IN THE COMPETITION APPEAL TRIBUNAL

CaseNo:1590/4/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 12th June 2023

Before:

The Honourable Mr. Justice Marcus Smith
Professor Anthony Neuberger
Ben Tidswell
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Applicant

Microsoft Corporation

And

Respondent

Competition and Markets Authority

And

Intervener

Activision Blizzard, Inc.

A P P E A R AN C E S

Daniel Beard KC, Robert Palmer KC, Nikolaus Grubeck & Stefan Kuppen (On behalf of Microsoft Corporation)

Lord Grabiner KC, Lord Pannick KC, Brian Kennelly KC, Douglas Paine & Jason Pobjoy (On behalf of Activision Blizzard Inc.)

Rob Williams KC& Richard Howell (On behalf of Competition and Markets Authority)

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Monday, 12th June 2023

(10.00 am)

MR JUSTICE MARCUS SMITH: Mr Beard, good morning.

MR BEARD: Good morning.

MR JUSTICE MARCUS SMITH: Before you begin just the usual live stream warning, but with this time a couple of bells and whistles attached. These proceedings are at the moment being streamed live. That is on the express basis that they are not photographed, broadcast, transmitted or recorded. That is a direction which is made by the Chair at the beginning of every meeting and hearing and is a direction that the tribunal expect all those tuning in to pay scrupulous regard to, and I make at that direction again now.

The direction is not difficult to understand and it is easy to follow. You can watch but you cannot do anything else with the material except allow it to inform your views, and that, of course, is why public justice is so important. You, the public, get to see what is going on without having to come to court. These are public proceedings and members of the public are very welcome to attend in person. We recognise, however, that in person attendance is a significant barrier to attendance, hence again live streaming.

Unfortunately there has in connection with these proceedings been a series of what would appear to be deliberate breaches of my direction given on 30th May at the CMC. I do not know the extent to which the parties are aware of these breaches. We are more than happy to share out of court what we know should any party wish to take matters further by way of routes that will be familiar to all of those before us.

I want to stress that there has not merely been a broadcasting, but a use of images

to disrespect the processes that are going on before these courts.

I don't want to say anything more about enforcement, because that is actually not the point. Disputes that come before this tribunal are important, always to the parties and often to third parties. They are rightly hard fought in a rigorous adversarial process. It is because the process is so rigorous and so hard fought that this tribunal expects and it receives not merely the highest professional standards in terms of the legal competence from the teams that appear before it, but also in terms of courtesy and respect for each other. The more important the dispute, the higher the stakes, the greater the importance of these values.

We expect far less of the public, who are here to watch and to be informed, but we do expect a minimum of respect and courtesy from the public. The directions that I give must be heeded for this reason alone and questions of enforcement are secondary. I want to be very clear that I control the process in this courtroom and I take the infringements of the direction that I gave on 30th May very seriously indeed. Live streaming of this event will resume at my direction if I give it after the transcriber break, but I now direct that the live stream of this hearing cease until then. You can switch it off. That's done, is it? Grateful.

Mr Beard, do proceed.

Submissions by MR BEARD

MR BEARD: Thank you. First of all, thank you to the President and the tribunal for that re-emphasis of the directions. It is extremely important that these proceedings are conducted in compliance with the tribunal's directions and indeed more generally with a degree of mutual respect and the absence of any personal attack or parody of people involved in these proceedings. It is deeply unfortunate and we are grateful to

the tribunal for (inaudible).

This morning I appear with Mr Palmer KC and Mr Grubeck for Microsoft. My learned friends Lord Pannick KC, Lord Grabiner KC and Mr Kennelly KC appear for Activision. Mr Williams KC and Mr Howell appear on behalf of the CMA.

I was going to start with the letter that the tribunal received -- I am going to start with the letter that was sent on a joint basis last night that is not in the bundles, but I am sure the tribunal has it.

MR JUSTICE MARCUS SMITH: We have it and have read it. Can I say now we are very grateful to the parties for the hard work in narrowing the issues before us. We really are very grateful.

MR BEARD: I am grateful. So on that basis can I take it that the tribunal is content to set the hearing date for 31st or the 28th, depending on the number of days that we are dealing with.

MR JUSTICE MARCUS SMITH: Well, Mr Beard, I see that we have a list at the foot of page 1 of the letter.

MR BEARD: Yes.

MR JUSTICE MARCUS SMITH: Of things which are agreed.

MR BEARD: Yes.

MR JUSTICE MARCUS SMITH: Can I just say something first about (i)? Clearly we are very grateful to the parties for having reached agreement on this. The only point we thought really for our own convenience more than anything else was whether Microsoft's factual witness statements could be highlighted perhaps in two colours, one to denote the material that Microsoft says was before the CMA and one to denote the material that Microsoft says wasn't. It is just if we have a binary marking up it will make our life a little bit easier when we are looking at matters.

MR BEARD: Without going back to the table we provided.

MR JUSTICE MARCUS SMITH: Indeed.

MR BEARD: I am sure we can arrange that, whether or not it is coloured or side-lined --

MR JUSTICE MARCUS SMITH: How do you it --

MR BEARD: We will provide that indication so that everyone is not having to cross-refer to the table we provided. We can do that, yes.

MR JUSTICE MARCUS SMITH: Very grateful to you. So, subject to that, absolutely no issue.

On the timing, we indicated last time that even though the estimate of the parties was four days, and I am sure it is right, we were minded to take this more slowly than otherwise. The question is, is five days enough so we start on the Monday or ought we just to have the Friday in case. Our marginal preference, but we will want to hear from the CMA on this, would be to go for the Friday and therefore have six days which we probably will not need, but you never know. We are bound to have questions. This is an interventionist tribunal and I wouldn't want any of the parties to be looking at their clocks thinking "If only we had started on the Friday" when we start on the Monday.

MR BEARD: If I might suggest, it might be sensible for present purposes to say that the hearing starts on the Friday. If, as we have the defence -- because, of course, we don't actually have the defence and so on -- it becomes clear that issues narrow, whatever else, it is going to be clear that we can definitely deal with it within five days, however interventionist the tribunal may be, then in those circumstances perhaps we can move it backwards, but I think it might be sensible at this stage, when we don't actually know the details of the CMA's position to take a slightly

precautionary approach in relation to these matters and then if it turns out that we start on the Friday and finish a day early, I don't imagine there will be many tears shed if that turned out to be the case.

MR JUSTICE MARCUS SMITH: Well, that's very helpful. Does anyone want to push back on that? Lord Grabiner, I will start with you.

LORD GRABINER: No.

MR JUSTICE MARCUS SMITH: Mr Williams?

MR WILLIAMS: No. We understood that the 28th would probably be at least a precautionary day. That is why the letter reflects that.

MR JUSTICE MARCUS SMITH: I am very grateful to you. Let's hope that Mr Beard is right and we are not as interventionist as in our worst dreams we imagined it to be.

MR BEARD: It is certainly not the interventionist that's the issue. It is what lies between the parties that is the problem here, sir.

With that then obviously you have the timing. There will be some issues in relation to it. Critical to it is the fact that CMA has undertaken to provide disclosure pursuant to duty of care, about having regards to what has been put forward by Microsoft as its requests by 30th June, and you will have seen from the correspondence that we have been progressing that to some degree. We have some blank questionnaires that have been provided to us and we now have an indication that there were, in fact, 26 meetings with the FTC during the period only of the Phase II enquiry and therefore what was going on and what assistance or input the FTC was providing during that period and prior to that is something that we will continue to pursue, but that can wait for today. Obviously some of the other timings do become tight, but in order to manage the situation as we have set out in our letter we think it is workable. So I am grateful.

That then does take us to expert evidence issues. I am just going to deal with those, if I may. You have the four reports that are being referred to. They are four brief reports at tabs 11 through to 14 of bundle C.

MR JUSTICE MARCUS SMITH: Yes.

MR BEARD: One on US law. That is the Kraus report. The second on the use of CMA of certain market share data. That's the Foschi report. Third, in relation to market definition issues. That's the Scott Morton report. Finally Caffarra, which looks at foreclosure.

What I was going to do was deal with matters in three stages, make some brief general contextual remarks, deal with the background issues on law and then refer to each of the reports in series, if that pleases the tribunal.

MR JUSTICE MARCUS SMITH: Mr Beard, that would be very helpful. We, having looked at this and sort of anticipating it as being the key issue for today even before the very helpful letter this morning, drew a fairly clear distinction between the legal expert opinion on US law and the three economists, and perhaps reflecting the economic bias of the tribunal in the sense of what we think we understand, we have got slightly different responses to the two sets of reports. It might help if I just articulated what our present tentative thinking is so that you can push back and the CMA can push back to the extent you consider appropriate.

Starting then with Professor Kraus's report on US law, our concern is that this is more liable to distract than to assist. It seems to us that the CMA in its decision is not really taking any point on US law that would require this tribunal to actually decide such a point of factual lawful. Rather, the CMA is I think taking the point that assuming, even accepting that these agreements are valid, they do not assist in terms of the legal certainty that they provide, which is, of course, the area of dispute,

but our issue is whether that is something that can be appropriately resolved simply by looking at the substance of the decision rather than the expert report of Professor Kraus. So that's the US point.

Turning to the expert economic evidence, Scott Morton, Foschi and Caffarra, we are much more conflicted. To be blunt, we would like to admit this evidence, even though we are satisfied that it can never be materially decisive. That in a sense is the logical conundrum that we are finding ourselves in. Let me try to unpack that.

It seems to us that if Microsoft had unearthed the point of economic expert evidence that was so undermining of the CMA's decision, we would be disinclined to admit such evidence without first a CMA response and, secondly, probably cross-examination, because a point like that requires proper probing.

Now, to be clear, we don't consider the evidence to go nearly that far. It is much more background, some of it opinion, some of it arguably submission. We don't mind any of that.

So if this material is really no more than a helpful articulation of the points that Microsoft are going to be arguing anyway such that the absence of the CMA response is not going to prejudice the CMA, then we would quite like that evidence to be in, first of all, because we are an expert tribunal not going to be misled by the wiles of blandishments of another expert and, secondly, because we are keen to read more rather than less.

So that means I think we need to articulate very clearly for the parties what we are actually saying. Assuming this evidence were to be admitted -- and I appreciate we will be hearing argument on this -- then were a material paragraph of a draft of our judgment to turn solely or even materially on the evidence of Scott Morton, Foschi and Caffarra alone, then it seems to us that is a paragraph that ought to have no

place in our judgment unless there was supporting material from within the decision itself to make good that point; in other words, we would have no problem in using Scott Morton, Foschi and Caffarra to elucidate what is already there to get a better understanding, but we wouldn't want that material even hypothetically to do the running in terms of what we were deciding in the judgment.

Now we fully recognise that this is rather close to saying that this evidence serves no useful legal purpose, and that may be right, but we would like to admit it on that basis. That's not the same as admitting it de bene esse. Rather, we are admitting it period, but we would be making it absolutely clear to Microsoft in particular the extent to which we feel we could rely upon it, absent the reply evidence from the CMA and cross-examination of the witness.

So that's to colour how we would see the evidence on the assumption it was admitted, and, as I have indicated, on that basis, which isn't the basis admitting JR evidence generally, we would be inclined to let it in, but that's subject, of course, to what Mr Williams has to same.

MR BEARD: That's extremely helpful as a starting point. I may reorganise slightly the submissions I was going to make in the light of it.

I think just dealing very briefly with the position that is being articulated in relation to the three economic reports, I think they are referred to as three economic reports because obviously they are from expert economists. Therefore the title is obviously apt. They are slightly different obviously, because Mr Foschi is dealing with -- Dr Foschi is dealing with matters to do with data that has been submitted or data that is material that was put forward in the course of the provisional findings. Therefore I am not sure, given the nature of the issue -- and we will come on to it -- that there is actually any concern that this would be material that could ever cross into the

particular paragraph definition that you are talking about, but obviously it would support the points that were being made about the misinterpretation of market shares.

Broadly speaking, though, in relation to all of the economists' material, as we will come on to see, what they do is they articulate from an economic perspective unashamedly the way in which economists see points that are being raised in the Notice of Appeal, and the points being raised in the Notice of Appeal are accompanied by broader argument. Therefore as a whole none of the -- one would not anticipate that any judgment that this tribunal would make in relation to these issues would depend solely on the material contained in these reports.

Therefore, the concern you articulate does not seem to us to arise and therefore the sense in having this material we say is obviously right.

That said, it is not that they are legally irrelevant in the sense that, for example, Dr Foschi's material does explain why it is that there is over-counting in relation to market shares in a way that were we simply to articulate those charts and include them in our Notice of Appeal and so on, the tribunal might say "Well, hang on a minute. You as lawyers, have you got the basis to put forward that material?"

Similarly with Professor Scott Morton where she is saying the market definition issue is a fundamental omission if you don't consider switching. That is a point we obviously make, but having the authority supporting that in relation to -- having the authority to support that from Professor Scott Morton from an economic perspective is obviously of assistance.

Therefore we do say that all of this is relevant and relevant to the determination which is, as we will come on to see, the appropriate test that we say is the one that should be applied.

Equally I think it is worth emphasising that in making our position clear what we said was we are not trying to stop the CMA making observations about the weight to be attached to this material or indeed subsequently saying well, it is so irrelevant it should be excluded. We were not trying to pre-empt all of that discussion. It is the CMA that's coming along and saying "You must apply for admissibility. We are objecting to that now". We say that's not the right way of doing it. The tribunal's approach is actually going a step further and specifically saying "We will admit on this basis" and obviously we are content to proceed on that basis, but I am concerned also to make sure that I properly articulate our position in relation to these reports and the background law, just because I anticipate that's the way the CMA is going to go.

MR JUSTICE MARCUS SMITH: Yes.

MR BEARD: So with those initials reactions which is yes, that is absolutely fine in relation to the economists. In relation to Kraus we think that there are issues there about (a) the admission of New York and Washington law in relation to these matters but (b) why it is that the interpretation under those laws is relevant, even though it is not complex, and I will come on and deal with those specific matters. I know Lord Pannick is also going to make one or two observations about these issues.

So can I just make one or two general contextual remarks without lapsing back into the structure too readily that I was going to approach matters on? As we will see when we work through the law, one of the problems we encounter quite quickly is the CMA is rather reluctant to recognise the way in which law can develop in this field and has actually in its skeleton tended to rely on case law that predates the central Law Society case or in a couple of cases postdates it, but apparently were cases where unfortunately this tribunal did not have the Law Society cases cited to it. In

those circumstances we do not think it is appropriate to be placing significant weight on that authority, and I will deal with that in a little more detail.

The second point is that the law does develop, and we see that through the Law Society case, but it develops for a reason. The changes we see recognise the nature of scrutiny and judicial review cases may develop and may depend on more detailed analysis of underlying materials, more technical issues than had previously been undertaken in traditional judicial review matters.

Now we know that judicial review as a process can be flexible. We have actually seen that in this jurisdiction when there was a European law framework that required it actually to go as far as a Merricks type standard in the Telefonica case. I don't think I need to take you to it. What we say is that judicial review can be flexible, can develop and expert evidence may be important in that context, particularly since expert testimony may well be simply a better means by which the tribunal can understand technical issues. This is in no way casting any aspersions on the specialist knowledge of the tribunal at all. It is to say those are better sources for the points that are being made.

The third point I think is to recognise that this tribunal has shown itself willing to adopt more innovative approaches to dealing with evidential conundrums both in relation to on the merits appeals and in relation to judicial review. There has to be a recognition that in relation to some issues the difference between those two standards might actually be quite difficult to identify.

Indeed, if one looks just at ground one in this case where one is focusing on issues of market definition, and the relevant approach to market definition, actually there is a debate about how different the analysis would be required here as compared with, for instance, the case which you, Mr President, are particularly familiar with, where

market definition was discussed at some length in relation to BGL and the meerkats. There are no doubt some interesting philosophical discussions to be had in relation to those issues, but in those circumstances whilst, of course, the expert evidence in these proceedings would be much less extensive than one would ever see in an on the merits appeal, the actual analysis one is undertaking in those two situations may not be quite so different. Therefore reference to expert material may be of real assistance. So we say no insuperable obstacles. The real test here is whether or not the material is reasonably required in order to resolve the case fairly and appropriately here, and with that I will just turn to some of the law.

MR JUSTICE MARCUS SMITH: Yes.

MR BEARD: Again I will try to deal with this relatively swiftly.

The CMA's approach to the law set out in paragraph 5 of its skeleton argument, which refers back to its previous skeleton at the first CMC, and it refers to things like a high threshold test and exceptionality.

Now we say there is just no such test as they are characterising it in law. The only real test is whether the expert evidence is relevant to a properly articulated ground for judicial review. Of course, as I recognise, in many sorts of ordinary judicial review, a grant of planning permission, for example, being challenged, there would not be any great relevance or appropriateness in putting forward an expert report on the effects of the development at that point. It wouldn't be relevant to the issues that were being dealt with. It wouldn't go to whether or not the planning permission should or shouldn't have been granted and it really would be essentially trying to turn the judicial review into a merits challenge, but it is possible to have expert evidence that is properly relevant to a permissible ground of appeal and over time what we have seen is the courts articulating various examples of where that's appropriate and

coming up with a non-exhaustive list of the circumstances where that might work.

So the earlier authorities, going back to Powis and Lynch, have to be read in that context. As I say, the context is particularly the Law Society case.

Just dealing with the earlier authorities very briefly, you have them in the bundle. I will give you the references but I am not going to take you to them given our points.

In Powis, it was said there were only a limited number of circumstances in which fresh evidence would be admitted. That's in the bundle of authorities, page 99, in particular at 595G. Of course, for a long time that sort of restrictive approach was followed.

In Lynch at paragraph 22, so that's bundle of authorities 111, they also maintained restrictive approach with a slight expansion to include admission of expert evidence to explain technical terms to the court where necessary.

Then we have BAA. That's bundle of authorities 256, paragraph 79. Again not really adding anything to those early authorities and adopting a restrictive approach. The same is true of the other authorities sighted by the CMA: Lafarge. That is bundle of authorities 305, paragraphs 2-6 and same bundle of authorities 309, paragraphs 10-14. The same is true of HCA, paragraphs 2-4. That's bundle of authorities 313.

Then we come to more recent judgments. The Tobii judgment. Now unfortunately the version of the Tobii litigation or the judgment from the Tobii litigation is relevant and is not actually in the bundle and we can provide it to you. I am not going to trouble you with more paper unless it is really important. It is clearly not unduly troubled today so far as we can see. If you were to have the right version, it is paragraphs 20 to 22 and 27 to 32, but again the problem with Tobii is although it post-dates the Law Society case it, doesn't appear that was cited to the tribunal in

there. So again we say, look, you can't reply on that sort of authority where it hasn't taken into account the most recent developments.

Dye & Durham, which is in the bundle of authorities at 725, we made the point last time at the first CMC that none of the counsel appear to have cited Law Society in that case. It is extremely unfortunate, but it does mean that relying on that as instructive in the way that expert evidence should be treated is just not correct in these circumstances. Just for your notes it is paragraphs 23 and 24 of Dye & Durham that I think the CMA rely upon.

So with that very brief tour of the other case law let me just go to Law Society, if I may. It is in the bundle of authorities. The place I want to pick it up in is in bundle of authorities page 339.

MR TIDSWELL: Which tab is it?

MR BEARD: I have it untabbed. Tab 25. I am most grateful. It starts at bundle of authorities, page 330. Where I want to just pick it up is 339 under the heading "Applicable principles". You will see there at paragraph 36 a description of the background referring to CPR 35 and then the classic statement from Powis at 37.

"38. Although these categories are a useful and well-established list, it would be wrong to treat them as if they were embodied in statute or as necessarily exhaustive. That is particularly so as public law has developed in ways which were not in contemplation when the Powis case was decided. In Lynch, Mr Justice Collins was prepared to allow some extension of the possibility of admitting expert evidence beyond the Powis categories in a case where a decision is challenged on the ground of irrationality. The judge accepted that where an understanding of technical matters is needed to enable the court to under understand the reasons relied on in making the decision in the context of a challenge to its rationality, expert evidence may be

required to explain such technical matters. We would extend this principle to a situation where, as in the present case, it is alleged that the decision under challenge was reached by a process of reasoning which involved a serious technical error. It would be glib to suppose that if an error of reasoning requires expert evidence to explain it, a challenge to the decision on the grounds of irrationality cannot succeed."

Then there's a quote from the Gibraltar betting case, which I just invite you to read briefly.

Then if we go down to 40.

"The same point in principle applies, in our view, to a challenge based on irrationality. A decision may be irrational because the reasoning which led to it is vitiated by a technical error of a kind which is not obvious to an untutored lay person, (in which description we include a judge) but can be demonstrated by a person with relevant technical expertise. What matters for this purpose is not whether the alleged error is readily apparent but whether, once explained, it is incontrovertible."

Then it talks about the corollary of this as recognised in the Lynch case going to the relevant question of irrationality. It says:

"This places a substantial limit on the scope for expert evidence. In practice, it means that if an expert report relied on by the Claimant to support an irrationality challenge is contradicted by a rational opinion expressed by another qualified expert, the justification for admitting any evidence will fall away. Two further issues are raised in these proceedings on which, in our view, expert evidence could in principle be admissible. The first is whether the consultations process was unfair."

Then at 43:

"The other issue raised in this case on which expert evidence could in principle,

depending on its content, be admissible is the argument that the decision to reduce legal aid fees constituted an unlawful interference with the right of access to justice."

So it is identifying there a range of categories. It is extending the principles on admission of evidence. Then we have also seen this being expanded upon further in the PCSU case. Now that was in the authorities bundle from the first CMC. I don't know if the tribunal has that. I have some copies of the judgment if that bundle is not available easily. I will pass them up. I will just do this by paragraph numbers, since we are in hard copy. Obviously a very different context in relation to migration issues, but you will see if we pick it up at just above 22 "Admissibility of expert evidence: the principles."

There you see at 23 the emphasis on those paragraphs I have just taken you to in relation to Law Society.

At 24, the Divisional Court's observation that categories were not closed in terms of when expert evidence may be admitted in judicial review was illustrated by the approach taken to the expert reports in that case.

That's referring to paragraph 41 that I took you to. Paragraph 25 is referring to paragraphs 42 and 43 of the Law Society.

Then it says:

"In additional circumstances, justifying the admission of expert evidence may arise where the Claimant's grounds of challenge raise issues of compatibility with the ECHR rights."

Then an example is given of the Gardner & Harris case.

Then it is worth just noting at 27 there is a statement referring back to the AB case where it said:

"There will be some occasions when expert evidence is needed on some technical

issue. The views of the expert on whether or not a decision is rational or otherwise lawful will not be admissible."

Now what that's clearly saying is "You as an expert can come along and explain what the issues are and where you think the flaws may lie, but, of course, it is up to the court in the end to decide on issues of rationality."

Then you see at 28:

"Determining whether the expert evidence is reasonably required" -- so it is a reasonable requirement to resolve the proceedings -- "thus involves identifying the issues in the proceedings to which the expert evidence is said to be relevant, evaluating whether the expert evidence is reasonably required to resolve those issues."

Then there is citation of the Banks Renewables case, which was in the previous bundle. I think again the version in the current authorities bundle is the wrong Banks Renewables but again I don't think we need to trouble unduly about that. It is quoted at some length in 29.

Really, it is those propositions about identifying the relevant issues and about evaluating whether the expert evidence is reasonably required to resolve the issues which set the relevant framework here. That is a very long way from Powis and Lynch in terms of the way that the relevant law should be approached and very much not in line with what the CMA is saying at paragraph 10 in its skeleton: that it will be virtually impossible for evidence to be admitted to show errors in the CMA's analysis.

MR JUSTICE MARCUS SMITH: You are pinning yourself very much, to go back to the Law Society, on the proposition in paragraph 40 in this case, namely when one is looking at a challenge based on rationality, you say that what matters, to take words out of the Divisional Court's mouth, is not whether the alleged error is readily

apparent but whether, once explained, it is incontrovertible.

MR BEARD: Yes.

MR JUSTICE MARCUS SMITH: Of course, one cannot understand whether something is inconvertibly wrong until one has heard all of the evidence. So it goes to that.

MR BEARD: Absolutely. We recognise that there are limits to the sort of evidence that can be adduced here, but we say that as we will come on to see when we look at the points in the Notice of Appeal and then what the expert evidence goes to, that that's precisely a type of issue that is being dealt with by each of the categories of evidence.

So with that I think I can just turn to the reports themselves.

MR JUSTICE MARCUS SMITH: Yes.

MR BEARD: Perhaps it is easier then to just deal with the economic material first. I will try to deal with it relatively briefly, given the tribunal's indication. Obviously you are familiar -- from the indications, Mr President, you have already given, you are familiar in broad terms with the content of it, but it is worth just tethering it back each time perhaps to the Notice of Appeal just so you have the relevant references. So if you wouldn't mind just bearing with me slightly in relation to this.

MR JUSTICE MARCUS SMITH: No, of course.

MR BEARD: Let's perhaps start then with Dr Foschi's material. Now, as you know, his report deals with cloud gaming market shares and in particular with what these would look like once one adjusts them to account for the large number of users who use the xCloud service, so this the Cloud streaming service within Microsoft system, simply to try out a game before downloading this.

The underlying point is obvious that if you are saying how significant is Microsoft in

this notional cloud gaming market, which we say is the wrong market definition, I should emphasise, but if you are looking at that, what's being said is “you fundamentally misunderstood and made an error in relation to and failed to take into account relevant considerations in respect of the level of market power and market share you are attributing to Microsoft, and that's significant to the remainder of the analysis”.

Now the reason we say that is because if you are somebody who is doing “try before you download”, the essence of your gaming is on the downloaded game thereafter. In other words, it is native gaming, not cloud gaming you are really engaged in.

So we say this evidence falls squarely within the categories set out in Law Society paragraphs 39 to 40. Here we are saying evidence of a serious technical error of a kind which is not obvious, for example, because it does involve some calculation and assessment, but can be demonstrated by someone with relevant technical expertise.

So if you have the Notice of Appeal -- I don't know whether you have it loose or whether you have it in Bundle A. I am going to just refer to paragraphs rather than pages for ease in case people are working off different versions.

MR JUSTICE MARCUS SMITH: Yes.

MR BEARD: If we just pick it up at paragraph 116, which on the internal page numbering is page 41 on the version I have, so this is just the heading to ground 1, "Fundamental errors in relation to the assessment of Microsoft's current market position".

You will see there at 116 this failure to consider the switching issue, which is obviously a very important issue here. Then 117 breaks these issues down, market definition ground 1A in relation to omissions on switching.

Ground 1B is even if you are right on your market definition you failed to take into

account out of market constraints.

Then obviously the one that we are focused on for the purposes of Dr Foschi is (c). "Even on the basis of a narrow cloud gaming market, the CMA's market share calculations failed to take account of different customer types and specifically that xCloud users use it in a very specific way (including to try games before downloading them). The CMA then went on (in its SLC analysis) to take those shares into account in a mechanistic way, with no recognition of the reduced weight that should be accorded to X Cloud users."

Now just pausing there, one can see immediately that Dr Foschi's evidence on its own is not going to be the final determinant of an outcome paragraph reputed to be quashing the CMA's decision on the basis of ground 1C, but you can immediately see how it is relevant to and reasonably required to understand how that issue is to be developed.

If we then just go on to paragraphs 187, 188, so page 61, this is ground 1C itself.

MR JUSTICE MARCUS SMITH: Yes.

MR BEARD: Here we are dealing with the irrationality challenge but it is in the form of, as you will see in the final sentence of 188, in particular failing to take into account relevant considerations in its assessments of market power and cloud gaming.

We then can move on just over the page. Just so you have it at 195 and 196, “evidence that MAU numbers”, that's Monthly Active Users, “maybe mask very different use types making them inappropriate as an indicator of market position”.

That's essentially what Microsoft has been saying in this case. It said that more than 80% of the times a gamer played a game on Xbox, cloud gaming, it is their first time playing and that they never played the game for more than a day, indicating that they

are just trying it before downloading it.

Now that was a proposition put in in the course of the enquiry, and what is being done here is Dr Foschi providing a short report -- I say short -- it is 15 pages long -- a lot of it is simply diagrams -- showing why that is correct and why that was a salient omission and a failure to take into account a relevant consideration.

If we turn up Dr Foschi's report, this can be illustrated. If we go to bundle C, tab 12, one sees at C213, paragraph 12, what you have there from paragraph 12 through to 26 is Dr Foschi calculating the extent to which gamers use X Cloud simply as a try before you download testing tool rather than actually playing the games on the Cloud.

Then if one goes on through to paragraph 27, what you have there is the implications of these findings with the conclusions in the final report. That's at 27 through to 38. So he is explaining why it is these assessments are relevant. We say this material is obviously germane to ground 1C. It is of real assistance to have it explained in this form, and it is right that in the paragraphs 39 and 40 he then sets out some brief sensitivities, but the essence of this is all material that is, we say, reasonably required in order to understand why these considerations were relevant and missed and therefore goes to the irrationality concern. We say technical considerations in relation to this sort of statistical data are plainly sensibly dealt with in a brief expert report.

The CMA's main objection seems to be that the report contains a very large volume of factual material that was not before the CMA at the time of the decision, but with respect, that is just not a good argument at all. The conclusions based on this data were put to the CMA during the course of the investigation, and up until the final report Microsoft couldn't know how the CMA were going to deal with the concerns

that they had articulated already and what Dr Foschi's analysis does is demonstrate the significance of this error.

Now the other objections taken -- I am just going to deal with them. I entirely recognise the position of the tribunal, but just to deal with the points that are dealt with in addition.

In the CMA's skeleton at paragraph 27 the suggestion is that this is merely essentially presenting the arguments that the CMA ought to have recognised that most X Cloud use is of the purpose of try before you buy.

It is interesting there the CMA refers only to the notice of application, not to Dr Foschi's report, because Dr Foschi's report performs the calculations and data assessment that's required to demonstrate the error. It is doing no more than that.

I should say it is also germane to ground 2, which is where the final report -- that's in relation to the final report saying only three cloud gaming providers entered into the agreement and that was not sufficient to make any difference. Obviously Dr Foschi's calculations explain why that is mistaken and why that is logically wrong.

Just for completeness dealing with the other criticisms level, the first at the CMA skeleton, paragraph 16, and this is a criticism levelled at all three, is they come at this from an economic perspective.

Well, I am not quite sure what economists should otherwise do. Indeed, if they were not coming at this point from an economic perspective that would be highly problematic.

It then says the instructions are too broad and not explicitly limited to judicial review type proceedings, but Dr Foschi is not trying to articulate all these issues in terms of some particular legal test. Indeed, one can see it might be extraordinarily dangerous to try to articulate to an economist precisely what the categories of judicial review

were and then say to them "You must only provide following comments under these particular heads". We have focused on what the challenges are in the Notice of Appeal and that's what he is talking to. That is obviously the right way to deal with these matters. We are not dealing with a report where the evidence is sort of untethered and the general merits attack.

Indeed, that's the criticism that is levelled at paragraph 17 in the skeleton, merits type opinion or advocacy.

That's just wrong. That is not what's going on in this report or indeed in the others. The observations that have quoted from Dr Foschi in the skeleton are taken out of context, quite frankly, because his observations about survey evidence having limited relevance as compared to real data are part simply of the explanation of what he is doing there. That is at skeleton 17.2. At 19 he says, and this is held against Dr Foschi, at paragraph 28 of his report he says that the final report doesn't address this evidence properly. That apparently is argument. In fact, it is being extremely polite, because what is then said in the paragraph is that the final report simply does not engage with this evidence and he is explaining why that is significant, but again that's not argument. That is simply explaining the relevance here of the points he is making and, if anything, of course, if these criticisms are valid, they go to weight.

Finally, two brief points. Independence. We are rather concerned about the CMA's approach in relation to these criticisms of independence. All experts in all proceedings are paid. Yes, Dr Foschi has been involved in these proceedings previously at the administrative phase, but we are not in territory akin to anything like the situation in HCA. He knows his duties to the court. He takes them seriously. You can see that in the content of the report.

As to the instructions, we have set out in his appendix to his report the instructions

that led him to give this report, and in the circumstances more general situations that broader categories of instructions need to be disclosed, is just no part of the relevant law at all.

So those are the objections. We say they don't amount to anything. In terms of the general cri de coeur that it would be terribly difficult for the CMA to deal with these matters, I have explained what is going on here. It is all in the context of what was put forward by Microsoft in the course of the investigation. This is not unknown to the CMA. They can plainly deal with it in their defence, particularly now that there is an extension of time in relation to the provision of their defence, so no prejudice there.

MR TIDSWELL: Just so we can understand what the CMA had during the process and did not have, is the position that the argument was articulated but that they didn't necessarily have access to the data that Dr Foschi now relies on, or did they have access to the data as well?

MR BEARD: So the statistics that were provided to the CMA were based on Microsoft's own telemetry data. So when I quoted -- when it was saying that 80 per cent of the time this was --

MR TIDSWELL: Yes.

MR BEARD: That was all based on telemetry data and we explained that to the CMA. What the CMA did not ask for was the underlying telemetry data that had led to that submission, but we were clear about the source of it. What Dr Foschi is doing is taking the underlying telemetry data that led to that submission and saying, "Look this is how it works and this is how you get to those calculations."

So he is unpacking essentially what was put before the CMA and explaining it more fully for these purposes. So no, they didn't have and didn't ask for the telemetry data

even though we provided these statistics.

MR TIDSWELL: Yes, that makes sense, and the outcome that he has reached in his tables showing how he reaches the outcome that he reaches, that outcome is broadly consistent with the point that was made during the process.

MR BEARD: Yes.

MR TIDSWELL: Thank you.

MR BEARD: I don't think there is anything further on that. Unless I can assist further on Dr Foschi, I will move on to Professor Scott Morton, if I may.

MR JUSTICE MARCUS SMITH: Yes. Thank you.

MR BEARD: This is even shorter. There are only seven pages dealing with substance. Again it is probably sensible just to pick it up in the Notice of Appeal, if I may.

MR JUSTICE MARCUS SMITH: Yes.

MR BEARD: Here if we could go to paragraph 179 in the Notice of Appeal, which is on page 58.

MR JUSTICE MARCUS SMITH: Yes.

MR BEARD: You will see here is the reference to the narrow market. This is at the conclusion of ground 1A. So what's being said here is there was a narrow market definition found and that was critical to the way that matters were dealt with and that's the conclusion of ground 1A. If you want the beginning of ground 1A, we were actually at it back on page 41, 42 around paragraph 119. I am not going to go through all of the detail. You have the point there.

Then we obviously also have ground 1B, which begins over the page, which is the failure to take into account constraints from console, PC or mobile in the competitive assessment. This is the alternative to ground 1A in some ways, because ground 1A

is saying that "Even if you were right on this very narrow market definition there were clearly out of market constraints and you just ignored them".

Professor Scott Morton's evidence we say is reasonably required to support that complaint. The question of irrationality is obviously for the tribunal. The fundamental nature of the errors made by the CMA we say are established by this evidence -- are established in the evidence and supported by Dr Scott Morton's material. Here I think it is just again relevant to turn up her report. So this is C, tab 11, beginning at 174.

MR JUSTICE MARCUS SMITH: Yes.

MR BEARD: If we pick it up after the introduction where she set out a summary of instructions which are appended to the report, her qualifications to act as an expert, which I will come back to. Then picking it up just above 10, you see:

"The views on the CMA's conclusion of market definition for cloud gaming."

Then you will see at paragraphs 12 to 16 what she does is she explains how the CMA has effectively based its assessment of potential future cloud gaming market on evidence that it has gathered in the cloud gaming world of today. So what she is doing is applying an analytical framework to how one should think about this as an economist. What she does it she identifies essentially a conceptual error, because the CMA has effectively lumped together two disparate services, the now and the future, calling them cloud gaming and extrapolating from one to the other. We see that explained at paragraphs 17 to 23. She says how that conceptual error has led the CMA to go wrong in relation to market definition, and in particular you will see that she picks up in paragraph 18 the concise statement she makes that the CMA failed to carry out an absolutely standard piece of analysis by failing to consider switching behaviour.

What we are doing with this material is establishing that such a failure is an incontrovertible error. We say the expert evidence is appropriate here.

Her report then moves on from paragraph 23 to 28 to explain how the CMA's errors in relation to market definition also undermined its foreclosure analysis. That goes to ground 4, but we say all of this can be relied on to classify this as an example of expert evidence relied on to demonstrate the decision under challenge was reached by a process of reasoning which involved a serious technical error. That's precisely what's envisaged in Law Society, paragraphs 39 to 40, albeit we think you can take a broader view here in any event and say in the specialised context of a challenge to market definition this is specialist evidence which explains the omissions and errors that have been made.

This is not, as I say, in any way to suggest that this tribunal does not have significant expert experience itself, but it assists in dealing with these matters, both to identify them and identify their materiality.

In their skeleton argument the CMA suggests that these issues have not been turned into public law questions. I have very briefly gone to the Notice of Appeal and explained how they are public law questions. The material is therefore reasonably required to support ground 1 of the Notice of Appeal.

The other objections, well we are back into saying Professor Scott Morton is an expert economist who deals with these matters from an economic perspective, to which we say yes, the instructions are there. It suggests that she is unaware of whether or not this is an appeal or a judicial review. Actually in paragraph 10 she specifically says she understands that this is an appeal by way of judicial review, but says:

"I'm not a lawyer and don't seek to comment on how legal tests are applied."

You would expect no less of her or indeed no more in the way in which she deals with these matters.

If we then deal with the CMA's objections to the suggestion that she adopts the role of an advocate, she's not doing that. She is identifying fundamental errors in the final report. That is not as an advocate. That is as an expert economist.

Then at 21 to 23 in their skeleton again there is this doubt expressed about independence and impartiality. It is quite surprising that a public authority in the position of the CMA is raising these sorts of points. This is someone who has acted as the chief economist of the Department of Justice in the US. Last year she was acting as the US FTC's expert in the Illumina/GRAIL proceedings, which was concerned with vertical input foreclosure allegations being made in the merger context. She has been acting for US authorities in relation to these matters. To suggest that she is somehow not independent is just unjustified. She has written extremely widely on these sorts of matters. It is without any merit here. She clearly is dispassionate in the way that she approaches these things. The analogy with HCA is inapt. She signed the relevant declaration. She has been paid for work and she has been involved in the Microsoft proceedings in the US. She makes that clear, but it was a limited involvement, and as regards the instructions, as I say, they are set out.

If there are particular factual matters that can't be dealt with, then obviously the CMA can highlight those, but we don't see what those are.

The objection taken in paragraph 24 of their skeleton to particular factual statements, they are actually in the context of discussion of what the final report itself found.

So we say plainly appropriate and clearly these are matters that can be dealt with within the defence (inaudible).

Dr Caffarra. I will try and go faster still, if I may. Her evidence particularly relevant in relation to ground 4. The CMA's submission at paragraph 29 of its skeleton is these points should be advanced as legal submissions based on public law principles. We have articulated in ground 4 what the public law issues are in relation to this case. If what's really being said is somehow we should have set out this material in our Notice of Appeal, that feels an almost perverse criticism, because it is obviously better that someone in the position of Dr Caffarra is able to provide this material, she does so by situating it in a broader debate about technology mergers. We think that is positively helpful to the tribunal. There are criticisms made of her independence. She has been widely critical and well published on issues to do with problems with technology mergers but she makes clear why those sorts of criticisms don't apply here.

Just for your reference if we go to the Notice of Appeal, paragraph 316, this is ground 4. I am not going to go through it, but the public law mischief is here in the context of the allegation that Microsoft had the ability to foreclose cloud gaming. We say that it lacks basis, evidential basis, is based on irrelevant considerations and is not rational. It just does not stack up. You can see that at the end of 318. All of these are basic principles of public law.

If one goes to her report, so this is tab 13 in bundle C, again the substance of it is short, but picking it up at C258, she explains how the final report conflates exclusivity with anti-competitive foreclosure. She explains it by reference to key literature. Her evidence on this issue is consistent with the Law Society principles. She is providing a technical explanation of a fundamental economic error which leads to irrational conclusions.

Paragraphs 21 to 24 address the CMA's failure to use an ordinary benchmark for

foreclosure. So that's an expansion of those points.

Then 25 to 33, the next section concerns an apparent separate ecosystem theory of harm that the CMA repeatedly alludes to in the final report.

In the skeleton argument at paragraph 29 it says that's not part of the decision, a critical part of decision that's being relied on. To quote them:

"This was a straightforward input foreclosure theory."

But if that's the case, then Dr Caffarra's material is explaining why you couldn't rely on other materials.

Finally, at 38 I think probably helpfully for the tribunal Dr Caffarra does situate this discussion in the context of broader policy debates. Is this impossible for the CMA to deal with? Not at all. Clearly it can be dealt with in the defence, and actually Dr Caffarra makes these matters clear for both the CMA and the tribunal.

Independence. Absolutely and very. Appeal versus JR, is there any confusion? No. It is clear what her central points are. Her report is discursive but helpfully so. It is not advocacy. Any of these criticisms would essentially go to weight, if anything. Saying that Dr Caffarra is merely some kind of mouthpiece for Microsoft in paragraph 24 of the skeleton is just an objectionable approach. She is very clear about what she is referring to and, in fact, the basis for that accusation is merely about what she says is her understanding about the use of Linux, a particular operating system. She makes it clear it is her understanding. It is not advocacy in that context.

In relation to all of these reports we say clearly relevant, clearly fulfilling the criteria. This is a very long way of saying we would entirely accept the way in which the tribunal deals with these issues.

That then takes me to a different report, which is that of Professor Kraus. I am just

conscious of time for the shorthand writer, given that we began at 10 o'clock.

MR JUSTICE MARCUS SMITH: If that's a convenient moment, we will rise for ten minutes, so to 11.20. We will resume the feed at that point.

MR BEARD: I am grateful.

MR JUSTICE MARCUS SMITH: Thank you very much.

(Short break)

MR JUSTICE MARCUS SMITH: Mr Beard.

MR BEARD: Mr President, I will deal briefly with Professor Kraus's material. You are already familiar with the report, which deals with the interpretation under New York and Washington state law of four specific types of contract clauses found in the licence agreements Microsoft has entered into.

In very broad terms what is being articulated there is the importance of considering these agreements under their relevant applicable law and what the CMA would have understood had they carried out that analysis.

Now in order to deal with that and put it in context, it is worth just turning back to the Notice of Appeal, if I may. So we are in the context of ground 2, which begins at paragraph 208, page 66, in the Notice of Appeal.

MR JUSTICE MARCUS SMITH: Yes.

MR BEARD: If we go on to page 77 at 254, there's a summary of the CMA's reasons for dismissing the agreements as immaterial. Those do not withstand scrutiny.

The first heading there is "Uncertainty".

It is suggested that these agreements were uncertain.

So on the CMA's case that in conjunction with the second consideration, scope, meant that no material weight should be attached to them. Under the heading

"Uncertainty" you have first of all beginning at paragraph 255 considerations of enforceability and you have factual evidence from individuals in Microsoft as to why it is there is robust enforceability. Obviously that's going to be considered at trial.

Then if we go over the page to -- a couple of pages to page 81, you then get to the specific terms. It is 265 that's perhaps most instructive here:

"In support of its analysis of the agreements the CMA relied on certain terms in these agreements. Despite the agreements all being governed by US law, the CMA appears not to have obtained any expert evidence on foreign law in seeking to construe their terms, carried out its own assessment, fundamentally misreading and misunderstanding the terms. Issues of foreign law are not a matter in respect of which the CMA could simply rely on its own interpretation."

Then you see the further criticisms are set out in the following paragraphs. What is said here by the CMA today and in their skeleton argument is that Professor Kraus's report is a foreign law -- it is dealing with foreign law and it is irrelevant to Microsoft's challenge, because the only question that arises is under Tameside, where no reasonable authority could suppose based on the material before it that the enquiries they made were sufficient. That's paragraph 33 in their skeleton argument.

But if you just turn over the page to page 86, after the summary of interpretation of the relevant clauses, paragraph 268:

"The CMA has therefore misdirected itself as to the nature and operation of the terms of the agreements, taking into account irrelevant considerations, failing to comply with its duty of enquiry and/or reaching irrational conclusions."

Now Tameside is essentially only the second of those considerations. So the CMA criticism here focused on Tameside is not sufficient, because what we are saying is that actually what you did with your interpretation was irrational, and we are

explaining that based on this evidence.

Now the suggestion has also been made by the CMA that this material goes too far, because Professor Kraus's report refers to the application of principles of US law to the facts, but that's not the right consideration here. It is true, of course, that experts are not to fulfil the role of actually applying the law to the facts in reaching decisions, but in terms of interpretation of relevant clauses it is obviously right that a US law expert will necessarily be assessing how a clause would be interpreted by a US court and has to look at the particular clause in question.

MR JUSTICE MARCUS SMITH: Well, that I understand, but, I mean, let's go back to paragraph 255 --

MR BEARD: Certainly.

MR JUSTICE MARCUS SMITH: -- in your notice of application --

MR BEARD: Yes.

MR JUSTICE MARCUS SMITH: -- where you say:

"The contracts are written under US law."

Yes.

"Therefore their terms must be interpreted accordingly."

Yes.

"As in English law, the fundamental principle is the contracts are binding and must be complied with."

Then you cite, of all things, Chitty to say that there's a relationship between freedom of contract and bindingness of contracts.

MR BEARD: Yes.

MR JUSTICE MARCUS SMITH: Now why don't we get all of this from a combination of simply reading your submissions and reading the contracts, and we can work out

whether they are saying something approximating what Microsoft says or whether they are sufficiently uncertain so as to give traction to the CMA's conclusion. I mean we are not -- we are not at a level of having to answer a specific technical point. I mean, suppose it was an insurance coverage question of one loss event or two and you had a row of US experts to say it was two, not one, but the CMA concluded it was one, not two, well that's the sort of thing where I would say these things in almost any jurisdiction are sufficiently uncertain, that to say it was one loss event rather than two would be a reasonable conclusion and we wouldn't be interested in the US opinion because it is too technical to get into the granular answer.

So what I am saying is we have something here which is sufficiently broad brush and impressionistic, because after all the US and the English regimes of contract law are not that different. We ought to be able to test simply looking at the material that we have without the expert report on US law, to understand whether there's traction in the complaints that you are articulating.

MR BEARD: Let me take that in three stages. First of all, perfectly rightly you pick up 255 but that, of course, is under the head of the enforceability consideration. It is not in terms of the specific interpretation of the specific clauses. We see that being engaged in from 265. There we really are in the territory of dealing with the proper interpretation of specific US law contract clauses. We are making two points. You as the CMA can't go around just working on a blithe presumption that you can read everything as akin to English law when it is under another law and you have failed to take US law advice. That's a public law failing in and of itself. So we are saying that, but we are also saying you got that wrong. The way you did it was wrong.

The only way we can say you have got that wrong and that was fundamentally wrong and fed into your decision is by saying this is how you properly interpret these

clauses under US law. That's what it goes to. Professor Kraus's evidence is not on the enforceability point. It is on the specific interpretation. I don't want to see how close an analogy I am getting to your insurance example but here we are saying from a public law point of view the relied as a key element of this uncertainty concern on their interpretation, and we say that interpretation cannot just be based on English law. It has to be based on US law. We say it was a significant failing not to do that at all, but then we explain what the interpretation was under US law. We can't do that any by other means than by expert testimony.

Now, sir, you may be right that in some respects what you are doing here under US law ends up being certainly on some of the clauses the sort of interpretation you would carry out under English law. I am not demurring. I am not suddenly saying we are reinventing the nature of common law interpretation between the two jurisdictions, but you can only do that properly through the lens of US law analysis in order to test the public law proposition here, otherwise you are taking an unjustified shortcut, missing out the fundamental issue that they have not taken US law advice, and then assuming in your conclusion that you can treat interpretation of the clauses in US law as akin to English law without actually testing whether or not that proposition is correct.

MR JUSTICE MARCUS SMITH: Does it come to this, that you are -- are you accepting that if one reads the US contracts through the lens of an English lawyer's eyes, in other words reads the language just as language, the CMA's conclusion is a defensible one; in other words, one needs to have the statement of US law that things are not quite what they appear on the face in order to understand the error.

MR BEARD: No, I am not saying that. I am not saying even applying the English law approach they have got that right. What we are saying is if you do this properly, and

we say you have to do this properly because you are dealing with US agreements, you have to look at it through the prism of US law, because you can see in parts of Professor Kraus's report that there would be a sort of familiarity in the approach of analysis that he is adopting, as we would as English lawyers adopt in relation to contractual interpretation.

So no, I am not saying the only way you could succeed in showing there was a problem here is by focusing only on the US law analysis, but we say that is the only right way of carrying out this exercise is to focus on the US law analysis, because otherwise you are presuming your own conclusion about how you properly interpret these clauses.

So that's why we say we have a central error, which is the Tameside point that they didn't carry out the analysis they should have done, but also we are explaining why if they had carried out this analysis and properly done it, you would have got a different conclusion in relation to the interpretation of these clauses that then goes to the uncertainty element.

MR JUSTICE MARCUS SMITH: You see, I wonder if there isn't a difference between questions of construction of contract and more technical rules of law. Suppose the CMA had said these agreements are simply unenforceable because there's the doctrine of consideration in American law and there is to consideration here. I am hypothesising. So they effectively invented a rule and said by that rule of American law these contracts aren't enforceable. Now in that sort of situation you would expect that conclusion, that assertion as to legal effect of foreign law to be in some way back stopped. It might be controversial, but you would at least want to know that there was a rule in American law that serves to arguably at least invalidate these contracts.

Is interpretation different in the sense that we are just talking about the meaning of language? I mean, when one has a case of construction of English law contracts in a court, of course, you get cited West Brom and Arnold v Britton and all the other cases. You read them and then you essentially go to the language of the contract and work out what it means without really paying perhaps as much regard as one would like to, to the general articulation of how one interprets contracts in English law, because it is the language that matters, not so much the rules as to how one looks at things.

So yes, you need to know that one looks at the instrument as a whole and that sort of thing, but does the granularity of what the language means actually add to the importance of the enquiry we are undertaking?

MR BEARD: So I am not sure about the answer to that latter question on the granularity of language, but taking a step back to the preliminarily question you asked, which is are there essentially errors that are different in kind that would require foreign law evidence, and you give your consideration example as one, and are there lesser errors that then don't require foreign law evidence. Our answer to that is no, because the bigness of the area is not a criterion that dictates whether or not you need foreign law evidence to assess the scale, scope and impact of that her error when you are talking about contractual matters. So I can't really take it further than that. The answer is no.

Yes, of course you are right when it comes to consideration of language in a particular clause. The nuances of the language are accepted as a part of American law as they are as a part of interpretation under English law. No doubt about that. One can see that from Professor Kraus's report, but the framework within which you consider that language and the consequences of that language for the

practical force of those clauses has to be considered under the framework of American law. You can't make these differences between something that is to do with consideration and something that is to do with linguistic interpretation, because the framework needs to be the American law system.

So I understand that it would be nice if one can say "Let's not worry about it too much. We all understand this is written in English" and then be as soon as one begins to articulate that, one can think of examples where American English and English English is not entirely congruent and that might well be expanded as a scope of difference when one comes to the interpretation of the importance.

But I don't want to lose sight of the fact that fundamentally in order to do this exercise you do need to look through the glasses of American law at the language. If the glasses of American law said "Actually we look at this in the same way as English law", well, that makes it easier for us to reach a conclusion, but that doesn't change the exercise and which pair of glasses we have to wear in relation to this exercise.

MR JUSTICE MARCUS SMITH: I understand. You are saying that that is true whatever the nature of the legal issue, because one doesn't know in advance of making the enquiry whether the difference exists or not and you must not presume.

MR BEARD: Exactly.

MR JUSTICE MARCUS SMITH: Okay. If that is right, doesn't the US law evidence prove too much in the sense that isn't it enough for your purposes to be able to say the CMA simply didn't go to a US law expert?

MR BEARD: That's one of the challenges. That is what the CMA are saying. They are saying essentially that this is just a Tameside language, because if you are right that you needed to use US law in order to interpret US law, I know that sounds like a tautology but it is not what the CMA did, then you get home on this point, to which

we say amen. That's fine. We do. We are also saying if you are then saying that doesn't make any difference because the way in which you interpret these clauses would just be "You can treat them likening English law. We could assume these things", that's not right either, which is what this goes to.

MR JUSTICE MARCUS SMITH: Immaterial error or material error.

MR BEARD: That's the issue. We are not trying to sit here and say Professor Kraus's report is massively complicated or that English law can't understand what's going on here, or that a number of the outcomes are vastly different from English law. We were not saying that at all, but you had to do it through this route and there are material differences comparing what Professor Kraus says is the proper interpretation of these clauses as compared to the way in which the CMA has approached it.

I can take you through each of the sections but that is the essence of the position here, which is why we say this is not a big deal in terms of the burden on the CMA but it is a big deal in terms of the relevant legal approach which does matter for the purposes of a public law challenge here.

There are various points in the skeleton argument saying "It will be impossible to deal with. We will have to go and get expert evidence" and so on. They had this material for a substantial period of time. They have already had it for three weeks. If they specifically disagree with what our American law expert is saying, then I am sure they have identified that. They will be able to focus down on what it is they need an American lawyer to deal with. At the last count scarcity of American lawyers was not a world problem that had yet been identified, even in London, and therefore it would not be impossible for them to find someone that might be able to assist them if they have points of disagreement. They don't have points of disagreement, that's

fine, and then we can proceed to the argument as it is.

But in those circumstances we are saying it is obviously something they can deal with. They should have been dealing with it, because we put it forward, and given the extension of time in relation to defence, if they want to get further material and they think that's appropriate, then they can serve it with their defence on the date that has been dealt with.

Now I know that Lord Pannick and Lord Grabiner have something to say. So I am going to pause there.

MR JUSTICE MARCUS SMITH: I am very grateful, Mr Beard. Thank you very much.

Lord Pannick.

Submissions by LORD PANNICK

LORD PANNICK: Thank you very much, sir and members of the tribunal. On behalf of that division I have one general point I want to make in support of what Mr Beard has said and then Lord Grabiner is going to assist the tribunal on the report specifically of Professor Kraus and the relevance of the US law.

The general point that I want to make is this. We say that to make a ruling that any of this expert evidence is inadmissible at this stage would be premature, and it would be premature to conclude that any of this material will be of no assistance when the tribunal does not yet know the substance of the CMA's response to the detail of Microsoft's complaint.

We respectfully submit that the proportionate approach at this stage is for the expert evidence to be looked at, all of it to be looked at, de bene esse. The CMA can respond as they see fit. Any decision on admissibility can be taken as and when

necessary in the light of the substantive defence, and indeed whether Microsoft at the substantive hearing need to rely, and if so how, on the expert evidence at that stage rather than this tribunal attempting now to determine a number of questions that may turn out to be unnecessary, to be hypothetical.

Indeed, the tribunal will have seen this is precisely the approach that Microsoft and the CMA, with our agreement, have reached in relation to the witness statements on which Microsoft reply. They very sensibly agreed "Let's wait and see what disputes it really is necessary for the tribunal to determine".

Sir, there's one recent authority in the Supreme Court which supports such a de bene esse approach to contentious evidence. I hope the members of the tribunal have a copy of this judgment. It is called Shagang Shipping decided in 2020, Volume 1 of the Weekly Law Reports, page 3549.

Sir, members of the tribunal, you will see that the Supreme Court was concerned with evidence about alleged bribery and torture, some distance from the normal work of the CMA, but nevertheless the statements of principle are of assistance.

If, please, you turn to page 3563, you will see paragraphs 58 and 59 where Lord Hamblen and Lord Leggatt, speaking for the Supreme Court, say this:

"58. How and in what order questions concerning the admissibility and weight of evidence are dealt with is very much a matter for the trial judge. There is no “one size fits all” approach. The judge will consider how best to deal with such matters in the light of the issues, the evidence and the arguments in the case as a whole. There will usually, if not invariably, be more than one legitimate approach which can be taken. In many cases, for example, issues of admissibility can be dealt with efficiently by admitting the evidence de bene esse. This means taking the evidence into account on the assumption without deciding that the evidence is admissible.

Unless the evidence turns out to be critical to the decision to be reached, the issue of admissibility may never need to be determined. This is often a convenient approach to adopt, as resolving issues of admissibility can be complex and time-consuming."

I would respectfully add to that if one only deals with determining an issue of admissibility if and when it arises, the debate is more focused on precisely what use is being made of the evidence and why.

Now that case concerned hearsay evidence, but the principles are of general importance and indeed they are stated as such by the Supreme Court.

My submission is that the reasoning of the Supreme Court is applicable in the circumstances of this dispute. These proceedings -- and we are very grateful for it -- have been expedited. The issues are not yet crystallised. Points of technical complexity are in play. This tribunal has enormous economic expertise but there are issues of technical complexity about gaming to which the evidence is addressed.

It may well be that this tribunal finds in due course that it can resolve the issues in dispute without recourse to the expert evidence, but it is at least reasonably possible that the tribunal will be assisted at trial by all or some of this evidence. My respectful submission is it would be unwise now to exclude it. That's my submission.

As I mentioned, Lord Grabiner is going to assist on US law and Professor Kraus.

MR JUSTICE MARCUS SMITH: I am very grateful. You don't say that there ought to be a difference of approach between civil proceedings, which these were, and judicial review, which these are.

LORD PANNICK: No, because the same issues arise in relation to questions of admissibility and weight. Now the question of whether a de bene approach rather than the court determining the issue at a preliminary stage is a wise and sensible thing to do. That approach does not depend upon the nature of the proceedings in

my submission.

MR JUSTICE MARCUS SMITH: I am grateful. Thank you.

Lord Grabiner.

Submissions by LORD GRABINER

LORD GRABINER: Thank you, my Lord, members of the tribunal. I don't want to repeat matters that have been addressed already or said by my learned friend, Mr Beard, but I want to traverse the same territory, if I may, just in relation to the proposed evidence of Professor Kraus.

So it is trite law as a matter of English conflicts law that where you have a foreign contract that's governed in effect by some foreign legal system that proof of the interpretation of that contract and meaning of that contract is a matter of foreign law. Foreign law in an English court is a matter of fact and has to be proved by expert evidence. The contracts we are concerned with here, one is -- some are governed by Washington State law, others I think or another by New York State law. So, for example, if you want to understand the meaning of the expression "Commercially reasonable efforts" in a contract governed by one or other of those two legal systems, you should be looking at local law expertise.

Now it may be that there won't be very much, if any, difference between the approach adopted in those jurisdictions compared with our own. Well, that's fine, provided you bear in mind the fact that they may be different. That's the key point.

Now at the beginning of this morning your Lordship said the approach adopted by the CMA was to assume the validity of these agreements and your Lordship was concerned that we shouldn't be getting into looking at evidence that didn't assist the CAT in its work or didn't, as your Lordship put it, distract this court when it came to

evaluating the matters which are the subject of this appeal.

Now our position is, and in this I think we are completely in agreement with Microsoft, that we know that the CMA did not take local legal advice, if I can put it like that. At the same time they concluded that these agreements had little or no value.

Now we take the view that (a) they should have taken that advice and (b) the conclusion that those agreements had little or no impact is frankly nonsense. That conclusion involved the proposition that these legal agreements carry little or no weight, either legally or commercially and we fundamentally disagree with that and we take the view that that was a fundamental error which is judicially reviewable. That is the reason why the Professor Kraus evidence goes in.

Now if I can just move on to the point made at the end of my learned friend Mr Beard's submissions, with which we respectfully do agree, and that is this, that the CMA has had this evidence now for three weeks. It knows exactly what Professor Kraus says, and actually when you read what Professor Kraus has to say it is entirely unsurprising and very easy to understand and very straightforward.

If they agree with what Professor Kraus says in his witness statement, that is fine. If they have reason to disagree then the simple thing for them to do is to put in some appropriate evidence to show that they disagree. My suspicion is that they will not disagree with any of it actually, in which case there is no problem, but if they do disagree they have enough time now to put in that response evidence.

If you look, for example, at their skeleton argument for today -- I must say that the word "skeleton" has lost its real dictionary meaning, hasn't it? I am not criticising them because we do this as well.

If you look at paragraphs 39 and 40, you can see set out there the concerns that

they have in relation in particular to the evidence of Professor Kraus. They say in 39:

"It will take a minimum of three weeks to prepare the relevant evidence beyond the proposed date for its defence".

So just pausing there, we know that they received this material on 24th May. We also know I think, subject to what may happen later on today in these proceedings, they are now not due to serve their defence until 6th July. Then they say in paragraph 40:

"If Kraus 1 were admitted, the CMA would need to be able to instruct US lawyers."

Well, pause there. I must respectfully suggest that that's surprising that they have not done that already. Surely they would have done. They have known this was an issue for a very long time:

"To submit responsive expert evidence. This evidence is not available in-house."

Well, I am not suggesting it is, but the ability on the part of the CMA to access that American law advice even in London we know is around and available.

"The CMA would be able to instruct an expert within two weeks of the second CMC, ie by 26th June. The CMA's expert would need at least another two weeks to prepare a responsive report, ie 10th July."

Now that is only four days after we are anticipating getting their defence. So what I am saying, and I am sorry to be long-winded about it, is that if there is anything in Professor Kraus's report that they disagree with, they can get the advice to respond to it. I suspect there will not be any, but if there is anything, it can be put forward.

The other point would I make in this context is this, that whether they do or whether they don't put in anything to contradict it, this tribunal is in a perfect position to express a concluded view as to the meaning of these contracts, and that is actually

rather an important point, because if these agreements contain, as we respectfully suggest they do, very powerful arguments indeed as to their significance in the context of this bid and the solution, the behavioural solution to the problem that was concerning the CMA, and which it was not satisfied could be satisfactorily resolved, then it would be the most straightforward exercise in the world, and one in which this tribunal would be well capable of coming to easy conclusions about, namely what is the correct interpretation of these agreements, albeit as a matter of Washington or, as the case may be, New York law.

That's all that I wanted to say, but I do emphasise the point that my friend Mr Beard was making, which is that these are matters of foreign law. Foreign law is fact in an English court, and there is every justification for Professor Kraus's evidence to be admitted at this stage. As I say, not least because essentially that was not an exercise that was undertaken at all by the CMA.

MR JUSTICE MARCUS SMITH: Thank you very much.

Mr Williams.

Submissions by MR WILLIAMS

MR WILLIAMS: Sir, I will just arrange myself, if that's all right.

Sir, members of the tribunal, I am going to deal with the economic evidence first and then I will deal with the position in relation to US law, which is a much shorter point. Obviously we have heard what you said in your preliminary observations. We continue to oppose the admission of the economic evidence. I am going to make my submissions, which will really be developing the points made in our skeleton argument written submission and then pick up, if I can characterise it this way, your pragmatic suggestion as to how we might proceed as we go along.

We make really three overarching points in relation to the economic evidence. I will set these points out first and then develop them.

First of all, expert evidence is only admitted exceptionally in judicial review proceedings for defined purposes. We don't say they are exhaustive, but we do say they are defined. There is a clear line of authority in this tribunal establishing the sorts of reasons why expert evidence may be admitted and also importantly the circumstances in which proposed expert evidence shouldn't be used in merger review proceedings.

In our submission what we have seen in the Microsoft application and in Mr Beard's submissions today is an attempt to shoehorn really the evidence that has been prepared into some of those established categories, essentially explanatory material and technical errors.

In our submission on a straightforward reading of the reports the material doesn't serve those purposes. What the reports do is clear on their face. They critique the CMA's findings on the questions of substance or, put another way, they set out or support Microsoft's case using the vehicle of expert evidence. In our submission that's not a proper purpose for expert evidence in judicial review proceedings and that is really the short answer to the application.

The second overarching submission is that when one looks at the notice of application, it is equally clear that the expert evidence isn't necessary or reasonably necessary in order for Microsoft to pursue those grounds of review, the pleaded grounds of review. They are public law challenges to the CMA's reasoning on familiar public law principles, and this tribunal doesn't need, doesn't reasonably require the views and opinions of an economic expert witness in order to understand the issues, to understand Microsoft's case or to test whether a public law ground of

review is made out. It is not reasonably necessary for any of those purposes. That is so whether the complaint is one of irrationality or a failure to have regard to relevant considerations or having regard to irrelevant considerations. The evidence simply is not required for any of those purposes.

To the extent that the points made or the arguments made by the experts in their report translate into public law arguments, those arguments can be made by counsel, and indeed they need to be made by counsel because the expert evidence obviously is not framed in a way which addresses the public law test. The critique is on the merits.

The third submission is that beyond those threshold issues there are a number of specific problems with the evidence which reinforce the case for admitting it and these are issues about the expert instructions. Both the instructions which were given and those which have not been disclosed, and questions about the independence of the experts arising from their prior work for Microsoft on this case. I do say those are subsidiary points in the context of the overall argument. I am not going to spend much time on them, but we do make those points.

There is a further issue, which is about the new material in Dr Foschi's report. That is a material point and I will spend a bit of time on that.

In response to the submissions Lord Grabiner was making just a few moments ago, given that we now have an agreed extension of time until 6th July, it is not part of my submission that the preparation of the evidence introduces overwhelming practical difficulties. I am going to be focusing on admissibility at the level of (Inaudible).

MR JUSTICE MARCUS SMITH: I am grateful.

MR WILLIAMS: So just before going into those points in more detail I just want to make a submission about why this matters, and obviously this will start to touch on

your introductory observations, sir.

We were before the tribunal two weeks ago discussing the importance of speed and efficiency in applications for review of merger decisions and, as I said on that occasion, merger proceedings are essentially expedited by default. I think we can all agree these are expedited proceedings. I mean, these proceedings are even more expedited than usual, but every case is conducted on a compressed timescale, which means that it is especially important for the material that's put before the tribunal to be relevant, necessary and proportionate for the preparation and determination of the case.

There's a short period for the preparation of applications. There's a short period for the preparation of defences. We have an extension of time, but we have an extension of time for the reasons that have been explained to the tribunal. That time is not simply at large. It is important in those circumstances that the task of preparing a responsive case is not expanded beyond what is necessary for the purposes of the determination of the issues. It is not just about preparation. It is also about the oral hearing itself. The hearing tends to be short and focused. This case is going to be a bit longer than most, but it's still going to be a very compressed hearing by the standard of any civil trial of comparable complexity or importance.

So in the context of all of that it is obviously important that merger review proceedings are conducted in a streamlined and efficient way, and it is in my respectful submission obvious that if one starts to introduce expert economic evidence on the substance of the argument, you are going to cut against that whole streamlined model of review. Issues of economic principle and analysis lie at the heart of every merger decision and the sort of evidence that is advance in this case, if that's admitted, there's every reason to fear it will become the norm wherever there

are debates about market definition, market shares, the framework for analysing competitive effects and so on and so on. There is nothing unique about this case and there really is a question of whether the gates ought to be opened.

I will leave on one side for the moment the tribunal's preliminary observations. The implications of admitting expert evidence are considered in the authorities that I am about to take you to, but they include the need in principle for responsive evidence which takes time and costs of repair, costs about how conflicts of evidence are going to be resolved, is cross-examination going to be needed, the lengthening of the hearing and so on and so forth. In my submission the tribunal has repeatedly expressed concerns about what Mr Justice Sales, as he then was, described as a diversion from the efficient and speedy resolution of disputes on judicial review principles.

So we do say there's a significant point of principle about how this regime is supposed to operate both at the level of legal principle and as a matter of practicality and the issue before the tribunal does have wider implications.

It is notable in my submission that when the tribunal has rejected similar applications in the past, it has expressed wider concerns about opening the door to evidence of this nature in a way which undermines and disrupts the regime more generally.

We will seem that in a moment in BAA and HCA. One also see it in Lafarge, paragraphs 10 and 14, and in Tobii, the admissibility ruling, paragraph 88.

So the tribunal, if I can put it this way, said at the beginning of the hearing "Can we admit the evidence on a basis which does not generate those sorts of problems, does not generate the disruption" about which I have just been expressing concern?

In my respectful submission the difficulty is that the tribunal's pragmatic suggestion tends to prove our point that, in fact, the evidence is not reasonably required for the

disposal of the proceedings and is not properly admissible on any relevant legal basis.

So in my respectful submission all of the reasons why the tribunal takes the view that possibly the evidence could be admitted in a pragmatic way are also reasons why it ought not to be admitted in principle.

Just to take this point. In my respectful submission the reason the evidence could never be determinative, which I think is what you contemplated, sir, is because it doesn't establish what is in the terminology of the authorities an incontrovertible technical error. If it did establish an incontrovertible technical error then arguably it could be determinative, but it doesn't do that. As I will develop shortly, that really goes to the question of admissibility. It is not a question for the tribunal to manage at a pragmatic level.

So that's an overview of the position in relation to the economic evidence. In relation to the US evidence the argument is somewhat different. There are two main points, the Tameside point, which Mr Beard has raised with you and developments of the evidence in that context, and, secondly, if the evidence is admitted how far it ought to go, and I will come back to those issues at the end of my submissions.

Before I go further, if necessary, I would like to address the Activision position and Lord Pannick's submissions that you ought to admit the evidence de bene esse. I addressed you last time on the reasons why that was undesirable and inconsistent with the practice in relation to expert evidence in judicial review proceedings as distinct from the legal position generally in the Shagang case, which Lord Pannick showed you. I probably ought to take you back to the Banks case, which contains a useful summary on this point, if this point is still live. I had thought that by, or assembling here with fully developed arguments that the tribunal was gearing up to

resolve the issue, but if that's still a possibility I will take you to the Banks case.

MR JUSTICE MARCUS SMITH: Yes, I think we should hear you on that.

MR WILLIAMS: Banks is at tab 30 of the authorities bundle. If the tribunal wants to see the context, it is at paragraph 2. It's a judicial review challenging the decision governing the awarding of contracts relating to renewable energy generators.

The discussion in relation to the admissibility of expert evidences runs through the first few paragraphs of the judgment. I was going to pick it up at paragraph 6. You can see a bit further into that paragraph the court introduces the Law Society case, which has loomed large in the argument before you. Paragraph 7 then deals with the question of the procedure to be followed by claimants. What you see in paragraphs 7 through to 8 is essentially the Divisional Court's criticism of the procedure that was adopted in that case, where the admissibility of the evidence was not determined as a threshold issue. You can see at the end of the quote in paragraph 8 it says:

"The upshot was that arguments about whether or to what extent the expert evidence should be admitted were made by each side alongside evidence which relied on the expert evidence. That was an unsatisfactory way to proceed."

That's essentially the approach that Lord Pannick is urging upon you, deprecated by the Divisional Court in that case.

Then there is reference in paragraph 9 to the BAA case before this tribunal and his observation, which I think I highlighted at the last hearing, but obviously that was only the Chair on that occasion. The quote from BAA which says:

"It is important that the application for permission should be made at the earliest possible in the proceedings. The matter should not be left hanging in the air, leaving everyone in a state of uncertainty until the hearing itself."

What one then sees in the judgment is a discussion of what happened in that case. This judgment was given on 28th January 2020, just to give you the context, and you can see from paragraph 11 that a rolled up hearing has been fixed for 3rd to 5th March 2020, so quite imminent, and the preceding month there had been an application to rely on expert evidence. The court had to decide what to do about that. The court ruled on what it was going to do about that predicament in paragraphs 16 and 17. It is probably worth you just reading those paragraphs.

Sir, that in my submission is illustrative of the practice of the Administrative Court in dealing with these issues, which, of course, draws on the practice of this tribunal, so it is the established approach in proceedings of this nature.

Really two reasons are given, two important reasons are given for dealing with these matters at a preliminary stage and not leaving them over to the final hearing.

The first is the point I showed you in the Law Society case, that it is unsatisfactory for the tribunal to hear argument which intermingles the substance with questions of admissibility. That creates disorderly -- issues of disorder at the final hearing.

The second reason is that it's undesirable for a party in the position of the CMA to be in a state of uncertainty, but, of course, the uncertainty applies to all parties and indeed to the tribunal.

So Lord Pannick makes the point that a different approach has been taken in relation to the factual evidence in this case. I hope it is clear from our skeleton argument that we have taken a different approach to the factual evidence purely on grounds of the art of possible. We have a one-day hearing before this tribunal. It is 12.30 now and I am making my submissions on expert evidence. If we had to deal with the admissibility of ten witness statements, then we certainly wouldn't be done by 4.30 or 5 o'clock. We simply took the view that there was too much to do in a one-day

hearing and in expedited proceedings where there is not the capacity to be in court dealing with these matters week in, week out, we have taken a practical view, but that does not mean that issues which are capable of being resolved on the basis of submissions at this hearing ought not to be resolved to give certainty to the parties, and in my submission it is perfectly practicable for the tribunal to deal with the expert evidence as we have urged you to do.

That is partly because there is in my submission, or there are a set of core issues running through those points rather than the more disparate issues which arise in relation to the factual witness statements.

With respect to Lord Pannick, we don't think that the approach taken generally, including as set out by the Supreme Court in the Shagang case, simply translates to proceedings of this nature. Certainly the strong views of this tribunal in BAA was that it was desirable to resolve these issues, and in my respectful submission because of the nature of the legal principles that the tribunal applies to these issues because they are clear and because of the restrictive approach that is taken to the admissibility of expert evidence, it is perfectly practicable for the tribunal to resolve that issue, and in my submission it ought to do that.

So in our submission you should resolve the question today and I am now going to take you into the argument on the economic evidence in a bit more detail.

So the tribunal has various rules in the authorities bundle. I don't think you actually have rule 21, which governs the admission of expert evidence, but it is in the Dye & Durham case. I could show it to you there. Maybe you have another copy. Dye & Durham is at tab 33. It is on page 10 of the judgment. The relevant rule is rule 21(2):

"In deciding whether to admit or exclude evidence, the tribunal shall have regard to

whether it would be just and proportionate to admit or exclude evidence, including by reference to the following factors."

We rely on (a):

"The statutory provision under which the appeal is brought and the applicable standard of review.

(b) Whether or not the substance of the evidence was available to the Respondent."

That's relevant to Dr Foschi in particular, but obviously none of these reports in the form in which they are now presented were before the CMA. I also wanted to flag (e):

"Whether the evidence is necessary before the tribunal to determine the case."

This tribunal has consistently adopted the same approach in broad terms to these issues as the Administrative Court. So we have a body of authority which in part is the tribunal's own authority incorporating relevant decisions of the Admin Court. We agree with Mr Beard that the Law Society case is part of that relevant body of jurisprudence. I will go to that shortly.

So that body of authority sits underneath the jurisdictional rule and provides guidance as to the circumstances in which the tribunal will admit expert evidence in relation to judicial review proceedings, and I think I can get more or less all the points I want to make in relation to the tribunal's jurisprudence from the judgment of Mr Justice Sales, as he then was, in HCA, which is tab 23. So that's the first authorities bundle, tab 23.

So he introduces the issue at paragraph 1. In paragraph 2 he refers to the conventional grounds for the admission of fresh evidence in Powis, Lynch and so on. Then he refers to his own observations in the BAA case, in which he -- I think it was the first application before this tribunal in which those principles were applied by the

tribunal.

In particular you can see at paragraph 80 Mr Justice Sales made -- the tribunal chaired by Mr Justice Sales, I should say, made observations in relation to the implications of admitting expert evidence in review proceedings under what was then section 179 and which also applied to merger -- sorry. That was a market investigation case and the observations apply equally to merger review cases.

At the end of paragraph 80 he makes the sorts of observations I was making to the tribunal a few minutes ago about the impact that admitting the evidence would have on the process of review, bearing in mind the relevance of that evidence to public law grounds of review such as are necessarily relied on in proceedings of this nature.

Then at paragraph 4 he develops those points and says:

"There are strong reasons to support this approach, as touched on in the judgments above."

Then he makes points. I will not read them all out, but he picks up a number of important points.

In subparagraph (a) he develops the practical points that I have been making to the tribunal.

Subparagraph (b) is an important paragraph, which is about the tribunal's expertise, and I do want to stress this point, because in the end Microsoft's main point is that the evidence is necessary or reasonably useful to help the tribunal understand difficult or technical questions of economics. In my respectful submission that is a fundamentally unpromising point when the technical issues to which the evidence goes are the very same technical issues in which this tribunal has expertise as specialist tribunal.

When we come to it, in my submission we can see that none of the points that are expanded upon in the expert reports are points where the evidence is reasonably required to assist the tribunal. Whether it might satisfy the criterion of being interesting or useful background reading or illumination, that's not the test.

But the notion that this tribunal in my submission needs assistance understanding the issues, understanding the arguments, as I say, is fundamentally unpromising.

MR JUSTICE MARCUS SMITH: The CMA then wouldn't have a difficulty were the tribunal, being an expert tribunal, effectively to originate its own expert opinion evidence from, let us say, Professor Neuberger in line with what is said by Microsoft in their expert evidence, that not being admitted; in other words, you wouldn't have an issue in our taking a stance, which would effectively be unflagged to the CMA, which is or would be exactly the same as what is articulated here?

MR WILLIAMS: Well, within the parameters of the public law challenge, sir, no. It is obviously part of the function of this tribunal and the incorporation into the panel of this tribunal of panel members with relevant non-legal expertise, economic expertise, whatever it may be. It is part of the raison d'être of the tribunal to bring that understanding of the material to bear, but obviously it does so within the parameters of public law principles. Obviously there is a body of authority dealing with the question of what is the standard of review and whether it is heightened because it is an expert tribunal and so on and that's familiar territory.

But, no, of course part of the advantage of the constitution of this tribunal is that, if I can put it this way, it can cut through what would for a different audience be very difficult and technical material and see straight through it.

Ultimately what we are talking about is competition (inaudible) applied to a particular industry. In my respectful submission that is what this tribunal is here to do. It is

here to bring that level of penetration through to the material, albeit applying always relevant judicial review principles.

MR JUSTICE MARCUS SMITH: Yes.

MR TIDSWELL: If it is said that you have a basic principle of economics wrong in the analysis and Mr Beard says, "Well, I have to have some form of platform to make that argument, so it is convenient for me to produce an expert who says this is a basic principle of economics", and then that is put to you and you choose how you will wish to deal with it, and you may feel that you wish to respond to it by disputing whether or not it is a basic principle or you might say, "That is a basic principle. That's not what we did", so different courses you might take. Are you saying it is not legitimate to go down that path in the framework of what is set out, for example, at HCA, and indeed is it more desirable to do that in circumstances where Mr Beard makes the argument and then we make the assessment of it with the inherent knowledge of the tribunal? Is that a better way of approaching it than actually getting the point out in the open with an expert report that says "This is the principle" and gives you an opportunity to comment. I appreciate you will say that's not what the expert reports do, but just at a principle level is that the position?

MR WILLIAMS: Yes. We're going to look at the Law Society case in relation to the definition of an incontrovertible technical error in a moment. I mean, it is quite difficult to envisage a situation which meets your criteria, though, sir, because, as I said a moment ago, this is an expert tribunal. Take the idea of a cogent theory of harm, because that's one of the topics we are debating. Now if it were suggested that the CMA has set out a theory of harm and there is a basic economic flaw in the reasoning built into the steps which form part of that theory of harm, I can see how that could be said to be a basic error of economics. That's just really not how you

analyse that problem.

The first point I make is that is precisely the sort of territory where this tribunal is well equipped and indeed, as I said a moment ago, its very reason for existence to be able to grapple with those sorts of issues, to tackle those sorts of points certainly in my respectful submission to a public law standard.

Of course, if this were an appeal on the merits where the tribunal were deciding between competing economic arguments, the issue takes on a different complexion, but where it is basically said that the CMA's reasoning is so flawed that it fails a rationality standard basically, the idea that that's not an issue which this expert tribunal can deal with without an expert report telling it what the basic economics are, it is quite difficult to see.

But our main point in response to your question, sir, is if we were confronted with a report which presented material of that nature, then we would be zoning on those issues and focusing our position on the precise issues. Our main point is that that is not the nature of the material, and the reason why we oppose the admission of these reports on the basis of these principles is because they simply do not meet that test, sir.

MR TIDSWELL: I don't want to take -- I know you want to go to the principles and we jumped on the report, but it might be said that there is a bit of both, that in some of these reports you find some economic principles which you have just stated and there may be some grey areas between economic principle and what actually is just a view, and then you get into perhaps quite a lot of argument about what the CMA should or should not have done by reference to that. That's not unusual in the context of expert reports, as we know. That happens in all sorts of situations.

MR WILLIAMS: Just to finish up on to that point, yes, I would agree there are two

questions. One, has the CMA made an incontrovertible and basic error of economics, and, as I say, that is the sort of thing which, when one is dealing with the JR standard, it is really difficult to envisage that not being dealt with on the basis of argument, submission and this tribunal's expertise. Has the CMA made an error in applying a particular theory of harm? Of course, that is then tested on the basis of usual public law principles. Does the reasoning stack up? Is it rational, relevant considerations and all the rest of it.

So, you know, one has to really focus on what the nature of the issue to be determined by the tribunal is and ask how the evidence relates to that. In my submission what doesn't assist the tribunal, doesn't even go to the grounds of review, is a sort of commentary, a commentary we see, and certainly, I mean, to the extent that the reports make points which do more readily translate into public law type complaints -- for example, the point that is made about switching analysis, that's a point that can be made. It is the meat and drink of the tribunal really. Do we regard the analysis that has been carried out on this question of switching as sufficient? It is just the (inaudible). The tribunal is not going to be assisted by broad statements of opinion by an expert running in parallel with that.

MR TIDSWELL: You are therefore not going to take any objection to Mr Beard standing up and saying, "It is a basic principle. You need to assess switching" and that's his say so, and you are saying we can make up our minds about whether that's right or not without -- you are not going to object to the fact that he is effectively advancing economic evidence.

MR WILLIAMS: I don't think it is going to be any part of our case that switching is not a material consideration in these cases. The question is going to be what evidence did the CMA look at? What were its reasons for carrying out the analysis,

relying on the evidence it did and its reasons for not focusing on other things? That will be the framework, as it is in all these cases. It is fairly unheard of for an expert coming to the tribunal to tell the tribunal that a merger decision needs to think about things like switching and competitive effects outside the relevant market and these sorts of things. That's just the framework we are all dealing with.

So, yes, we were in HCA. You have probably read this. I don't want to take up a lot of time, but I think it is just worth drawing to your attention these points.

(e) was about expertise and that's the exchange we have just been having. (c) is also a point -- (c) is expertise. (b) is the irrelevance in general terms of expert evidence where the issue is being assessed under a public law standard and (c) is expertise.

Paragraph 5 contains a useful formulation of the test, which is:

"The overarching question is whether the admission of Dr Mazzarotto's expert report would be of significant value to assist the tribunal in its determination of this case, bearing in mind the context outlined above, the proper caution to be exercised by the tribunal when asked to admit expert evidence under section 179 and having regard to the usual factors under rule 19."

In my respectful submission that is the test. The test is not, as Mr Beard said, “is it relevant?” That is plainly not the test. The test is much more restrictive than that. Whether the test is framed in terms of significant value or reasonably required, it is a higher threshold than relevance. The tribunal has to ask if the evidence is necessary, as rule 21 provides.

So then paragraph 6 picks up some more themes. We have referred to these in our skeleton argument. I will just give the reference.

6(i) is the question of independence. I will deal with that a bit later on. It is the

situation where an expert has been involved during the enquiry and then during the litigation.

6(ii) is the very general nature of the instructions that were given to the expert in that case and the consequences that has in terms of the substance of the evidence, and in my respectful submission that is very similar to what one has in this case, very open instructions, "Please provide your views" and then a recitation of views, which is provided really without any kind of reference to the purposes for which expert evidence might be admitted or the specific tests that are relied on now.

6(iii) makes the point that the arguments that are made are points which can be made by counsel in any event, and that's really bound up with the sorts of points I was just discussing with Mr Tidswell.

Then, just moving forward in the judgment, 11 and 12 deal with proportionality arguments. I think this has faded away now. This was referred to by Microsoft in their skeleton argument as a background factor, but none of the arguments for admitting the evidence rely particularly on the fact that it goes to the question of proportionality. I don't think the argument is put more generally than that.

Then 13. This deals with sensitivity analysis, but the bit we rely on is paragraph 13, the last sentence:

"There is no reason why the relevant figures for sensitivity purposes cannot be agreed or set out clearly and the relevant points made on them by way of submission."

So the point is the mere fact that Microsoft wants to put into play some form of calculated figures doesn't mean they need to put in an expert report. It doesn't mean that expert evidence is reasonably required. If it is simply a matter of mechanical calculation, they can say, "This is what would have happened if you had run the

numbers in that way", and that doesn't need to be dealt with through expert evidence.

I make this point in the context of Dr Foschi's market shares analysis. It is one thing -- I mean, we have points to make about some of the material he presents and some of the new material, but to the extent that Microsoft just want to say on the basis of material before you, "This would be the effect of a calculation", one does not need expert evidence for that purpose.

MR TIDSWELL: That does rather beg the question of whether you are in a position to actually make that agreement now, or not quite now, I mean, but if that is the actually right way of dealing with it, and you've been presented with the material -- you take a point about some of it as not being within the scope -- then is it something that actually -- is that the easy way to deal with this, just to agree the tables?

MR WILLIAMS: It is difficult to agree the tables, sir, because they rely on new analysis. I mean, there is a prior point. I'm making a more general point, which is to the extent what is said is, "Here are some numbers in the final report. If you analyse the numbers in this way and extract this, this is what you get", then one does not need expert evidence for that purpose. That's the point I am making, but with Dr Foschi we have a different problem, which he that has done new analysis, which doesn't work in the way that I have just described.

Okay. So HCA provides a summary of the tribunal's approach as expounded in several cases -- BAA, Lafarge, Tobii, Dye & Durham -- in similar vein. Under all of those cases economic of substance going to the economic issues in merger review proceedings, it has been refused every time it has come before the tribunal. So Microsoft is striving to break new ground.

Pulling those submissions together before I go to the Law Society case, we say there

are really two questions for the tribunal. For the evidence to be admitted the answer needs to be "yes" to both questions. First, the evidence is of one of the proper purposes for which expert evidence may be admitted in these proceedings, and is the evidence reasonably necessary? Does it add significant value for the purposes of the tribunal's role in determining the challenge?

So we accept, of course, that the tribunal's jurisprudence has drawn on authorities from the Administrative Court, and we accept that the Law Society case, although it comes after some of those cases, is relevant and important authority. I just want to go to that case and make submissions about it.

MR JUSTICE MARCUS SMITH: Yes.

MR WILLIAMS: It is at tab 25. I think we can pick it up at paragraph 36. In my respectful submission the authority does repay a rather closer reading than Mr Beard gave it in his submissions.

Paragraph 36 essentially makes the points that I have been making about the restrictive approach that is taken to the admission of expert evidence in judicial review proceedings.

Final sentence:

"To answer that question, it is seldom necessary or appropriate to consider any evidence which goes beyond the material which was before the decision-maker…, let alone any expert evidence."

So that is the framing point.

37 sets out the categories of admissible expert evidence under the prior authorities prior to Lynch and prior to this case. Familiar territory. I don't need to go through that.

38 says:

"Although these categories are useful and well-established, it would be wrong to treat them as if they were embodied in statute or necessarily exhaustive",

and it talks about the evolution of the law. Of course, we accept that that's the way that the law in this area has developed and may continue to develop.

They identify Lynch as an expansion of the classic categories, and the final sentence of the paragraph:

"The judge accepted that where an understanding of technical matters is needed to enable the court to understand the reasons relied on in making the decision in the context of a challenge to rationality, expert evidence may be required to explain such technical matters."

Then what one sees in the next two paragraphs is something which is presented as a new category, but, in fact, it's an expansion of that previous Lynch category, which is evidence relating to a technical error. I am sure you have read the paragraph. I don't need to take you through it now.

I mean, the submission we make about paragraph 39 is that what is being contemplated here is a mechanical or demonstrable error, classically something in the nature of a modelling error. It is an error which might not be apparent because it is embedded within some technical process, but once one exposes the detailed workings of that process, the error is manifest.

You can see that from in particular the observations of Mr Justice Green, as he then was, in the Gibraltar betting case, where he gives the example of a serious error of calculation:

"Although the calculation is complex, only an accountant, an econometrician or actuary might have exclaimed that it was an ‘obvious’ error or a ‘howler’."

So that's the sort of territory we are in here. We are not talking about alleged errors

of appreciation or assessment. We are talking about mechanical demonstrable errors.

The submission I make really -- and I will make it when we come to the report -- is that none of the issues in this case are of that nature. The expert evidence is expressing disagreement with and criticism of the CMA's reasoning and assessment of the evidence. Of course, we accept that those arguments can be framed as public law challenges at some level, but to characterise them as incontrovertible technical errors, it is just a misreading or misapplication of this authority.

In fact, paragraph 40 is helpful in making clear that really this is a form of explanatory evidence. It is about explaining the manifest error to the untutored audience. I don't think it is seriously suggested that this tribunal can't understand the rationality of complaints made by Microsoft without expert evidence. I have made the submissions I would have made on this point in response to Mr Tidswell's questions. So although Microsoft has floated this notion of explanatory evidence, he hasn't actually given any examples of points which need to be explained to this tribunal. In my submission that's because there aren't any. The evidence does not purport to be explanatory evidence. It is a critique.

That point is reinforced by paragraph 41, which explains that where the error is controvertible, because there's a contrary argument, by definition the evidence is not admissible. This takes me back, sir, to your preliminary observations.

Once one recognises that the issues to which the expert evidence goes are not issues of this nature, where the expert evidence is capable of demonstrating an error, then that in itself demonstrates that the evidence is not admissible under this principle.

So in my respectful submission, I mean, this authority is not a sort of year zero for

the principles in this area of the law so as to discredit all of the tribunal's previous learning and authority on this topic. It is a very modest expansion of the recognised principle that where expert evidence is necessary to explain a matter which wouldn't otherwise be apparent or clear to the decision maker, that's admissible, but Microsoft is a very, very long way from demonstrating that any of its expert evidence falls within that category.

If I can just follow that up with the Lynch case, which is the basis really for that, which is at tab 16, and in particular paragraphs 22 to 25. That is page 111 to top of page 112 in my bundle. This is the authority in which that category of explanatory evidence was first expounded. What one sees in paragraphs 24 and 25 is the court making very clear that a distinction has to be drawn between explanatory evidence and evidence going to the question of rationality. If the tribunal just wants to look at those paragraphs. I don't know if you have read them in advance.

MR JUSTICE MARCUS SMITH: No. (Pause.) Yes.

MR WILLIAMS: This really ties back into the position as we saw it in the Law Society case that evidence may be provided to explain a matter which wouldn't otherwise be apparent to the tribunal, to the court, but the expert evidence can't usurp the function of the court, and the important point I take from this is that once one goes beyond explanatory evidence and into what is essentially argument on the question of substance, that is not permissible and you have crossed the line from explanation into substance, into argument, and this ties back into the notion that expert evidence should only be admitted where it goes to an incontrovertible error rather than to contested matters of substance.

So those are the legal principles. I am going on to the application of the principles now. I am conscious it is approaching 12.55. Shall I make a start?

MR JUSTICE MARCUS SMITH: You can either make a start or we can resume at 1.55.

MR WILLIAMS: That might be sensible, sir.

MR JUSTICE MARCUS SMITH: Well, if that is convenient, we will do that. We will resume than at 1.55.

MR WILLIAMS: I am grateful.

(12.53 pm)

(Lunch break)

(1.55 pm)

MR JUSTICE MARCUS SMITH: Mr Williams.

MR WILLIAMS: I dealt with the law before lunch and am moving on to apply those principles to the three economic reports.

If the tribunal has Microsoft's skeleton argument handy, I want to make this point before I do it. Mr Beard has addressed you on how we are taking an overly rigid view of the law and how the law is flexible and the categories aren't closed, but if one actually looks at the way they put the application, paragraph 21 sets out a number of purposes for which expert evidence may be admitted in proceedings of this nature. (c) is explanatory material. (d) is serious technical errors. When you read the case, it is incontrovertible technical errors, but that's the way they put it.

If you then turn over to paragraph 24, you see how they apply to those categories. You can see that it is all (c) and (d) as far as the economic evidence is concerned.

So that's the way they have put the application. It is consistent with what they said in paragraph 467 of their grounds.

We say they can't bring themselves within those categories. I have already started to develop the point. I will now do it with specific reference to the four reports, but

I do want to make this point before I go further.

I mean, with respect to the tribunal, the same point applies to the tribunal's pragmatic suggestion, where I think by definition you wouldn't be making a finding that the evidence goes to any of those specific categories at this point. You would be bringing the material in, and I use this world neutrally, as background contextual material which informs the debate.

MR JUSTICE MARCUS SMITH: Yes.

MR WILLIAMS: The problem with that, sir, is inevitably it is bringing the material in on the question of the substantive argument, the substantive debate between the parties. In my respectful submission the authorities I showed you before lunch are clear that that's not a proper purpose for admitting the evidence in judicial review proceedings, and if the material were brought in going to one side of the argument, there is an obvious equality of arms issue, because with the best will in the world the tribunal says, "We will read it and it will inform us in relation to one side of the argument", but as we have seen in the prior authorities, as soon as one admits evidence on one side, as soon as the evidence has any kind of probative function, it is necessary to consider whether the counterparty needs to put in responsive evidence. Then you have conflicts of evidence and so on and so forth. So in my respectful submission as soon as the evidence is in you do generate all of those practical problems, but the prior point is unless the evidence comes in for one of those purposes, it is simply not admissible.

MR JUSTICE MARCUS SMITH: I understand that. I think, though, if there are procedural issues about this evidence going in on which you want to address us, then you should do so.

MR WILLIAMS: Procedural issues?

MR JUSTICE MARCUS SMITH: What I mean is we have a very helpful agreed timetable in the form of a letter articulated this morning. Were we to say the material was to be admitted on some basis, either Lord Pannick's de bene esse or the basis on which we addressed you this morning, then I think before making any such decision we need to understand what the CMA says the effect is on this time frame.

MR WILLIAMS: Well, there are two different points, sir. We don't say at the moment that it would give rise to timing difficulties, because we have the extension.

MR JUSTICE MARCUS SMITH: No.

MR WILLIAMS: Give or take a few days, that gives us the time we need to deal with the material, but that doesn't mean there are not any procedural issues, because, as you said in your preliminary observations, sir, as soon as you admit evidence and responsive evidence, you are into a conflict of evidence. That is really the antithesis of the basis of nearly all judicial review proceedings. It is not at all clear to us how the tribunal can deal with that. Indeed it is precisely because that issue is likely to arise with all of the consequential impact on the conduct of the proceedings that the tribunal has been very cautious, very resistant to admitting the evidence, and that's why it needs to be perfectly satisfied that the evidence serves a proper purpose. So there would be procedural issues. There is no doubt about it. In my respectful submission we would have to have the opportunity to respond, and you are straight into the territory that the tribunal identified at the outset would be deeply problematic.

So moving on then to apply the principles, and I will try to take this reasonably quickly, because you have seen the material. I am not going to take up time going through the reports. You have read them. The point is you have seen the evidence is really from beginning to end a critique of the CMA's findings on a number of topics. Of course, the experts do contend that the CMA has made errors, but none of those

errors we say is an incontrovertible technical error in the Law Society sense. They are all errors of assessment and reasoning.

We have given examples in the skeleton argument of where one sees the experts dealing with the issues in that sort of way, but they are only examples, because it characterises the whole report.

So I am instead going to make some general points about the reports, what they do and the way they are relied on in the notice of application.

Starting with Professor Scott Morton, her core argument is really the CMA has made an error in defining the market, because it has treated various uses of cloud gaming which are connected to console use as part of a distinct cloud gaming market. She says that feeds through into errors in the competitive assessment.

The core idea which you see referred to I think three times in the report is that the CMA has confused two time periods, that is, the use that's made of cloud gaming now, which is connected with console use, as she says, and she says that's different from the sort of device agnostic cloud gaming that the CMA expects to see in the future and which formed the basis of the CMA's concerns. That is the way she puts it.

In my respectful submission that's clearly not a complaint of a technical error. The contention that the CMA has confused itself in its assessment of the evidence, it is an error of analysis. It is an error of assessment. Of course that sort of critique can be made or framed as a public law challenge, but a case of that nature doesn't need to be and indeed shouldn't be made on the basis of expert evidence going to that point of substance. So that's the general point.

If we then look at how Professor Scott Morton's evidence is relied on in the notice of application, there are three paragraphs. The first is paragraph 126, which is at

page 49 of Bundle A. This paragraph essentially makes one point twice, which is that the CMA's market definition feeds through into its assessment of competitive effects. That is such a general point that expert evidence could never be needed to make a point of that nature before this tribunal. Indeed, there is authority of this tribunal on that point in the Meta case. So the submission is made in paragraph 126. It is then repeated in reliance on Professor Scott Morton's evidence, which doesn't add anything to the submission.

In my respectful submission that point doesn't require expert evidence. It is just a matter of looking at the report and seeing how the CMA's reasoning flows through from market definition into competitive effects in the context of that very general observation. So nowhere near meeting the test.

Paragraph 31. I beg your pardon. 131. I dealt with this paragraph in my exchanges with Mr Tidswell before the break. I don't want to repeat what I said. This is the switching point. Switching in broad terms is obviously a conventional part of the assessment of market definition and competitive effects. At this level of generality no-one is debating that switching needs to be considered. The question is what did the CMA do? Was it sufficient? Ought it to have done more?

I think it is in this context just worth mentioning for your note -- I will not take you there -- that in paragraph 5.97 of the final report the point the CMA makes is “we didn't do a diversion analysis because what we are concerned about is the assessment of competitive effect in the future. We have not looked at switching in the future, but what we have done is look at the evidence going to the question of switching between native and cloud gaming on the basis of the evidence available to us”.

Now the tribunal is going to have to grapple with that. Obviously there is a challenge

to it, but the idea the tribunal needs this evidence at this level of generality from Professor Scott Morton is just not real.

The third point is 183, which is on page 66. In some ways Activision have made this point for us about this point, because again it is another general point about how the competitive assessment works when market definition is controversial. You have a general observation of Professor Scott Morton there and then Activision have cited law on the point. So it's another obvious point about competitive law practice. It is a general point. The real question is going to be in the meat of what did the CMA do? How did its reasoning work? These sorts of general framing observations are just not necessary for the purposes of this tribunal doing its job.

Indeed, if one stands back and looks at how limited the reliance is on Professor Scott Morton's evidence in this notice of application, I mean, it can't be said that it is necessary for the purposes of the application. It really is just a distraction.

Turning to Dr Foschi, the purpose of this report is to argue that one can draw inferences from data about the usage of X Cloud, about how far that is an aspect of console gaming as opposed to a discrete cloud gaming offering. The question is how does that feed through into market definition and market shares, but it is important to be clear. This is not about some putative error in the quantitative analysis of the data. It is about whether the CMA's interpretation of the data and the inferences drawn from the data are reasonable. We say that is not an allegation of a technical error. It is a question of assessment, and again expert evidence has no proper role to play in running that kind of case.

If we could just look at Dr Foschi's report, which I think is C12, 214, and if you could just read paragraphs 14 and 15.

MR JUSTICE MARCUS SMITH: Yes.

MR WILLIAMS: The critique is the final report doesn't engage with the evidence. What the CMA did seems of limited relevance. The final report should have probed gamers' behaviour. I mean, it is not opinion evidence in a true sense. It is commentary. It is argument. It is advocacy.

Now the report does move on from there to set out calculations of market shares, first of all extracting try-before-download usage from the Microsoft numbers and then recalculating market shares, but it is important to understand that this is new analysis.

What Microsoft said to the CMA is really summarised in paragraph 14 of Dr Foschi's report. If you want a reference, that's dealt with at 5.77 of the final report. Microsoft made that point. They didn't submit any quantitative analysis. They made the headline point. They didn't submit the data. It is their data. If they'd wanted to submit it to the CMA in support of its analysis, they could have done so. They didn't do that. They submitted the headline point.

What Dr Foschi has done is he has used the data that Microsoft has available to it and he has carried out a new analysis over and above what was done during the course of the enquiry, and he has then submitted -- he has set out that new analysis in this report. You can see this in paragraph 16, last sentence:

"Part of this analysis was included in Microsoft's response to the Provisional Findings."

Then he gives a reference to 3.27, which I think is what is actually quoted in paragraph 14.

MR JUSTICE MARCUS SMITH: So 14 you are referring to?

MR WILLIAMS: 14 of this report says:

"Microsoft explained in their response ..." and so on.

MR JUSTICE MARCUS SMITH: Yes.

MR WILLIAMS: That's quoting from the same paragraph of the response to the provisional findings. So he has now carried out a new analysis using data the CMA did not have. In my respectful submission that can't be relevant to whether the CMA made a public law error. It can't be a technical error if the analysis was not made available to the CMA and data wasn't before the CMA to analyse.

There was a related point, as we have seen in paragraph 14, that was put to the CMA, but not evidence everything that follows paragraphs 14, 15, 16 in this report. That's all new analysis. It is all effectively another go at the same issue supported by new information.

MR TIDSWELL: Does it go to the same essential point, which is that 80% of gamers are using to try before they buy? That is the point.

MR WILLIAMS: Yes.

MR TIDSWELL: It is all of the same piece. If all he is doing is substantiating the 80%, then that's not -- that's doesn't seem to be quite such a problem. If he is making a different point from it, then I could see ...

MR WILLIAMS: It is fair to say that arguments with reference to the 80% in these proceedings are simply picking up the story where it was left, but the debate is not really about -- well, the workings that go to establish the 80% were not before the CMA. So we shouldn't be drawn into debate before this tribunal about what one can learn, understand or see from those workings.

MR TIDSWELL: If the CMA were to dispute that 80% was right, then obviously you would have to do this or someone would have to do this, wouldn't they? So we are back into this analysis that if you say you accepted the 80% there wouldn't be any need for this. Nobody knows whether you do yet. You might say, "The 80% doesn't

matter, because here are 15 other reasons why we have reached the conclusion" or you might say the 80% is wrong, in which case we do have to go down this path, don't we?

MR WILLIAMS: Can you take out the final report in bundle B?

MR JUSTICE MARCUS SMITH: Yes.

MR WILLIAMS: This is B, 245.

MR JUSTICE MARCUS SMITH: B, 245?

MR WILLIAMS: It is 8.91. It might be worth you just reading that, sir.

MR JUSTICE MARCUS SMITH: 8.91?

MR WILLIAMS: Yes.

MR JUSTICE MARCUS SMITH: Very good. Just so we are absolutely clear, the finding of the decision Dr Foschi is pushing back on is the numeric in red on the sixth line. Is that right?

MR WILLIAMS: I am not sure it is as narrow as that. I think he is pushing back on the idea that when you look at the market and the market share, you should include users who try before download in broad terms. So I think the point is a bit more general than ✂%.

The point I was going to make is Microsoft made submissions to the CMA. They said, "Look, this is the percentage of users that are try-before-download users". The CMA grappled with --

MR BEARD: Just to be clear, numbers highlighted may be confidential.

MR WILLIAMS: I don't think I said the number, did I? Did I say the number?

MR BEARD: I think we can deal with this later, but just when you are going through any of this material --

MR WILLIAMS: I am really sorry if I said --

MR BEARD: No, no. It is fine. Everyone deals with it.

MR JUSTICE MARCUS SMITH: I can't say I clocked it if it was said. Those who are listening in, if their memory is better than mine, they should not be using it and please forget that figure, because there are confidentiality issues here.

MR BEARD: I am most grateful. I am sorry to interrupt.

MR JUSTICE MARCUS SMITH: Mr Williams, I didn't hear you say it, but Mr Beard --

MR WILLIAMS: I don't know if I heard myself say it, but that doesn't mean I didn't say it.

MR JUSTICE MARCUS SMITH: No, indeed. These things happen, but we don't want it to happen again.

MR WILLIAMS: So the point that is being made is submissions have been made to CMA. The CMA grappled with it. It identified in this paragraph there were limits on how far things can be circulated out and so on. The point I am making is if one is looking at that sort of analysis and one is then introducing new data, new analysis into the equation in a way that wasn't before the decision maker, one can see how the debate about what the CMA could or might have concluded would take on a different complexion when one brings new analysis into the picture.

MR TIDSWELL: I don't think Mr Beard says this is what's happening here. I am not sure whether it is or not, because I am not close enough to all the detail to express a view myself, but I think it is being said that in the administrative stage Microsoft came along and said "We think this is the position in relation to this category of users. Actually you should be taking them out of your assessment because of the nature of what they are doing", gave you a percentage and now, as I understand Mr Beard to be saying, all that Dr Foschi is doing is just substantiating the number that was given to you.

MR WILLIAMS: He is doing a new analysis. He is at a minimum ex post facto rationalising that number.

MR TIDSWELL: But he must have had some basis to put the 80% forward in the first place presumably or rather Microsoft must have. Maybe they have redone the allegation or this was a calculation they did before. It doesn't really matter, does it? If at the end of the day there is going to be -- I don't know if there is going to be a question about this. If there is going to be a question about whether the statement that's made in the administrative process is right or at least substantiatable, then, as I understand Mr Beard, he is saying all Dr Foschi is doing is substantiating that. He is just making good on that. That seems to me quite different from running a -- when you say a new analysis, it is new in the sense it might not have been done at the time. It might have. We don't know. It's not new in the sense it is introducing a new point. It is actually just substantiating a point that has been made. I don't know if that's right or not. It is what Mr Beard says, though.

MR WILLIAMS: I think that's broadly what they say. We do come back on the point on what basis does the evidence have to be admissible? It doesn't fall within any categories we have talked about. It is simply if Microsoft wants to put in evidence of the basis of the workings supporting the number as factual evidence or something like that, that's a different matter, but it is really hard to see how, applying the principles that apply to the admission of expert evidence, this evidence is admissible on any basis.

MR TIDSWELL: It seems to me we are somewhat in the territory where a forensic accountant might be presenting numbers. He turns up and says, "Look, you could have someone in the company to do this, but it is convenient for me to explain and put it in context. Here are the numbers". In a way it is quite a different sort of expert

report and different basis to get expert evidence in. Actually all that really is I think, if you look at the case law on that, is just a convenient presentation of fact, as I suppose a lot of expert evidence is, but it is particularly a presentation of factual material in the form of an expert who is acting as a convenient way of getting it in front of the tribunal. So it is not really expert evidence in the true sense of offering an opinion other than that there is an opinion being given that the arithmetic and table being produced is correct. That's how I understand it. That may not be how Mr Beard puts it, but it seemed to me that would at least be one justification for treating it as expert evidence of a type.

MR WILLIAMS: Yes. I think the point I would make is it is actually not a justification because it doesn't bring the application within any of the categories. Really what it is, is a vehicle for presenting on a somewhat different basis material which is similar to material which is before the decision maker, but it is put in the context of a report which around the presentation of those numbers presents a whole set of arguments about how the CMA ought to have analysed this and what are the implications and all the rest of it. I see that the way you put it to me, sir, is to say that this material is less egregious -- that's possibly not the way you put it -- but in the terms of my submission less egregious than argumentative material arguing the merits of the case, because it is simply presenting factual material. The question still arises on what basis it is said to be admissible. We do make the point that if they wanted to present us with evidence --

MR JUSTICE MARCUS SMITH: You say it is new fact?

MR WILLIAMS: It is new fact, yes.

MR JUSTICE MARCUS SMITH: Can I just test this? Can we move away from paragraph 8.91 to a nice hypothetical thing, because I think all three of us feel we

are not close enough to the detailed decision to debate 8.91 certainly at this stage?

So let's suppose that a point of fact is being articulated in the course of the CMA's investigation and Microsoft say "The answer to this point of fact is 4X". It doesn't matter what X is, but the answer is 4X. The CMA get a certain amount of justification as to why the answer is 4X, which goes so far, but that is all the CMA get. In light of this evidence, but without further communication to Microsoft, they say in their decision, "The answer is X, not 4X" and that is a material difference, let us say.

Now if one has not got the exchange between the submission of the original 4X answer and the X finding of the CMA, then is it new evidence if Microsoft now adduce further material in support of the 4X factual proposition, which was not before the CMA, but which could have been before the CMA, had the CMA said in the course of the investigation, you know, "We are not very happy with your 4X answer. We think the answer is, in fact, X". Would that be new evidence or would that not be?

MR WILLIAMS: Well, I think the example you have put to me, sir, is more like the sort of evidence you can see in connection with a process challenge, where you do often see a party submitted X, the authority decides Y but doesn't revert to the party in relation to that issue, and the party says, "They didn't give me a hearing about that. If only they had given me a hearing, I would have told them that, in fact, they had misunderstood what I had said in the first place", something like that.

So one does see in proceedings of this nature factual evidence going to exchanges between the parties, what was put to the decision maker and what the party would have sought to do had it had a chance to deal with that. That's really quite different from putting in an expert report containing a new analysis of numbers that was not submitted to the CMA.

MR JUSTICE MARCUS SMITH: Don't get too troubled about the expert report. Are you saying you would have no problem if Microsoft had adduced an employee of Microsoft who had just done this number crunching but was otherwise in terms exactly the same as what Dr Foschi is saying here?

MR WILLIAMS: What we say is in principle the legality of the decision needs to be tested with reference to what was put to the CMA and what the CMA found in relation to it. It is not at all clear why this kind of ex post facto rationalisation or even the workings carried out at the time that was not provided to the CMA, why that's relevant.

MR JUSTICE MARCUS SMITH: What I am saying is in response to us making the point this is an expert report, and, of course, so it is. What I am trying to understand is why this is not a red herring and your objection would be as forceful if this was a factual witness statement.

MR WILLIAMS: It would be, because under the Powis principles the factual evidence is admissible to show what was before the decision maker. That's one of the recognised categories in Powis.

MR JUSTICE MARCUS SMITH: Yes.

MR WILLIAMS: I am not aware that factual evidence is admissible to show what sat behind the evidence that was before the decision maker.

MR JUSTICE MARCUS SMITH: So we don't need to worry about the expert factual divide. What we are worrying about is this is after the event material that was not before the CMA.

MR WILLIAMS: And the fact it is the workings in support of a number which is similar to a number which was before the CMA is also a red herring, because the information doesn't come into play simply because it was behind the scenes

workings that we didn't see.

MR TIDSWELL: What if you were to say in your defence, "We didn't pay any attention to the 80% because we didn't think it was a particularly robust number". Would that put it in play, because then the point would be this was a critical part of your analysis -- I am just rehearsing what the argument might be -- this was a critical part of your analysis. You actually were told you had a bit of it wrong. You formed a view arbitrarily and without proper investigation and so on. Therefore, if you maintain the position it is irrelevant and not the best number, would they then be entitled to respond and say, "Actually here is the workings that show it is right"?

MR WILLIAMS: That's an illuminating question actually, sir, because another way of looking at that question is “what is the nature of the error alleged by the CMA”? If it was said that the CMA made a finding which involved an erroneous interpretation or use of that number as a number, then your point would be directly in play, sir, but that isn't the way that it is put. The way it is put I should say this number was submitted to the CMA. The CMA has made errors of assessment of analysis with regard to the assessment of that number as part of the body of evidence that went to this question. So there is no allegation of an error.

MR TIDSWELL: Again I am going to portray my ignorance about the case, but isn't it being said surely this was a critical bit of evidence that meant your assessment couldn't be right, or at least, putting a hole in it, you ought to have been questioning it, because it was inconsistent with where you got to and indeed the paragraph you have just shown us, which I don't think refers to this point.

MR WILLIAMS: I don't think that the criticism is the CMA has made an erroneous finding about what the 80% is and what it relates to. The criticism is that the CMA has erred in its assessment of the usage that's being made of cloud gaming in this

context and this is one strand of the evidence. So I take your point. If the CMA had made a finding which said, "In fact, we think really the right number is more likely to be 40%" or something like that, that might put a different complexion on this debate.

MR TIDSWELL: Does that mean therefore -- the only question that matters here really is whether we are going to find ourselves at the hearing with you saying "We don't accept the 80% as a valid number". If you accepted the 80% -- I am not certainly not requesting you to do that now, because everyone is in doubt -- if you were to say at the hearing it is not a valid number, then we have a bit of a problem, haven't we, because Microsoft will say -- it is a materiality point, isn't it? You would be saying it does not matter because it is not right and Microsoft would be saying it is right. That's the problem we are trying to avoid here I think. Again just to be clear I am not pressing you on this point.

MR WILLIAMS: No, I understand.

MR TIDSWELL: Against the possibility you might say that in the defence, one can see why Microsoft wants to foreclose that possibility by making it plain where that 80% came from. If on your reasoning it doesn't really matter where it comes from, because you are entitled to make your assessment, and you've given it whatever weight you thought appropriate without getting into the question of whether it was right or not, at that stage all of this goes away, doesn't it?

MR WILLIAMS: I will just make --

MR TIDSWELL: I think that is your point, yes.

MR WILLIAMS: I will take instructions as to whether there is anything I can help the tribunal with on that question, but in relation to the point you have just put to me I am afraid I will play back the submission I made to you.

MR TIDSWELL: I understand.

MR WILLIAMS: One has to ask for what purpose is the evidence said to be admissible. They say it is in relation to technical errors. Now if the technical error were "You have misapplied the 80%, because you have construed it as relating to X rather than Y", then all of these questions about what the number is might be real, but that's not the way the argument is put.

MR TIDSWELL: I think you are drifting ahead to the expert point whereas we are really on the new evidence point I think. I appreciate the two are tied up, but I think it is quite helpful to separate them, because if we say Microsoft can't (inaudible), they will come along and say, "Here is a witness statement from the CFO".

MR WILLIAMS: I see why you put that to me, sir. In fact, it is also true if one is construing the grounds and saying what are said to be the errors -- I don't mean in the Law Society sense -- if the error, whether it is an incontrovertible technical error or just an error, relates to what you made of the 80%, what does it tell you, that would be one thing. As far as I am aware that's not the basis of the error. In relation to --

MR TIDSWELL: I have your submission on that point I understand why you say that.

MR WILLIAMS: In relation to the question you put to me I will take instructions and maybe I will come back to that at the end if we can take that further.

MR TIDSWELL: Yes.

MR WILLIAMS: I am moving on to paragraph 139 of the notice. I am sorry if this is taking longer. This is closely related to what we have just been talking about. 139. You can see it starts off by saying:

"The CMA had before it a considerable body of evidence suggesting that there might be material switching of this type."

You can see why they put it in that way, because it is all about the evidence that was

before the CMA.

Then you move down to subparagraph (d). It is interesting again that Activision have sort of made our point for us again, which is that you see:

"Evidence suggests that X cloud users are employing the service for relatively marginal activities such as try before download."

That cite is Foschi, but, of course, that's the new analysis. Then Activision have referred back to the evidence that was before the CMA, which is the proper way this point ought to be litigated. That's the point about what was before the CMA and what was not before the CMA.

What one sees at the end of that paragraph is the submission which is redolent I think of what Dr Foschi says in paragraph 15, which is that:

"Any reasonable interpretation of this data ..."

That is the point. So that submission is made as a public law argument. It doesn't need expert evidence in support of that point.

I think there are three more references to Dr Foschi's evidence in this report.

191. Here is the same point, which is all about the inference that the CMA ought to have drawn. 205 is really the same point again.

Now there is one more point to make in relation to 191, which is what this paragraph does is it says if you take out try before download users, you end up with different market shares, because Microsoft has different users. That is essentially a piece of arithmetic.

As I said earlier on, we don't object in principle to parties providing effectively arithmetic which shows the implications of evidence they put before the CMA and say, "Look, do the maths. This is what it sees". In general terms one would hope the arithmetic ought not to be controversial. That's a different sort of point from

providing new analysis and new evidence.

That point is also the answer to -- also applies to 271, where one has the calculation of market shares in relation to other game providers once one does Dr Foschi's analysis -- sorry -- once one applies the removal of (inaudible) to the market shares.

So again we say that once you separate out the new evidence from the old evidence and have regard to what Microsoft actually needs or reasonably requires the evidence for, we say it is not reasonably necessary in support of any of those points.

Finally, Dr Caffarra. Her report has two aspects. The first is a discussion of what the CMA's theory of harm is and, secondly, there's a critique of a number of findings which go to the theory of harm. As Mr Beard explained earlier on, her report starts with a discussion of two possible theories of harm which she labels an ecosystem theory and an input foreclosure theory. Her critique suggests that the CMA has somehow gelled them together to create a sort of hybrid theory.

It is important to say that the CMA clearly defined its theory of harm in the report. So there is a clear yardstick against which to assess the CMA's findings. I just want to show you that. It is B, page 213. Paragraphs 8.2 and 8.3 set out the input foreclosure theory of harm and the elements of that. It is a sort of familiar discussion: ability, incentive, effects. That is why we said in our skeleton it is a straightforward input foreclosure theory of harm. It is really with reference to that theory of harm that the findings have to be tested. The rest of the chapter sets out CMA's application of that theory of harm and the assessment of the evidence, and obviously those findings can be challenged in the usual way, but it is not necessary or appropriate to seek to bolster that sort of attack on findings made in support of a theory of harm with reference to expert evidence.

I will just develop that a little bit in the context of the reliance that is placed on

Dr Caffarra's evidence in the notice of application. The first reference is 75. One sees:

"As set out in the report of Dr Caffarra, a long held view in economic analysis is that exclusivity cannot be simply assumed to lead to foreclosure."

There is a footnote reference there to paragraph 17 of Dr Caffarra's report. In fact, she says that almost word for word. Then she quotes an article. So to the extent that this is suggesting that there is a kind of economic starting point for all of this, it is not really developed on the basis of expert evidence. It is just a reference to an article. This is actually just a contextual point at this stage. The debate in relation to this comes a bit later in paragraph 321.

A bit further down that page at paragraph 77 we have the second of the three references to Dr Caffarra's evidence in the notice. You can see the sentence:

"As Dr Caffarra explains ..."

That's another similar sort of point, because you can see there's a reference to Caffarra 17 and then a whole bunch of references to articles. Even in the notice the point that's made is of multiple recent empirical papers. In itself it is not the evidence. It is just a vehicle for quoting some articles.

MR JUSTICE MARCUS SMITH: Just to be clear, is your objection extending not merely to Caffarra but also to the articles that she cites? Would you --

MR WILLIAMS: They are cited in footnote 42. We are not seeking to strike out footnote 42. We are not trying to strike that out. Really it is the last sentence that is of interest:

"Merely providing a list of pre-existing assets and talking up their significance independently of the merger does not constitute a recognised theory of harm from an economic perspective."

This point is an illustration of the exchange I had with Mr Tidswell earlier on, which is that's the critique. That's the argument, that from an economic point of view it is not enough to just list assets and say, "This is all going to lead to harm".

That is the classic example of the sort of this reasoning does not stack up, which is well within the competence of this tribunal, and it's a good illustration of the point I made that really the debate at that level, it is hard to see how it is ever going to be furthered by expert evidence.

In fact, I should just say this is a straw man. This is not the basis of the CMA's finding at all. I just showed you the CMA's theory of harm. It is not about simply saying harm flows from an ecosystem. That's not the point here. If you want to provide a rationality critique of the theory of harm, it can and ought to be done in this way, by making a submission, and not by running an expert report in the background.

The last reference in this report is 321. It says:

"Further, and in any event, it was wrong to assume that exclusivity implies anti-competitive foreclosure."

So part of the point this is just put in terms of wrong, which is a point that's made on the merits rather than in public law terms. Just assume this is all going to be framed as a public law challenge.

If you read through what Dr Caffarra says, for example, at the top of page 127 it says:

"The final report's conflation of exclusivity with foreclosure is a persistent flaw of this investigation."

I will come back to that language a bit later.

"While, of course, exclusivity can lead to foreclosure, a mechanism needs to be

articulated with some measure of empirical support that benefits will exceed the cost."

So when we looked at the CMA's theory of harm, we saw that they deal with ability. We saw that they deal with incentive. So the CMA has tackled these issues. There are findings in the report going to those topics and Microsoft is going to have to make out a challenge to those findings on public law principles. Really evidence at this level of generality is not probative of the case. There is a theory of harm. The question is are the findings made in support of it? Is the theory rational? Is it open to the CMA on public law principles and are the findings made in support of that theory supported to a public law standard?

Again we say it is just not reasonably necessary to have expert evidence sitting underneath the notice making points at that level of generality. It is just not something this expert tribunal needs in order to get to the bottom of whether the CMA has articulated a proper theory and supported a proper theory.

So that is everything I wanted to say about the substance of the evidence, the economic evidence.

A couple of sweep-up points before I deal with US law. First of all, on instructions, and I just want to show you this. I think the tribunal has the point. There is an example -- Dr Caffarra's instruction letter is at C271. Paragraph 5 of the instruction letter:

"Please provide your views from an economist's perspective on theory of harm 2."

So it is a completely open-ended invitation to Dr Caffarra to provide whatever comments, views or thoughts she has in relation to theory of harm 2 necessarily on the substance. One can see there that the purpose of the report is not to provide explanatory material. It is not limited to the identification of incontrovertible or

technical errors or anything like that. It is an open-ended invitation to provide commentary and the tribunal has read what she has to say.

The submission we make is in some ways this is the route of the problem. The experts have been instructed as though it is enough for them to be asked to do that. With respect, that is obviously the wrong premise, having regard to all the authorities the tribunal has seen. It is not surprising from that starting point that the tribunal has been provided with evidence which goes beyond the bounds of what is properly permissible in the proceedings.

I have made the point that the reports are not framed with regard to the nature of the proceedings, the fact that these are judicial review proceedings. The point I was making wasn't that Dr Caffarra ought to have been instructed to identify examples of Wednesbury unreasonableness or anything like that in the report. The point I am making is simply that, given that the reports are simply unfiltered commentary on the merits of what's happening on the CMA's findings, then that renders the content even less useful to the tribunal, because it simply provides commentary at large really without reference to any guiding or limiting principle.

Independence. We have dealt with this in the skeleton. Just in terms of what the position is in fact, it was clear from Dr Foschi's report and from Dr Caffarra's report that they had assisted Microsoft with the investigation. It was less clear in Professor Scott Morton's report, because she referred to work for Microsoft generally. She didn't refer specifically to her work in connection with this investigation. The CMA knew that she had attended a site visit. So they knew that she was somewhere in the background, but beyond that it isn't clear. It is not satisfactory in my respectful submission that we have a report from Professor Scott Morton but we don't have any clarity at all about what role she has played in relation to the investigation before this.

This is not a personal attack on her. She is an incredibly distinguished and eminent economist. Just in process terms this tribunal and the CMA are entitled to know what role she has played.

We are not saying, of course, that an expert who has had prior involvement in the investigative stage of the proceedings can never satisfy their duty to the tribunal. We are not saying that, but what we are saying is that where the expert has had prior involvement, that raises additional questions and obstacles to the admission of their evidence.

The answer to that under the rules of procedure is for the expert to set out the role that they have played and their instructions. We don't understand Mr Beard's point that it is enough for the experts to say what is said in paragraph 5 of Dr Caffarra's instruction letter.

We have cited in our skeleton argument the relevant authorities on this. I am not going to take up time on it, because it is not the main point for today's purposes, but it is clear in my submission that when one looks at the authorities we have cited, that one has to go further than simply say what issue has the expert been asked to address in their report. One needs to provide the material instructions. When one has an expert who has worked for a party in relation to the very same matter at a different stage of proceedings, when different considerations apply and the same expert duty doesn't apply, it is important to understand the position. That applies to we think all three experts or certainly applies to Dr Foschi and Dr Caffarra.

The purpose of that is really to understand their role in relation to the process of helping Microsoft forge the arguments it has pursued. How far were they involved effectively in an advisory role, how best can you get the merger through, as distinct from providing independent expert analysis? We just don't know what role they

played in relation to the forging of those arguments.

So it was open to Microsoft to take steps to remove doubt about this, to provide greater transparency about the background. It hasn't taken that opportunity. There are hints in the reports where one sees the fact that the experts have lived and breathed the process, the fact that Dr Caffarra talks about things being a persistent flaw of the process and so on and so forth. I showed you the example of Dr Foschi's what I said was advocacy in paragraph 15.

So this is a real question. It's not -- we don't make the point front and centre in our objections to the evidence, but it is another consideration and it is another reason which militates against the admission of the evidence, at least absent clarity as to what the experts' instructions at prior stages were.

So those are my submissions on the economic evidence.

There is one final point which is in our skeleton, which is if you are against us in relation to any of the expert evidence and you are minded to admit it, we have made the point repeatedly that we don't actually understand what are said to be the incontrovertible technical errors or even the technical errors in the public law sense for which the expert reports are relied upon. If the evidence were to be admitted on that basis with a view to the CMA providing suitable responsive evidence, then obviously we would need a higher level of clarity than what we have at the moment about what is said to be a technical error in the true sense. So steps would need to be taken to ask Microsoft to provide particulars of that.

Okay. Kraus. I can take this much more quickly you will be pleased to hear. Can we just start with the notice, paragraph 99, Bundle A? This is where Microsoft plead Tameside duty. I am just giving you this for your reference. You will see towards the end of the paragraph in footnote 65 they cite a case called Balajigari. I make that

point because I am going to go there in a moment.

If one turns on to page 90 -- Mr Beard took you here -- you see the allegation of the breach of the Tameside duty at 266. Now it is true --

MR BEARD: 266 doesn't say it is wrong in law, irrational and/or a breach of its Tameside duty. Our point is it is not just the Tameside duty point. That is really clear from 266.

MR WILLIAMS: I was about to deal with that point. Mr Beard made the point earlier on that the challenge is not solely a Tameside challenge. It is an irrationality challenge. The point we make is that this point wasn't before the CMA. So it is hard to see how the CMA can be said to have acted irrationally in its appraisal of material which was not before the CMA. The gravamen of the complaint is that the CMA needed to take foreign law advice and get to the bottom of this in order to reach the conclusions that it did.

We resist that allegation obviously and the CMA will set out its case in due course. I mean, essentially the points we will be making, sir, are similar to some of the points you made in your observations, namely this is all about the commercial uncertainty that arises in relation to agreements, and the clauses that are identified are examples, illustrations of specific applications of the sort of uncertainty that arises, and that one can really go as far as one needs to reading the clauses. That's the sort of case which we make in relation to this. So we tend to agree with you, sir, that this evidence is a distraction in that context, but just in terms of the pleaded grounds the complaint has to be -- the complaint can't be that the CMA erred in its appreciation of the significance of these points of law. It has to be that the CMA did not make sufficient enquiries. So that's what we say about the Tameside point.

MR TIDSWELL: Is it said in the context of -- I don't think Mr Beard put it quite like

this, but I was certainly thinking about it -- that there is a question of materiality. So -- anyway you put aside the point about the fact that it is law and you have to get expert evidence, because really that is just the only mechanism by which Microsoft could deal with the point. If you just take it as a simple you have not investigated something you should have and then you are entitled to say, "Even if we" -- you might dispute that, but if that was wrong, you are entitled to say, "Even if we had, it would not have made any difference, because the factual position would show no difference to what we had assumed". In order to get to that point don't they have to provide the factual evidence that shows that it would have made a difference? Putting it very simply and putting aside the legal point, that's what I've understood they were doing.

MR WILLIAMS: Yes. I see that point. Before one gets to that point there is a prior point, which is that if one looks at the findings that have been made and the extent of the findings, and how far they go and how far they don't go, for the purposes of those findings did one need to dig into the weeds of all of this?

MR TIDSWELL: Yes. That's the question which is (inaudible) I think.

MR WILLIAMS: That's right, but also the point that I make is that the question of materiality also forms part of that enquiry, which is to say, "Look, would it have been material, given the extent of the question that the CMA was asking itself?"

MR TIDSWELL: Yes.

MR WILLIAMS: Beyond that -- I mean, I accept the point against me that if one thinks one needs to go further than that and understand what would the enquiries have shown, obviously the tribunal can't know that without expert evidence. I accept that, but you need to get past my first point.

MR TIDSWELL: Absolutely, but on the assumption that it is possible that you might

lose on first base, then don't we have to allow them to prepare to deal on second base? I think that is the question. Again I am expressing no view at all. I am not in a position to express any view on whether you're going to win or lose on first base, but just against the possibility that you might, then surely they have to be prepared to deal with the materiality point, and actually the notice of application is a put up or shut up on that I think by the way the system works. It seems they don't really have much choice but to put in something on that against that possibility. Now there may be all sorts of other reasons why they -- I think they probably have a broader argument about why it should be in, but just at that level it seemed to be there was some justification for it. That's not really an expert point at all. It just happens to be the only mechanism by which they can prove it is through an expert process.

MR WILLIAMS: Yes. I accept if you are persuaded that effectively -- the logic of our case is we made these findings. They only went as far as they went. We carried out sufficient enquiries for the purposes of making those findings. We read the agreements. One can learn what one needs to learn from the agreements. I accept that if the tribunal thinks that the enquiry needs to go further than that, I accept that the only vehicle for putting this evidence before the tribunal is Dr Kraus' report and any other expert evidence that might come into the equation. I accept that.

MR TIDSWELL: In that position you have a choice, haven't you? You can either stake everything on first base and just assume it is going to be fine or you can try and deal with the possibility of losing a first base and having to fight on a second. So where does that leave us in terms of the admissibility of it? Does that mean you would accept a limited purpose for admissibility or are you still holding out against that?

MR WILLIAMS: I will just make the two remaining -- if you weren't with me on the

point of principle, there are two further points. The first point is -- I think this is the basis on which you put it to me, sir, which is without expressing any view on the merits of all of that, the evidence needs to come in because the point is arguable, and if the evidence is admitted on the basis that it is arguable that one will need to go to that further stage, but without prejudice to the CMA's ability to argue that it is in the final analysis irrelevant for the sorts of reasons I have given, to some extent I think that would address the concerns I have raised. That is the first point.

The second point is the question of the cross application of the Dye & Durham authority and how that applies in this context, because the basis of the ruling in that case was that even where evidence of foreign law is admitted, it should be admitted to establish what the law is as it bears on the issues rather than to express conclusions about the application of the law. They did say in that report that some of the evidence was argumentative. I am not submitting that Professor Kraus's evidence is argumentative, but it does stray beyond merely stating the law.

So if one applies the same approach in this case, it would result in a paring back of Professor Kraus's evidence, and we have set out in footnote 12 of our skeleton argument our broad assessment of how that would work.

Now, just to be clear, we are not asking the tribunal to direct that paragraph 7 of our skeleton argument ought to be implemented, because you would need to be left with a coherent and readable report, but we have just started to do some of the work that we say would need to be done if the tribunal were to apply the Dye & Durham approach. I will say candidly it is not an easy exercise to do, and in some ways trying to draw that line between what the law is and how it applies is a bit different in the context of the construction of a contract than if it is if you are setting out the position in relation to some other area of the law more generally. We are simply

following the logic of the ruling of this tribunal, of Mr Malek in that case, and it would go further. I can take you to one or two paragraphs of the report if that will help. It is more a question of principle about whether that sort of exercise needs to be done.

MR TIDSWELL: Yes. If we are in what we were talking about, which is this is a secondary problem if you have not prevailed on the first point, then you might take the view that actually the more expedient thing to do would be to see it in that context and perhaps we can live with the ambiguity. Does that leave you in an uncomfortable position?

MR WILLIAMS: No, it doesn't leave me in an uncomfortable position. Obviously we are conscious that this is very similar to an issue that the tribunal resolved not that long ago, where the tribunal reached a view for principled reasons as to how far evidence of this nature ought to go and it is true. I mean, I could show you an example, but I don't think it will take things very far. There are examples which seem to fall a bit more foul of the points that were made in Dye & Durham and Professor Kraus's report. I am not suggesting it is going to make a huge difference to the future conduct of the proceedings. That is just simply what this tribunal decided about where the line ought to be drawn in relation to evidence of this nature. I think the more material point I am making is that I accept one is just not going to start red lining it. One has to be left with a readable, intelligent report that's of assistance to the tribunal. That's why we are not simply saying (inaudible) footnote 12.

Can I just have a moment, because I am just taking instructions on one of the issues that you --

MR JUSTICE MARCUS SMITH: Yes, of course. Would it help if we rose for five minutes?

MR WILLIAMS: It would help. Other than that I have finished my submissions.

MR JUSTICE MARCUS SMITH: You ought to have the opportunity to take proper instructions. We will rise for five minutes.

(Short break)

MR WILLIAMS: Just a couple more references. That's all. I gave you the reference to B074 but didn't take you there. It is probably worth looking at. B074. Just two paragraphs I wanted to show you. This is knitting the Microsoft position that we saw in Dr Foschi's report.

MR JUSTICE MARCUS SMITH: At 5.77, yes.

MR WILLIAMS: The footnote 142 takes you back to 3.27. I am just trying to orientate the tribunal if that helps.

MR JUSTICE MARCUS SMITH: Yes.

MR WILLIAMS: Which we saw again cited in Dr Foschi's report.

Once you have read that -- it is 5.84 on page 76.

MR JUSTICE MARCUS SMITH: Yes.

MR WILLIAMS: I am sorry I didn't have that reference at my fingertips earlier on. That's really to support the point I was making to you that the Microsoft evidence is noted in the first sentence and a conclusion is drawn from that which is consistent with the thrust of the evidence. Then you see further on in the paragraph the CMA's assessment and appreciation of that and its significance in the context of other evidence. So that's the point I was making to Mr Tidswell when I said this is not really the nature of the debate. The debate is not really about that number. It is about how the CMA -- what the CMA has made of that evidence in the context of other evidence before drawing the conclusion:

"We therefore consider this evidence suggests it is unlikely that trying games before

downloading is the primary reason people are interested" and so on and so forth.

It is the assessment and conclusions that are drawn as opposed to the evidence itself.

Unless I can assist the tribunal further.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Williams.

Lord Grabiner.

Reply by LORD GRABINER

LORD GRABINER: My Lord, thank you very much indeed. Professor Kraus. Mercifully I can be extremely brief, because the exchange between (inaudible) and my learned friend Mr Williams has clarified the position very simply indeed. The key word, if I may say so in this context, is the word materiality, which I think came from Mr Tidswell.

Our point is that the failure on the part of the CMA to take proper American law advice in relation to those agreements is a material matter. Not only did they fail to do that, but they also reached rather critical conclusions in relation to the relevance of those documents in the context of this case. They said that those agreements had little or no relevance to the matters that they were concerned with.

Now our position is that we challenge that and to that end would he want to rely upon the evidence of Professor Kraus, who explains how American law works in this context, Washington and New York. As I said earlier this afternoon, and it is an important point, if my learned friends take the view that there is anything in Professor Kraus's expert advice or opinion that they disagree with, they are in a position to respond and they have time to do so, and I think I am right in saying that they do accept that they do have time to respond, if necessary.

So the short point is, and my sense from my friend's submissions a little earlier before we took that short adjournment was that he accepted that that was the position. Our position is that this does not go in de bene esse. It goes in as evidence and if the other side are so minded to respond to any parts of it or the totality of it, if they wish to do so, that would be a matter for them and we obviously have no objection to that. So if we can proceed on that basis that is a very satisfactory result as far as that issue is concerned.

MR JUSTICE MARCUS SMITH: Lord Pannick.

Reply by LORD PANNICK

LORD PANNICK: Thank you very much, sir, and members of the tribunal. On the de bene esse approach as an alternative way forward if the tribunal is not persuaded by Mr Beard and Lord Grabiner, that all or some of the evidence should be admitted, can I respond to what Mr Williams said? He relied on two authorities, Banks and BAA, which he said rejected a de bene esse approach.

The value of the Supreme Court judgment in Shagang is that it recognises two things. It recognises first that each case depends on its own circumstances. There's no rule that applies to this issue, and it also emphasised that there can be in particular cases good pragmatic reasons not to exclude evidence at the preliminary stage.

The reasoning of the Supreme Court in my submission is as applicable to a judicial review type hearing as it is to any other civil proceedings, and Mr Williams did not address the reasoning of the Supreme Court, the pragmatic reasons why it is often helpful not to determine the issue at the preliminary stage.

I am not inviting the tribunal to make a general ruling. Far from it. I am inviting the

tribunal to focus on the circumstances of this case. I explained this morning why we say that it would be a proportionate solution to adopt a de bene esse approach. The questioning from the tribunal, very helpful questioning, if I may respectfully say so, to Mr Williams has illustrated how the relevance of the expert evidence may well depend on the content of the CMA defence, which will only be presented on 6th July, and what parts of it may or may not be accepted by the tribunal.

Mr Williams acknowledged that the CMA has itself agreed to a de bene esse approach to the witness statements. He emphasises that that is for pragmatic reasons, but his pragmatic approach shows that there is no objection in principle to a de bene esse approach in merger proceedings in this tribunal if it is a sensible way to proceed. His pragmatic approach also shows that there's no insuperable practical bar to the tribunal proceeding in this way. He expressly accepted, and rightly so, that the CMA will have adequate time on the timetable that was approved earlier this morning to respond as it sees fit. His point, Mr Williams' point, which he emphasised, is that this would be problematic -- his word -- as the tribunal would then have or may have conflicting evidence, but, members of the tribunal, that is the essence of contested proceedings, and the virtue of the de bene esse approach is that the tribunal would only need to address the admissibility and indeed the relevance and the merits of the evidence, the expert evidence, to the extent necessary in the light of the CMA defence and in the light of the way Microsoft responds and puts its case for the substantive hearing.

My practical suggestion to the tribunal, if it thinks there is merit in this de bene esse approach, is that the tribunal should make clear that the skeleton arguments for the substantial hearing should identify with precision, highlighting in a distinctive colour if that is helpful, which paragraphs of the expert evidence Microsoft are relying upon

and why, and the CMA should identify with precision in their consequential skeleton argument which parts of their experiment evidence, if there is any, and there may not be, they are relying upon and why.

If -- and it may not be necessary -- rulings then need to be made on admissibility, they can be made by this tribunal at the substantive hearing on an informed basis in the light of what is then in dispute and how precisely the expert evidence is being deployed. I commend that approach to the tribunal as most likely to advance the goals of efficiency and justice if -- I emphasise if -- the tribunal is not persuaded, and I hope it will persuaded by Lord Grabiner and Mr Beard, that at least some of this evidence should be admitted now. That's my response. Thank you very much.

MR JUSTICE MARCUS SMITH: I am very grateful. Thank you very much, Lord Pannick.

Mr Beard.

Reply by MR BEARD

MR BEARD: Sir, I adopt the submissions made by my learned friend, Lord Grabiner. The submissions of my learned friend Lord Pannick, as we have discussed, are the position that we adopted in our application here that these matters could be dealt with de bene esse, but as I made clear at the outset, if the tribunal is minded to admit on the basis that was outlined at the outset, that may be simpler and clearer in relation to how these matters are to be dealt with. Therefore we are more than content to proceed on that basis.

In relation to either course I will just make a few very brief remarks, if I may, but obviously should the tribunal have any particular concerns I am more than happy to deal with them.

Just turning to Mr Williams' submissions, first, in relation to law he says we are shoehorning in our application to the various heads set out in the case law as to when evidence and in particular expert evidence can be admitted.

I was clear I hope that that is absolutely not the approach that is advocated in the Law Society case. It says it is not an exhaustive list. It is not a question of shoehorning.

Now, of course, we are not suggesting that in judicial review proceedings some sort of vastly expansive approach should be adopted, but attempts to limit what can be considered and when it can be considered, as Mr Williams sought to do, are not sound, and indeed some of the exchanges with the tribunal illustrated that, where certain material might be better presented by an expert, could theoretically be presented by a factual witness in these circumstances.

The second point I want to make about limitations is that Mr Williams tried to turn every round into a challenge to incontrovertible fact. As I made clear I hope in briefly going through the Notice of Appeal, that just isn't the case. We have challenges raised on irrationality, failure to take into account relevant consideration, lack of evidential basis and so on. The expert evidence clearly assists in relation to those.

I just pick up one point that he emphasised towards the end, this idea that in relation to Professor Kraus and the US law everything becomes Tameside. The basis for that seemed to be that since Professor Kraus's material wasn't before the CMA, then the only argument we had was a Tameside argument. With respect, that is plainly wrong. What the CMA had before it were the agreements that were plainly written to New York and Washington law. What we are saying is it was irrational for the CMA not to take into account a US law consideration and it was irrational in those circumstances and a failure to take into account relevant considerations in

interpreting them as they did, apart from and in addition to the Tameside issue that they should have gone and got US law to deal with those matters.

The third thing that I want to just pick up is there's been a lot of tribute to the tribunal's expertise, which is, of course, a wonderful and marvellous thing. On the other hand, there is a danger of confusion here. On the one hand you have expertise. On the other hand you have evidence, and it is important that the tribunal, however expert it may be, has the evidence to be able to deal with these matters. On occasion we almost drifted into the territory of the tribunal being able to take judicial notice of the fact that market definition analysis involves necessary consideration of switching. That's a wonderful thing if that is true. Unfortunately as an appellant we can't be absolutely confident that that is a matter of judicial notice, because it is not within the ordinary territory, given that it is a technical issue. In those circumstances, whilst it may be very familiar to the tribunal, it is right, for example, that Professor Scott Morton simply articulates those issues.

Indeed, it was interesting when Mr Williams was talking about market definition that he said the CMA -- he was almost certain the CMA would not say that switching was unimportant, but his almost certainty is not quite the same as clarity in relation to those matters and, of course, we look forward to their defence in that regard.

The fourth point I want to pick up briefly, floodgates. We are very far from any floodgates risk here. We are dealing with narrow, focused, specific and short material and we are asking for it to be admitted, or at least considered on the basis of what is happening in this case, on the basis of the provisions that we have set out in our Notice of Appeal, which we say the CMA has not complied with. We are not in the words of the recent film trying to deal with everything everywhere all at once here. This is not some sort of the generalised commission.

Fifth point briefly on instructions, yes, some of those instructions were broadly open-ended. Mr Williams did not take you through the more detailed material there in relation to the experts' instruction by reference to CPR 35. It is not the root of any problem. We don't want to constrain the experts in the way that they approach matters, but, of course, we recognise their evidence can only go to public law issues when it comes to consideration by the tribunal.

We have a total of four weeks from start to finish to deal with this. We gave short instructions. We got short reports, and in relation to these questions of independence indeed that timing issue is important. It is difficult when you don't have very long to actually identify external personnel who are not involved at all, who might be able to comment usefully on some of the particular issues that arose in relation to these issues.

In relation to Professor Scott Morton, points are now being taken about the extent of her independence because she attended a site visit. She was not involved in the UK proceedings to date, but if the CMA were so concerned about these matters, it would have been helpful if they had raised these issues prior to the skeleton on Friday in relation to her position.

Sixth point briefly on Dr Foschi's data. The great emphasis is that it is new. We have been around the houses in relation to this I think. It doesn't assist a great deal to try and analyse it as new or not new. Just to be clear, the position was those figures as articulated in his statement, paragraph 14, were put forward. It was articulated they were based on telemetry data. The CMA had a vast amount of telemetry data. In other words, the data we gather as Microsoft from our own systems that we can provide. It is correct that that telemetry data was not split between Cloud and non-Cloud for these purposes. Had the CMA been interested in

that split we could have provided it. It was material that we were going back and forth with the CMA in relation to. What Dr Foschi does is effectively set out and substantiate the basis for those calculations, as was clear from the exchanges with the tribunal. Plainly that is something that is relevant and useful to the tribunal.

As to the various references to paragraphs 5.7, 7.5 8.4, 8.91, we can look forward to coming back to those, because our point in relation to them is the analysis there, such as it is, by the CMA is both confused and confusing and the outturn of that analysis is wrong.

We have now disposed of issues about process. The CMA have very fairly said now that there is an extended timetable. They can deal with all of this.

Just going back to the suggestions that our expert evidence doesn't go to the Notice of Appeal and that somehow all you need to do is look at the Notice of Appeal, look at the decision and then consider whether or not our points are well made. I think it is right to break the bad news to CMA that there will be more submissions on these matters along the way. It is not simply what's set out in the Notice of Appeal. We need to expand on these issues. That is what we will be doing through our skeleton argument in response to their defence and of course at the oral hearing.

It was interesting hearing from Mr Williams that the approach that it appears the CMA will adopt on market definition is that they are only looking at switching in the future. Of course, that's precisely what Professor Scott Morton says is problematic about the approach adopted by the CMA.

The criticism of Dr Caffarra that she refers to articles and that her report is a vehicle for setting out material in economics that relies on articles is no criticism at all. Indeed, it is precisely why it is appropriate for someone like Dr Caffarra to set out these materials, because for a non-economist to be proffering these articles to the

tribunal does not offer the experience, background and knowledge in the selection of the relevant materials that is precisely what she is doing in order to assist the tribunal in their assessment of these matters.

Unless I can assist the tribunal further, those are our concluding remarks in relation to these matters.

MR JUSTICE MARCUS SMITH: I am very grateful to you, Mr Beard. Thank you very much.

MR WILLIAMS: Just in relation to something Lord Pannick said in reply. He made a new suggestion that the parties highlight in their skeleton arguments, which will obviously be prepared at a very late stage before the hearing what expert evidence they are replying on and so on. Obviously that kind of (inaudible) is far too late for the purpose of the CMA preparing any responsive evidence. When I said we need clarity, that's really not a solution.

MR JUSTICE MARCUS SMITH: No, I don't think we would need to hear from you any further on that.

Thank you very much. We will rise for ten minutes and get back to you on the direction of travel for the trial. Thank you.

(Short break)

RULING (Extracted)

MR BEARD: No. I am grateful for the indication. We will, of course, respond to any queries that are raised as quickly and efficiently as humanly possible.

JUDGE: I am quite sure you will, Mr Beard.

Mr Williams.

MR WILLIAMS: I don't think any questions arise about permission for responsive evidence and so on.

MR JUSTICE MARCUS SMITH: Well, that is helpful, but I felt it was appropriate to make it clear given the pressures that all parties, but in particular the CMA at this stage, are operating under.

MR WILLIAMS: To the extent we need permission we have that permission.

MR JUSTICE MARCUS SMITH: You do.

MR WILLIAMS: I am grateful.

MR JUSTICE MARCUS SMITH: If there is nothing more, we will rise. Thank you all very much.

(3.55 pm)

(Hearing concluded)