IN THE COMPETITION APPEAL TRIBUNAL

CaseNo: 1601/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 23rd January 2024

Before:

Andrew Lenon KC
Tim Frazer
Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Dr Sean Ennis

v

Defendants

Apple Inc and Others

A P P E A R AN C E S

Paul Stanley KC, Robert O'Donoghue KC, Daniel Carall- Green & Victoria Green on behalf of Dr Sean Ennis (Instructed by Geradin Partners)

Daniel Piccinin KC & Timothy Parker on behalf of Apple Inc & Others (Instructed by Gibson Dunn & Crutcher)

Tuesday, 23 January 2024

(10.30 am)

Housekeeping

MR PICCININ: May it please the tribunal, I appear today with Mr Parker for the proposed defendants, and for the PCR we have Mr Stanley KC, Mr O'Donoghue KC, Mr Carall-Green and Ms Green.

Before I show you the pleadings and explain the grounds on which we challenge jurisdiction today, I just want to say a few words by way of introduction to the issues that are at the core of the application.

Sorry, sir, I just have in mind, is this being live streamed?

THE CHAIR: I am not sure, actually. If it is being live streamed, then I need to give the customary warning.

Some of you are joining us live streamed on our website. I must start with the customary warning. An official recording is being made and an authorised transcript will be produced. It is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court. Thank you.

Submissions by MR PICCININ

MR PICCININ: Thank you. I feel much better now.

At its core, this hearing raises a simple question: which country's competition law applies to the commission that Apple is said to charge for the service that's distributing apps and other digital content for iOS devices in various countries around the world? I just note that when Dr Ennis, PCR, refers to iOS devices, he means both iPhones and iPads and also, I think, iPod Touch. That question arises and permeates both of my main points today because of the way in which Dr Ennis has put together his proposed collective proceedings. As we will see, he's proposing to sue on behalf of all developers who are domiciled in the UK. His claim is that Apple is dominant in a market for the provision of app distribution services. That's what the market is.

Pausing there, when we talk about distribution services -- or when Dr Ennis talks about distribution services -- that's a shorthand for a list of services that they have outlined very helpfully in paragraph 2 of their skeleton argument for this hearing.

There are four items. First is licensing software. Second is making developers' apps and updates available to end-users. Third is marketing them, by which they mean marketing the apps, and fourth is collecting payments.

That is their case as to what the services are. Throughout this hearing I will be taking their case about what the services are, as the target for my argument. To be clear, none of this is the way that we, the proposed defendants, would characterise what Apple does or the relevant market. The argument we are making here is that the case that is put against us that has been pleaded against us is one that raises no serious issue to be tried. That's how all of this comes about.

So throughout my submissions I will keep referring to distribution services and you will know what I mean by that, and that I am not in any way endorsing my learned friend's ways of characterising what Apple does, or what the market is. That's the market and those are the services. Dr Ennis says that the commissions that Apple charges for those services are unfair. That's the alleged abuse and he claims damages measured by the difference between Apple's actual commission and what he claims would have been a fair commission for Apple to have charged.

Although I've just posed that question at the start as a single question, about which country's competition law applies, as you will see, that question actually breaks down into two parts. One question is this: as a matter of private international law, what is the

applicable law that governs these tort claims, that will determine its limitation, causation and all of that. That's one question. The other question is if these tort claims are governed by UK law or, indeed, by some other, some EU law, then does the territorial scope of the competition law provisions that are being invoked extend to the commissions that we are talking about today which are charged on the distribution of apps outside the UK and outside the EU? That's the territorial scope point. So that is a point about the territorial scope of these particular statutory provisions. What we will see in a moment is that that territorial scope reflects basic norms of public international law. That's where it comes from.

The significance for both of those questions for this claim is that this tribunal, as you know, only has subject matter jurisdiction over claims for breach of UK competition law and EU competition law in respect of the period prior to IP completion day, 31 December 2021.

If I am right that UK or EU competition law didn't apply, either because the governing law is some other law or because UK or EU competition law does not extend to these extraterritorial claims, then those claims cannot be brought before this tribunal at all. To put it another way, to the extent that they are pursued

under the only statutory provisions that this tribunal can apply, those claims are bound to fail to that extent. That's why the points we are making today are significant for this claim and feed into the serious issue to be tried limb of the jurisdiction challenge test. But I also want to say a little bit at the outset about why this is a very important question of substance, not just for this claim, but more generally as a principle of law, and why it needs to be grappled with now. The reason I say that is that, of course, competition law is a very important part of a country's economic regulatory framework. So the question of what kind of competition law a country should have and the role that the state ought to play in regulating markets more broadly, really engages quite fundamental philosophical and social and political considerations that do not get the same answers from every country.

So in particular, as it happens, the substantive question at the heart of these claims which concerns high prices, alleged high prices, that question of whether a competition law wants to regulate high prices on their own is itself a sensitive one, where different countries have made different policy choices, reflecting no doubt, different philosophies of market regulation.

So the question at the heart of this application is

really about the proper geographic boundaries of those regulatory choices. Who gets to make them? Is a country like Australia -- that's an example we picked not just because you happen to have Australian counsel in front of you but also because there is ongoing litigation in Australia, as we will see, in relation to these very matters -- is a country like Australia able to make its own rules about the terms on which an app store that markets apps in Australia operates, or does UK competition law reach across the seas to set limits on the commissions that can be charged there by a distributor of apps in Australia, where the developer/customer, happens to be domiciled in the UK?

Those are not idle questions. I say that because in other words, they are not just hypothetical or theoretical questions. Because right now, all around the world, courts and regulators and even legislators are grappling with this question of what rules should apply to app stores. As you will have seen in the papers and as I just mentioned, in Australia in a couple of months there will be a trial of a class action which includes a developer class, concerning the question of whether the terms on which the fourth proposed defendant -- I am just going to call the proposed defendants PD1, PD4, et cetera -- so PD4, distributes

apps in Australia, about whether those terms are anti-competitive. There is going to be a trial of that question.

The class in that case is seeking to apply Australian competition law to that question and that's true in relation to all app sales by developers domiciled anywhere in the world for whom PD4 distributes apps in Australia. So that includes the developers that are members of this proposed class. The same developers are having a class action pursued on their behalf under Australian law in Australia about the distribution services that are provided to them -- said to be provided to them -- in Australia.

So the premise of the Australian action is that Australian competition law governs the commission that Apple charges for the distribution of apps via the Australian storefront, irrespective of where the developer of the app may be domiciled. And that is completely irreconcilable with the contentions that the PCR makes in this proposed action. That's Australia.

In the Netherlands -- again, you will have seen in the papers that the regulator there, applying Dutch and EU competition law, has arrived at a result that PD2 has to allow the developers of dating apps that are published in the Netherlands on the Dutch storefront to

use third party payment providers. Again, that applies to developers anywhere in the world, whether they are domiciled anywhere in the world, but only in relation to their commerce on the Dutch storefront.

Then again in South Korea, you will have seen in the papers that they actually have legislation that makes similar provision for developers of any kind of app -- not limited to dating apps -- but again, only in relation to distribution of those apps in Korea, on the Korean storefront.

So those are all examples of countries outside the UK, applying through one organ of the state or another, applying their laws to regulate the terms on which Apple Inc. and its various subsidiaries around the world deal with developers in relation to the storefronts in those countries.

And although this world of digital transactions on digital storefronts sometimes seems complicated -- at least it does to me -- in this respect about the geographic boundaries, it is actually indistinguishable from the way in which the law treats the old world of retailing physical goods. If a UK game developer wants its game to be sold in a physical video game retailer, like a shop made of bricks and mortar in Australia, it is going to have to enter into some kind of distribution

or supply or marketing agreement with that retailer in Australia. The question of whether an Australian video game retailer's terms are fair, is one we say has to be answered by Australian competition law.

So, if I could just pick up the way that my learned friends put it in their introduction in their skeleton argument, paragraph 6, they say what is happening here is that a "multi-national business [by which they mean my clients] has come to the UK to offer services to UK businesses on a UK market, and has abused its [dominant] position by overcharging them".

We say that's the wrong way of looking at it. An Australian video game retailer, or PD4, does not come to the UK to offer services to a UK business on a UK market. It is the other way round. The UK game developer wants to sell its games in Australia and what it needs to do is choose between the various game retailers in Australia and appoint one or more as a distributor. So the UK game developer is doing business in Australia, not vice versa. That really illustrates what is the critical distinction that runs through all of my submissions today, which is the distinction between the question of to whom is the service being provided, where does the customer live, and a separate question of where the service is being

provided. Where is the hypothetical competition, where is the market.

The important question or group of questions is that second group. It's the one of where the service is being provided, where the market is. Because the place where the service is being provided is the place where the economic activity that we are trying to regulate, the PCR is asking you to regulate, happens. They are asking you to control the price at which services are being provided in Australia.

Yes, the services are being provided to a person who lives in the UK, who is domiciled in the UK, but the services are being provided in Australia.

You will have seen in our skeleton the various other examples or analogies that we have given. When I send flowers to my mother in Melbourne for Mother's Day, for example, or if I engage with a real estate agent, maybe the only one in some country town in Australia, to sell some land that I own there, if I do, or whatever it is, in all of those kinds of examples, I, as a UK resident -- someone who lives in, is domiciled in the UK -- am procuring services in Australia. I can't expect UK competition law to protect me from those Australian businesses providing services in Australia. I can't expect that any more than I can when I actually

travel to Australia at Christmas and buy a coffee in a coffee shop there and I am physically in the jurisdiction. It is the same thing. In both cases the economic activity, delivering flowers, acting as a real estate agent or acting as a video game retailer, whether physical or digital, in all of those situations the economic activity that we are trying to apply competition law to is an economic activity that happens in Australia.

Having given you that introduction, I now want to give you a road map for my submissions today. First, I am going to show you the key passages from the claim form and from Mr Perkins' expert reports, just to orient ourselves for the submissions that follow. Then taking things out of order from our skeleton, I am going to address you on territorial scope. Although that is, as I say, our second round of challenge, it's just helpful to look at it first because it actually provides some useful contextual background for the analysis of Rome II when we get to it. Then I will address you on applicable law, then forum, then alternative service, then non-disclosure. That will conclude my submissions when we get there. So if we could take up the claim form, please, which is in the core bundle at tab 4, page 86.

Happily, we don't need to look at very much of this, but there are just some key points about the claim that I want to identify for you. The first one is obviously in paragraph 1. What we are looking at here are opt-out collective proceedings under section 47B of the Act. Paragraph 2, you will see there are claims for -- what with other claims -- breach of statutory duty, which is a tort, and the statutory duty which is said to have been breached is that set out in Article 102 of the Treaty, or section 18 of the Act.

Then we have paragraph 3. Just picking it up over the page, you can see the allegation towards the top that:

"Apple is dominant [...] on the iOS app distribution market, and has abused that [dominant] position by charging prices [...] that are unfair in its own right and unfair as a system of pricing."

Then you can see at paragraph 4 that they rely on Article 102(a) and section 18(2)(a) to that end.

We can skip down a couple of pages to page 90, where you will find the class definition at the bottom, in paragraph 18. You can see the class is defined as "All UK-domiciled Third-Party App Developers who, during the Relevant Period, made one or more Relevant Sales."

Then over the page, at paragraph 19, we are told

that the class includes anyone who is domiciled in the UK on the domicile date.

Then just pausing there, if I can, for a brief detour on what this domiciled requirement means and why it is there, if we go to the authorities bundle, tab 7A, which is the Competition Act, and if we go on to page 114 -- sorry, sir, I am working electronically. How many volumes are there?

THE CHAIR: Of the authorities?

MR PICCININ: Yes.

THE CHAIR: Five.

MR PICCININ: I will try to guess, based on the tabs, where we are. I am guessing this one is in tab 1. Sorry, in bundle 1. Tab 7A, page 114 that I am looking for.

So this is section 47B which we saw before as the provision that the PCR is suing under. Paragraph 11 contains a definition of opt-out collective proceedings. We can see that they are proceedings that are brought on behalf of each class member, so anyone meeting the class definition, except for -- I just note over the page -- any class member who is not domiciled in the UK and does not opt in. So that's really what this UK domicile limitation is all about. It is really in recognition of that.

Then if we go on to page 120, you can see this comes

from section 59, which is the definitions that apply to part 1 of the Act. You can see in around the middle there is a paragraph 1B which tells us that various provisions of the Civil Jurisdiction and Judgments Act apply to determine whether someone is domiciled in the UK. That can be found in tab 4 of the authorities bundle, page 24.

We can see section 42 in particular, paragraph 1:

"[...] the seat of a corporation [...] shall be treated as its domicile."

Paragraph 3:

The corporation has its seat in the UK if, and only if, it is (a) incorporated and has a registered office in the UK, or (b) has central management and control here.

So it is clear from that that a developer will qualify as UK domiciled for the purpose of the claim if they are incorporated here and have a registered office here. Even if they have their central management and control somewhere else, they will still qualify as domiciled here.

THE CHAIR: So this is Bumble?

MR PICCININ: Exactly. We will come on to Bumble as an example. We will see that they satisfy that definition because the particular legal entity is domiciled here

and has its registered office at Reed Smith at least as, I think, the company secretary.

If we go back to the claim form now, and on to page 91.

We are in the definitions and you can see towards the bottom of the page there is a definition of "Third Party App Developer", which just means a developer who's not Apple. Then over the page, you can see there is a definition of Relevant Sale, which covers any sales via the App Store or within the app.

Then if we go back over the page, up to the definition of "App Store", it doesn't exactly highlight this for the reader but you can see there is no limitation here, there is no restriction to the UK storefront or to any particular storefront. So the class includes any developer who is domiciled in the UK, who has sold any app on any storefront.

Indeed, there is no requirement that the developer has made any sales at all on the UK storefront. They are still included, even if all of their sales are outside of the UK. All of the distribution services consist of distributing the apps outside the UK.

If you could go on to page 103 -- just really pausing here, as we head towards the pleading of the claim -- this is just a part of the claim form which is

really there, looking forward to the certification, where they are trying to tell the tribunal what they know about other proceedings that might be covering the same subject matter as this claim. What they say there in paragraph 50 is:

"The PCR is not aware of any separate proceedings making claims of the same or a similar nature on behalf of Proposed Class Members."

That is odd, because it is a matter of public record that similar claims are proceeding in Australia, as I said before, on behalf of precisely these proposed class members, amongst others, in relation to their comments on the Australian storefront which forms part of this claim. I say this as a matter of public record: it's an opt-out claim in Australia, so that means that there are published opt-out notices that are supposed to be there to bring the proceedings to everyone's attention. So it is surprising that the PCR said this. I don't suggest that the PCR was lying when the PCR said that he was not aware, but if he troubled himself to do a Google search, he would have become aware pretty quickly.

The other odd thing about this paragraph -- the reason I say that is it will be relevant later on when we come to full and frank disclosure -- the other thing

that is odd about this paragraph is that they mention these three other cases and they give the impression that Ennis is a bit like a UK developer class version of these other cases. But what they fail to mention is that each of the claims they refer to here are limited to commerce on the particular storefront of the country in which they are suing, and also of the law to which they are applying. So that the Kent claim is obviously -- as Mr Frazer knows very well, I am sure everyone knows -- is obviously only limited to the UK storefront. There is no limitation to UK developers at all, it is suing in relation to all commerce that takes place on the UK storefront, irrespective of where the developer is domiciled.

Then in paragraph 50.2 they refer to Cameron, which is a UK case. As I say, that is different, because that claim is brought on behalf of US developers rather than UK developers. What they fail to mention is that it is limited to UK developers' commerce on the US storefront. There is no attempt to sue for their commerce on the UK storefront.

Then in paragraph 50.3, they mention that Epic is sued in California, Australia, and they say the US. I assume that is a typo, they mean the UK, as California is in the US. But again, they fail to comment on that

and mention that -- obviously, they recognised that the point of suing under Australian law was so that it was sued in relation to the Australian commerce. They tried to sue in the UK in relation to the UK commerce and of course, this tribunal rightly refused permission to serve the UK claim on forum conveniens grounds, as it happens. Again, the point I am making is that there is no acknowledgement of the fact that their claim is unusual, in that they are suing only in relation to UK domiciled developers but in relation to their commerce on all storefronts around the world. That's the critical point.

If we could then go forward into the pleading of the background facts. I just pick it up at page 125. In paragraph 97, essentially what we are told is that if a developer wanted to sell digital content -- in other words, if it wants to charge for the download of an app or in-app content, then it has to enter into an agreement with Apple.

Then over the page, in paragraph 98, the proposed class members appoint one of PD1 to 6 -- those are the non-UK proposed defendants -- as agent or as commissionaire for the marketing and download of their digital content.

Then, if we just go on to page 137, just pausing to

note that in paragraph 111.2, they discuss the specific rules that apply in relation to the Netherlands which I mentioned at the very outset. Then over the page you can see 11.3, where they tell us about a similar provision in South Korea, following legislation there, which again I mentioned at the outset. Again, in both those cases, I just note that those interventions are limited, as I said before, to activity on the relevant storefront.

So that's the background. If we can just move on to their pleading of the case. It is really their pleading of market definition that I want to show you because I don't think anything turns on the rest. That starts at page 140. It is paragraph 115:

"The relevant market is the market for the distribution of Third-Party Apps."

We have seen later on what they really mean by that is the market for the provision of the service that consists in the distribution of third party apps. So it is the developer-facing market that they want to talk about.

Then, in paragraph 116.1, they elaborate on what that means on the product side. So they say that that market includes alternative app stores on iOS, as well as direct downloading of apps on to iOS devices. Those

are the competitors that Apple is said to face in this market, or at least those are the competitors that Apple would face in this market, if they existed. So that's the boundary that's being drawn for the market.

Then in paragraph 116.2, we are told that this is a UK market, full stop. Nothing else is said about what that means. What do you mean it's a UK market? For that, we have to look at the expert evidence of Mr Perkins. So we will go to that now. That's in tab 7 of the core bundle. But we can pick it up from page 229.

You can see the heading at the top of the page which is "The relevant geographic market". Paragraph 4.61 begins by outlining a two-step process that Mr Perkins is proposing to apply. Step 1 in that process is that he needs to assess whether it is possible for distributors of iOS apps -- so that is Apple -- to adopt different terms and conditions or different prices in different areas. Then step 2 is then to assess whether doing that, whether setting those different prices to the extent that is possible, would lead to significant substitution across different areas, either by app developers or users. Basically, the gist of the market definition exercise is that if your answer to that is no, people wouldn't switch, when you start from the

smallest base, then you conclude that you have the market, you don't need to go further.

Under the first heading he has there in bold: "The scope for differentiation between areas".

That's where he performs the first of those steps, where he's asking himself the question: to what extent is it possible for Apple to charge different prices in different areas? We will see in a moment that he's actually talking about two different things when he talks about setting different prices in different areas. Two different dimensions in which you might set different prices in different areas.

We start at paragraph 4.63, where he says in the first sentence that there is scope for commission rates to vary between jurisdictions. He gives the example of South Korea and the Netherlands, where it is now possible for developers to be charged lower commissions. To be clear, that is developers domiciled anywhere in the world but only insofar as they are selling in those countries. So that's the dimension. That's what he means by charging a different price in a different area. He means charge a higher commission for the service -- or a lower commission in that case -- for the service for distributing apps in the Netherlands or distributing apps in south Korea. So that is 4.63.

Then there is 4.64, in which he observes that price tiers are set on a national or a regional basis. What that is referring to is Apple sets these price tiers, these particular pricing values that developers can choose from. They are obviously expressed in the relevant currency. The point that Mr Perkins is making here is that if you have an app -- a single app -- which you, as the UK domiciled developer, are selling for 99 cents in the United States storefront and you are selling the very same app for 99p on the UK storefront, you are going to be paying a higher commission for the service of distributing that app in the UK than in the US.

So in 4.65, he reaches an interim conclusion which is that a monopolist of the iOS app distribution market could discriminate by reference to the location of the users. So he says that the UK is the smallest plausible geographic market.

I just want to pause there to note, in that paragraph, when he's talking about a UK market, what he's talking about is a market for the service of distributing apps to users who are in the UK. There is no other way to make sense of the reasoning that has led him to the conclusion that is expressed there, because it is all about the possibility of different commissions

being charged, depending on where the service is being provided. It is not about the domicile of the developer.

So that takes me down to 4.65. I then have to acknowledge 4.66, I don't shy away from it. There, he says it is also relevant, in addition to the analysis we had before, a further thing that is relevant is to consider whether Apple could discriminate, based on the location of the developer. What he says there is that it's not clear to him whether this would be possible. He's not saying that it is. He's not saying that it is impossible. He certainly hasn't identified any situations in which Apple does that or in which any other distributor of digital content anywhere in the world does that. He is not saying that. It's a thing that happens in these markets in the real world.

Then we have the heading "The extent of substitutability between areas". This is where we are moving into step 2. If you just go over the page to 4.68, that's where he says that an increase in the commission rate would not lead developers to switch away from distributing their apps in the UK.

So again, he's considering that question that he considered in the first set of paragraphs, in the first step. He's considering the question of an increase in

price that Apple charges to developers for the service of distributing their apps to UK users on the UK storefront. What he's saying is that if Apple increased the commission on the UK storefront, developers would continue to use those services. They wouldn't switch away. That is, of course, his view that you should define a market that is limited to the service of distributing apps on the UK storefront.

Then, at paragraph 4.69, he thinks about the possibility that Apple might discriminate against -- charge higher prices to -- developers domiciled in the UK. What he says is that he thinks that if that were to happen, then they probably wouldn't switch; as in they probably wouldn't move their domicile in order to continue using Apple's services. It's not entirely clear why he engages in this thought experiment, other than perhaps for completeness, because don't forget, he said earlier that he's not even sure whether that's theoretically possible, for Apple to discriminate on the basis of domicile. It's certainly not something that he says has any grounding in the way that the relevant markets actually work.

But putting that point to one side for a moment and giving the PCR the absolute maximum benefit of the doubt, at the absolute best for their position today,

that argument might support limiting the market to the provision of services to UK domiciled developers, as well as -- or in addition to -- limiting it by storefront. It doesn't detract from his earlier point, his earlier analysis which makes up the bulk of these sections, where he says that you need to define the market by reference to the storefront because charging different levels of commission at different storefronts would not lead to switching. That was his analysis.

So in other words, at the absolute most, for my learned friends, when he says the market that is limited to the UK, he must be meaning that in a double sense: a market limited to the service of distributing apps created by UK domiciled developers to end-users on the UK storefront. He can't have meant anything else.

Then he deals with end-user switching at paragraphs 4.70 to 4.71. Essentially, what he says there is he doesn't think that end-users would switch storefronts in response to an increase in commission in similar storefronts. Then he concludes at paragraph 4.72 that the market is limited to the UK.

As I say, it's clear from the reasoning that led him here and that what he means by that is at least it is limited to the UK storefront. He doesn't seem to have thought about the fact, at this point in time, that the

overwhelming majority of the claim relates to distribution services that are not on the UK storefront. He just doesn't discuss that fact in his report.

So what happened next was our jurisdiction challenge. In our jurisdiction challenge we raised the point that the vast majority of the claim actually relates to non-UK storefronts. So our understanding of what Mr Perkins was saying in his first report was that what you must have is not just that UK market but a series of markets by storefront around the world as well. Whether it is limited to UK developers or not doesn't really matter, but you must be having that series of markets. Then we built on that for the territorial scope, but more to the point, for the applicable law argument I am going to be coming to.

So we weren't trying to suggest that there should be some different geographic market analysis. We were adopting his analysis and explaining how we understood it. That prompted Mr Perkins, or it prompted the PCR to ask Mr Perkins to prepare a supplemental report which he did. That can be found in tab 8, the next tab, beginning at page 324.

In this report -- I'm not going to go through all of it because there's really -- it is divided into three sections. Section 1 is just an introduction, section 2

is headed "My approach and the economics of two-sided platforms", and what he does in that section is he says he thinks we have been confused and what he says is you need to distinguish between the market for the services that Apple provides the developers on the one hand and the market for the services that Apple provides for end-users on the other hand. And he says that he's going to focus on and he's always intending to focus on the first of those, which is the market for the distribution services that Apple provides for developers.

The reason I am not going to go through that right now is we have no quarrel with that, for the purposes of today. I said at the outset that I am happy to talk about the services that Apple provides to developers. That's the market that I am going to be saying is located in the place where they provide those services, as I said right at the beginning.

In addition to section 2, he also has this section 3, where he says: "Geographic market definition in this case".

That's on page 332 in the bundle.

If we just look at paragraph 3.2 there, he says:

"In Perkins 1, I assessed the geographic substitution possibilities available to app developers

and device users, in particular by considering whether significant numbers of app developers or device users would be likely to switch away from the UK in response to a SSNIP [that's a small but significant non-transitory increase in price] in the commission rate in the UK."

That's what he says.

But as we've seen, the analysis that he's referring to there was an analysis that's primarily asking whether developers would switch away from the UK storefront if there was an increase in commission on that storefront. The other possibility, as in the other possible interpretation of this sentence, that Apple might discriminate against UK domiciled developers, was the one that he opined he was not sure was actually possible. And yet the whole of the rest of this report, section 3, is all about that domicile switching possibility.

What he does, basically, he runs some numbers on the impact that Apple would have if it charged higher commissions to developers domiciled in the UK. The question he's posing there is whether those developers would be likely to switch. What he finds is on the whole, they would not. I am not going to attempt to argue that he's wrong about that in my submissions

today.

But what he doesn't do anywhere in section 3 -- there are two things he doesn't do: one is he doesn't do anything to bolster the opinion that he gave in his first report, on whether that kind of domicile discrimination is something that has any grounding in reality or not, rather than being a purely theoretical concern. He doesn't address that. The other things he doesn't build on or say anything about, really, in this report is that analysis from the first report that showed that on his view, the market has to be limited to the service of distributing apps by storefront, because of the possibility that you could have different commissions in different storefronts and the fact that developers would not switch away from a storefront in response to an increase in those commissions.

So this point that he's making in this report -- in other words, the point that you have to limit the market to developers in the developer dimension -- you have to limit it to the developers who happen to be domiciled in the UK, that is the one point today that I am actually going to ask you to reject on a summary judgment, serious issue to be tried basis. I am going to come on to that in the context of my applicable law submissions which is where it comes up. So the idea that it is

appropriate to limit the market just to those developers.

But although I am going to come back to that and I am going to explain to you why I say that is wrong, just completely flawed, I don't actually need to win that argument for either of my two grounds for challenging -- two principal grounds for challenging jurisdiction. That's because even if you focus on the supply of distribution services for developers, as I am going to focus throughout today, and even if you restrict the market to include only the developers, for the provision of services only to developers who happen to live here -- so that's what we get in Perkins 2 -- you still, when you get to applicable law, as we will see, still need to ask the question of what the distribution services actually are. And when you ask that question, what you see is that they consist of the marketing of apps to end-users on the various storefronts. Mr Perkins' own evidence, as I keep saying, is that you need to distinguish between those two storefronts because developers -- again, I am focusing on developers -- would not switch away from the Australian storefront, for example, in response to an increase in the commission that applies on the Australian storefront.

So that's what I wanted to show you about the pleadings and that is what I wanted to show you in the expert evidence, just to give us a common starting point to launch into my submissions. As I said before, in my road map, my first point is going to be the territorial scope point and that feeds into our argument brought on behalf of all the defendants, that there is no serious issue to be tried here -- so that's a ground for resisting jurisdiction for all of the foreign defendants -- non-UK defendants, I mean -- and it is also the grounds for our strike-out application or summary judgment application brought on behalf of the UK defendants, proposed defendants.

So that's what we are doing. As I say, this is the first of the two reasons we give as to why these claims do not raise any serious issue to be tried. What I am going to do in making these submissions, I am going to take the law from the judgment of Mr Justice Roth in Unlockd. But before we go there, I do just want to show you a couple of paragraphs from the decision of the Court of Justice in Intel, just because it explains the provenance of the rule that Mr Justice Roth is applying in Unlockd. He really takes it as read, but it is useful to see.

So that is at tab 36, volume 2. I want to pick it

up from page 1581, paragraph 40. This is in the judgment of the Court. You have the Advocate General's opinion earlier, but I don't think we need that for the point that I am making.

Just looking at paragraph 40, what you can see there is that the Court begins its analysis by noting that the general court in the first instance had held that the Commission's jurisdiction under public international law, to find and punish conduct adopted outside the EU, may be established on the basis of one of two tests. The first of those tests is the implementation test which comes from Wood Pulp. The second is the qualified effects test. I am just underlying that point that this is coming from public international law.

If you just go over the page to paragraph 49, you can see the conclusion of the Court on the question of what test applies. What it says is that:

"It must be noted, first of all, as the General Court held, the qualified effects test allows the application of EU competition law to be justified under public international law when it is foreseeable that the conduct in question will have immediate and substantial effects in the EU."

And that's what the qualified effects test is. Qualified effects means effects that are immediate and

substantial and foreseeable.

So what the Court was saying here was that what we called the qualified effects test is a valid basis of determining the territorial scope of Article 102, in addition to the implementation test which had existed for a long time before this. The point I want to emphasise is just that the purpose of that test, the role that it is playing in the legal analysis, is to ensure that Article 102 complies with norms of public international law. So that frames the point that I made at the outset, or provides the basis for the points I made at the outset about drawing boundaries for economic regulation.

So to see how that test actually applies in a context that is quite a lot like this one, actually -- in the context of digital content or markets for the distribution of digital content -- I want to go to tab 43 in the authorities bundle, which is in volume 3, for the decision in Unlockd. This is really a very important judgment for today. I do say that it is actually dispositive of this application in my client's favour. So I want to take some care going through it. If we could start on paragraph 3, which is on page 2016. What the judge does here is he introduces who the claimants were. It's important to pay close attention

to this, given the submissions that my learned friends make. You see that the first claimant is an Australian company and it's the parent of the Unlockd group.

The second claimant is an English company and the third claimant is another English company. That third claimant, we are told, was the company that entered into the relevant contractual agreement with D1. Now I am not sure you can actually see -- I think you can see from the headnote who D1 was. You can't see who the other ones were. But D1 was Google Ireland Limited. So that was an Irish entity.

Paragraph 4 explains what Unlockd's product was. It was the developer of software for Android devices. What we are told is that C2 -- which is the English company -- along with other members of the group, supplied software to app developers for incorporation into their apps. So Unlockd wasn't itself an app developer, like the proposed class members here, but it was the supplier of software to people who were.

What the software did was this: if you download the relevant app that uses the software on to your Android device, then every time you go to unlock your phone, a big ad is going to appear and take up the whole screen. That might sound like a funny thing to want to do. It might sound a bit more like a bug than

a feature, but the reason that Unlockd hoped people would want to do that was because they would then get rewards for looking at those advertisements. That's paragraph 4.

Paragraph 5, Mr Justice Roth explains in a bit more detail how the business model worked. Again, what he says is that C2, or other entities in the group, would partner with the developer. Then they would find third party advertisers to place the ads and they would have to pay for that and that money from the advertisers is obviously what is funding the reward that the developer is providing to the end-user, and then Unlockd gets a share of that revenue as its reward for providing this wonderful technology.

Paragraph 6 introduces us to the relevant Google services. At subparagraph (a), we can see we are introduced to the Play Store. That is the Google version of Apple's App Store. Then we can see at (b), we are introduced to Google's AdMob service. What that is, is a service that allows developers to have ads on their apps. What AdMob itself does is it plays the role of connecting the advertisers to the app developers, so it determines which ads appear on the app.

Then paragraph 7, we are told that D1, the Irish entity, is the Google company providing AdMob services

in the UK. Then at paragraph 8, we are told that at this time -- the time of the judgment -- there were only three apps in the Play Store anywhere in the world that used Unlockd's technology. First, there was Tesco, and Tesco had an agreement with C2, the English company. Tesco was an app that you could download on the UK storefront, unsurprisingly. The second one is Boost. Boost had a contract with another US entity, and that was an app that you could download from the US storefront. Then the third one is flybuys, which had a contract with an Australian entity and that was an app you could download on the Australian storefront of the Play Store. You can see here at the end of this paragraph that Mr Justice Roth notes that it follows from this that there are different versions of the Play Store in different countries, just like there are different versions of the App Store in different countries which I have been calling storefronts.

Then at paragraph 9, we are told that the relevant Unlockd company, which in the UK was C2, had a direct account with the relevant Google entity, AdMob. So just as in these claims, there was a contractual relationship between Unlockd and Google, in the same way that there is a contractual relationship between the proposed class members who are developers and Apple.

Then at paragraph 10, we are told that Unlockd had plans to grow, not just in the UK but in the EU and elsewhere. Then, in paragraph 11, we are told about the event that gave rise to the claim. Google informed C1 that it would suspend AdMob and also decided it would remove any Unlockd apps -- so any apps that used Unlockd's technology -- from the Play Store, everywhere in the world. So that's what the claim was about. The claim itself is then described under the heading "The claim". Paragraph 13, we are told that it was for breach of, amongst other things, Article 102 and the Chapter II prohibition, just like in this case.

Then, Chapter 14, we are told that Google was alleged to be dominant in several related product markets and this dominance is alleged to exist globally. Also in the EU, also in the UK.

Then at paragraph 17, we have the plea on effective trade. As I am sure you all know, both under EU law and under UK law, you have to show that the abuse of dominance has an effect on trade. In the UK, it needs to be in the UK; in the EU, it needs to be trade between member states.

You can see here the three ways in which it was said that there was an effect on trade. Paragraph 20 of the pleading, it was said that D3, which was Google US, had

made a single global decision affecting commerce everywhere, therefore effecting commerce in the EU and UK in particular. Paragraph 22, you can see that there was a pleading of the particular impacts on the UK apps which was obviously trade in the UK. Then in paragraph 23, there was an additional point which is that by locking out Unlockd in other parts of world, and affecting the whole group, you would have less revenue available in England to allow them to do business in England. So that was a third way in which trade in the UK would be affected.

Then in paragraph 18, we are told that just like in this case, this was a claim for damages on a global basis. Then in paragraph 20, you can see that there was an injunction as well which, again, was claimed on a global basis.

So that's what the claim was about. Over the page, you can see under the heading "Jurisdiction", the judge introduces the test for service out. I don't think we need to go over those. At paragraph 22, you have the serious issue to be tried requirement which is the one I am zoning in on in these submissions right now and the judge says, quite rightly, that that is the same test as the summary judgment test.

Then paragraph 24, under the heading "Article 102",

the judge notes that Google accepted at the time of the hearing that it couldn't challenge jurisdiction for a claim that was limited to the removal of Unlockd from the Play Store and AdMob in the EU. That was because D1 and D2, which were the European entities, had implemented within the EU, a policy of exclusion that had been decided upon by D3.

Then, in paragraph 25, the judge explains to us why that is all that is required in order to come within the territorial scope of Article 102. If you have a foreign defendant who implements, either on its own or through its subsidiaries or whatever, an abuse in the EU, then that is caught by EU law. So at paragraph 26, we are told -- so that analysis that I have just outlined covers the whole of the claim in relation to the EU, not just specifically in relation to the Tesco app but it extends beyond that to other potential commercial partners of Unlockd anywhere in the EU.

Just pausing there, that is irrespective of which corporate entity the Unlockd group might choose to make those commercial partnerships. There is no particular reason why Unlockd needed to incorporate a separate entity in each country in order to do business. That's not something that you have to do in international commerce generally. A company could use its English

subsidiaries, C2 and C3, for the whole of the EU in principle, if that was convenient. Equally, you could use the Australian company to do business in the EU. Or you could use someone else entirely. On any of those views, on Mr Justice Roth's reasoning here, Unlockd would have had a claim in relation to the exclusion of its technology, the exclusion of apps using its technology, from the EU storefronts.

The reason I am able to say that to you is when you look at the analysis in the paragraphs we have just been going through, nothing there hinges on the agreements having been made through C2 and C3, in that analysis. As we will see when I come on to my submissions, that is a real problem for Dr Ennis' case today under the territorial scope.

So that is the position for the EU storefronts. In paragraph 27, you can see that the real issue was whether there was a serious issue to be tried in relation to the refusal of supply carried out in other parts of world. That's really what this judgment is about.

The analysis of that question begins on the next page, in paragraph 29. The judge begins by telling us that -- this whole question I am addressing you on today about the territorial scope of EU competition law, it

was "long a contentious subject", he says -- you might say it was long a developing area of the law -- because for many, many years it was uncertain whether the qualified effects test applied or how it applied:

But he says it's now actually "been conclusively determined by the judgment of the Grand Chamber [...] in Intel ..."

Which you saw before. So now what we have are two alternative tests: one is the implementation test; the other is the qualified effects test.

Then at paragraph 30 the judge says our luck extends even beyond having had the Court of Justice tell us what the law is, because this issue has also been considered now by the Court of Appeal in Iiyama -- you will have seen that's a case that my learned friends rely heavily on today -- just as Unlockd did in this case before Mr Justice Roth.

So it's quite important that we see what Mr Justice Roth says about Iiyama in paragraph 30. That was a case about components -- it was a case about two cartels, each of which concerned one component in computer or TV monitors. One of them was LCDs -- liquid crystal delay displays, flat screens; the other one was CRTs, cathode ray tubes, which are the old, thick monitors. As I say, there were worldwide cartels

relating to the supply of both components, and there were worldwide cartels, even though in both cases, they were almost all manufactured in Korea or Taiwan. That's where the manufacturers, the cartelists, really were.

The claimants in that case, Iiyama, were a Japanese computer manufacturing and retailing group that had some subsidiaries in the EU and in the UK. They brought two claims, one suing on the CRT cartel and the other one suing on the LCD cartel. The jurisdiction challenges were heard separately but they both ended up in a single hearing and judgment in the Court of Appeal.

The supply chains in the LCD claim are described in the centre of this paragraph. Essentially, what happened was that a cartelist would sell the panel or the tube, as the case may be, to an innocent third party manufacturer that was based, typically, somewhere in East Asia. That innocent third party would then use the panel or the tube to build a monitor. Then it would sell that computer monitor to the Japanese parent company of the Iiyama group. Then after that, what would happen is that the Japanese parent company of the Iiyama group would sell the monitor -- I think it might have been the whole computer system -- to the subsidiaries that were based in the EU or the UK, and they would ship them there, so that those computers

could be sold in the UK or the EU by those subsidiaries.

It is just important to pause there for a moment. These computer monitors that formed the subject of the claim and on which there was said to be an overcharge, they contained the cartel products and they were being supplied physically into the EU. So it's not just a case about financial loss being suffered by someone who lived in the EU but is purchasing services or goods for delivery somewhere else; it's someone actually buying a product in the EU.

Then at paragraph 31, we can see that just like my learned friends, the claimants in Unlockd said that they were in a similar position to the claimants in Iiyama. You can see how they built the argument. They said: look, Google, in the Unlockd case, had a single global policy decision, just like the single worldwide cartel. Indeed, better than the claimants in Iiyama, in Unlockd, they were able to say that there really was a single decision that was made, quite irrespective of which storefronts of the Play Store it was being applied to. There was no distinction made by Google between the jurisdictions.

But Mr Justice Roth tells us that Iiyama was completely different, because that was an indirect purchaser claim -- this is paragraph 31 -- in the EU,

and you can see -- it says that in the last paragraph at the bottom of this page -- you can see that he then quotes from paragraph 100 of the Court of Appeal's judgment over the page, where it says:

"What matters is that the cartel was always intended to have worldwide effects, including in the EU, and it must have been contemplated that the supply chains whereby cartelised goods ended up being purchased within the EU might include intra-group transactions. The important point is that purchases are ultimately made, at an inflated cartel price, within the territory of the EU. The existence of such purchases [that's purchases of a product in the EU] [...] must therefore have an effect on the operation of the internal market ..."

That's the internal EU market for the purchase of those goods, or the supply of those goods.

So the critical point, if I can put it this way, as to what the issue was in Iiyama: Iiyama was a case where someone in the EU was buying something for delivery to them in the EU, which would normally constitute implementation. You wouldn't even have to worry about qualified effects, but it would normally certainly also count as qualified effects of the cartel. The issue in Iiyama, the reason -- it was actually Mr Stanley, Mr O'Donoghue and myself on the defendant's side in that

case -- what we were trying to say was: yes, yes, but that doesn't count. The reason it doesn't count is because before there was a sale to you, the claimants, of a product for delivery in the EU, before that, we sold the cartel products to someone else in Asia.

Our argument was that if you had that first step taking place outside of Asia, it doesn't matter what happens after that -- you can forget about it -- any claim in relation to the pass on of overcharge from that first sale is a matter for the competition law of the place where that first sale took place. It had to be a very hard line argument -- hard edged argument rather, in order to make it on a summary judgment jurisdiction challenge basis. And it was rejected, and the reason it was rejected, you can see here, is because what the other side said was: yes, but it was intended by the cartel -- that's what they planned to say at trial -- that these indirect sales into the EU would also be affected by the cartel. So because that indirect effect was actually an intended effect, it was something that the cartel was setting out to achieve, it ought to qualify under the qualified effects test as something that was a concern for the EU.

Actually, the European Commission had analysed it that way as well and it treated those types of sales --

indirect sales, they are called in the EU -- as being something of concern to EU law.

But that's a completely different issue from what we have in our case, where the services are being provided in Australia, or in South Korea or in the Netherlands. So that's what we say, which is the same thing, really, as what Mr Justice Roth is saying here, is that the emphasis is on purchases being made in the EU. The test is not whether financial loss was suffered by someone who was domiciled in the EU. That would be a completely different test. If that were the test, then any EU domiciled claimant could invoke Article 102 in relation to anything anywhere in the world, on any market anywhere in the world that causes them to suffer loss. That's not what we are doing here. We are looking for purchases being made in the EU.

Now in paragraph 32 -- actually, just before we go on to paragraph 32 --

MR FRAZER: Can I just ask a question: isn't the real difference in Unlockd, the price paid, the damage which was suffered was suffered ultimately by the EU purchasers because downstream of the cartel prices remain high and therefore the purchasers were the people who suffered injury, as you say, and therefore were able to sue. Whereas, as I understand the claim here, it's

not that the purchasers of the apps in countries outside the UK are said to have suffered damage; the damage is said to have been suffered by the UK-based developers who were charged what is said to be an unfair commission and, in the absence of pass on, the Australian or other users would have suffered no such damage. That's rather different from the situation you described to us.

Am I correct in that?

MR PICCININ: Sir, no. We say that the analysis that you see of Iiyama in Unlockd is not focusing on the place where a person suffered loss. It's focused on the place where a sale was made. So it's the fact that a good is being sold to someone in the EU at an inflated price is what engages the jurisdiction of EU law.

If I can put it this way, in some ways Iiyama -- in fact in a lot of ways -- is not a case that helps the tribunal to resolve this dispute. Iiyama, because it's a widgets case, a goods case, the sale into the EU is happening at the same place as the customer is. That's typically true in sale of goods cases. If I buy something, and you ask, well, where is the market that I bought it in, you say, well, I bought something for delivery here, so here is where I bought it. The customer and the goods are in the same place.

Our case is different. That's why we need to draw

a distinction between the place where the customer lives and the place where the service takes place. That's what this is really all about. And Iiyama doesn't help us to answer that question because it was a case where both things happened in the same place, but we are going to get on as we go on through Unlockd, we will see Mr Justice Roth's analysis of Google (Shopping) for example, where we tease out that distinction, and you see that in digital content cases -- or really any case like the flowers for my mother back home or video games in Australia, whatever it is -- if the customer is in a different place from the place where the services take place, it is actually that place where the services take place that matters. And Iiyama doesn't help us with that question one way or the other.

MR FRAZER: So your submission is that it is the place where the customer is based, which may not be the place where the harm is suffered; is that correct?

MR PICCININ: No, no. My point is it is not where the customer is based that matters, that's their case, the customer is the developer --

MR FRAZER: Sorry, I meant the end customer --

MR PICCININ: It's not about the end customer. I am not focusing on the supply of anything to the end customer. I am focusing on the services. It is the place where

the services that are being sold to the developer are actually carried out. And those services consist of marketing a product in Australia or marketing a product in the United States. As we will see when we go on to Google (Shopping) and the judge's analysis of that, that is how Mr Justice Roth treats it in Unlockd.

It comes back to the same point as I said at the start, which is, why is that the answer? It is all very well for me to tell you that is the answer or Mr Justice Roth to tell you that's the answer: why is that the answer? We are talking about economic regulation here, in other words that is shorthand for the regulation of economic activity: what is the economic activity and where is the economic activity being carried out?

Retailing in Australia is an economic activity that is a matter of concern to Australia rather than to the UK. That's really what it comes down to.

MR FRAZER: I understand. I promise this is the last, I won't stop you going forward.

MR PICCININ: No, please don't --

MR FRAZER: Does it require us to consider where this service was implemented and not consider where it had its qualified effects, or are the two things pointing in the same direction?

MR PICCININ: No, no, they both point in the same direction.
MR FRAZER: Okay.
MR PICCININ: I am just looking at the time, but if you have a question first --
THE CHAIR: Let's have a break now for five minutes.
MR PICCININ: Five minutes.
THE CHAIR: I am told there are issues on live stream so we will have a break of 15 minutes.
(11.48 am)
(A short break)
(12.05 pm)
MR PICCININ: Mr Justice Roth comes close to answering the questions that Mr Frazer and I were debating before but he doesn't quite. He asks rhetorically what would have happened if Iiyama's Australian subsidiary had purchased computers for delivery in Australia, or it's American subsidiary had purchased computers for delivery into the United States. He asks the question of whether Iiyama could have invoked Article 101 in relation to those transactions. He gives the answer that, obviously, they couldn't.

As I say, that's close to but doesn't quite answer my question, which is what if an EU domiciled subsidiary had purchased Finnish computers for importation into Australia or where it had a branch, for example -- it

might not have operated through a subsidiary, it might have just had a branch -- or had bought Finnish computers for import into the United States, again through a branch there, could the UK domiciled Iiyama entity who made those purchases invoke Article 101 in relation to those purchases? My answer is the same as the one that Mr Justice Roth gives here but he doesn't actually give it. So we will need to go on and look at his analysis and later paragraphs to see why I say that it's the answer.

In a nutshell, it's because, as I keep saying, it is the economic activity that is being regulated that we need to keep an eye on. It is a different question from the question of where financial loss is suffered or where the person who suffers financial loss lives. Those are different questions from which economic activity is being regulated. In the context of Iiyama, the economic activity that's being regulated is the sale of these computers in the EU. Those being sold at an overcharge as an intended consequence of the cartel was held, arguably, to fall within the territorial scope of EU law.

THE CHAIR: Why isn't a loss an effect?

MR PICCININ: It is an effect. So it is a consequence in that sense. As we will see when we come on to the

Google (Shopping) example, that's not the type of effect we are looking for. Because we are talking about economic regulation here, we are talking about markets. It's qualified effects on markets that we are looking for. That's why, when you have this unusual situation -- it's not that unusual but it's unusual in the case law -- where there is a difference between the domicile of the customer and the place where it has actually purchased some economic activity, if I can put it that way, that's when we get to this question and you have to ask: does loss count or not? And we say not.

If it were loss, as I said before, that would be that much simpler exercise and you would have thought one of the authorities might have said that was the answer: any claimant who is domiciled in the EU can always invoke Article 102 in relation to anything that happens that causes them to suffer loss, irrespective of where in the world that happens. But that would be quite surprising.

As I say, if that were right, then I could complain about a real estate agent's commission in Australia, I could complain about flower delivery services in Melbourne, all under UK law competition law, just because I am here and I am making payments out of my bank account in the UK. And I think that would be

a very surprising way to distribute competition law competence. A very strange way to draw boundaries for economic regulation of markets. That's my submission.

But we will see what the judge says. But before we get on to the bits I am keen to get to, I just want to note paragraph 33 as well, which is still talking about Iiyama. What Mr Justice Roth says is that his analysis is entirely consistent with -- it is in line with -- the underlying Commission decisions. This is quite important because what the Commission had actually found -- the Commission had to think about the territorial scope of its own jurisdiction. What it had found was that the effect of the cartel on sales of transformed products by third parties into the EU constituted part of the infringement. In contrast, we have the final sentence of this paragraph that "Neither decision" -- sorry, underneath the quotes, the final sentence:

"Neither decision had regard to sales made outside the EU [or] EEA, although these were both world-wide cartels."

Again, just look at the way that's being put. It is about where the sales were made, not the domicile of the legal entity that made the purchases. It is where the sales were made. That's the economic activity that we

are interested in.

So then we have a discussion of the Intel case. We don't need to go through all of that. Intel was a very different case because the aim of the conduct was found to be to prevent a product from being sold in the EU. So that is an effect in the EU. Again, an effect of the same type.

But I just want to draw your attention to an important point at the end of paragraph 36, at the top of page 2026. Unlockd pointed out there that the formal communication from Google suspending the apps all around the world, was actually a communication issued by D1 -- which you will remember was Google Ireland in the EU. I mention that just because a simplistic or naive or, more charitably, a literal interpretation of implementation, might have suggested that that was implementation of the global decision in the EU. But that argument goes nowhere because that's not what these tests for territorial scope are about. As I say, what they are about is delineating the outer limits of a country's regulatory sphere. That's what we are doing. That's a matter of substance, not who sent what letters from where or where were you when you made the agreement. That's not what this is about.

Then look at how the judge characterises what was

happening on the facts of Unlockd in the middle of paragraph 37. He says that:

"... the Unlockd group ..."

He's talking about the whole group there:

"... has an independent product."

And then various companies in the group had started successively to supply that product in a number of different markets:

"In each of those markets, the relevant Unlockd company is being denied access by Google to [Google's] services."

That's the AdMob service.

And then it's not actually the Unlockd company but it's the developer that is being denied access to the Google Play services. And he says:

"The fact that this is the result of a single policy and decision of D3 [Google US] cannot, in my judgment, mean that Google's conduct in denying access to its services in the US or in Australia has an effect on trade within the EU so as to constitute an infringement of Art.102."

Again, just look at the way this analysis is being conducted. It's about the denial of access to Google's services in particular countries. It's not about the domicile of the company that was asking for those

services. We say the denial of access to services has to be treated in the same way as the charging of a price for a service. In fact, you can think of a denial of access as the charging of an infinite price or a price so high that no one would pay it. It all comes to the same thing, 100 per cent commission.

Mr Justice Roth goes on in paragraph 38 to say, imagine if the claim -- to illustrate his point further -- imagine if the claim had been brought "at a time when [the product] was not supplied in the UK at all".

Again, "not supplied in the UK", that's the way it's put. He says it's "inconceivable" that EU law would be engaged.

So again, note that this thought experiment has moved on from the earlier ones, where he's focused on the domicile, or he covers both the location of the service and the domicile, back in paragraph 32. Now he's just talking about the product being supplied. He's not asking whether a UK domiciled company is being excluded from AdMob or the Play Store in the US, he's asking whether the product is being supplied in the UK. So that's the way he characterises it on the facts of Unlockd.

He then goes on from paragraph 39 onwards to

illustrate his thinking further with the Google (Shopping) case. This is quite important too because I do say that it is revealing because it is another situation where the place of the person who suffered loss, who is Google's customer, is not the same as the person where the offending services are being supplied. We can see how EU law treats that situation and the question of whose problem is it, whose law applies.

In paragraph 39, Mr Justice Roth explains the Google (Shopping) case. He says that that case concerned Google's practice of giving prominence to its own shopping website through something that was called -- it was actually called this initially, "Product universal". The point that he makes, or one of the points that he makes is that the Commission only found the infringement started at the time that Product Universal was launched in each of the countries that it was launched in. So the infringement start dates were actually differentiated by the time in which the Google service was being launched in each jurisdiction of the user, not of the competing comparative shopping companies.

The other point that Mr Justice Roth makes in this paragraph, is that the remedy which was 'stop it', was only applied to the application of Google (Shopping) to users in the EU. You can see in the final sentence of

this paragraph:

"There was no question of [...] requiring Google to cease [its conduct] as applied to users outside the EEA."

So Google in Australia or Google in Turkey or Google wherever else, was free to continue to prioritise in its search results, its own Google (Shopping) service at the expense of the results from competing comparison shopping services.

Then paragraph 43, just two pages on, takes that analysis a step further. Because Mr Justice Roth there notes, rightly, that some of the competitor comparator shopping services that the Commission looked at in its decision in that case, were active in more than one national market. As in they were trying to provide comparator shopping services to end-users in lots of different national markets. The judge pointed out that Google's conduct of giving preference to its own shopping results, as against those of those competitors, could cause harm to those comparator shopping services in various EEA jurisdictions in which the conduct occurred.

But we are told that the Commission did not even consider the effect of those competitor services -- those competitor groups -- in non-EEA markets, even

though Google's conduct was not restricted to the EEA. That's true, even though some of these, like Health Food, were European entities.

So in other words, a European comparison shopping service cannot invoke Article 102 to complain about the way that Google treats them, the European comparator shopping service, when it provides responses to searches that are made by end-users outside of Europe. If a European comparison shopping service wants to complain about the way that Google is treating it, when Google provides these search results outside of Europe, then that European comparison shopping service who may have suffered loss in their bank account in the EU, has to complain under and invoke the competition law of the place where the searches took place, where the service was being provided, where the interaction also with the comparator shopping service is being provided.

Why is that the answer? Why can't a European comparison shopping service complain and invoke Article 102 about all of the consequences that that European company has suffered from Google's abuse of dominance all around the world? Why not?

The answer is the same one I keep giving which is that each country has the right to regulate what goes on in its own market. So if a European comparison shopping

service does business outside Europe, and is unhappy with the way that it is treated outside Europe, then even though the business is European and might be domiciled in Europe, that's someone else's problem. It's actually the country where the service is being provided, that's where the economic activity is occurring. That's the country that gets to decide what the rules of the game are.

It would be wrong for Europe or the UK to act as a kind of colonial force, trying to alter the way that services are being provided in India or in Australia.

You can see exactly those concerns that I have just articulated to you being articulated by the judge under the forum limb, when he gets to that, down on page 2029, and it is paragraphs 50 and 51.

The judge says:

"Where allegedly anti-competitive conduct concerns the Australian market, that is a matter for Australian competition law, and similarly, where it concerns the US market, that is a matter for US federal or State antitrust law."

Pausing there, he's talking about the markets that are effected, he's not asking where the person who suffers loss in that market lives. That's a different question. He says:

"Indeed, I note that on 21 March well-known Australian lawyers instructed by Unlockd Media Pty Limited [which is an Australian company] sent a letter before action to Google alleging breach of Australian competition law and threatening to seek an interim injunction in the Federal Court of Australia. And on the same day, a leading US law firm wrote on behalf of the same company [seemingly that's the Australian entity], to Google, threatening an antitrust claim for damages and a complaint to the relevant US antitrust authorities."

It seems, again, it's not the domicile that matters, it's where the market is. And the market is where the services are being supplied, Google's services.

Paragraph 51:

"I recognise that when a global company pursues an allegedly anti-competitive international strategy which may affect its competitors in many different markets across the world, it is much more convenient if such an adversely affected competitor could bring its complaint against that conduct in one forum. But mere convenience is not a basis to extend further the extraterritorial reach of EU competition law, still less does it make it appropriate for the English court to assume the role of competition policeman of the world."

And we say that that is absolutely right, that that analysis transposes to the present case perfectly and is dispositive. If a UK domiciled developer has a problem with the commission it pays to PD4 to distribute its apps in Australia, that is a question for Australian competition law.

MR FRAZER: Can I ask in that case, is it significant that in the case that Roth J was considering here, the impact was on a competitor of Google because it was competing -- its price comparison services were competing with competitors, either competing with price comparison people or vendors, and therefore it was quite clear that there was an effect on competition in relation to those territories? Which is obviously something which is not of relevance here in relation to the alleged conduct.

Should we be looking at it differently, or does that make no difference to your submissions? So here is an effect on competitors in those territories --

MR PICCININ: I understand the question.

MR FRAZER: There is no effect in Australia on Australian competitors, for example and, therefore, you talk very much about a country seeking to regulate economic authority according to its own traditions but what would it be regulating in our case? The Australian consumers,

device users, might not be affected by this if there is no pass-on, for example.

MR PICCININ: They might or they might not, depending on that, that's right.

MR FRAZER: Exactly.

MR PICCININ: What we are regulating here -- this is what is in common between the two cases -- what we are regulating here or purporting to regulate is the price that PD4 charges for the provision of services in Australia. Services are provided to a UK domiciled developer, amongst others, for services that it is providing in Australia. That is the same in the Unlockd case, where the service of, you know, AdMob services -- you know, advertiser matching, is being provided in Australia, or in the US or the UK or wherever it may be and that's the service that was being refused access in the case of Unlockd.

You make the point that that refusal of access in the Google case does something extra. It doesn't just harm the Unlockd entity, it also causes harm to competition and that that harm to competition -- you say it might be something that is for the law of their states and you are asking me whether that's different from this case.

My answer to that is no, because that is an

additional effect in Google. If my learned friends are right, it's enough for them to say 'I have an entity that has suffered harm as a result of the abuse'. There doesn't need to be any additional competitive effects anywhere and they don't say that there is one. What they are saying is that it is the domicile of the developer that matters, simply because that's the person who is saying they suffered loss, and that's where they live. And that's not the analysis you have just seen here from Mr Justice Roth.

It is true in that paragraph he mentions -- just because those are the facts in front of him -- the competitive harm. But I think the reasoning that you see there transposes the same, if you are talking about an exploitative abuse rather than an exclusory one. It takes you to the same place.

You will have seen that my learned friends seek to distinguish this decision on the basis that Unlockd was an Australian company. They say that's different because it's an Australian company trying to invoke UK competition law and that's why they can only do it in relation to the UK storefront.

But as we've just seen, that's not the basis of the reasoning. It's also just untrue. As you can see, two of the three claimants here were English companies, not

Australian companies. Although, as it happens, Unlockd, in that case, was using different subsidiaries in different countries to carry on its business on different storefronts. It doesn't have to do that. That's not the only way to operate. Nothing in the reasoning that we have seen turns on the fact that that was how they operated. So it is a fact of the case but it is not a fact that feeds into the reasoning in any way.

Suppose, as I say, that Unlockd had used the English companies -- still an Australian parent but it's used English subsidiaries for whatever reason -- to service apps in all of the three countries, Australia and the United States, just like Bumble does, as we will see when we come on to it. What, in Mr Justice Roth's analysis in this case, would have changed if those were the facts? Absolutely nothing. It just doesn't figure in his analysis at all.

The reason it doesn't figure in his analysis is that the domicile of a company just has nothing to do with the economic activity and the place where the economic activity is being carried out. That's the point of substance which is determinative of the scope of jurisdiction under public international law.

The other point that my learned friends make is that

they say that what we are trying to do is make you look at the consumer facing market, the market in which Apple provides services to consumers, instead of the developer-facing market. That's in paragraph 35. But that's not the point. As I have said repeatedly -- I hope I have made clear -- that's not what I am trying to do at all. I am happy, as I say, to take their case at face value and focus on the developer facing market and I'm happy to talk about the provision, just for today, of distribution services, as if that was what the market was for. My point is that just like Google's distribution services on the Play Store or just like Google's AdMob services in Unlockd, you need to look at the place where the services are being provided.

If you are talking about the distribution of apps in Australia, whether that's apps that feature the Unlockd software or whether it's the dating apps supplied by a UK domiciled company, the distribution service is being provided in Australia.

So that brings me on to another fundamental flaw in the PCR's case in relation to territorial scope, which is that it is focused on domicile as the defining feature. When they talk about a distributor -- that's Apple -- selling services to developers in the UK, they say repeatedly throughout their skeleton what they mean

by that is that the distributor is selling services to developers who are domiciled in the UK, in the sense that we have seen in the case law.

Domicile, as we have seen, just means incorporation plus registered office. We say that is just a matter of economic irrelevance to the question of territorial jurisdiction to regulate markets around the world.

In our reply, we give some examples to illustrate that point. I just want to show you. I know you have seen them. But it is in the core bundle at tab 3, page 79. We give the example in paragraph 28. What we say is one of the highest billing UK domiciled developers -- so this has not been cherry-picked from the bottom of the list just because it is convenient, this is one of the big ones in the class, is Bumble Holding Limited. That meets the definition I said before because it is incorporated here, because it has its registered office at Reed Smith's premises. But as you can see, that's just one entity in a wider group, just like Unlockd had UK domiciled subsidiaries.

It is just one entity in the wider group, the parent of which, in this case, is not Australian but is a Nasdaq listed company that was founded by a US woman and has its headquarters in Texas. And as you can see -- almost all of this is from public accounts --

almost all of its revenue comes from the US. Just like many of the proposed class members.

That's one example. That's what we mean by services being provided to a developer in the UK.

Over the page at paragraph 30, we have another example which is Flo Health. This one is even more interesting in some ways because until quite recently, the US parent was the developer. Then my learned friends would say that Apple was -- back in those days, I think, or 2022 -- Apple was providing distribution services in the US. That's what they would say. But then, in 2022, for reasons that, as far as we know, have nothing at all to do with this case, they had a corporate reorganisation, which is an economically meaningless activity, it is a purely legal activity, and they now route through exactly the same app traffic as they always did through a UK entity.

So overnight, exactly the same services that Apple had previously -- all of these Apple entities had previously been providing to the US domiciled entity, and so they were services in the US, to take my learned friend's approach. Suddenly they become services being supplied in the UK. And one minute, the question of what Apple is entitled to charge Flo Health for the distribution of its apps in the US, in Australia, in

Brazil, one minute, according to my learned friends, it's the Sherman Act that determines the price that Apple can charge for all of that commerce around the world, is all regulated by the Sherman Act, and then the next minute, all of that commerce flips and it is now being regulated by the Competition Act. And that is all just determined by which legal entity happens to be the contracting party.

Let's take it a step further. What if Apple wanted to make all of these competition law problems that are raised by my learned friends with the App Store, what if they wanted to make them all go away? Could Apple adopt a policy which said that developers -- in order to, you know, sign up to the DPLA, in order to put their products on the App Store storefronts around the world, they need to contract with Apple through an entity that is domiciled in a country that doesn't have a competition law? They can receive the money in whatever bank account they want, anywhere in the world. They can still sell their apps on all the same storefronts, but now the contracting entity is going to be domiciled in a country that doesn't have competition law.

The consequence of my learned friend's analysis is that all of a sudden, there is no competition law that

applies to any of that exercise. There is no economic regulation of what price Apple can charge for the services that it supplies, marketing the very same apps that it markets today, in the very same countries in the very same way. All of a sudden there is no law.

We say this just illustrates that it is actually quite absurd to suggest that something as important and substantive as the territorial boundaries of a country's right to regulate commerce, turns on something as irrelevant and arbitrary for these public international law purposes as the domicile --

THE CHAIR: That's not quite fair, is it? I don't think that the claimant is saying that it is the exclusive jurisdiction that is the jurisdiction of the domicile, are they?

MR PICCININ: Under the territorial scope point, that's a good question, but I suppose we can have them answer. Certainly, at a minimum then, they are adding --

THE CHAIR: They are not saying that Australia doesn't have jurisdiction to deal with the Australian shopfront.

MR PICCININ: I don't know what the analysis is that leads them to that conclusion. When they have a claim that's brought by a UK domiciled developer, in relation to its commerce on the Australian storefront, they say that the only thing that is happening there is distribution

services being supplied in the UK. That's my understanding of the way they put it. I will have to hear how they explain the Australian case later.

But I do take your point. But even turning one step before my last one, even if Apple couldn't get rid of competition law entirely, it does still remain the case that they say the UK's right to regulate these transactions comes from the fact that there has been a shift in domicile of the company that is the contracting party. And that happens even though the services that are being provided haven't changed at all. I say that just doesn't make any sense.

So that is why we say that just as in Unlockd, the claims that relate to commerce on storefronts outside the UK and outside the EU, fall outside the scope of UK and EU competition law. And that is enough to dispose of these parts of the claim because there is no serious issue to be tried in relation to them. They are bound to fail. So that is the territorial scope point.

I then come on to the other way in which we put our case, which is the applicable law. This is really just an alternative route to the same conclusion. So either one of these will do. As I said at the outset, for this route, instead of focusing on the territorial limits of competition law, we arrive at our destination by

analysing the question of which private law governs these claims, these torts. It is common ground that the answer to that is to be found in Rome II. We have that in the bundles at authorities bundle tab 10, which is volume 1.

I will come back to the recitals but I would like to start by showing you how the regulation works in its substantive articles. So article 1, we are told that the regulation applies to non-contractual obligations in civil and commercial matters. That applies here.

Over the page, I should show you article 3, where we have the heading "Universal application".

PROF NEUBERGER: Could you give me a page number?

MR PICCININ: I am so sorry, it is page 196.

PROF NEUBERGER: 196, thank you very much.

MR PICCININ: It is article 3. Article 1 is on the preceding page.

So universal application. We are told that:

"Any law specified by this Regulation shall be applied, whether or not it is the law of a Member State."

So that's the sense in which Rome II has universal application. What that means is that if you apply the rules that are set out here and you found out that the applicable law is the law of, say, Japan, then that is

an acceptable result. What happens is that the English court or the Dutch court or whichever European Court is applying Rome II, is then required to apply Japanese law to the claim.

We then need to look at article 6, which is the relevant provision, everyone agrees, in this case. It's headed "Unfair competition and acts restricting free competition." They are being lumped together. Article 1 deals with claims concerning unfair competition. So does article 2.

Then we get to article 6(3) that comes in two parts. Part (a) says that:

"The law applicable to a [tort] arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected."

Then, at (b), what we are told is that where the market is affected in more than one country, and the claimant sues in the domicile of the defendant, then the claimant can choose the law of the forum, provided that the market in that country -- the country of the forum -- is substantially affected by the restriction of competition out of which the tort arises.

Then we are also told that where the claimant sues more than one defendant, it can only use this provision

if the restriction of competition on which the claim against each defendant relies substantially affects the market of that member state.

Again, I just note that this is a provision that is based on the location of the market. It's not based on the domicile of the claimants. It would have been the easiest thing in the world to say 'domicile of the claimant', or 'the place where loss was suffered'; but instead, what it says is it's the location of the market and it's the market that's affected by the restriction of competition.

So article 6 leads to three questions. One question is: is this an article 6(1) claim or an article 6(3) claim? Then the next question is: whichever one of those you choose, which country does it point to?

Then the third question is: if the answer is 6(3), and the analysis in 6(3)(a) does not point to England, then can the PCR solve that problem by making an election under article 6(3)(b)?

Now, just on that first question, you will have seen in the papers that we raised the argument of whether it should be article 6(1) or should be article 6(3) and we argue it should be article 6(1). We raise the argument not because it makes a difference to the ultimate answer but because it struck us as a question which has not

been decided in the authorities, so we thought it right we should raise it. But reflecting on that, preparing for this hearing, once you get down to applying the test under article, either 6(1) or 6(3)(a), you actually end up with exactly the same argument which is an argument about this: is what matters the place where the customer lives -- that's the developer -- or is what matters the place where the service is provided? You can have the same debate under 6(1) as you have under 6(3), so because of that, I am not proposing to address you, unless you would like some assistance, on the 6(1) versus 6(3) issue.

MR FRAZER: Just coming back to the point I have already made, the choice is -- both 6(1) and 6(3), as you say, point to the country where -- in 6(3)(a), where the market is or is likely to be affected.

MR PICCININ: Yes.

MR FRAZER: And your submission is that the market is affected in the place where the service is provided.

MR PICCININ: Yes, that's right.

MR FRAZER: If we took, say, the distribution of services in Australia, so the app itself is distributed in Australia, let's say, for a UK-based app developer, in what sense is the market in Australia affected?

MR PICCININ: Yes. Because the market is a market for the

provision of the service which consists in marketing this product on the App Store in Australia. That's what the service is. And the commission is just the price -- on my learned friend's analysis -- this is the basis for their claim -- it's a price for that service. So the economic activity that we are talking about here is the economic activity of marketing digital content in Australia. So what article 6(3) is saying, if you try to apply it to -- it is difficult because there isn't a restriction of competition in this case.

MR FRAZER: Yes.

MR PICCININ: So we are having to treat restriction of competition there to include charging a high price. What is the high price being charged in relation to? It is being charged in relation to the provision of services in Australia.

MR FRAZER: Even though the high price is not being charged in Australia?

MR PICCININ: But it is being charged in Australia.

MR FRAZER: Only if there is a pass-through.

MR PICCININ: No, no, no. So what happens is that PD4 is the one that is charging the high price. What it does is it takes the money that is paid by an Australian end-user and it subtracts from that the commission and then it remits the remainder to whatever bank account

the developer has nominated, which could be anywhere.

MR FRAZER: I see.

MR PICCININ: If you ask what that price is, what price are we regulating? We are regulating the price of a service that is being provided in Australia, because it would be the same if it was Woolworths, which is an Australian supermarket.

If you asked what price it charges for -- that's not a good example because it's not a sales agent. A better example would be a real estate agent in Australia. As I said before, if I engage a real estate agent to sell some land in Australia that I happen to own, then the real estate agent is charging a price for its service of putting up pictures of my property in its shopfront, taking people around and showing them, telling them why that property is great and they should pay a lot for it. Then it takes payment and subtracts the commission and remits the remainder to me.

That price -- as I say, it would be very surprising if the question of whether that price was a lawful one is one that UK law has anything to do with.

MR FRAZER: If the person, the legal person charging the price, was not an Australian subsidiary -- you posited this before -- but was, say, a UK subsidiary, it is still a price charged in Australia --

MR PICCININ: Yes.
MR FRAZER: -- because the services are rendered there?
MR PICCININ: That's right. Competition law doesn't care, for these purposes, where you happen to have your registered office. That may have significance for lots of other things. There may be lots of reasons why you want to be domiciled in the UK or in another country. It may have to do with tax, it may be that you have some employees there, maybe you don't. There are lots of reasons. I am not saying domicile doesn't matter for anything ever, but I am saying for these purposes, when we are talking about competition law, when we are talking about economic regulation and price regulation, then what matters is the good or service for which the price is being charged, and where that is.
MR FRAZER: Can I just put another hypothetical to you?
MR PICCININ: Please.
MR FRAZER: This doesn't indicate any hostility to your argument, I just want to make sure I have it right.
MR PICCININ: I am very grateful.
MR FRAZER: Imagine there is a dominant auctioneer, auction service provider, based in the UK. They are dominant because perhaps they are the only ones dealing in a particular kind of product or entity or something like a non-fungible token or something like that, and a buyer

in the UK consigns three lots to that auction house. One lot is sold to a bidder in the room in the UK, and the other one is sold to a telephone purchaser in France and the third is to an online bidder in Australia. There is no problem in relation to the buyer premium but the seller premium is suggested to be abusively high. So though the seller makes the money, the auction house collects from the three bidders, it takes off its premium and it renders the rest to the seller. How should we apply your submissions in that case? Which competition law applies?

MR PICCININ: Yes, that is a more difficult case. But I think you referred to there being a physical location for the auction service that was being conducted, which was here. So one of the sales was to a person in the room.

MR FRAZER: Yes. But it takes place over the Internet as well, as they always do of course.

MR PICCININ: The Internet as well. Where things take place exclusively over the Internet and they are not targeted at any particular set of end-users, it is a different case and so it is more difficult to answer, but I could see why you might argue in that case it was the UK. What doesn't matter, in my submission, is the happenstance of the domicile of either party to it.

If you think about real estate agents again, if you think about Foxtons taking on an engagement to sell an apartment in Mayfair that happens to be owned by a Russian national, who lives in Russia: what law applies to the question of whether Foxtons' commission is too high or not?

I think it would be very strange to say that that was a question for Russian law and to characterise that as the provision of services on a market in Russia. It would be even more strange if I then told you that actually that Russian national happens to own the property through a BVI company, as is reasonably common, and now all of a sudden Foxtons is actually providing services on a market in the BVI and that it is BVI competition law that applies to the question of whether Foxtons' commission is too high.

That really is the same as the way that my learned friends characterise the service that PD4 is providing: it is a sales agent; it is marketing a product in a country. It doesn't really matter who happens to own the thing that is being marketed and sold, what matters is where is the service being provided?

MR FRAZER: Okay, thank you.

THE CHAIR: It is being provided in Australia, you would say, because that's where the storefront is accessible?

MR PICCININ: Yes, that's right.

THE CHAIR: Yes.

MR PICCININ: It is slightly more complicated than that, but essentially that's right. It is accessible by Australian users, so that is what it all comes down to.

As I said, I am happy to proceed by having this debate under 6(3) instead of having the prior debate about whether it should be 6(3) or 6(1), because ultimately it is going to take you back to this same question, which is whether the market is located where the customer, here a developer, lives; or is the market located where the supplier, here Apple Inc. and the various subsidiaries around the world, is providing the services that the customer and others have procured from it?

You have my answer to that. I have given you the Foxtons example of why my learned friends' answer doesn't make any sense. You can also think about supermarket retailing. If you imagine an Australian wine producer like Jacob's Creek entering into a distribution agreement with Tesco to market and sell its wines in the UK, and then there is some question about whether something in that agreement is unlawful in competition law terms, again I do say it would be very strange to say that's a question to which Australian

competition law applies, given that it is a question about distribution services in the UK. But I am really now putting the same point in multiple ways.

Now, my learned friends try to wriggle out of that answer on the basis that they have defined a market for the provision of distribution services that is limited to the provision of services to developers that happen to be domiciled in the UK. That's the basis on which they say it's a UK market. You have seen already the evidence from Mr Perkins about that.

I am now going to get on to the argument of why I say they are wrong to limit it in that way. I do just want to remind you again that even for this part of my argument, I don't actually need to win on that point that Mr Perkins is wrong. He is wrong, but that doesn't matter in a sense. Because even if you define the market in the artificial and arbitrary way that they do, so that it is limited to the provision of distribution services for UK or on behalf of UK domiciled developers, you still have to answer the question under article 6(3) of where that market is located.

We say that question, too, you have to answer by looking at where the distribution services are being provided, because all of the hypothetical competitors in a market -- and that's sort of what a market is, right,

it's a field in which competitors compete to win your business -- that entire field consists by definition of people who provide that service. That's why you need to look for the economic activity that is taking place and where it is taking place.

It should not be lost sight of that the whole reason that the class representative -- the first class representative -- has limited his claim in the way that he has by reference to UK domiciled developers is not because they share any economic characteristic but because they want to take advantage of the opt out provisions in the Competition Act. Having assembled a group of proposed litigants based on domicile for those litigation procedural advantage reasons, what the PCR is now doing is seeking to define a market in order to fit the contours of that claim. We say that's the tail wagging the dog.

I am now going to get on to the market definition. Perhaps the last thing I should do just before the break is show you one passage from one authority which is about the approach of this tribunal to issues of market definition. The reason I want to show you that is because one thing my learned friends say is they say 'hands off, this stuff is very difficult, very technical, you shouldn't feel confident to deal with

this without having expert evidence from both sides and considering it at trial', so I just want to show you what this tribunal has said about the nature of the market definition exercise.

Tab 61 of the authorities bundle, the BGL case, volume 4, page 2795 I am looking for. Paragraph 114, subparagraph 8. What the tribunal said there is:

"It is important that market definition not be over-analytical or over-dependent on expert evidence. It is necessary that the law be predictable to those persons who are subject to it so that their behaviour can conform without the need for regulatory intervention. It may be that a market is sufficiently technical to require technical expert evidence as regards the product and its uses, but (as a general proposition) we do not consider that the Tribunal will always be assisted by solely economic evidence on questions of substitutability. It is incumbent on the parties to consider and establish the probative value of expert economic evidence on this issue. Although we appreciate that market definition is from time-to-time, referred to as a science, we consider such a description to unduly accentuate the technical aspects of what ought to be a common sense exercise of judgment, informed substantially by an understanding of the thinking of

persons in the market in question."

Now, obviously, the economics of market definition can be tricky and they can be technical and they can be important, but what the tribunal is saying here is that not every aspect of it needs to be. The tribunal is not required to suspend its disbelief, let alone its common sense.

The submission that I am going to be making after lunch, I think, is that the particular part of the market definition that we criticise for today's purpose is an easy one -- it is a narrow point and also an easy point that the tribunal can reject right away -- and that's just the aspect that seeks to limit the scope of the market to developers who are domiciled in the UK.

Looking at the clock, now is a convenient moment, thank you.

THE CHAIR: 2 o'clock.

MR PICCININ: Thank you.

(12.59 pm)

(The short adjournment)

(2.00 pm)

MR PICCININ: Before I return to the market definition argument that I was about to make, I just want to go back to the question of why we say -- really prompted by Mr Frazer's helpful question about the auction house --

why do we say that the distribution services that are being provided to developers are being provided in the country of the storefront, on the facts of this case. Again, I just want to go back to where I started, really, which is what are the services and just unpacking what we mean by them being provided in Australia, for example.

(Pause for technical problem)

MR PICCININ: Yes. So what I was about to address you on is why do I say PD4, for example, is providing services in Australia. In what sense is that true? What happens is that the developer who may be domiciled in the UK, i.e. Bumble, decides what they want to do is they want to sell their digital content to end-users in Australia on the Australian storefront. So they make that election. In doing so, as you have seen, under the DPLA, they appoint PD4 as their agent. Apple then curates the apps which are available on the Australian storefront which is a different set to those available on other storefronts and presents them to end-users in Australia, much like organising them on shelves and grouping them by category and presenting them in response to searches and all of that in a way that is aimed at Australian end-users and will be different from the way that the same apps are presented in another

country like Japan, for example.

Then an end-user in Australia will see on the virtual shelf the developer's app, decide they want to download it and pay for it, and then again, Apple will process that transaction in Australian dollars and thereby complete the sale of the digital content from the developer to the Australian end-user.

That basic idea is true of quite a lot of e-commerce that you see around the world, with Amazon or the Play Store or eBay, presenting different things in different jurisdictions. It's not going to be true of all e-commerce but it is true of a lot of it. It happens for a reason, because there is something substantively important, economically important about the act of trying to market a product to consumers. So there is something real going on there. It is not happenstance that things are organised in these storefronts in this way.

Really, your question, Mr Frazer, I think, was getting at the situation where sometimes the services, in particular the e-commerce, may be provided in a way that is really not tethered geographically, very strongly, to one place. In fact, we could take your example further and make it even harder for me and say, you know, suppose we had a purely online auction house

for digital content, a non-fungible token, so it only exists digitally and the server for the auction house is on a ship in the middle of the Pacific ocean and uses satellite connections to interact with owners of NFTs, who may be anywhere in the world and connecting them with purchasers of NFTs, who may be anywhere in the world, in any currency of either party's choosing which may be different currencies, so we can make this as untethered from geography as we could.

The effect of having done that, come up with an example which is really geographically untethered, where it is very, very difficult to say that the services are being provided anywhere in particular, is that you make it very, very difficult to apply Article 6 of the Rome II regulation, because it is quite hard to say where the market is, so you are going to have to latch on to something to add to the question, because you have to give it an answer. With applicable law, unlike with territorial scope, it actually is like in the Highlander movie series, there can be only one.

So, I don't know what solution you would adopt for that very, very difficult case. It may be that you fall back on the type of analysis that you have in Rome I for contracts, for example, where a distribution contract is governed by the law of the habitual residence of the

distributor, not the manufacturer, or where the law of an auction sale contract is governed by the habitual residence of the auction house. So these are all just ideas but one way or another you would be adopting a solution that truth be told, when we all look at it, is just a solution to a very, very difficult question, because you are dealing with something which is not geographically tethered.

But my submission to you is we don't have to worry too much about those cases, because that's not this case. This case, like most cases involving commerce, whether e-commerce or otherwise, actually is geographically tethered. There is something real that is happening. It is not the case that Apple operates a single storefront that is displayed to all consumers elsewhere in the world; there is a series of storefronts that are geographically tethered for real economic reasons. That's why we say what we are doing in the article 6(3) analysis is something that accords with the economic reality of the issue that we are looking at.

So I hope that's an answer to your question.

MR FRAZER: That's extremely helpful, thank you.

MR PICCININ: Now I want to tackle head on the bit in Mr Perkins' analysis, where he says that the market should only include in it developers who are domiciled

in the UK. I just want to show you what we said about this in our reply, because really we tackled it very firmly and head on. So that's in tab 3 of the core bundle. Tab 3 of the core bundle, page 78.

You can see in paragraph 25 we said that it is "illogical to define a market for the purposes of competition law by reference to the domicile of developers". I mean that in this case. In paragraph 26 we went on and said that that approach of defining by reference to customer domicile on the basis of purely theoretical customer domicile discrimination, is an approach that was not supported by any guidelines or any textbook or any decision or practice that we were aware of. Then we explained, in common sense terms, why it was inherently arbitrary.

We gave the example of iPhone sales discrimination by postcodes. If I can just elaborate on that. Suppose that Apple decided that they were going to set a different price for the sale of iPhones for people who live on Upper Street in Islington. A higher price. We are going to increase the price of iPhones by five to 10 per cent for consumers who have that as their address. Just suppose that is theoretically possible and they do it.

Let's go through the way Mr Perkins would analyse

that, and did analysis of the same kind of thing in his second report. He says how many people who live on Upper Street in Islington would sell their house or terminate their lease and take up residence on some other street in Islington in order to save five or 10 per cent on the price of an iPhone. The conclusion he would draw, I am sure, is not very many people would move house just to get an iPhone which is five or 10 per cent cheaper, because as much as everyone loves their iPhones, the place where they live is more significant than that, than the amount of money they would gain. Indeed, just the stamp duty would make it far from worthwhile.

So his analysis would then support the definition of a geographic market that was limited to consumers of iPhones who live on Upper Street in Islington. We really do say that is just absurd and makes no sense at all. Then if we made the point by reference to Bumble and Flo, as we've already seen, to demonstrate how economically meaningless domicile, in particular, is.

And again, we put it quite forcefully in paragraph 29, where we said if this was a claim that had been brought by the Bumble group of companies or just by Bumble Holding Limited rather than being a collective action being pursued on behalf of all developers, it is

the same thing. It is the same claim that is being pursued. It is really quite difficult to imagine an economist trying to define the market by reference to the fact that Bumble Holdings Limited is the particular contracting entity and that it happens to have a registered address in London.

So that's how high we put it. That's how fully we explain the point.

The reason we make this point, what I put in writing, is given how strongly we criticise Mr Perkins' new approach -- to be fair, these points were new because we were responding to something that was new -- you might have thought if these points were no good or even if they were even arguably wrong, what would have happened is that the PCR would have come along, at the very least explained why what we were saying was wrong or why we were saying these implications didn't follow as a matter of common sense from what Mr Perkins had said, or if necessary, by asking Mr Perkins to file a supplemental expert report, responding to what we had said. That's what you would have thought someone would do in the face of these kinds of submissions.

But that's not what they've done. They have not grappled in the skeleton argument with our point that this approach is inherently arbitrary and leads to

absurd conclusions, where you can define any market, effectively, with a domicile dimension. So we do say you can safely reject this single facet of the PCR's new case, that the geographic market should be defined by reference to the domicile of the developer. The narrow point, we say it is clear and obvious and, indeed, we can't see how this can turn on any evidence, whether expert or otherwise, that is not currently before you.

Before I move on from there, I do want to just say as well that if my learned friends are right that developer domicile determines or defines the market, and that you say that the market is in the place where the developer is when you are faced with an unfair pricing claim, then at least under article 6(3)(a), that should be the answer for the applicable law analysis in Kent as well. This is where it is different, sir, from territorial scope, where I can see it is at least arguable that the same conduct might fall within the territorial scope of more than one competition law. I can see that's a point that might be made but not under article 6(3)(a). Article 6(3)(a) gives an answer. If you are alleging that a particular price charged to a particular developer for the provision of a particular distribution service is an unfair price because it is too high, then the answer to the article 6(3)(a)

analysis can't depend on whether the claim happens to be brought by that developer or by the end-user, because in either case the restriction of competition, so far as there is one -- it has to be the high price that they are referring to -- is the same. It's the same price charged for the same service to the same person.

It can't depend on whether there is or isn't pass on -- or whether there is or isn't said to be pass on -- because if that were right, firstly because that's a different point from what the restriction of competition is, but secondly, what would you do in a case where there was 50 per cent pass-on? What would you do at trial if that's what you determine, that there is 50 per cent pass-on? Is half of the commission to be assessed by reference to UK competition law and half of the commission to be assessed by reference to US competition law? That doesn't make any sense and that's not how applicable law analysis is supposed to work.

So I do say, going back to, you know, that moment, sir, when I pushed my argument one step too far and you rightly pulled me up for it in relation to territorial scope, and this was the hypothesis that Apple says I would only want to deal with people who are domiciled in countries that don't have competition law, well, that does work here. Because if their analysis is right,

then that would be the applicable law for the claim and the claim would fail. That really doesn't make any sense.

Yes, so those are my submissions on the domicile dimension. I do just want to remind you again, as I said at the outset, even putting all of that to one side and even accepting the whole of Perkins 2, defining the market by reference to the domicile of the developers, you still need to answer the question of where the services are being provided. So we say you still get the same article 6(3)(a) answer which is that the market is located in the place where the services are being provided and that's Australia.

So whichever way you look at it, what you have is a series of markets in the countries of the different storefronts and a series of complaints that the prices charged for those services in those different countries is unfair. And that means that when you come to apply article 6(3)(a) to a developer's claim relating to the commission on distribution of their app in Australia, the answer is that it is Australian competition law that applies. Of course, as you know, that's the same answer as is given in the Australian claim.

So we say that the PCR is wrong about the application of article 6(3)(a).

That then takes us to their argument under article 6(3)(b). Here, their argument is that if the claims do relate to various markets around the world that are affected, and so in principle, there should be a mosaic of different laws that apply to those different claims, just as there has been in all App Store litigation to date, they say that the PCR can elect on behalf of all of the proposed class members, that all of those claims should be governed by English law.

We say there are two reasons, each of them works independently, why they can't do that. The first reason is that under article 6(3)(b), you need to look at each restriction of competition separately. Looking at the alleged restriction of competition of charging a high commission on distribution services in Australia, that restriction of competition does not affect the UK market, it only affects the Australian market.

So the PCR tries to get around that problem by saying: no, no, no, no, no, there is a single global commission decision as to what the commission should be. And that's the wrong analysis, we say. We say that for two reasons: first, this is not a single global decision. As you have seen, there are different commissions that apply on the Dutch storefront and the South Korean storefront. It is true that Apple only

made those decisions in light of the local regulatory action or legislation that happened there, but that makes no difference. So it doesn't matter why Apple made those decisions, what they show is that the question of what should the commission be is, in principle, a different question in relation to each storefront to each set of distribution services. So even if Apple gives the same answer to that question wherever it can, still there are different questions. That answer is a factual answer.

The second answer is a legal answer, which is that even if you really do only have a single global decision, you still need to analyse the different facets of that decision separately from an article 6(3)(b) perspective. Just like Mr Justice Roth said in Unlockd, when dealing with territorial scope and I accept that's a different point.

But we can see that from the tribunal's decision in Westover, which was a Rome II case. I know Mr Frazer will be very familiar with that one. That is in the authorities bundle at tab 55, which is volume 4. This was a case about interchange fees. I should perhaps just first explain, for those who have not had the joy of it, what interchange fees are and what the claim was about. Interchange fees are the fees that apply when

a person uses a payment card like a Visa card or Mastercard to buy something from a merchant. What happens is that the merchant's bank which is called the acquirer in the jargon, has to pay the interchange fee to the issuing bank, which is the card holder's bank. That fee is, just to keep it simple, determined by a rule that is set by Visa or Mastercard, and that rule falls to be characterised as an agreement between the various banks, or a decision of an association of undertakings.

It has been found that at least certain of those fees have the effect of restricting competition in the market in which the merchant banks compete to provide banking services to the merchant. That's the market in which the restriction of competition takes place.

You can see in paragraph 6 on page 2566, the different types of interchange fees that were at issue in this case. There were broadly three categories of them. The first type was domestic MIFs interchange fees. And a domestic MIF is one that applies -- this is what the rules say -- it's a fee that applies to a transaction where the issuing bank and the merchant are in the same country. Then we had the intra-EEA MIFs which apply where the issuing banks and the merchant are in different countries but they are both in the EU.

Then the third category was inter-regional MIFs which apply where the issuing bank is in a different part of the world -- so not in Europe -- and the merchant is in Europe. But equally, that would also apply vice versa.

So those were the types of MIFs that were in issue. The merchants, as I said, alleged they were contrary to Article 101.

We can skip down to page 2578. You can see in paragraph 53 that the tribunal says that in applying article 6(3)(b) we need to address three questions. Firstly, what is the non-contractual obligation on which the claim is based? Secondly, what is the restriction of competition out of which that obligation arises? Thirdly, does that restriction of competition affect the market in the country of the forum?

The answer at (a) was the liability for damage caused by the infringement of Article 101, paragraph 54. Paragraph 55, the answer to (b) was essentially the collusive arrangement to set a positive MIF, a positive interchange fee.

Then at paragraph 56, the tribunal gives the example -- an illustrative example -- of a cartel, and whether the markets are national or wider doesn't matter. What we are told is what matters is that there

is one restriction of competition which is affecting several different countries. That's because even though several different countries are affected, there is only one cartel, there is only one agreement that they won't compete with each other.

Then in paragraph 57, we see a continuation of that example, now involving the cartel being carried out through local subsidiaries in each market. Again, we are told that that makes no difference. I just note at the end of that paragraph the tribunal says, about six lines up from the bottom, that that approach "avoids the potentially serious difficulty of the claimant having to determine the boundaries of the geographic market in order to know what law or laws govern its claim".

That problem didn't arise in that case.

But they were saying it's desirable that you should be able to apply article 6 without doing a full market definition analysis, and that you can do that typically.

Then we have the crux of the decision which is at paragraphs 58 and 59, dealing with two different categories of MIFs separately. In paragraph 58, the tribunal was concerned with the Italian domestic MIFs. Again, these are the MIFs that apply when a card holder with an Italian bank buys something from a merchant in Italy. What the tribunal said is that the restriction

is the collusive arrangement to set positive MIFs there, as in positive domestic Italian MIFs in Italy. Of course, that is true whether the Italian MIFs are set at the same rate or a different rate from everywhere else. And of course, now, domestic interchange fees, as I know Mr Frazer knows, are regulated under the Interchange Fee Regulations throughout Europe. So the fact that Visa or Mastercard might set the same rate in every country doesn't make a difference. The point is, in principle, it's a different question, and so in principle, it's a different restriction of competition.

That's why you had to look at whether the acquiring market in Italy was the one that was affected, not the acquiring market in the UK. So they couldn't elect to use article 6(3)(b), even though there were also UK domestic MIF claims in the same proceedings.

Then in paragraph 59, the tribunal deals with cross-border MIFs and says that those are in a different position. There you can rely on article 6(3)(b). That's really because by its very nature, you are talking about a fee that applies in a cross-border transaction of the type that is covered by it. You are expressly saying that there shall be a fee of 2 per cent on any transaction that crosses a border. So you can see why that is inherently the same question. It's not

just the same answer, it's the same question, whether you are talking about a cross-border transaction involving a UK consumer in Italy or an Italian consumer in the UK, because of the nature of the fee.

So we say that the present case is analogous to -- if you are with me on article 6(3)(a), the present case is analogous to the Italian domestic MIFs. In principle, the question of what commission to charge on the Australian storefront is separate from the decision of what commission to charge on the UK storefront, even if Apple gives the same answer which, of course, we know it doesn't always do. So that's why the claims based on the Australian storefront can't invoke article 6(3)(b), to get lumped in with the claims on the UK storefront.

So that's my first answer to the PCR's attempt to use article 6(3)(b) as a get out of jail card. If I am wrong about that, then we have the separate question of whether article 6(3)(b) can be used for non-EU claims at all. We say it can't. To make that good, I need to go back to Rome II, which is in volume 1, tab 10.

Sorry, of the authorities bundle. Yes. I said we would go to the recitals and now we are. So it is page 193. If we just look at what is said in recitals 22 and 23, which are dealing with article 6(3), we say that:

"The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law [...]."

Then down to 23:

"For the purpose of this regulation, the concept of restriction of competition should cover prohibitions on agreements [...] which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, [set of] practices or abuses are prohibited by Articles 81 and 82 [...] or by the law of a Member State."

So we say it's clear from that that this legislator only had in mind claims under Articles 101, 102 or member state competition law. There is no reference here to restrictions of competition as a concept under other competition laws. So we say that's what the legislator had in mind.

It might be relevant just to note that the entirety of article 6(3) was actually added late, through the legislating process. It wasn't in the original proposal for a regulation made by the Commission. 6(3)(a) was

added by the Council and then 6(3)(b) was added really close to the end of the process by the Parliament. So we don't have the kind of travaux that you would normally expect to see, explaining what they were thinking. But it does seem here that they thought it went without saying, unsurprisingly, that what they were talking about was European competition laws, if I can put it that way.

I have to accept that when you look at the text of article 6(3)(b) itself, it doesn't contain any limitations of the kind I have just stated, other than picking up that wording of restriction of competition. But we do say that the construction of article 6(3)(b), the literal construction that seeks to apply that to all markets around the world, leads to absurd results. Because we say you can see why the legislator was not concerned about the procedural short cut of applying one member state's competition law to a claim relating to restrictions of competition happening in another, because all member states' competition laws are very, very similar, if I can put it that way. They are practically the same because of the mandatory effects of Article 101 and 102 and the modernisation regulation.

But it is a completely different thing to try to apply EU competition law to a restriction of competition

in a completely different jurisdiction, which may be a market in which there is a different competition law or none. So we say that the PCR's reading of article 6(3)(b) in Rome II effectively involves the EU legislating to colonise these global markets. There is just no hint anywhere in the legislation -- certainly not in the preamble -- that that is what the legislator thought that it was doing.

Now, my learned friends take a linguistic point on article 6(3)(b), where they refer to the market being affected in more than one country. They say: aha, when they say "country", they must mean something different from member state. But that type of linguistic point is not really the way we do interpretation of EU legal instruments, as the tribunal knows. But in any event, it's clear that this legislator has not used those terms in the way that is suggested, because if you go to recital 6, you can see -- that's on page 192 -- that what the legislator said is:

"The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the

court in which an action is brought."

It is clear there that "country" is referring to member states, so obviously, it goes without saying -- because obviously, Rome II does not apply outside of the member states, and we say that article 6(3)(b) is just another example of the word "country" being used in a context where it goes without saying.

I would also just note that there is no hint in the Westover case that the tribunal thought that what article 6(3)(b) was doing was allowing you to bring in claims relating to MIFs all around the world into the UK. Not even inter-regional MIFs. When a Japanese tourist buys something from a retailer in York, the idea you would sweep that in and start applying English law to those claims is something no one has ever even tried to do. I accept that the tribunal was only deciding the case in front of it, in which no one had been that mad, but it really would be mad and that is not how article 6(3)(b) is to be construed.

Why not? What is the madness underpinning it? It really comes back to where we started again which is that it is inconsistent with the nature of competition law which is inherently territorially bounded, respecting the norms of public international law. So you can understand why the legislator thought that this

limitation went without saying.

Finally, I do just note as well that there is something that is, at the very least, odd in the PCR purporting to make an election under article 6(3)(b) on behalf of developers selecting English law to apply to their claims relating to transactions on the Australian storefront, in circumstances where those same developers are currently seeking to apply Australian competition law to exactly the same arrangements, the very same transactions. We say that it can't be right that someone is allowed to make an inconsistent election from the election -- it's not an election that's made in the other case -- from the way the claims are being pursued in the other case.

So for those reasons we say that the PCR can't rely on article 6(3)(b) either. So UK law, in a private international law sense, does not apply to the claims in relation to non-UK/non-EU storefronts.

So, that brings me to my next topic which is forum conveniens. I can deal with this quite shortly. It is common ground that the PCR has to show you that England is distinctly or clearly the most appropriate forum for these claims. You always need to compare, when you are doing this analysis -- or certainly it is helpful to compare -- England to an alternative. And the

alternative that I have in mind, you will be able to guess, is the law of the country of the storefront or rather, the forum of the storefront.

I want to deal with this on two different bases. You probably picked this up from the written materials anyway. First, assuming what I have said about applicable law and territorial scope is correct, and then, secondly, assuming that my learned friends are correct that by hook or by crook -- you know, by article 6(3)(b) or an election, they can get English law to apply. I want to deal with them on those two alternative bases.

If I am right that the only competition law that applies is the law of the storefront, then most of the claim falls away before we even get to forum, because the tribunal obviously can't hear claims for breach of US or Australian competition law. But the position is more complex. And the reason I want to address you on this hypothesis is about the EU storefronts. For example, Ireland. Those claims, the claims relating to the Irish storefront, the tribunal could, in principle, hear claims for breach of Article 102 for the period prior to IP completion day. But it can't do that for the period after IP completion day. So that means that I have to accept that there is a serious issue to be

tried in relation to the claims concerning the EU storefronts in the period before IP completion day, and that's where our forum argument kicks in and does its work. Because --

THE CHAIR: What are the roles? What are the EU storefronts, which countries are they?

MR PICCININ: I think for every --

THE CHAIR: All of them?

MR PICCININ: I will be corrected. I am told that's right, one for each member state.

So we say that it would make no sense -- it's clearly not the most convenient course -- to pursue the Irish claims, for example, up to IP completion day, in this forum, with the Irish claims after IP completion day needing to be pursued somewhere else, most obviously Ireland.

Aside from the obvious and significant practical waste that would be involved in that approach, there would also be a very significant risk of irreconcilably inconsistent judgments being given, with a different outcome applying before and after IP completion date, applying the same law to materially indistinguishable facts just because you have a different tribunal hearing the evidence that is put forward.

In addition, and indeed, this is one particular way

in which the inconsistency might arise, a court hearing that claim in Ireland could make a reference to the CJEU on a point of law, for example, that the right approach is the concept of economic value in an unfair pricing claim, whereas of course, this tribunal cannot. So we say that point works in two ways: one, in principle it is right that these claims should be heard by a forum that can make that kind of reference; secondly, it is undesirable to have them heard split, so that one can be referred and the other not, with the result that you get inconsistent judgments.

So we say that if we are right about the applicable law or territorial scope, then that is the end of the road, not only for the Australian and Japanese and US claims but also for all of the EU claims, so the only claims that this tribunal should hear are those that relate to commerce on the UK storefront. We say that is really a very clear case in our favour -- far from being clear the other way -- and I am not sure it is actually contested but we will see.

The second way in which we deploy the forum argument proceeds on the assumption that we are wrong about applicable law and territorial scope. So to be clear, we are proceeding on the basis that under Rome II, the applicable law is English law, or at least it is if the

PCR elects that it should be. And that they can make UK competition law apply extra-territorially in the way that the claim seeks to do.

My submission is that even if that's right, we already know that other countries are applying their competition laws to UK developer commerce on their storefronts: Australia, Netherlands, South Korea. So we say that you still have the forum question and the answer to the forum question that you ought to give is the same one that the tribunal gave in Unlockd at paragraph 51, which we looked at before, where Mr Justice Roth said even under the forum heading, when he finished his territorial scope analysis, that it was more appropriate for the US and Australian courts to hear the claims in relation to commerce in those jurisdictions, applying their own laws.

That's true, even though US and Australian competition law are both quite different from EU competition law, including in relation to the refusal to supply issue in that case.

So that's why we say even if the Competition Act is available to the PCR in principle in this case, they can get there through one route or in those circumstances but especially if that is only because of an election that is being made under article 6(3)(b) which is the

device of convenience rather than one of substance, then the tribunal should decline jurisdiction for those reasons.

I know my learned friends have gone through and done the usual kind of check box analysis that you see in forum cases, where they say: well, the class members are domiciled here and the documents might be here, and there might be some witnesses here and there are some lawyers here; we say that's not the right approach to forum conveniens. It may be in a particular case that those practical considerations are more significant, but as the analysis in Unlockd shows, where you have a big point of principle like the one we are advancing today, about just what is the appropriate forum to have the economic regulation of distribution activities in Australia considered, exactly the same question that Mr Justice Roth was answering in Unlockd, we say that trumps all of those considerations, particularly in circumstances where those practical considerations about witnesses and documents are not made concrete in any way. They say in theory, there will be documents in the UK, but they don't actually have any plan for there to be disclosure from class members in the litigation plan they have put forward. So these are theoretical points being made, not ones of real practical significance.

But I will see the way it is developed and reply accordingly.

That then brings me to alternative service. On that front, I think we should go back to the order that you made, sir, in the core bundle, tab 5. The substantive provisions are on page 171. In paragraph 1, you granted permission to serve on all eight defendants -- proposed defendants -- in two ways: by courier to Gibson Dunn, and also to Apple Inc. in Cupertino, and then also by email to three particular email addresses at Gibson Dunn, all three people in London.

Sir, I am talking about the order you made. I am not making any criticism of you at all. You made the order that was sought, and for the reasons that had been put before you. But the point I am making by looking at this is that other than Apple Inc., who was going to receive by courier, everyone else was only going to receive these documents if Apple Inc. passed it on to them, or if Gibson Dunn did. That's in circumstances where none of the other proposed defendants have instructed Gibson Dunn to accept service for them.

So that's the order that was sought and made. There is no dispute, sir, that you had the power to make it or that the tribunal has the power to ratify it, so to speak, now. But there is an issue between us about what

test should have been applied. You have seen that in the papers.

We say that the tribunal should only grant permission for alternative service in this case if exceptional circumstances can be shown. That's because all of the states -- together with the UK -- are party to the Hague Convention. So we say you need exceptional circumstances to put to one side the methods of service to which those countries have consented under the Convention. Then in contrast, the PCR says that the test is only that you need to have a good reason. Other than in relation to Japan, where they now accept that they put you on the wrong horse, sir, and that they should have said that the test was exceptional circumstances -- and that's because according to them, the elevated test of exceptional circumstances only applies when a state has lodged objections under article 10 of the Convention.

So I am going to address you on that question first, of what the test is. Then I will turn to the facts. Before we look at the case law, I just want to show you the Convention itself. That's because it is important to understand what the contracting states actually agreed to when we look at what the case law comes on to say about it. That we can find in the first bundle of

authorities at tab 3, page 8.

We can see article 1, what is said is that the:

"... present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."

So the UK has given a commitment to all of the other Convention states that this Convention will be applied in all cases like this one. Okay, so that just takes us to the next question: what does it need for the Convention to apply? What does it provide?

Article 2 provides that each Convention state has to designate essential authority to receive requests for service, in conformity with articles 3 to 6. Then articles 3 to 6 set out the well-known mechanism for originating states to forward documents for service through the central authority that has been designated by the receiving state.

But those are not the only methods that are permissible under the present Convention. Over the page at article 8, there is another route which is direct service on persons abroad through diplomatic or consular agents, and that route is available unless the receiving state has declared its objection.

Then we get to article 10 which says, again, unless

the receiving state objects, you can also serve by postal channels directly to persons abroad.

But the point I want to note is that there is nothing in this Convention at all that permits a person in Australia, like PD4, to be served by sending the judicial documents by courier or by postal means for someone else -- someone else -- in the US, or to solicitors in England by email, in circumstances where they are not instructed to accept service. I am not saying, as I say, that you had no power to order alternative service of that kind, but my point is that even putting Japan to one side, where the test is now common ground, the alternative service that the tribunal was asked to order and did order, is inconsistent with the commitment that this country gave to the Commonwealth of Australia and to the Republic of Ireland and so on, back in 1965, when this Convention was agreed.

What I am going to show you is that when you look at the case law, what it establishes is that if you were going to do that, if you were going to order alternative service of a form that is not permitted by the Convention, you need exceptional circumstances. A garden variety good reason will not do because this country does not treat its international commitments so

lightly.

So I want to start with what is, if I may say so, a very clear articulation of the principles by Mr Justice Marcus Smith, sitting in the patents court in a recent case. That is the case of Nokia v OnePlus, which is at tab 57 in the bundles in volume 4.

In paragraph 1, on page 2597, you can see that this was a case in which Nokia were suing a Chinese mobile phone manufacturer, and defendants 1 and 3 were incorporated in the People's Republic of China. Paragraph 3, you can see that there were other defendants who were in the UK. It is D2 and D4. We don't need to read through the detail in paragraph 4, but basically what happened was that D2 and D4 were served in England and the proceedings were rumbling along while the claimants tried to serve D1 and D3 in China through the proper Hague Convention means. But as sometimes happens, they ran into difficulties. There was a risk of holding up the proceedings so they applied for alternative service. You can see exactly what they sought on page 2599, paragraph 11: service by email on a person who was the legal director of D3, and service by email on Hogan Lovells, who were the solicitors for D2 and D4. That was in London, I think.

You then get a discussion of the authorities and

I think we can pick that up from paragraph 18, in which the judge discusses the Supreme Court's decision in Abela. You can see just below E in that paragraph -- the letter E on the right -- that the judge explains why alternative service is more fraught in cases involving defendants out of the jurisdiction. He refers to the coercive processes of the English courts being foisted upon the defendant, who is out of the jurisdiction. That is why we must tread more carefully. It's not just a matter of ensuring the proceedings are dealt with in accordance with the overriding objective. Or equally, I would add, in accordance with rule 4 in this tribunal.

Paragraph 19 is important too. Lord Clarke in Abela recognised the importance of treaties and conventions on service. He said:

"If one has entered into a convention with another state for the service of civil proceedings on persons in that state, then to disregard those provisions would be disrespectful and contrary to the rules of comity between nations."

That's the same point that I was making before.

Then at paragraph 20, the judge notes that Lord Clarke referred to what Lord Justice Stanley Burton had said in Cecil v Bayat. Then the judge says:

"What one gets, in cases where there is a convention

in place, is that a form of service that is not stipulated by the agreement between the States -- here the Hague Convention -- that process can only be disregarded or set aside or circumvented where there are special or exceptional circumstances."

And that is exactly the proposition of law that we are inviting the tribunal to apply today.

Now my learned friends say that that is wrong and it is inconsistent with what they call the modern cases. I will deal with that. But I just want to show you that this case is obviously not an old case. I think it is 2022. But also, it was not decided per incuriam. If you see paragraph 22 just on the next page, there is a reference to the decision of Mr Justice Foxton in the M v N case, which contains one of the classic statements of what my learned friends now call the modern approach.

So the position is not that Mr Justice Marcus Smith was unaware of that case law. He obviously thought that the modern approach was as he had summarised it back in paragraph 20. As I will show you in a moment, when you read the cases correctly, he was right about that.

The origin of what my learned friends call the modern approach seems to be a decision of Mr Justice Popplewell, as he then was, in a case called SocGen. That's in tab 38, which is volume 3.

Page 1684.

You can see from paragraph 2, over the page, that the defendants were incorporated in Turkey and the UAE. Paragraph 4, the claimants purported to serve the defendants but at least arguably, ineffectively.

Then over the page, at 6(1)(a), there was retrospective alternative service being sought. Then, the key bit of the analysis is on page 1700, paragraph 9(b), where the judge says:

"It remains relevant whether the method of service which the Court is being asked to sanction under CPR 6.15 is one which is not permitted by the terms of the Hague Convention or the bilateral treaty in question."

Again, that's the same way that we just saw Mr Justice Marcus Smith put it. Then he says:

"For example, where the country in which service is to be affected has stated its objections under Article 10 of the Hague Convention to serve as otherwise than through its designated authority, as part of the reciprocal arrangements for mutual assistance [...], comity requires the English Court to take account of and give weight to those objections. I would regard the statement of Stanley Burton LJ in Cecil [...] to that effect [...] as remaining good law."

Then he says Lord Clarke in:

"... Abela was careful to except such cases from his analysis of when only a good reason was required, and to express no view of them. Although Stanley Burton LJ's reasoning that service abroad is an exercise of sovereignty cannot survive what was said by Lord Sumption [...] in Abela, there is nothing in that analysis which undermines the rationale that as a matter of comity the English court should not lightly treat service by a method to which the foreign country has objected [...] as sufficient. That is not to say, however, that there can never be a good reason for ordering service by an alternative method in a Hague Convention case."

So we say that the question of whether exceptional circumstances is required turns on whether the court is being asked to sanction a method of service which is not permitted by the terms of the Hague Convention. That the particular example of the country stating objections under article 10 is just that. It is an example. It is easy to see how that example relates to the first sentence of this paragraph.

Because if what you are seeking is alternative service on the defendant by post, then, of course, it is important to ask whether the receiving state has objected to service by post under article 10. Because

if it hadn't objected to service by post, then article 10 makes it clear that service by post is permitted by the terms of the Hague Convention. So the first sentence would not be engaged and the garden variety good reason would be good enough.

But I think what my learned friends really draw on is the next case in the series which is the case of Flota, which is at tab 40. It is in the same bundle. It starts at page 1927. We can pick it up from 1935. You can see the heading, "Alternative service".

This is a decision of Mr Justice Leggatt, as he then was. In paragraph 20, you can see in the middle of the paragraph there is a reference to the decision of Mr Justice Popplewell in SocGen, which is the one we have just been looking at. You can see in paragraph 21 that Mr Bird, who was counsel for the defendant, submitted that objections under article 10 were just an example.

Then look at exactly the way he puts his point. He says:

"... exceptional circumstances are required in any case where the country in which service is to be affected is a party to the Hague Convention."

Pausing there, that is obviously not what Mr Justice Popplewell said in SocGen. While it is

clear, he said so in terms that article 10 was an example. Mr Bird is right about that.

Mr Justice Popplewell had explained that the exceptional circumstances test only applies where the method of service is not permitted by the terms of the Hague Convention.

So unsurprisingly Mr Justice Leggatt disagreed with Mr Bird's submission. But he then expressed his view of the test somewhat differently, suggesting that the question is whether:

"... the country in question has indicated some positive objection to persons resident in its territory being served by any means other than in accordance with the Convention."

Taken on its own, without the rest of the paragraph from Mr Justice Popplewell, it's a bit unclear what he meant by that, because we have already seen what the Convention actually says. It provides for similar methods of service, and then it says expressly that the Convention shall not interfere with other particular methods of service like post in the absence of objections.

So the Convention itself is a commitment that only those identified methods of service will be used. That's why exceptional circumstances are required.

That is really the end of the analysis in the case law. The later cases all fall back on the analysis that we have just seen in this pair of cases, or simply record summaries of what the parties have agreed to be common ground.

So turning to the facts of this case, I have to accept in relation to personal service on Apple Inc., exceptional circumstances would not be required because there is no objection. It is now common ground that exceptional circumstances are required for Japan because Japan has objected to postal service. That's the reason why my learned friends accept that exceptional circumstances apply. I have a completely different reason, which is that postal service is completely irrelevant in a case where alternative service was not service on Apple Japan by post, it was service on someone else in another country, by courier and by email, and that's not authorised under the Convention at all.

We say it is quite absurd to say that it is consistent with the Convention, to serve a foreign defendant by sending the claim form by email to any old person in England or in some completely different country. That's why we say the answer is the same for Japan as it is for every other country, other than the

US, exceptional circumstances need to be shown.

So then we turn to the facts and the exercise of discretion. We say that, actually, irrespective of which test you apply, exceptional circumstances or good reason, this order should not have been made. First, that there is a very basic point which is that it was gratuitous to allow service on the non-US entities by serving only on Apple Inc. and Gibson Dunn. They could have at least required service on each of them by post.

Second, whichever standard applies again, it's common ground that it is not good enough to say that the Hague Convention route would involve delay, because it always involves delay, and otherwise, alternative service would be the norm rather than the thing you are asking for a good reason for.

The only point that the PCR really has in this case is that delay in this case would cause litigation prejudice by preventing them from catching up with Kent. There are several problems with that. The first problem is if it is right, it is a problem of their own making. Dr Kent filed her claim back in May 2021, almost three years ago. What on earth has Dr Ennis been doing all this time? No explanation has been given for that at all. We say he can't turn up late with no explanation whatsoever and then say he shouldn't have to follow the

proper procedures because he's late.

He says that that is legally irrelevant and he relies on the analysis of Lord Clarke in Abela. Perhaps we should look at the relevant paragraph there. That's in authorities tab 30, which will be in volume 2, page 1066.

It is paragraph 48 that they rely on. What he's doing there is disagreeing with one part of the reasons from the Court of Appeal judgment below. That was the case in which the claim form had been issued shortly before the end of the limitation period. Then there was a problem with service. So unless retrospective alternative service was ordered, the claim was going to be time-barred.

In that context, what Lord Clarke is saying is that the focus should be on the question of whether they had done all they could to serve within the period of the validity of the claim form. That is a different proposition which we can understand because you are entitled to wait until the end of the limitation period to sue, and having done so, to benefit from all the usual tools in the CPR, to enable you to serve the claim form within its period of validity.

What we have here is a totally different issue. There is no point about limitation. What we have here

is the PCR wanting to obtain a procedural advantage, catching up with Kent, but he has put himself in a position where he can't do that without an indulgence. We say that's his problem.

The second point is this. In order to make this argument work, to say that he is suffering litigation prejudice, he needs to explain how, with the alternative service being approved, he plans to catch up with Kent. But the directions in Kent are for witness statements, I think it's 26 January, the day after tomorrow. The expert reports, 26 April; reply expert reports, 2 August, leading to a trial that is less than a year from now, in January 2025. Yet here we are in late January. Realistically, expert evidence is going to be exchanged in Kent before a CPO has even been made in Ennis. Even if it is made, even if you do approve the alternative service.

No explanation has been given as to how they propose to deal with that. I am not here to say it's impossible, but we will deal with case management proposals as and when they are made and say what we have to say about them then. But I do say it is incumbent on them to explain how they can catch up, if they are going to seek an indulgence in order to allow them to do so.

So those are my submissions on alternative service.

Which takes me to my final topic which is full and frank disclosure. Again, I think I can be brief about this. I don't think we need to go to the law because there is no real dispute about the principles. If I can just state three principles and we can find out if Mr Stanley agrees or disagrees. They are that the PCR had to make the tribunal aware out of the matters that we would have wanted the tribunal to be aware of, if it had not been an ex parte application. Obviously, that is limited to matters that are material. The authorities speak about full and frank disclosure not being like marking an exam paper, so we accept that. But equally, it's not good enough just to leave the relevant matters for the tribunal to figure out itself from annexes, for example. The important issues do need to be brought actively to the attention of the tribunal.

We say that the non-disclosure in this case has actually been quite serious really, at the serious end of things. Obviously they said nothing at all about the territoriality argument they have addressed you on today. That's so, despite the territoriality argument now being quite well trodden ground with the discussion in the Iiyama case and the discussion from Mr Justice Roth in Unlockd which led to the refusal of service in that case; that's also despite the fact that

their approach, which they must have known -- or would have known if they did any Google searching -- was inconsistent with the way in which all other App Store litigation is currently being conducted around the world.

Indeed, far from bringing that to the tribunal's attention, I showed you earlier in paragraph 50 of the claim form that they positively told the tribunal that they were not aware of any separate proceedings making claims of the same or a similar nature on behalf of the proposed class members. Although, as I say, maybe they didn't know, they put the tribunal in a position where it was believing something that was untrue.

I will just note again that in the witness statement accompanying the application for service out then -- we can find that in the core bundle, page 356 paragraph 51.8, they do actually cite Unlockd, which might be how it came into the decision. So they are aware of the Unlockd case, but there is no discussion here of the fact that in that case each court was applying its own competition law to its own storefront.

They cite that as a case for the proposition that multinational companies like Apple, like Google, can expect to have to bring evidence to defend their conduct in courts around the world. I do say that is quite

a shocking summary of what you should take from Unlockd for this case. That's whether you agree with my submissions on it or not.

We say that that is a serious case of non-disclosure. It's common ground that the tribunal has a discretion on what to do about that, whether to set aside service and make them serve again -- this is not a case with a limitation period problem -- or the tribunal can deal with it another way such as with a costs order. We say that this is a case where setting aside is appropriate, particularly in view of the fact that there is no particular prejudice to them and, as I say, it was quite serious non-disclosure.

Indeed, I think I have made this clear. It goes further than simply not having articulated the arguments that we would have wanted to make to you about applicable law and about territorial scope. They don't draw to the tribunal's attention the factual premise for that argument, which is that they are suing in relation to commerce all around the world. You can tell that that's the case if you read the claim form and expert evidence carefully, and particularly when you take a look at the size of the claim, but that is not drawn to the attention of the tribunal in any way.

So unless you have any questions for me, those are

my submissions.

THE CHAIR: Thank you very much.

MR PICCININ: I am very grateful.

THE CHAIR: We will take a five-minute break then.

MR PICCININ: Yes.

(3.16 pm)

(A short break)

(3.23 pm)

Submissions by MR STANLEY

MR STANLEY: Sir, at the heart of Apple's case, as Mr Piccinin has articulated it this afternoon, are two propositions. If Apple is to succeed in this application, he needs not merely to be right about them in the end, he needs to be so clearly and unquestionably right.

The first proposition is that the relevant market, where one was dealing with a provision of services, is to be found in the place where the services are provided. The second proposition for services which consist of distribution services of the kind we are dealing with here is that for such a market (several inaudible words) the relevant geographic market is to be found (several inaudible words) wherever the end-user is located.

He is wrong about both of those propositions. Not

just possibly wrong -- although that would be sufficient for our purposes (several inaudible words) to see that he is wrong.

The auction house we looked at -- I am so sorry -- provides one pretty clear instance where one would certainly not say that the services were being provided in the place of the ultimate acquirer of goods. Actually, Mr Piccinin's favourite example of ordering flowers for his mother on the banks of the mighty Yarra is just as good. Mr Piccinin is too young to remember Interflora and therefore he imagines that when you order flowers to go to Australia, the market in which you engage is an Australian market. It's certainly not. We say, if a person in London -- in the days of telephones and florists -- wanted to order flowers to go to Australia, he would be very likely to go to a florist in London to order those flowers, and there was then a network of contracts which resulted in flowers arriving on the doorstep of the Melbourne housewife.

THE CHAIR: You can still do that, can't you?

MR STANLEY: You may be able to. But it simply demonstrates the point that it is just not right to say, as a matter of law -- which is more or less the proposition that Mr Piccinin, lacking as he does, so much as half a page of economic analysis of the market that we are dealing

with, has to make -- that those two propositions hold good. They simply don't.

I will return in more detail to those and how they fit into the law. But let me tell you where, in a sense, we are going, in terms of a positive summary of my case.

I am going to start with choice of law and not with territoriality, as logically, it comes first. I will deal with both. But the relevant choice of law rule is, there can be no doubt about it, Article 6(3) of Rome II. That requires one to identify the market or a market which is relevantly affected. The market in this case is the market to provide distribution services of apps to developers.

So far as UK developers are concerned, that is a UK market. Or at least sensibly and arguably so. It is certainly not, unquestionably, a separate market for each country in which the marketed apps are provided to end-users. Effectively, each UK developer is buying from Apple by a single contract forced upon them by Apple, without which they cannot even begin to develop software, let alone market it anywhere, for distribution of their apps.

If it is a wider market than that -- and it may be. It may be that in a competitive market, the market to

distribute apps which UK based app developers would participate in as purchasers could be broader than the UK, that's certainly not inconceivable. But even if it were broader, it would certainly include the UK and what it would not be is a mosaic of distinct markets scattered through the world, based on the position of the end-users and dictated by the way that Apple has chosen to organise its so-called storefronts. Which, let us not forget, are nothing more than a metaphor for what is, in the end, simply software that Apple puts on users' phones. There are no storefronts, there are no shingles hanging outside and people knocking on the door. It is all a metaphor for what is nothing more than a globally managed distribution system for apps.

And Apple's practices, admittedly arguably abusive, including excessive commission, are implemented in the UK. They have direct and substantial effects in the UK and on UK developers. And all of that is more than fairly arguable. And that, in the end, is the only question that you have to answer at this stage.

There may be all sorts of additional complexities and arguments to be had in the future about quantum, about whether particular developers actually participate in that market or perhaps on some other market, about exactly how you define it, but for present purposes, you

answer the question that you have to answer for the moment. Rightly, because jurisdiction questions and these sorts of hearings are supposed to be measured, as we are always told and always forget, in hours and not in days. This is not supposed to be a very complicated examination question.

If that is right, then one ends up with a claim for breach of a UK statutory duty governed by UK law, brought by persons domiciled in the UK, under a UK statute which specifically permits them to bring those claims against defendants who form a single undertaking and include persons who have been served here as of right.

That is the nature of the claim, which in my submission, there is no real doubt that this is the appropriate forum for resolving that claim, which is of course, a completely different question from choice of law, although my learned friend muddles the two.

So that's, in summary, where we are going. I will deal with things in roughly that order. Then I will deal with the fascinating topic of alternative service and the applicable test, and the non-disclosure or misrepresentation allegations which seem to be being still pressed right at the end.

Before I turn to the law, I do want to canvas the

factual material which is before the court, and show you a little of it that you haven't seen so far. Can I take two things as axiomatic? First, in relation to matters which are properly the subject of evidence, whether that is evidence of fact or evidence of opinion given by an expert, the tribunal acts on the evidence that it has before it. Counsel may, of course, make submissions about the evidence and we can make submissions on the law, but it is not for counsel -- however brilliant they are -- to turn themselves into economic experts from the front row and make submissions about matters which are properly the subject of expert evidence.

With great respect to Mr Piccinin, he did do a bit of that. The only evidence from any economic expert that there is, is from Mr Perkins. In due course Mr Piccinin may be able to cross-examine him. He will have the disadvantage that Mr Perkins will be able to answer his questions instead of him simply posing them as, obviously, questions to be asked, but this is not the time for that to be done. So that is the economic evidence.

That also goes, actually, for anything factual. I don't think there is any serious factual debate.

The second thing is in an application such as this, at a preliminary stage -- and I have already made this

point -- there is no embarrassment about the tribunal encountering many issues on which the proper answer is "Well, that's a very interesting question, maybe, maybe not, we will address that in due course." This is not the moment in which one has to answer questions. In fact, I think Mr Piccinin began -- and I am sure it was an accident on his part -- by posing the question which the tribunal has to answer as: which law applies?

Of course, actually, that's not the question the tribunal has to answer. The question the tribunal has to answer is, is it clear beyond argument, effectively, that English law does not apply to these claims? That is the question. It may sound pedantic, but there is a real practical difference between those two questions.

That may also apply to difficult points of law. We will come in due course to Mr Piccinin's very interesting argument that article 6(3)(b) does not apply in relation to any law other than the law of a member of the European Union. An argument which has escaped the editors of Dicey, the writer of the commentaries on the Rome Convention but it may be a very interesting argument in due course. I don't have to show he's wrong, I simply have to show that it is an argument to be had in due course.

Starting with the facts then. The defendants are

all companies, part of the Apple group. Two of them, you know, are UK based and served here as a right. That is relevant when we come to the very tail end question of forum conveniens because the burden of proof is different for defendants served as of right and defendants served outside of the jurisdiction. The others, however, are registered and domiciled elsewhere and can't be.

Common ground, as I understand it, for present purposes at least, but for competition law purposes they form part of a single undertaking and that for tort purposes, they have engaged, at least arguably in this case, in a joint enterprise which would render all of them liable for any tort committed. So there is no need to distinguish between the defendants, at least for the purpose of liability. They are jointly and severally liable for whatever has happened.

Can we just start with the App Store? I was going to start with the developer agreement. That, if we have the core bundle -- I think it begins at page 404, but my referencing may be wrong. I hope that is right. Yes, it does.

Important or of interest to note, each developer has one agreement, an omnibus umbrella agreement. If we start under the "Purpose" clause, which is actually

useful as a description of the agreement in the round. It begins by the developer wanting to use Apple software to develop one or more applications for Apple branded products:

"Apple is willing to grant You a limited licence to use the Apple Software and Services provided to You under this Program to develop and test Your Applications on the terms and conditions set forth in this Agreement.

"Applications developed under this Agreement for iOS, macOS [and so forth] can be distributed [...] through the App Store if, selected by Apple, [or] on a limited basis for use on Registered Devices [-- that doesn't concern us in this case --] or for beta testing through TestFlight."

And that doesn't concern us.

The critical thing is, it is not just as it was, we will see in Unlockd, that you develop the app and then you go to Apple to say: can we market it? You have first of all to agree with Apple that if you do develop the app these are the ways in which it can be distributed, and one of those is through the App Store:

"Applications that meet Apple's Documentation and Program Requirements [yet another massive document] may be submitted for consideration by Apple for distribution via the App Store [...]. If submitted by You and

selected by Apple, Your applications will be digitally signed by Apple and distributed, as applicable."

As one would expect, we have seen two references there to Apple and to the App Store. If I can pick up the definitions of those. Apple is defined at page 405, and that is Apple Inc. And the App Store is defined two items above that as:

"... an electronic store and its storefronts branded, owned and/or controlled by Apple, or an Apple subsidiary or other affiliate [...], through which Licensed Applications may be acquired."

Now, as you know, in terms of the background, in practice, not only does Apple insist in this agreement that if developers want to use its software to develop a product, they then have to deliver that product through the App Store, it also imposes on device users through their phones, unless they are jailbroken, the need to use the App Store in order to download apps. So at both ends, both the developer end, through the agreement and the user end, through the software that is put on the phone unless they are jailbroken in breach of the licence agreements, Apple requires that the App Store and its storefronts should be used.

In terms of the distribution requirements, if we go back to the agreement at 3.2(g) which is at page 420.

3.2 is your "Use of the Apple Software and Apple Services", and as a condition of using the Apple software and Apple services you agree to various things.

If I just draw your attention to a couple of them, (f) requires that you:

"[won't] directly or indirectly commit any act intended to interfere with any of the Apple Software or Services, the intent of [the] agreement or Apple's business practices [...].

Then (g) requires that applications for those operating systems -- and those are effectively the devices, as opposed to macOS --:

"... developed using the Apple Software may be distributed only if selected by Apple (in its sole discretion) for distribution via the App Store, [or] for beta distribution through TestFlight or ad hoc distribution as contemplated [in the agreement]."

And then there are various provisions for other requirements.

Any application must then comply with various requirements which are set out in clause 3.3 and the many, many subsidiary clauses which follow, which relate to particular aspects of apps.

So the developer agreement ties developers in from early on. Not just to where they distribute but to all

sorts of things about what the app actually looks like.

If we go to page 455, this is an agreement which Apple can change. So its terms are effectively -- sorry, 438, I was giving you the entire agreement clause which probably you don't need to turn up. 438 deals with changes of the agreement.

If you look at clause 4:

"Apple may change the Program Requirements or the terms of this Agreement at any time. New or modified Program Requirements will not retroactively [be applied] to Applications already in distribution [...], provided [...] that You agree that Apple reserves the right to remove [the] Applications from the App Store [...] that are not in compliance with the new or modified Program Requirements [...]."

So that gives with one hand and takes with the other. The new program requirements don't apply to things which are being distributed but Apple can stop them from being distributed if they don't comply with the new program requirements:

"In order to continue using Apple Software, Apple Certificates or Services, You must accept and agree to the new Program Requirements and/or new terms of this Agreement."

So the agreement is not fixed. The agreement is,

effectively, whatever Apple -- and that is Apple Inc. -- decides at any time it should be. They can change it at will.

Now, the distribution requirements -- that power then extends, if we go to clause 6.9. The decision to allow distribution is dealt with in clause 6.9:

"You understand and agree that if You submit your application to Apple for distribution via the App Store ..."

Notice it is submitted to Apple, so that's Apple Inc.

Apple Inc. may, in its sole discretion, determine that your application doesn't meet all of the documentation or program requirements, reject it for any reason, even if it does, or if it chooses to do so, select and then it digitally signs the applications for distribution via the App Store.

So Apple retains control of that.

Then at section 7, it fleshes out the various mechanisms of distribution which the one which is critical in our case is the one which is dealt with in schedule 2, a fee-based licence application.

Those are dealt with in either schedule 2 or schedule 3, but we can focus on schedule 2. Schedule 2 begins at page 496. This is not light reading but this

is where it starts. So 496 says that by clicking to agree to this schedule 2, which is offered to you by Apple, you agree with Apple to amend that certain developer licence program agreement currently in effect between you and Apple to add this schedule 2 thereto, supplanting an existing schedule 2, except as otherwise provided herein in capitalised terms shall have the meaning set forth in the agreement.

Again, notice by clicking to agree, you have already bound yourself to distribute only through schedule 2, so you don't really have any option if you want to distribute with a fee but to click to agree to schedule 2.

Then you see the appointment of the agents:

"You hereby appoint Apple and Apple Subsidiaries ..."

So both Apple Inc. and the Apple subsidiaries, which are then defined collectively as Apple, and I take it for the rest of this schedule that references to Apple are references to all of those entities:

"... as Your agent [singular] for the marketing and delivery of Licensed Applications to End-Users located in those regions listed on Exhibit A, section 1 to this Schedule 2, subject to change ..."

So again, Apple can decide which entity you are

appointing as agent, in relation to which storefronts and which regions. That's within their control:

"... [and] Your commissionaire for the marketing and delivery of the Licensed Applications to End-Users located in those regions listed in exhibit A, section 2 to the schedule, subject to change [so same principle], during the delivery period."

"The most current list of App Store regions, among which you may select, shall be set forth in the App Store Connect Tool [so a single tool] and may be updated by Apple from time to time."

That list of entities and places, I am not sure that I could find in this version of the agreement the exhibit which would be the exhibit to schedule 2, but we do have the exhibit to schedule 1, which I think is in similar form. And that you will find at page 486 of the bundle. You will see that you appoint Apple Canada as agent for Canada. You appoint Apple Pty Limited as agent for Australia and New Zealand. You appoint Apple Inc. as the agent for the United States. You appoint an entity called Apple Services LATAM -- which must be Latin America -- LLC as the agent for, effectively, the Caribbean and Latin America. You appoint iTunes KK as the agent for Japan.

That deals with section 1. Those are the agency

appointments, subject to change.

Then Apple as a commissionaire, you appoint Apple Distribution International Ltd as what is described as "commissionaire" for the following regions, and that effectively covers Africa, the Middle East and Europe, I think, including the United Kingdom.

So that's the form in which the appointment as agent is made. It is through this single contract which you required in order to get the software that you have bound yourself to enter into a contract where the actual agency relationship can be shifted at any time, as Apple decides how it is going to organise the App Store and its various storefronts.

Now, that's the context in which we make the claim. I don't think that I needed particularly to show you any more of the claim form than you have already seen Mr Piccinin showed you this morning. I think you have correctly understood and Mr Piccinin showed you the way the claim is being made.

I am just going to show you one thing from the claim form.

MR FRAZER: Just before we leave the agreement, Mr Stanley, is anything to be taken from clause 14.10 which is the dispute resolution clause which I think takes the laws and I think the forum in California?

MR STANLEY: It doesn't apply. Everyone agrees it doesn't apply.

MR FRAZER: Right, thank you.

MR STANLEY: Because you can't, by an exclusive jurisdiction agreement, avoid the application of Chapter II --

MR FRAZER: Thank you.

MR STANLEY: It can't be done. That's not a point that's taken. The only thing I didn't show you, actually, in that, which I should do, is I didn't show you the actual commission arrangements. Those are at 499, I think. Yes.

Clause 3.4:

"Apple shall be entitled to the following commissions in consideration for its services as Your agent and/or commissionaire under this Schedule 2 ..."

And then there are various commission arrangements set out. I just draw your attention to one thing. If you look at (b), the Small Business Program, which is for developers who have qualified and been approved by Apple for the Small Business Program and they pay a reduced commission, and that must have been less than 1 million in total proceeds during the twelve fiscal months occurring in the prior calendar year.

That, you notice, is not storefront by storefront. Nothing about this is organised storefront by

storefront. This is the total payments over the whole of the App Store.

That's not surprising, because when no one was thinking about it, the App Store is presented in this agreement as a single thing, operated by Apple through a succession of storefronts, as it sees fit, in the various different entities.

But this division into bundles of contracts in relation to individual stores, there is one contract which you enter into which covers everything and it is managed as a single entity.

On the claim form -- I am sorry not to have shown you that earlier -- the one thing I wanted to show you which was relevant to the way that the market is put, if you go to 157 -- this is looking at whether the commission is unfair when compared to comparable products. 157 of the bundle, paragraph 144 of the claim form. You will see that the products which are regarded as comparable products, are effectively App Store-like distribution mechanisms, if I can put it like that. They are other ways of distributing apps. That's the market in which the claim form identifies the commission as being as comparable for the purposes of paying commission.

I draw attention to that only because I think it was

suggested that there might have been some slipping in the way that the market was being looked at. In my submission, that shows that the argument I will address to you, which is that we are interested in the market of the services which are being provided to developers by Apple, is always the way that the claim is being put. That is, after all, what the commission is supposed to be relating to. That is the price which Apple is extracting.

Now, can I turn, then, having looked at the facts, to the question of the choice of law rules? I think Mr Piccinin has almost conceded that we should be looking at article 6(3) of Rome II. But I don't think the point should be left hanging. It is quite clear that we should be looking at article 6(3) of Rome II. And we had left it hanging as much as Mr Piccinin. We have been inclined to say, well, we don't care if it is 6(1) or 6(3); we win anyway. Since it is clear that it is 6(3), let's not play that game.

I was going to look at the regulation. I know you have been looking at it in one place and I was going to look at it in a different place in the bundle because there is an amended version of the regulation which applies post-Brexit., and which does actually make some amendments to article 6(3), infuriatingly. I have been

working from that, although I don't think for any present purposes, it matters.

That's at tab 13, which I think will be in authorities bundle 1. This is the consolidated amended version which survives Brexit. If one starts, just so we can orient ourselves in the way that this works, it covers all non-contractual obligations. So it goes a bit wider than torts.

Article 4 sets out the general rule. That is at page 251 of the bundle:

"Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."

Adopted as the general rule.

That is then subject to qualifications. If you look at 2:

"However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply."

That's interesting, because it means, for example,

if you have -- in principle, if you have two English people driving through France and they crash into each other, you could apply English law to that, which remember, when we come back to look at the effective territoriality and how far public international law principles of jurisdiction are relevant, when one is looking at choices of law.

Then 3 provides a rule where it is manifest from the circumstances of the case that the tort or delict is more closely connected with a country than that which would be selected by paragraphs 1 or 2.

That general principle provides a guide to understanding what article 6 -- because article 6 is not so much an exception to that rule, as an elaboration of that rule in the particular context of a competition law or unfair competition claim. I wasn't going to take -- I think this tribunal said that in Westover, but I was going to take you to the recital which makes that clear, which is recital 21 at page 243.

It says that:

"The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure

that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected [...] satisfies these objectives."

So it is a clarification of how damage is to be understood. A rule which selects the choice of law based on the place of damage is to be understood in the context of competition.

Now, 6(1) and 6(3) you have already seen. Unfair competition is a term of art in many civil law systems. They have particular laws which govern unfair competition and relations between competitors. In an English law context, we don't have a single tort which covers that. There are examples of it being applied to torts like passing off -- which is the tort that I commit if I make my goods appear confusingly similar to your goods, for example, that would be regarded as subject to article 6(1) as a species of unfair competition tort -- but its principal focus is on either the protection of consumers or the law which governs sort of fair fighting between competitors in relation to things like misrepresentation and trading practices.

Article 6(3) talks about a restriction on competition. We can pick up -- I think Mr Piccinin

showed you those -- the recitals make it quite clear that article 6(3) should cover infringements both of national and Community competition law, and that its focus is on both Chapter 1, Article 101 -- Article 101, I suppose I should say, in the context of a community regulation -- Article 101 restrictions and concerted practices and so forth -- and on abuses of dominant position governed by what was then Article 82 of the treaty, now Article 102.

I suppose one could argue -- and that is, for what it is worth, the view which is expressed by commentators as to the scope of article 6(3). I think the clearest explanation is in Professor Dickinson's book, as I think he is now. That we have the relevant extract from, but I am going to have to give you a bundle reference, I am afraid. It is tab 74 and it is probably in the last authorities bundle, whatever that is. 5.

It begins at 3745. At 6.25 he makes the point I have just made about the sort of scope of unfair competition. Then at 6.33, which is at page 3749, having quoted the recital, recital 23, he says:

"Accordingly, Art 6(3) covers not only breaches of EC Treaty law but also corresponding breaches of the competition law of individual Member States. It is unclear whether the definition in Recital (23) is

exhaustive or whether Art 6(3) is also capable of encompassing similar conduct that is prohibited by the anti-trust legislation of a non-Member State of the European Community. As the regulation has universal application under Art 3, there seems no reason in principle why it should not. The alternatives, which appear less satisfactory, would be to fit claims to enforce the competition laws of a non-Member State into Art 6(1) or to leave them to be regulated by the general rule for tort [or] delict in Art 4."

The point about universal application is you are not supposed to need to look anywhere other than this regulation to find a choice of law rule to govern all non-contractual cases.

I need not take you to all the other authorities, but similar conclusions are reached by Mr Brealey in his book, which you have at tab 77, and also in the Calliess commentary in a section which we added to the supplemental bundle yesterday. But all they are saying is what you have already seen which is what the recital says and I don't think it is much in dispute. But it makes the point that it is article 6(3) which is the relevant one, not 6(1).

Now, the counter-argument would have to be this: that there are a few cases of abuse of a dominant

position where the essence of the abuse is not an anti-competitive abuse but an exploitative abuse. Those could be regarded as subject to a different choice of law rule. In other words, not arising out of a jurisdiction.

That would be a massively bizarre result to reach, for two reasons. There are very few cases in which one can clearly distinguish between abusive conduct and anti-competitive conduct. In many cases there will be focus on one or the other, but there are many cases in which both will be in play, and it would be massively inconvenient to have different choice of law rules for them. Indeed, probably unworkable.

There is no indication in the text of the recitals that that was intended. It would be odd, actually, to have a single cause of action, and in this case we can safely say that because it is the very cause of action mentioned in the recital, article 82 as was, to have that governed by two different choice of law rules, depending on the exact nature of the allegations which were being made. It would just not be workable.

So the correct view is probably that Article 102 is regarded as dealing with restrictions on competition, broadly conceived, in the form of the special obligations which a dominant firm has, both not to

exploit that dominant position and to maintain workable competition on the market and avoid restrictive abuses. In other words, you deal with everything together.

So if that is right, article 6(3) applies and we then have to ask two questions, if we go back to article 6(3) itself. I was going to look at it again in the current version, which is at page 253 of volume 1.

First you have to ask: what is the country where the market is or is likely to be affected? That's (a). If the answer to that is a country, then that is your choice of law. If the answer is that it's more than one country, there is more than one country where the market is or is likely to be affected, then you have two possible ways you can go forwards: one is by what is called the distributive or mosaic theory -- I think there is a German expression which is mosaic, and it sounds much cleverer because it is in German, which effectively means you look at all of the markets and in relation to the conduct or the loss suffered in each market, you apply the relevant law for that market; or (b) provides the option that:

"[If] the market is [...] affected in more than one country, the person seeking compensation for damage who sues [and this is the amendment] in a court in a part of the United Kingdom, may instead choose to base his or

her claim on the law of the court seised, provided that the market in the United Kingdom is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises."

And:

"... where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant ..."

So that's the case here:

"... he or she can only choose to base his [...] claim on the law of that court if the restriction on competition which the claim against each of these defendants relies directly and substantially affects also the market in the United Kingdom."

So you can choose from the available mosaic of laws, the law -- so long as the United Kingdom is directly and substantially affected, you can choose to apply the law of the UK, lex fori. What you can't do is do that for all of the defendants, unless all of the defendants are acting in the same market. That's not an issue in this case: all of the defendants are jointly and severally liable for the same thing, at least on that we know the answer.

So what one is effectively asking in this case, for

the purposes of 6(3)(a) is, is the UK the market which is affected? Bearing in mind that this is, in the context of tort/choice of law, a specialised version of the damage rule, so one has damage at the back of one's mind; and secondly, if it is more than the United Kingdom, if there are other markets in other countries affected, is the United Kingdom amongst those which are directly and substantially affected by the restriction on competition? If so, you can also choose to have everything governed by UK law, precisely in order to simplify what would otherwise be the multiple application by a single court of multiple different rules of competition.

I think I will deal now -- because after I finish this, I was then going to embark on the slightly more interesting topic of what is the market affected and I think it is probably better if you don't mind if we start that tomorrow morning -- what I can do now is deal briefly with the points that Mr Piccinin made about why 6(3)(b) would not apply in this case.

The first is that he said -- and I think he took you to Westover for this, although it is actually a proposition which is just obvious when you read the text of 6(3)(b) -- that you have to have one restriction. If you have multiple restrictions in

a single case, then you have to ask of each of them what is the market which is affected for the purposes of 6(3)(b). You have to have multiple markets affected by a single restriction and not multiple restrictions. You can't pile cases together in that way. As a matter of law that is an uncontroversial proposition. In fact, one might think an obvious proposition.

How does that sit in this case? Mr Piccinin says, well, it is obviously multiple restrictions because there are multiple markets. Now that argument must be wrong. It can't be right that whenever you have multiple markets you have, by definition, multiple restrictions, or article 6(3)(b) would never bite on anything. It is designed to deal with a situation where a single restriction has effects in multiple markets.

And what is the case here, really, on the evidence that you have? It is at the moment the DPLA more or less and nothing else. We have one contract that is entered into with the developers. That contract binds those developers to enter into contracts of Apple's choosing -- so the identity of the commissionaires or agents is entirely irrelevant -- pursuant to which what is more or less the same commission everywhere in the world, with the exception of minor adjustments in one or two countries where Apple's arm has been got up its back

by a regulator, of 30 per cent. Payable not to anyone specifically, just payable to Apple. A bunch of people. In practice, collected by Apple, put into some Apple bank account, and just a deduction made and the balance remitted to the United Kingdom.

That is at least arguably a restriction. It is not a multiplicity of restrictions operating jurisdiction by jurisdiction; it is a single practice which is being applied through a single agreement. Not just as a matter of decisions being taken or decisions being communicated, but as a matter of the contractual and commercial machinery that Apple has put in place.

On any view, including on Apple's view of the world, that affects the UK developers on the UK market. There is an effect on this market. And on any view, including Apple's view of the world, it directly and substantially affects the UK market. Even if you accepted that Unlockd is the key that unlocks everything, in Unlockd, the conduct was in relation to the UK product on the UK market, no problem.

So we are in article 6(3)(b) territory on any view. If that's right, that's really the end -- I say the end of the case. It's not by any means the end of the case but it is an answer to this application, and it is an answer to this application whatever other views you

reach on any of the other more difficult issues.

The other argument is made, well, that can't help us, that can't help us if we are looking at non-EU. You can choose this for markets within the EU, but you can't choose it for states outside the EU. States outside the EU have to be brought in some other way. That is an argument which Mr Piccinin accepts derives no support whatsoever from any text in the regulation. It would be consistent with the recitals if you understood national competition law to mean only the competition law of the member states of the EU, but if so, that intention has not been given effect to.

You might ask why. There is a reason for 6(3)(b). 6(3)(b) is there to encourage the effective enforcement of competition law by discouraging people from taking the point that you have to understand 175 different competition laws in order to be able to bring your claim, so long as UK competition law is one of those which is directly and substantially affected.

But I don't have to say Mr Piccinin is obviously and madly wrong. I simply have to say: very interesting argument that nobody has seen before which would be very well worth investigating at proper length when it turns out whether it matters, not a matter in a million years for summary judgment.

So that is effectively the way that we -- it is a short cut. I am not going to use it as the only answer I give, because I am going to give a more substantive answer to the points that Mr Piccinin makes about the market. But if that is right, it is an answer, and it is an answer also with respect to -- or it begins to answer the territoriality questions as well. Because if you look at 6(3)(b), it is carefully designed to incorporate territoriality in all of its forms. It requires that the UK market is affected and it requires that there is a direct and substantial effect on the UK market. That's the choice of law rule.

Whether territoriality actually has any separate role to play in light of Rome II which resolves the choice of law questions is a question that I will return to tomorrow when I come to territoriality.

It also, with respect to him, takes a different view from the view that Mr Justice Roth took in Unlockd in paragraph 51, where he seemed to think it was okay to send people to a multiplicity of jurisdictions to litigate.

Now, that might be because in the particular case he was thinking of there were not a multiplicity; there were three jurisdictions and there were three different decisions being taken. But the plain intention of

(3)(b) is to avoid just that kind of problem at the choice of law level by simplifying cases in order to make it easier, not more difficult, for competition law to be properly enforced.

Sir, I am about to turn to the question of the market. I am certainly not going to finish that in ten minutes but I am content to make a start or wait until tomorrow. I am making good progress and I am confident I will be done by lunchtime in any event.

THE CHAIR: Let's wait until tomorrow in that case.

MR STANLEY: Very well.

THE CHAIR: 10.30.

(4.18 pm)

(The hearing adjourned until 10.30 am,
Wednesday, 24 January 2024)

I N D E X