

MR PALMER: A trigger identified by the court is the express request and refusal, an express refusal, and that may be why it seeks to define it in that way, to provide that line. But, for present purposes, all I need to do in response to a strike-out application is to say: this is at the very least arguable. There is no single knock out point of the kind that Mr Beard relies upon. I will come to the evidence in a moment, as I say. He relies upon this contested claim that we require IP rights in order to offer any form of alternative distribution.

Even if he were right to some extent to the contrary, that's not enough to transform an abuse which we say is clearly made out by the straightforward and indeed blatant exclusive dealing obligation under 9.2.1 of the GDPA, the related user agreement,

inter alia refusal to supply case, the refusal to supply being consequent upon and subsequent to the striking out of that provision.

Now there may be questions as to how far Sony is required to go to facilitate access and in what form, and there may be arguments about what would then be permitted to happen in the counterfactual and what would happen in the counterfactual.

Can I just take a moment?

THE CHAIR: Yes.

LORD RICHARDSON: I have a question that follows on from the Chairman's question. I don't know if you've finished.

MR PALMER: Yes.

LORD RICHARDSON: When the Chairman was asking you about, as it were, is it a matter of judgment or is it a bright line distinction essentially, and you were saying, as I understood it, possibly it's a bright line distinction and you rely on the refusal, as it were; and that's paragraph 232 of Google that you've taken us to, to page 875 in the electronic bundle.

But that's not the only point. There are two points in that paragraph. The other one is that the trigger of the exclusionary effect, the impugned conduct, lies principally in refusal as such and not in an extrinsic practice such as, in particular, another form of leveraging abuse. They talk about that example there, then cite a whole series of cases following, some of which we've been shown.

So, in other words, the first point I want to put to you is there's plainly something else in terms of the way that the court is distinguishing between cases which are, as it were, refusal to supply and cases to which that higher standard should not apply.

The second related point, which I think goes to what you were talking about in answer to the Chairman's question about the counterfactual, and I would be grateful if could you try and unpack this a little bit for me, is to what extent is the

counterfactual relevant to the finding of abuse? In other words, I understand, and you've pled, you've set out your counterfactual in order to show causation, as it were, and tie you to your damages claim. But in terms of the abuse, why is that relevant to that?

MR PALMER: No, it's not something that of course it's necessary, as you suggested in the question, part of the cause of action.

LORD RICHARDSON: Yes.

MR PALMER: Which is a statutory duty to show (inaudible), and (several inaudible words) counterfactual by which to assess what difference that would have made. But the abuse is the prior step of the exclusive dealing. That's what we need to establish.

LORD RICHARDSON: That's the point I wanted to put to you, was that what I would understand here we are dealing with is we are asking ourselves: what is the legal test that we should be applying to determine whether or not there is a finding -- sorry, whether or not a finding of abuse should be made.

Now to that extent I am slightly struggling with the extent to which the counterfactual in that regard helps me at all in that. I can see how it goes -- I can quite see how it fits in with the case that Mr Beard is putting forward, later on in the analysis, but at this stage it doesn't --

MR PALMER: Mr Beard says, before that point, perhaps anticipating that, is: well, even if it does amount to an abuse, you can't recover anything more than nominal damages without --

LORD RICHARDSON: It's clearly relevant then.

MR PALMER: Which is where that point comes in on the counterfactual, so that's I think why Mr Beard structures that argument in that way.

LORD RICHARDSON: So would I be right in understanding that your position

therefore would be that, in relation to the question as to whether or not the Bronner test, if we just want a shorthand, the refusal to supply test applies, in a sense the counterfactual doesn't matter one way or the other, because the issue here is: is there abuse? And what we are looking for there is an assessment of that, and you point us to 232 and refusal to supply and the trigger of the exclusionary effect, the impede conduct, as it were, what's there is in addition to the refusal to supply. Am I right? Is my understanding right?

MR PALMER: All I need is an established independent freestanding head of abuse.

LORD RICHARDSON: Yes.

MR PALMER: Which is exclusive dealing. That's established by, we say, plain as a pikestaff, at 9.2.1. Mr Beard says: no, that's not sufficient because what you are really complaining about is a refusal to supply which requires you to satisfy different and independent conditions. The reason I take you to Google is to show that that isn't so. It's enough to establish conditions for exclusive dealing, in our case, self-preferencing discrimination in that case. But in both cases it may well be underlying that is an implicit refusal to supply. But if so, and we don't necessarily accept that in our case, then we move on to the next stage.

LORD RICHARDSON: May it be fair, thinking about it, Mr Beard's submission is that it was you who took us to the counterfactual part. It may be Mr Beard says: well, properly analysed, properly analysed, one has to see this as a refusal to supply and that's illustrated by the counterfactual as opposed to only found in the counterfactual.

MR BEARD: That's correct.

LORD RICHARDSON: Thank you. Sorry, but it's helpful to understand --

MR PALMER: (Several inaudible words due to overspeaking) this point arises for the first time in response, specifically in response to paragraphs 104 and 105 of our pleading which is the counterfactual and it's that that they say: in other words, what

you are seeking -- the allegation you are making is a refusal to supply.

That takes me on I think to that second limb of the case. Perhaps I should just answer, sorry, you had a first question as well, which I don't want to lose sight of, in relation to paragraph 232 of Google.

LORD RICHARDSON: Yes.

MR PALMER: Electronic 875, where you indicated that there were two limbs to what the court was saying here. The first limb was the refusal must be express, there's a request, and a consequential refusal and, two, a second condition before you get to refusal to supply is that the trigger of the exclusionary effect lies principally in the refusal as such. So again it builds on the fact that there has been a refusal and not in extrinsic factors, such as, in particular, another form of leveraging abuse.

Again we say on both limbs Mr Beard doesn't get home in establishing refusal to supply because there has been no request and the trigger of the exclusionary effect is not a refusal but on the inclusion in the GDPA and in the user agreement of those restrictive conditions, which we say are a function only of PlayStation, Sony PlayStation's dominance.

LORD RICHARDSON: You say that's the extrinsic practice, as it were?

MR PALMER: Yes.

THE CHAIR: That's just another way of putting the point that there has to be an independent abuse point though, isn't it?

MR PALMER: Then to go on to the secondary point which is advanced which is: well, anyway, how are you going to recover more than nominal damages unless you can show that you are entitled to some form of -- that you can show that there has -- without -- effectively requiring exactly the kind of supply which we would say is directly captured by the refusal to supply conditions and that's (audio distortion) provided in Google, first of all, from paragraph 244, which is electronic 877.

THE CHAIR: Just looking at the time, Mr Palmer, I am happy to go on -- yes, if it's easier to stay and --

MR PALMER: If I can leave Google and then --

THE CHAIR: Yes, absolutely, that's fine, yes.

MR PALMER: At 244:

"The obligation for an undertaking which is abusively exploiting a dominant position to transfer assets, enter into agreements or give access to its service under non-discriminatory conditions doesn't necessarily involve the application of the criteria laid down in Bronner. There can be no automatic link between the criteria for the legal classification of the abuse and the corrective measures enabling it to be remedied", and that's the key point here.

"Thus, if in a situation such as that at issue in the present case giving rise to the judgment of Bronner -- sorry, such as that at issue in the case arising in Bronner ...(Reading to the words)... not only refused to allow access to its infrastructure but it also implemented active exclusionary practices that hindered the development of a competing home delivery scheme or prevented the use of alternative methods of distribution, the criteria for identifying the abuse would have been different", ie lower, than those in fact imposed on Bronner.

That's our case, so Sony preventing the use of alternative methods of distribution here.

"In that situation, it would potentially be possible to undertake ...(Reading to the words)... on reasonable and non-discriminatory terms. That would not, however, have meant that the abuse identified would have been any refusal of access to its home delivery scheme.

"In other words, it's not because one of the ways of ending ...(Reading to the words)... must be found, having regard to that aspect alone. The practice at issue in

the present case also includes relegation and that relegation, in conjunction with Google's promotion of its own results, is a constituent element of those practices ...(Reading to the words)... on its general results page."

In other words, the fact that bringing such an abuse to an end may subsequently entail a degree of access or entering into agreements or even transferring assets is not enough to bring this into the refusal to supply category and to show that the Bronner criteria need to be fulfilled after all. There's no automatic link between the two. Again that's not expressed as being in any way limited to the abuse identified in the Google case but as a general proposition as to when the Bronner principles will apply.

So, yes, we entirely agree and accept that this judgment in no way cuts down the extent that -- the content of the Bronner principles in cases to which they apply, but it provides very helpful authority for our case in explaining the difference between a case where there's an independent abuse and a case where refusal to supply conditions must be fulfilled.

If that's a convenient moment?

THE CHAIR: Yes, it is. I should mention that we will need to rise sharp at 4.25 tomorrow. I am conscious that may have hopefully not too much impact but some impact on whether everything can be done. So if that's the case, then we clearly can run into Friday morning. But just so you know, that's a soft target to aim at, if it's convenient. If it's not, then we have time on Friday.

MR BEARD: I think we will see where we get to tomorrow.

THE CHAIR: Absolutely. No pressure on you.

MR BEARD: Barrister time estimates, as we know, are highly unreliable.

THE CHAIR: I think you are doing very well so far. We are certainly not putting any pressure on. Just so you know, that's the schedule tomorrow.

Thank you.

(4.34 pm)

(The hearing adjourned until Thursday, 8 June 2023 at 10.30 am)