IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1601/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 24th 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)

Wednesday, 24 January 2024

(10.30 am)

THE CHAIR: Yes.

MR STANLEY: Sir, I don't know if there is anything you want to say for the live stream.

THE CHAIR: No, I am not going to repeat the warning.

Submissions by MR STANLEY (continued)

MR STANLEY: Very good.

Then can I turn to the analysis of the market?

I will begin by simply stressing again two points which are not normally controversial but which Apple formally acknowledges and then effectively ignores.

The first is that market definition and analysis is often a complex process which generally requires expert evidence. In Kent, for example, I think there are two experts on both sides in relation to it.

It isn't, except perhaps in the simplest of cases, normally a matter merely for submission. That doesn't mean, as this tribunal pointed out in BGL, that it is simply a matter for expert analysis. That is a different (inaudible). It is a complex (inaudible word) which requires, normally, both economic expertise and legal (inaudible). That means, of course, that it is highly unlikely to be a topic suitable in anything other than the simplest of simple cases for summary

determination. The second point is that in this case there is expert evidence on the market definition in the form of Mr Perkins' reports, as one would expect, but there is no other expert evidence at this stage. Apple has chosen to serve none and that has the consequence, in my submission, that Apple cannot sensibly invite the tribunal to do anything other than accept for present purposes that Mr Perkins' views are reasonably arguable views.

It can challenge them, and it no doubt will challenge them in due course. And that, again, is or should be common ground. I won't ask you to turn it up, but Apple say it at paragraph 19 of their skeleton. They say:

"Apple fundamentally disagrees with the entirety of the PCR's approach to market definition but this is not the stage of the proceedings to determine positively what the relevant market is."

Quite. Instead, they say:

"Apple takes as its starting point the PCR's case that the relevant market is for app distribution services, supplied to developers and seeks to apply article 6 of Rome II to that market."

A similar point is made in the written submissions. If one looks at core bundle 75, at paragraph 15, what

Apple said in their reply submissions was that:

"This jurisdiction challenge is not the occasion for the Tribunal to consider the Proposed Defendants' case on market definition. The Application is concerned with the PCR's case advanced in the Claim Forms that have now been served on the Proposed Defendants with the Tribunal's permission."

The difficulty is that, having said that, that is then precisely what is done, to the point that yesterday Mr Piccinin made some sort of submission that the tribunal should derive something from the fact that Mr Perkins had not served a further report dealing with what is said to be criticisms made in the submissions. But there is nothing in that. It is expressly said that this is not the occasion on which that matter is to be considered, and it is not the occasion on which that matter is to be considered.

Can I then turn to how we do put our case? Can I start, even though I think it is the less controversial aspect, with the definition of the relevant product market.

What Apple has created in the App Store, is a platform which faces two ways. It faces end-users, people who want to download and buy and use software, and they can only get their software through the App

Store, and it faces developers, people who have developed or are developing software and they want to do that and market and distribute it because they can only do that through the App Store. So at both sides of that platform the respective consumers of the services of distribution and the services of the software itself have no choice but to engage with Apple to provide that service.

Now the economic effect on developers and users is, of course, a matter for debate. If the developers were able to and did pass on the whole of the commission that they paid Apple to end-users, then the practical consequences in terms of whose pocket is hit would be felt entirely by the end-users. They would be the only victims of whatever it is that Apple is doing, assuming for present purposes that Apple is overcharging.

And the developers in that situation would be no worse off because of Apple's monopolisation of the distribution services side of the market.

At the other extreme, if the developers couldn't pass on any of the excessive cost to app users, the only victims would then be the developers. The end-users would be paying no more for software than they would if the market was operating fully competitively so far as they were concerned, and of course, the truth may lie

somewhere in the middle.

But the important thing to notice is that that is a two-sided platform which has economic effects in two different markets and two different groups of people, the market for software which faces the end-users and the market for the creation and distribution of software which faces the developers. And Kent is obviously concerned with the first of those markets and this case is concerned with the second of those markets. Concerned with how Apple competes or doesn't with other undertakings which could take a developer's product and go out to distribute it and sell it to end-users.

Now that is a starting point for Mr Perkins' analysis. Can I just give you a couple of references for that? If we could start with core bundle at page 218. That's in tab 7. You will see at paragraph 4.16, Mr Perkins identified that:

"A further challenge exists for market definition in this context, due to the fact that the Apple App Store -- currently the only way of distributing native apps on the iOS platform -- is a 'two-sided platform', with app developers on one side and iOS device users on the other. The App Store acts as 'matchmaker' between the two and there is an interdependence between the two sides. iOS users are more likely to use the App Store

to find and download apps the more apps are available in the App Store, and app developers are more likely to use the App Store to distribute their apps (and to develop new apps) the more iOS device users use the App Store."

He points out in 4.17 that there are, therefore, interdependent network effects.

Again, at 4.57 of the same report which you will find at page 228 -- this is on the conclusion that he reaches on product market definition:

"Taking account of the potential responses of app developers, iOS device users and potential competing suppliers of app distribution services on the iOS platform, I conclude that the following substitute services are in the same antitrust market as the Apple App Store:

"a. The distribution of iOS apps via alternative app stores on the iOS platform (including specialist app stores); and

"b. The distribution of iOS apps via direct download from websites onto the iOS platform using a mobile device browser."

And he goes on to exclude certain other things. He returns to that essential analysis at his second report at page 330, where he's emphasising the need to see that there's a two-sided platform. It begins at

paragraph 2.16, where he points out that:

"Apple's submissions appear to elide or misunderstand the basic economic features of two-sided platforms. While they draw a distinction between app developers and consumers (with consumers presumably defined only as device users), they ignore the fundamental point that customers on both sides of the two-sided platform [...] are consumers of the services provided by the platform."

"2.17. Instead, market definition in Apple's submissions is only considered in the context of device users, with Apple stating that the country of the storefront 'is the country in which Developers compete for the business of consumers, and it is that process of competition that determines the extent (if any) to which allegedly unlawful commission harms Developers (on the one hand) or consumers (on the other)'. In his witness statement, Doug Watson states that 'an iOS device user agrees to the Apple Media Services Terms and Conditions, with the relevant Apple entity for that storefront', then breaks down UK developers' revenues by geographic areas. Apple does not provide any of the economic evidence or argumentation that would be expected to support a claim that there are many national markets based on the locations of device users."

"2.18. The failure to deal properly with the two-sided nature of the App Store means that Apple fails to recognise the relevant competition (or lack thereof) in the context of the alleged abuse is competition among suppliers of distribution services to provide those services to app developers, not competition among app developers for the business of device users. It should be noted that the excessive price I have considered was on the commission rate that Apple sets to app developers. The interaction between Apple and the app developers is therefore central to the alleged abuse (rather than the interaction between Apple and device users or between device users and app developers)."

The second relevant document in this context is Apple's brief to the Supreme Court in --

THE CHAIR: Just stop there. The competition among suppliers of distribution services to app developers, that is basically a global market, isn't it?

MR STANLEY: He says it is a UK market. It might be broader than the UK. I will come to that in a moment when we look at geographical market. But what it is not likely to be is a succession of balkanised markets defined by reference to where the device users are. It is not impossible that it might operate in that way, but it seems very unlikely.

That, in fact, is -- I wasn't going to take you to it because it is a different case and I am just making a submission, but in the Australian proceedings, the way it is defined is it is either an Australian market or it is a global market, one or the other, basically. That's the way it is put.

I am happy with either of those because if it is a broader market, that's the very purpose that article 6(3) of the Rome II regulation is supposed to deal with.

Then Apple's brief in Pepper -- now, Pepper was a case in the Supreme Court. The actual decision in the case which was ultimately adverse to Apple, for reasons of US law, doesn't matter, but Apple, in the course of those proceedings, themselves produced a very useful summary of how they saw the platform working, and the two-sided nature of it. We have that in the core bundle, volume 2, I think it is, in tab 25.

The issue in Pepper, not that it matters, but so that we understand the context, the issue in Pepper was that the claimants in Pepper were saying: we purchased apps from Apple and, therefore, we have a direct claim against Apple for any price or increase in the price which has been passed on to us as a result of the developer's commission.

Apple were saying: it's not enough that you

purchased directly from us; you are effectively making a pass-through claim, because unless the developers have passed on this, and therefore under Illinois Brick, which is a US Supreme Court decision, you can't have a claim under US law. The majority of the Supreme Court ruled that what mattered was the contractual nexus, that that satisfied Illinois Brick, and it didn't matter that it was a pass-through claim. The minority said that it did matter. That was the target that was being hit.

But for present purposes, it's not that point, it is the way that Apple describe how the system works. And if we start at 1026 in this document.

At the top of the page, Apple makes the point that it charges developers a 30 per cent commission, but that developers independently set their app prices. Apple doesn't set the prices for the developers: the threshold question is then whether end-user consumers have standing to seek anti-trust damages, based on the allegedly monopolistic commissions on app distribution, a service that iOS developers, not end-users, buy from Apple. That was the issue.

Then at 1031, Apple set out a diagram in which they say -- well, just picking up the sentence beginning at the bottom of 1030:

"Apple structured the App Store as an agency-based,

two-sided marketplace for connecting developers and consumers, as depicted below."

And it shows what's called the developer tier, the distribution tier and the consumer tier. You see the two-sided nature of the platform very conveniently set out.

At 1032, at the top of the page, Apple makes the point. They say:

"Apple provides a variety of services to developers, including reviewing apps for safety and compatibility ..."

Can I just point out, that's something done by Apple Inc, it has nothing to do with the independent distribution. You mustn't lose sight of the fact that we do talk about distribution but there is a basket of services which may be relevant here.

"... hosting the App Store, acting as the developers' sales and delivery agent, collecting the purchase price (if any) from consumers on the developers' behalf, and remitting proceeds to developers from around the world. And as much or more important than any of this, Apple connects the developers to every one of the many tens of millions of iPhone (and iPad) users worldwide. In return, developers agree to pay Apple an annual $99 membership fee, and a 30% commission

on their sales revenue from paid apps and in-app purchases. App developers alone decide whether to charge for an app or its content and, if so, the price ..."

Again, at 1057, after quite a lot of discussion of the law, at the bottom of the page, Apple having said that anti-trust is interested in substance, not in form, and ultimately not prevailing in that case:

"From that perspective [says Apple] - considering Respondents' theory of antitrust injury and what it implies for Illinois Brick - the 'actual market realities' that matter are that consumers do not purchase the allegedly monopolised service from Apple, only developers do; and while consumers do purchase apps from Apple (acting as the developers' sales agent) app prices are set by developers alone. App stores 'are basically platforms connecting app users (smartphone owners) and app developers.' They are 'two-sided' platforms, where a platform operator, such as Apple, 'offers different products or services to two different groups who both depend on the platform to intermediate between them.'"

And then returns to the graphic.

The important point for present purposes is that it hardly lies in Apple's mouth to contend that that

analysis is unarguable, nor that its only role is simply the distribution of apps in far-flung places. It makes the point that it has other roles as well, in the context of this. That may be controversial in due course but it is a point that Apple also makes in the Kent proceedings.

If you look at the authorities bundle, please, tab 64, which is in volume 4, this is an otherwise uninteresting ruling on expert evidence. I am sure it is a very important ruling, but not of interest for present purposes, although it does explain the number of experts who are going to be dealing with the market in that case.

But it makes the point that Apple are stressing in the Kent case that the commission they say that they extract is not simply extracted for the purposes of the distribution services, it's extracted as part of the development process. We see that at a quotation which is set out at paragraph 36 which was justifying the appointment of an expert in intellectual property to assess the value of that. That's at page 2985. You can see in paragraph 36, the tribunal says:

"We consider it plain that Apple intends to argue the points set out above and that there is sufficient material in the Defence to satisfy us that there are

issues relating to intellectual property that might justify the provision of expert evidence.

"We refer to the following passages in the Defence by way of example: (1) concerning the value of the iOS system and tools to developers: '15. The DPLA is a portfolio licensing agreement that offers a limited license to develop iOS Apps "using the Apple Software" and distribute them, if accepted by Apple, "via the App Store" to iOS users. Apple thereby grants developers access to (amongst other things) ..."

And there is then a very long list of things which it said are being provided. Then in 133, at page 2986:

"[...] Apple denies that any Commission it has charged is excessive or unfair. In particular, the CR's case fails to account for demand-side factors when assessing the value of the product that Apple invented. Consequently, it does not measure the real economic value that developers and consumers derive from the App Store and the wider iOS ecosystem: ... (b) Apple's commission is not a mere fee for the distribution of software or the processing of payments. It is not intended to reflect Apple's costs in running the App Store. Instead, the Commission reflects the economic value of the ecosystem that Apple has built and continues to build. The economic value that Apple

provides to developers and consumers is substantial ..."

And so forth. Then still in the context of this complex two-sided market, the third document I wanted to refer you to, although you have seen bits of it before, is this tribunal's decision in BGL, which deals, of course, specifically with two-sided markets. That we have in the authorities bundle, volume 4, at tab 61.

You will recall that was a case about price comparison websites. The decision, obviously, is not -- I am not referring to the decision in any way as suggesting that the market in this case would need to be analysed as the market was in that case. These are different markets which would require separate analysis. But what the case certainly does show is that there is no rule of law that in a two-sided market that involves an intermediary which charges a commission to provide marketing or distribution services, the proper analysis is to collapse that market and look at it simply at the level of the ultimate consumer rather than the purchaser of the distribution services.

If I could just show you the passages that I would like you to have in mind. Briefly, to recall at 2776 the tribunal notes that "the process of market definition is an iterative and a sequential one" and it is "not a process where, ex ante, the correct answer

will immediately suggest itself". Because there is a need to consider "different products (and different market geography), and (considering the different parameters [...] work out whether the hypothetical monopolist could profitably sustain a five or 10 per cent increase in price." There is "a substantial element of 'trial and error' involved in carrying out the exercise, and that is what we mean by 'iterative'."

Then at paragraph 90, turning to two-sided markets, the tribunal points out that:

"Although the term 'two-sided market' is a term of economic art, it carries with it a high degree of uncertainty of concept, making it a difficult subject for analysis and - unsurprisingly - a difficult subject for the purpose of market definition."

Then at paragraph 120, the tribunal turns to certain, as it were, basic points that it regards as important in that analysis. We are at the page I didn't write in my notes. 2777.

Sorry, 2799. I didn't write it in my notes and Mr Carall-Green had the wrong page on his screen.

At paragraph 120:

"Given the variety of multi-sided markets, their different network effects and pricing strategies, it is unsurprising that the Decision has stressed the

different approaches that have been taken by different competition authorities when defining markets. Thus, the CMA has regarded itself as free to choose which approach is 'appropriate' in the given case. In terms of predictability of outcome, such an approach does not commend itself, and in our judgement imports into the tool of market definition judgemental factors which are not relevant at the stage of market definition, but which fall to be considered later on in the process for discerning anti-competitive effects that we have described. In short, we consider that the approach to market definition in the case of two-sided markets -- both as reflected in the Support Study and in the Decision -- needs to focus on the essential and seek to avoid the confusion that occurs when irrelevant factors are imported: ..."

Then some factors:

"(1) We remind ourselves that we are concerned with substitutability. A product can either be a good or a service, and it is supplied by someone to someone else. Conventionally, one would use the terms Buyer, Seller and Product, and we shall do so here: but it is important to bear in mind - particularly in two-sided markets - that a Product may be provided for nothing, and that the meanings of the terms Buyer and Seller may,

for that reason, be a little unnatural. Nevertheless, these are the terms we will use.

"(2) We refer to the Product whose substitutability is being tested or assessed - and which will be subjected to the Hypothetical Monopolist Test or the SSNIP - as the Focal Product, because it is the focus of the inquiry. For the purposes of assessing product substitutability, it is necessary to be very clear exactly what Focal Product the Buyer is acquiring and the Seller supplying."

So here, the focal product that the buyer is supplying is the distribution services and associated things and that's what the developer is acquiring:

"(3) It is also necessary to be aware of the manner in which the Focal Product is provided by the Seller to the Buyer. This interface (for want of a better word) between the Buyer and the Seller, whereby the Focal Product is acquired (by the Buyer) and supplied (by the Seller) is extremely important in understanding the true nature of the Focal Product. The interface is particularly important where what is being acquired/supplied is a service, for the interface itself may form a part of the service. We will use the term Interface to describe this relationship between Buyer and Seller, but we would note that in this case the term

is equivalent to the term channel ..."

"(4) As we have seen, two-sided markets tend to be defined as markets interlinked or interacting with each other through a common platform. It is because of the common platform that there is interaction between two or more markets, with the resultant network effects that we have described. None of this is very helpful in terms of getting to grips with the question of product substitutability with which we are concerned."

And then they descend to a bit more detail. But in the middle of (5), we will see how they analysed the platform in that case:

"The Platform faces in two directions, because Compare the Market is supplying two Products ... Each Product has a different group of Buyers or potential Buyers."

True here too.

"(6) We consider that the Decision falls into error in eliding these two Products (and the Buyers and Seller acquiring/supplying them). We accept that the Platform operates as a 'matching platform', bringing together consumers and home insurance providers. But we do not understand why that classification impels a process and a conclusion that involves only one exercise in substitutability (or to use the wider, more misleading

term, market definition). There are two Products in play, and it seems to us that each of them constitutes a Focal Product in relation to which substitutability must be assessed."

Then picking that up again in (8) on page 2802:

"The point is that there are two quite different Focal Products being supplied (admittedly, by the same Seller, the price comparison website) to two quite different sets of Buyers (consumers and home insurance providers). By using 'PCW Services for Home Insurance' as the (only) Focal Product, the Decision conceals this fact. The consequence is that, when it comes to the application of the Hypothetical Monopolist Test, the constraints that exist separately, distinctly, and above all differently in relation to each Focal Product are wrongly conflated.

"(9) Each Focal Product ought to be considered separately, within the market definition Framework we have described, because different substitutes may exist in relation to each. We are confident that not to do so is liable to lead to error, precisely because it fails to pay proper regard to the fact that the substitutes for each Product sold by the Seller (here, Compare The Market) may very well be different. As we stated earlier, the purpose of defining a relevant product

market is to identify the products or services which are sufficiently close substitutes so as to exercise a competitive constraint on the price of the Product. It is perfectly possible for the competitive constraints to vary according to the Product under consideration: indeed, that will, in our judgement, likely be more often the case than not."

So it is important in these two-sided markets to recognise which product you should be looking at to understand the market in relation to that product.

Now that was all said in relation to the product market. But it is, obviously, equally applicable in principle to the geographical market, to which I now turn.

Asking those questions, the focal product we are considering is the bundle of services provided to developers, the developer side of the platform. The developers we are concerned with here, because they form the class, are UK domiciled developers. We are, of course, also not entirely concerned with simply how the market operates as things stand, because Apple's own decisions about how to structure the relationships and transactions in what is manifestly a monopolised market are not going to be decisive for the actual market definition. We are also interested in how the market

would operate, were it to be operating competitively.

I won't take you to it, because my learned friend has already shown it to you, but Mr Perkins' evidence is that that is a service which is provided on a market which is at least a UK market. Apple's contention, advanced as a matter of submission -- and therefore, as I understand it, effectively as a matter of either unarguable fact or actual law -- is that there is not one market for app distribution which includes the UK, but there is a succession of individual markets in each territory in which the end-users are based and each of those is a separate and distinct market. And they have to be right about that to be entitled to the order that they seek in this case, which is effectively to say that we must be limited to claims in relation to sales which are made ultimately to consumers on the UK market.

Now if that is being said as a matter of law, it is, I think one can say, plainly and unequivocally not so. It is not just possible, it is not uncommon to find in two-sided situations that the upstream and the downstream markets -- if I can use terms which I think cause those behind me a certain amount of concern because they tend to oversimplify, but I will use them just because they are convenient -- are different. Just to give you an example of that happening in a somewhat

similar case -- and I am not at all suggesting that it is authority for anything other than the negative proposition that you don't define these markets just in terms of the consumers, the Commission's merger decision in Travelport/Worldspan is an example. We have that in the supplementary authorities bundle at tab 2.

That was a case in which there were companies which provided travel distribution services. So they effectively operated as an interface between -- I think it was mostly airlines, but anyway, the ultimate provider of travel services and travel agents, who in turn, interfaced with consumers.

If we look in the supplementary authorities bundle, tab 2, page 41, we can see the background. At paragraph 9, it describes the landscape. Paragraph 10 says that:

"The product market affected by this transaction is the market for electronic travel distribution services through a GDS. A GDS is a two-sided platform through which TSPs [that's travel service providers] such as airlines, car rental companies and hotel chains distribute their travel content to TAs [that is travel agents] and ultimately to end-consumers. At the same time, TAs can access and book travel content for end-consumers."

"(11) GDS providers act as intermediaries in a market of a two-sided nature, connecting two separate customer categories. In the upstream market (the TSP side of the Market), TSPs offer GDSs information on their booking inventory and the content while the GDSs offer TSPs booking capabilities and a distribution channel to TAs. In the downstream market (the TA side of the market), GDSs offer TAs reservation, booking and ticketing services by means of a comprehensive tool which allows comparison of prices and conditions from hundreds of TSPs. The Commission's in-depth investigation has confirmed these characteristics of the product market."

When it came to the geographical side of the market, if you turn on in this to paragraph 60, which is at page 50, you can see that:

"The notifying party submits that the upstream side of the market (that is to say, TSPs providing booking inventory to GDS providers) is at least EEA-wide."

"(61) The majority of replies to the Commission's market investigation state that the market is global. The main argument put forward by the respondents relates to the fact that they conclude worldwide agreements with the GDS providers.

"(62) However, despite these views, there are good

reasons to conclude that the market ought to be considered as EEA-wide rather than global."

So the upstream market was an EEA wide market in the Commission's assessment.

If we go to paragraph 70, which is at page 52, this is looking at the downstream side of the market:

"The responses of TAs to the Commission market investigation fully confirmed that the markets are still predominantly national in scope. Almost all TAs -- often including online TAs -- are still active in only one country, with the exception of a few TAs/Travel Management Companies ('TMCs'), such as American Express and Carlson Wagonlit, which could be considered to have pan-European (or worldwide) activities. The subscription fees that TAs pay for the use of a GDS and the incentive payments they receive vary between countries. In addition, Amadeus and Galileo have established national sales and service points in almost all countries of the EEA, in order to better serve the specific national markets."

"(71) It is therefore concluded that the geographic market is EEA-wide on the upstream side of the market and national in scope on the downstream side of the market."

I am not drawing anything from that, other than it

is an example -- there is certainly no rule of law that you have to look only at one side. It is totally consistent with the way that this tribunal suggested things should be approached in BGL.

At which point, then, if one looks at the criticisms made of Mr Perkins' conclusion, quite apart from the fact that they are, in a sense, procedurally unjustifiable, in the absence of any evidence to make them -- made at the wrong stage of the case -- they rest on what is sort of homely analogies which, when one looks at them, break down. It's not helpful to imagine products other than the product that we are actually concerned with here, like flowers or physical objects, and asking how that market in relation to that would operate.

If you are imagining a world in which, in order to distribute the physical product, a producer has to put on his boots and pack his attaché case with his samples and head off to Brisbane with his packet of games or to Ginza(?) to reach different consumers, yes, then you might then think that the distribution services are being separately provided in Ginza(?) and in Brisbane, but we are not dealing with that kind of case. Nor are we dealing with a case like supermarkets, where you are looking to define the geographical market, based on how

far consumers are going to drive in order to visit a particular supermarket. We are dealing with a situation of software which is delivered electronically, which is not at all obvious that that sort of national border is going to matter at all.

If one asks the question what would happen in a competitive market, is it plausible that UK based developers would be able to contract in the UK with people who were able to distribute the product worldwide? That, in our submission, doesn't seem an implausible possibility at all. Indeed, I think as Mr Frazer, in a sense, suggested, one might think it is more likely that the market would be broader than merely a UK market rather than it would be narrower. It certainly would not be a market that involved a UK developer having to go separately to Japan, and Korea and Australia and Canada in order to purchase their distribution services for the product there. That is far from being overwhelmingly certain. That is implausible. So at least a UK distribution market and probably wider.

In any event, there is a point which I made yesterday, so I won't repeat it, that actually, even if one looks at physical products, it is a false analogy and leads one to conclusions which are obviously false,

as the auction house and Interflora examples show. And one can multiply them. Take shipping cartels, for example. Take Mogul Steamship v McGregor, where you had a group of shipowners cartelising the trade to Shanghai and Wuhan. Does one say, in relation to people who want to ship their products to Shanghai and Wuhan from London, if that's the area where the shipping cartel is operating, does one say that one has to assess that by Chinese law rather than UK law, because the market affected is the market in Shanghai? It seems slightly implausible.

Does one then say that if one adds Singapore to the cartel, one is now going to have to assess the cartel by two different systems of law, even though in all of those cases, the effect which is being felt is an effect on people who are contracting in the UK to ship their goods outside?

Those examples show one that as one would expect, this is not just a matter of legal definition. It is a matter of factual analysis and there is nothing implausible about the factual analysis that Mr Perkins is (inaudible). If that is right and the market either is a UK market or includes a UK market, then either article 6(3)(a) or article 6(3)(b) provides a perfectly plausible answer.

THE CHAIR: It doesn't matter on your case, does it, whether it is a UK market or a global market of which the UK is a part?

MR STANLEY: It doesn't matter at all. For these purposes. It may matter for other purposes. That may be very important when one comes to look at pricing decisions or all sorts of things like that. It is all down the line. But for the choice of law analysis, it is not important in the slightest.

Then just really, I think, in a sense, those are my submissions on this. But can I just pick up the Bumble example, and what that shows and the suggestion that domicile is artificial.

In one sense, the response to this is to confess and avoid. Domicile is, in a sense, a malleable connecting factor. To say it is artificial is going too far. It is a connecting factor which is often used in law and for good reason, that it does often reflect economic reality and in any event, you have to have a connecting factor and sometimes that's the only connecting factor you can find.

It is obviously critical -- legally critical -- in the sense that it is a connecting factor which is identified by the act as relevant to the definition of classes, and one which is being used in this case.

That's, in a sense, besides the point so far as choice of law is concerned.

There is no reason either to consider that the Bumble example is a typical example. There will be many developers who look very different from Bumble within the class. Not suggesting that that class consists entirely of people whose centre of operations, economically speaking, is said to be outside the UK. It will include many people whose centre of operations clearly is in the UK.

But where would it actually take you? It wouldn't show you that there is not a UK market. The most it might show you is that there was an argument that some members of the class were not, in fact, active on that market, that's a possibility, and that might affect the way that you looked at the claim down the line when it came to quantification. But that's no different from many other points which could be made, for example, pass-on. It may be that some developers can pass on, and that other developers can't pass on. There may be differences there. All of those are effectively substantive points. They are not really choice of law points at all.

They certainly don't get one to the analysis which my learned friend needs which is to say that at the

stage of analysing choice of law, the place where the ultimate end-user of the app is concerned is the only game in town. Because unless we are in that territory, this claim proceeds.

So one can see why it is a forensically interesting point to make, but it is not a point which actually casts any light on the issues which are actually before the tribunal. It doesn't really help anybody.

That's what I wanted to say about choice of law. Can I turn, then, to territorial effect? Can I make a preliminary observation which is this: one might question the assumption that at least in cases, now that the Rome II regulation is in force, that it is really necessary to consider territorial effect separately from choice of law. I say that for two reasons. I say that because the underlying public law, public international law jurisdictional considerations are not normally thought to be decisive in choice of law cases. The example I gave yesterday, that you could have a road accident in France which involved two British citizens, and you would say: well English tort law applies to that. Nobody stops and says: that is outrageous as a matter of public international law because that involves England extending its reach to the French roads. That's just not the proper analysis at all.

But more importantly, if one looks at article 6, once one has decided that the UK market is among the markets affected, and that there is a direct and substantial effect on the UK market, one has inevitably answered the territorial effect question, given the relevant test under EU law. It has been answered. There is no need, therefore, to overcomplicate the analysis by going back around the same block again.

But in any event, the test is, of course, common ground. It is a two-pronged test. Either consisting of implementation or consisting of there being direct immediate and substantial effects. I was going to show you a very few passages from Intel. Although there is no controversy about it, they are passages that are worth bearing in mind when one comes to look at Unlockd which I will do in a moment.

That is at tab 36 of the authorities bundle which I think you will find in volume 2.

I was going to show you first of all one point from the Advocate General's opinion. I am going to be a little bit careful about this because the court, unusually, didn't actually follow everything that the Advocate General concluded in that case. It took a broader view. But on the point I am going to show you, I think did not disagree with.

If we could turn to page 1565, discussing implementation.

At paragraph 293, the Advocate General says:

"To conclude on this point, collective or unilateral conduct is implemented within the internal market -- and thus unquestionably triggers the application of arts 101 and 102 TFEU -- when there is an element of intra-territorial conduct. In other words, when part of the unlawful conduct is executed, applied or put into effect within the internal market because one of its essential constituent elements takes place there.

"However, were implementation to be considered the only jurisdictional criterion triggering the application of EU competition rules, various types of conduct that may well have the object or effect of preventing, restricting or distorting competition within the internal market would fall beyond the reach of those rules. Here I have in mind conduct that is characterised by unlawful omission, such as a refusal to deal or boycotts ..."

It is worth just noting that, the significance of the distinction between omission and commission for the purposes of implementation, because to raise the curtain on what I will say in a moment, Unlockd is an omission case, in a sense. It is a refusal to supply; it's not

about the terms on which a supply was provided.

Whereas you might say: well, if you are looking at this case, it is pretty straightforward. If you ask whether this is conduct which is being implemented within the EU, it is being implemented within the EU. What else is charging commission to developers conceivably going to amount to?

Then in the Court's judgment which I think you were shown yesterday, but at 1582, beginning at paragraph 54, the significance of paragraph 55, the overall strategy that was being taken and, at 57, as the Commission emphasises:

"... to do otherwise would lead to an artificial fragmentation of comprehensive anti-competitive conduct, capable of affecting the market structure within the EEA, into a collection of separate forms of conduct which might escape the EU's jurisdiction."

Now, as Justice Roth emphasises in Unlockd, that's not an invitation to say that if you find one piece of conduct and a separate linked piece of conduct, you necessarily analyse it that way. It is important not to artificially break up what is effectively a single complaint, to a succession of separate points. I pray that in aid in this case because as you have seen, everything goes back to a single agreement. It all goes

back to the DPLA. That is for every developer, the origin of everything that is subsequently done everywhere.

That is a point which the Court of Appeal stressed in the Iiyama case. That you have at tab 41, which I think will you find in volume 3. The relevant passage I wanted to show you for these purposes is at page 1981, paragraph 93, where the court says:

"Furthermore, the need to take account of the offending conduct as a whole [which the court emphasises] is a theme repeatedly emphasised by the court in its judgment in Intel. It applies to all three elements of the qualified effects test. In relation to foreseeability, the court said at [50] that it is necessary to examine the relevant conduct 'viewed as a whole', in order to determine whether the Commission has jurisdiction to apply EU competition law. In relation to immediate effect, the court (as we have seen) endorsed the approach of the General Court. And on the question whether the effect would be substantial, the court said at [56], again agreeing with the General Court that 'it was appropriate to take into consideration the conduct of the undertaking viewed as a whole in order to ..."

I think it should be "assess", not "access":

"... the substantial nature of its effects on the

market of the EU."

So all of that is relevant in the context of a case where we are looking at a single contract made between Apple Inc. and all the other Apple defendants, insofar as they are involved at all and UK based developers one by one, which leads to a single course of conduct, the commission being extracted by Apple for distribution of services through something which is described as "the App Store", albeit one which has different storefronts as Apple have set them up.

We are not dealing with a bundle of separate contracts. We are not dealing with separately negotiated transactions. We are dealing with a single contract and a single course of conduct.

If one then applies both the implementation and effects test to that, the answer, in my submission, is pretty clear. It is conduct which is implemented in the UK, it is conduct which has, plainly, effects in the UK. It may have effects elsewhere as well, but the only way you can say that it doesn't is by engaging in precisely the sort of disaggregation, precisely the sort of artificial splitting up of what is, on our case, a single abuse, into a succession of separate abuses, all done by reference to this highly doubtful and artificial market definition, by reference not to the

market in which the developers operate but to the market in which the apps are sold and there is no justification for doing that.

Now can I turn, then, to Unlockd? The important thing to bear in mind, in my submission, about Unlockd, is it is not a case which decides anything. It is simply an application to the circumstances of a particular case of those well-established principles of law. It is often -- though I am about to do it, but I sort of have to do it because Mr Piccinin spent about 45 minutes on it yesterday -- very unhelpful to take a decision on a particular set of facts which contains no relevant statement of principle and start arguing about whether the facts of this case look a little bit different or a little bit similar in different ways.

The right approach in these cases, when the test is understood, is simply to apply the test to the circumstances which are beyond the tribunal. I made my submissions on that and it is not difficult. It only really becomes difficult because we are unnecessarily arguing about the extent to which Unlockd looks similar or different to this case.

What I am therefore going to do is to identify for you simply the differences, so that you can see why we say there are material differences which are, in

a sense, sufficient for you to say: well, that may well have been the right decision on the facts of Unlockd, but it's not going to help us to decide this case.

So that is in tab 43 of the authorities. That's in volume 3. I wasn't going to take you through all of it, because you read most of it yesterday, but I will emphasise the points I would like you to bear in mind.

Paragraphs 7 and 8, so that you identify who the relevant companies were, and in particular paragraph 8, in fact, for the three apps in the Play Store which incorporated the Unlockd product.

PROF NEUBERGER: Could you give me the page reference?

MR STANLEY: Yes, of course. I am so sorry, sir. It begins at 2017.

PROF NEUBERGER: Thank you very much.

MR STANLEY: So three apps. The first is Tesco Mobile Xtras. That was distributed through Tesco Mobile in the UK and was pursuant to a contractual arrangement entered into between Tesco and the second claimant. So you had an English subsidiary company which had agreed with an English company to distribute an app in the UK.

The second was Boost Dealz. That was distributed through an American company, Boost Mobile LLC -- at least I infer an American company, the judgment doesn't say but it sounds like it. It is a subsidiary of

Sprint -- pursuant to a contractual arrangement with Unlockd Media Inc, which was a Delaware corporation, not a claimant, who have a US company which has entered into an agreement with another US company for the distribution of a particular app in the US.

Then Unlockd Rewards which was distributed through an Australian company, Loyalty Pacific, pursuant to a contractual relationship with another Australian company in the Unlockd group, not in fact a claimant in this case.

The complaint was a complaint about denying access of apps which included the Unlockd software in particular markets. So not putting those apps on the market.

If one turns to paragraphs 37 and 38, which in my submission represent the real meat of the positive conclusion that Mr Justice Roth made, and the reason he thought there was a distinction with Intel. He says in paragraph 37 that in Intel:

"However, in Intel, the dominant company's rebate and incentive payments to Lenovo had the effect of deterring Lenovo from incorporating AMD's CPUs in its computers, and thus of preventing the launch of such a computer in the EU as much as anywhere else in the world."

That's probably right, but it is worth bearing in mind that very few of them were going to enter the EU anyway but it doesn't matter. Not much was required but at least that was present:

"The present case is not one where Unlockd in Australia is producing or developing a product for which production or development Google is denying a necessary input."

That's one distinction with this case, because the developers in this case are developing a product for which production/development Apple has a necessary input which it denies, unless the commission is paid:

"Here, the Unlockd group has an independent product, developed without any input from Google ..."

Not so here. The restrictions in this case bite at the stage when development even begins:

"... which various companies in the Unlockd group had started, successively, to supply in a number of different markets: currently, the US, the UK and Australia. In each of those markets, the relevant Unlockd company is being denied access by Google to its services which (it is assumed for present purposes) are necessary for a successful supply."

Again, contrast this case, ask where is the effect on the market? In that case, the complaint is a

complaint of being denied access to a market at which consumers can buy your product. It's a different complaint in this case. The complaint in this case is about commissions which are paid by developers.

Actually, if one asks where is the competition affected, unless there is pass-through, it isn't in the market where the apps are supplied to consumers that there is a competitive effect in this case, it's on the market where the developers buy the services providing those apps. So it is completely different markets. So far as it is relevant to the restriction being complained of, it is a completely different market structure.

Then in paragraph 38, the judge goes on by testing the proposition in a way which is interesting:

"The proposition advanced by the claimants can be tested by asking what would have been the position if Google had announced that pursuant to its governing policies the Unlockd product would be refused access to the Play Store and AdMob after the product had been launched ... in the US in January 2016, at a time when it was not supplied in the UK at all."

If the position had been that the US subsidiary company, not a claimant in the case, was supplying a product on the US market and Google then decided it

wouldn't be allowed, could the UK company say: well, because we might supply in the future, that's enough to give the UK jurisdiction over this refusal to allow supply in the US market?

And the judge says: well, no, that is not really realistic:

"I regard it as inconceivable that this decision by Google could at that point have constituted an infringement of art.102. When Unlockd subsequently sought to introduce its product within the EU, then the decision by Google might have founded a complaint under art.102, but that would be in respect of the refusal of access as regards the apps in the EU; it would not thereby transform Google's conduct vis-à-vis Boost Dealz in the US into a violation of art.102."

That's the reasoning.

Now, some people might say: well, there are questions about that reasoning. If, for example, Unlockd had been on the brink of launching the product everywhere, that had been the plan, and if Google's conduct had been designed to thwart that plan, the case would have looked, in fact, very, very like the Intel case, but it just shows how important the conclusions in particular cases are and how they turn on their particular facts. There is nothing remotely similar to

that sort of analysis which can be applied in this case.

The only other point which was raised and rejected in that case was an argument that the subsidiary company would have suffered, effectively, because if the parent couldn't market the app throughout the world, that's going to have an indirect effect on the ability of the parent to fund its subsidiary. That might affect the way the subsidiary behaves in the UK. That was the argument that Mr Justice Roth said was too indirect.

Again, compare that to this case. In this case, what you have is UK developers paying commission to Apple in the UK. A very different kind of effect and a much more direct effect.

So ultimately, my submission is that that authority -- and this is not a criticism of it in the slightest, it is just irrelevant -- it happens to be a case about electronic commerce but the underlying market structure and the underlying complaints and the underlying rationale of the decision have nothing useful to tell you about this case.

If that is so, and I am right about the choice of law, there is really no difficulty at all in saying it is a UK market which is being very directly affected by conduct which is implemented in the UK. That's quite sufficient to satisfy the territoriality requirement.

Now, I am about to go on to forum non conveniens, and then alternative service. I think probably I can finish forum non conveniens before a break, if that is convenient. Forum non conveniens, can I remind you -- I know you will have it in mind, but occasionally we lost sight of it yesterday. It's not about the choice of law, it's not about the rules which will govern a case, it is simply about where a case should be decided.

Although the principles are not in dispute, and I know in particular the Chair will know them well, but can I remind ourselves of the relevant standards and tests from Spiliada so all members of the tribunal can understand the submissions I am making. It goes back to now a very old case in the House of Lords that you have in volume 1 of the authorities bundle at tab 15.

The relevant statements of principle were set out by Lord Goff, beginning at page 315 of the bundle. Now, there are two ways in which forum non conveniens operates. It operates differently, depending on whether you are looking at a defendant who is being served as of right in the jurisdiction or a defendant who is being served outside the jurisdiction. In this case we are looking at two defendants -- I think that is right -- who have been served as of right in the jurisdiction and

we are looking at other defendants who are being served outside the jurisdiction.

So the defendants served in the jurisdiction, they must apply for a stay of the proceedings. That is the topic that Lord Goff addresses first. The basic principle which he sets out by side letter C, subparagraph (a):

"The basic principle is that a stay will only be granted ... where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."

"As Lord Kinnear's formulation [this is (b)] of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay."

He then turns to consider the significance of the fact that there has been service as of right. If we can pick up the conclusion on page 316, beginning at letter E. Having discussed various cases, he says:

"In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that

there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right; and there is the further advantage that on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to the country), it should be all the easier for him to prove that there is another clearly more appropriate forum for trial overseas."

Then in (d), dealing with the analysis process:

"Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described in MacShannon's case as indicating that justice can be done in the other forum at 'substantially less inconvenience or expense'. Having regard to the anxiety expressed [...] in the Société du Gaz case concerning the use of the word 'convenience' [...],

respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by [...] Lord Keith of Kinkel [...], when he referred to the 'natural forum' as being 'that with which the action has the most real and substantial connection', [...] it is for connecting factors in this sense that the court must first look."

You first of all look to see what are the connecting factors with the action itself:

"If [...] at that stage [...] there is no other available forum which is clearly more appropriate [...], it will ordinarily refuse a stay."

If, on the other hand, there is some other available forum which is clearly more appropriate prima facie, then you go on to consider other rarely arising circumstances of justice.

Then the difference then, if you have the service out, is explained at 320. The test is the same. But at side letter E, Lord Goff says:

"The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse

of that applicable where a stay is sought of proceedings started in this country as of right."

So the same question: what is the appropriate forum in which the case can be tried in the interests of justice of the parties and for the ends of justice? But if you are serving someone here as a right, the burden is on the defendant to show that there is another clearly more appropriate forum. Conversely, if you are serving someone here out of the jurisdiction, the burden is on you to show that England is clearly and distinctly the most appropriate forum.

Now in this case -- and I am assuming that we are right on choice of law, because if we are wrong on choice of law, then the only cases which will be decided here are claims by UK developers in relation to UK apps or possibly the EU apps. It is very difficult to see that you would say other EU forums have to be involved but I will leave that to your discretion.

So we are looking at a case where we have UK law, you have two UK defendants served here as of right, and Apple hasn't even identified any forum in which those UK defendants can be sued or should be sued. It hasn't begun to even attempt to discharge its burden in relation to that. So the defence goes on against those defendants. There is no justification for getting rid

of it.

It is dealing with UK developers under UK law and with the lawfulness of that commission. And you look at the alternative and the alternative is to call the trial of those claims, those UK law claims in a multiplicity of jurisdictions, unidentified, around the world, so that they are split up. In my submission, it is clearly more appropriate that the claims, governed as they are by UK law, brought as they are by UK developers, should be proceeded with in this tribunal. Particularly since those claims will proceed in this tribunal so far as the two existing defendants are concerned, because there is no possible justification -- so you have multiple defendants, here is a tribunal (inaudible due to loud cough); multiple claims, here is a tribunal where they can all be resolved, all of them governed by UK law. It makes no sense at all to suggest that they should be scattered around.

That is the conclusion which in very similar circumstances the Court of Appeal reached in Iiyama. That we have in the authorities bundle -- I had it earlier and I have lost the tab reference. It is tab 41, which is in volume 3.

You see beginning at paragraph 128, the court said:

"We come to the issue of appropriate forum for the

resolution of the claims. Technically, in relation to the CPR defendants who were served out of the jurisdiction, the burden should be on the claimants to show that England and Wales is the appropriate forum. In our view, however, nothing turns on the burden of proof [and I agree with that]. As will already be apparent, we have little difficulty in agreeing with Morgan J in the LCD Action in concluding that, in relation to both SECL and LGD, England and Wales is the more appropriate forum for the trial of claims against them for breach of Article 101."

As Mr Justice Morgan noted:

"SECL and LGD did not contend that England and Wales was [...] inappropriate because it would be [...] appropriate to pursue the claim [...] in the courts of another EU member state [...]. It was submitted that they should be sued in Taiwan or Japan [...]."

We have a difficulty here that, apart from some reference to other member states in which there could be a reference to the CJEU, there's no other alternative forum which is really identified at all and there is certainly no single forum identified anywhere where these claims can be brought, which at least was done there:

"The primary claim [they] wish to advance is for

damages for breach of statutory duty by infringement of Article 101."

Subject to the amendment that it is 102 or the Chapter II prohibition, that is the same here.

"We agree with his conclusion at [78] that it is far more appropriate that the claims for breach of Article 101 be litigated in England and Wales rather than Asia."

And we would say, rather than California, Australia, or anywhere else.

"Prima facie the tort of infringement of Article 101 occurred in the EU and the damage resulting from it was suffered in their respective countries of incorporation of the claimants which are based in the EU. In relation to the sixth claimant, Mouse, it was not contended that a different result should follow [...] Article 101 has direct effect [...]. As Morgan J concluded [...], it would not be satisfactory if the claimants were forced to sue some of the defendants in England and Wales and others in the Far East."

That also applies here.

"They would then have to try to prove their case at two different trials [...]."

Here, as I understand it, it is not just two different trials, it is goodness knows how many different trials.

"[They] would be at a risk of inconsistent findings of fact, and the courts of Taiwan or Japan would have to apply EU law as a foreign law. As we have already mentioned, both trials would involve the same or substantially the same issues and substantially the same witnesses and experts [...]."

Then:

"In all the circumstances, we have no hesitation in concluding that England and Wales is the more appropriate forum for the claims under Article 101 in each action and against all the defendants."

And it is just the same here.

One should not, of course, lose sight of the fact that what is really going on is not trying to identify, as forum non conveniens suggests one should, where in the world should the case be tried, interests of justice of the ends of the parties: it is trying to identify a litigation set of places where the claims are untriable in practical terms, so that the litigation effectively never gets off the ground at all.

That's the real underlying rationale of this and that is not the purpose of forum non conveniens. Forum non conveniens is not designed to prevent claims from being tried; it is designed to identify the forum in which the claims naturally belong, in which they can

most suitably be tried in the interests of justice and determined.

That, in my submission -- I only have to deal with alternative service, but that would be a convenient moment for a morning break if you wish?

THE CHAIR: Five minutes.

(11.52 am)

(A short break)

(12.06 pm)

MR STANLEY: Turning to service. Obviously it is more arid than the Sahara desert in terms of merits, this point. Apple knows about the proceedings. Everything that is intended to be achieved by service has been achieved. It has actively participated in the proceedings, not just by making a jurisdictional challenge but by making an application for summary judgment or strike-out on normal (inaudible) was pretty plainly a waiver of (inaudible) objections, objections to service.

There is no limitation issue or purpose served by requiring service later. And the whole exercise is designed to serve no useful purpose other than delay. But there we are.

So far as the first defendant is concerned, I think there is not even evidence that the service by post in California is not perfectly effective service, quite

apart from the order for alternative service. But, as I say, we will address it for whatever it's worth, which is not much.

The relevant test. This is, not surprisingly, something which comes up from time to time at first instance, so there are a number of first instance authorities. If one goes to tab 62 of the authorities bundle, which is in volume 4, there is a recent approval by the Court of Appeal. The page reference is 2961.

The case itself had absolutely nothing to do with anything we are debating, but there had been an order made by the Commercial Court for service by alternative means. You can see at paragraph 95, Lord Justice Males said, referring to CPR6.15:

"It was common ground that the applicable principles were accurately summarised by Foxton J in M v N [which I will show you in a moment]. In particular, where a respondent is domiciled in a state which is a party to the Convention on the Service Abroad ..."

That's the Hague Service Convention:

"... it must be shown that there is a good reason for allowing alternative service instead of requiring service to be effected pursuant to that Convention."

And the rest of that is simply a discussion of the exercise of discretion in the particular case which you

will get nothing helpful from.

M v N is at tab 52, which you will find in volume 3. There are two paragraphs in Mr Justice Foxton's judgment, paragraphs 8 and 9. They begin at page 2413. In paragraph 8, the judge said that it is well trodden ground, as it is:

"I do not propose to tread it again in this judgment. In brief, and I hope uncontroversial, terms, the effect of those authorities is broadly as follows (the references to the HSC [Hague Service Convention] being intended to encompass other service conventions as well)."

The rules say there has to be a good reason.

"The fact that the court is being asked to make an order for alternative service on a defendant domiciled in a [Hague Convention] country is a relevant factor in considering whether a good reason is made out. In proceedings in which the [Convention] is engaged, there are a number of cases which have held that merely avoiding delay or inconvenience will not be sufficient to constitute a 'good reason'. In those cases where the country in question has stated its objection under Article 10 [...] to service otherwise than through its designated authority, it has been held that relief under Rule 6.15 will only be granted in 'exceptional

circumstances' or in 'special circumstances' (if that is different)."

In other words, something outside the norm. Some debate as to what the requirement of 'exceptional' means but it has generally been interpreted as requiring some factors sufficient to constitute a good reason, notwithstanding the significance to be attached to article 10.

So it is not really a different threshold, it is just saying: well, how good the good reason needs to be depends on how far you are doing something which is positively contrary to or not contemplated by the Hague Service Convention:

"However, it is clear that there are circumstances in which an order for alternative service will be appropriate in [Hague Convention] cases [...], in which good reason for making [the order] can be established notwithstanding the HSC factor."

Then in 9, among the cases where it has been considered to be a good reason, are cases in which an attempt is made to join a new party to existing proceedings, effectively so that they are not held up, or cases where an expedited trial is appropriate. That's in 3.

In other words, cases where it is more than just the

ordinary consequences of delay or cost, there is a particular case management reason why swift service is necessary.

In this case, judging matters, of course, by reference to the time when the order was made, which is the right thing to look at, the purpose of the order was to at least keep open the possibility that these proceedings, which obviously have similarities and overlap with the Kent proceedings, could be managed alongside the Kent proceedings. My learned friend says that seems now improbable. I don't know how probable or improbable it is. If it is improbable, it is partly as a result of the delay which has been caused by this application but there we are.

That was the good reason. It was, in my submission, a perfectly adequate reason for granting or permitting alternative service in this case, notwithstanding the Convention and to the extent a special reason was required, it was a special reason in this case.

Then misrepresentation and non-disclosure, just the last of the last, adds, as it nearly always does, absolutely nothing. The main complaint -- and I am leaving aside the suggestion made, I think yesterday, that there was something to do with the Australian proceedings which had never been complained about

before -- but the main complaint was about territoriality and Unlockd. If I can show you what Mr Gallagher's affidavit or witness statement, rather, said, that is in the core bundle at page 357 which is behind tab 9.

If you look at paragraphs 52 to 54, Mr Gallagher identified -- first of all, he referred to the fact that in Qualcomm Mr Justice Morgan had said:

"... if the loss is paying an overcharge when buying the goods, the loss would seem to be made where the goods are bought."

Then he identifies that:

"Apple may seek to argue that the proposed class members in this case did not pay an overcharge 'when buying the goods [or services]' but rather when selling their own goods (since Apple's commission is taken at the point of sale)."

So Apple may say that Qualcomm didn't apply. And:

"Similarly, Apple may seek to argue that the place 'where the goods [or services] are bought' is not where the app developers are located (i.e., the UK) but rather where the customers buy the apps (i.e., in various jurisdiction around the world) ..."

So that a different analysis applies.

So that argument, which seems to be a fair summary

of the argument that my learned friend is principally making, was identified by Mr Gallagher there. So far as Unlockd is concerned, that case was of course -- as my learned friend accepts -- before the tribunal, albeit referred to originally for a different reason. But it goes a little bit further than that, because if in the core bundle you would go to page 1002, please, you will see part of a letter which was sent by Gibson Dunn on, I think, the day after the application had in fact been made. At paragraph 5, they said:

"We expect the PCR to draw this letter to the attention of the Tribunal in relation to any ex parte application in relation to service. As the recent press reports suggest the PCR may have already brought such an application, we request that you confirm to us when this letter is sent to the Tribunal given your duties of full and frank disclosure."

Then under "Scope of the Claim", they said:

"It appears that the Threatened Application is intended to capture all global transactions made by UK-domiciled app developers where a commission is paid. The PCR does not set out any analysis of applicable law or the territorial scope of UK and EU competition law in support of such a claim (other than to simply assert that all the claims are governed by English law). For

example, it does not address the case of Unlockd v Google ... in which Roth J found that there was no serious question to be tried as to an alleged infringement of EU competition law concerning conduct related to Google's storefronts in other parts of the world."

So they asked for that letter to be drawn to the tribunal's attention and it was provided to the tribunal, I think, that day and you can see that that is confirmed in correspondence at page 1005.

Now, if that's what they wanted the tribunal to be told, that's what the tribunal were told. There is nothing useful or fair about complaining that the sort of detailed, and in my submission, false points which have ultimately been made by Apple in the course of this application, should have been laboured before the tribunal at that stage. That is particularly so when one is dealing, as one is here, with quite technical points before a specialist tribunal. I am not saying that that means there isn't a duty of full and frank disclosure, there obviously is, but the duty of full and frank disclosure is not a duty to go into relentless detail about every point which could possibly be taken.

The proper forum for those points to be taken is a hearing such as this one. If the tribunal has

rejected those points on their merits, there is nothing independent in the allegations of a failure to make full and frank disclosure at the application stage.

Unless there is anything further I can assist with, those are my submissions.

THE CHAIR: Thank you, Mr Stanley.

Submissions in reply by MR PICCININ

MR PICCININ: Sirs, I plan to structure my brief reply submissions around five questions, all of which focus on the key questions of territoriality and applicable law. The first of the five questions is: why should you decide these points about territoriality and applicable law at this stage rather than at trial?

The second question is again in relation to those two points: who has to show what at this hearing?

The third question is a short point of law that my learned friend has raised for the first time, I think, in his oral submissions to you, which is the question as to whether territoriality is actually a separate requirement in a tort claim to which UK law applies under Rome II.

The fourth question is another short point of law about how article 6(3) (b) applies. So can article 6(3)(b) be invoked by the PCR in this claim?

Then once we have dealt with those preliminary

questions, if I can put it that way, we get to the key question which is how should we characterise the conduct at issue in this case? It is obviously a case about a price for a service, but the question is: what is the service and where does the service take place, and so what competition law applies to it? That's the fifth question.

On to the first question. As is somewhat traditional in hearings of this kind, my learned friend urges you to say in relation to as many of the points that come up as possible: well, that's an interesting question, isn't it? Let's decide it on another occasion at trial.

In relation to the particular points that arise in this application, we say that's the wrong approach. We say that for three reasons. First, just as a matter of principle, at times Mr Stanley's argument seemed to be that if a point arises which he and I disagree on, then it follows that it should be left for trial, as if a tribunal of this kind, hearing a jurisdiction challenge or strike-out, should never consider the arguments that are made to it and decide anything of controversy between the parties.

That is obviously wrong. It only makes sense to leave a point to trial if there is a disputed issue of

fact, and I am including there economic fact, but it has to be a disputed issue of fact on which some further light can be shed by hearing further evidence at trial. If there is an issue that raises a pure point of law, of legal argument, or if it is a point that turns on facts but the facts are already clear because the conduct has all been open and in the public domain pursuant to contracts that are downloadable from the website, then the tribunal can and should decide those questions now. That's the first point.

The second reason, which is really to bolster that, as to why you really should decide the points if you can, is a practical one. It is because the points that we are making are points about applicable law and about territoriality, and the reason why that is significant is because if you just say "Don't worry, we will figure that out later at trial", then what you are doing is you are embarking on a process where you are going to conduct a trial about the legitimacy of prices that Apple charges for its distribution services in Australia and that trial itself, conducting that trial, is already treading on Australian toes. That was the point Mr Justice Roth made in his judgment in Unlockd. So that's one reason.

The other reason why it is important to decide these

points if you can is because otherwise, you will end up with what we already have here in this case, and in the Australian case, which is exactly the same developers simultaneously pursuing claims in relation to the exact same conduct, the exact same commerce but seeking to apply different laws to that same commerce in different fora at the same time. That is a highly undesirable outcome. At the moment it would be Australia and the UK, but there is nothing in principle if my learned friends are right, to stop them or someone else from doing the same thing in every other country around the world. So you have a multiplicity of proceedings in relation to the very same claims, by the same people.

Finally, the courts have repeatedly told us --

THE CHAIR: You are not asking for a stay on that basis?

MR PICCININ: We are asking for a stay under forum conveniens. I suppose the lis pendens point is just a species of forum conveniens. Really, our point is that it is quite critical that courts grapple at this stage with the question of whether it is their law or not, whether they are the appropriate forum or not, because otherwise you are going to result in one -- even just having one court or the other stay first doesn't really answer the question of which law should be being applied.

My final point on this first question is that the courts have repeatedly told us that the principle of legal certainty is important and it requires that these kind of issues that we are raising are issues that firms should be able to assess for themselves in advance without complex economic evidence. A distributor of apps in Australia should be able to know whether its price setting is subject to Australian law or UK law, so that it knows, for example, whether it is effectively required by law to be charging different prices to different customers, depending on where those customers happen to be domiciled around the world.

When I say "the courts have repeatedly told us that", I am referring to this tribunal's decision in BGL in the paragraph I showed you yesterday, where it emphasised that even market definition is something that firms should be able to do for themselves. But, more importantly, this tribunal in Westover -- more specifically, this tribunal in Westover said that you shouldn't even need to do a market definition analysis to apply article 6(3) of Rome II because it doesn't matter whether the market is national or global. To pick up your point to my learned friend, sir, it doesn't matter for me whether the market is national or global. What you need to do is to look at the place where the

restriction of competition is and where it is felt.

Mr Justice Roth in Unlockd was able to apply the territorial scope principle at the jurisdiction stage in this case, without a trial of any kind. So we say that it is important and it is appropriate for this tribunal to grapple with these issues now. That was my first question.

My second question was: who has to show what at this hearing? My learned friend opened yesterday by saying that Apple has to show that the relevant market or effects are found at the end of it, in the place of the storefront. Indeed, that I have to go further than that and show that there can be no argument that the market or the effects could be anywhere else. That's wrong in principle as well. It is the PCR who has to show that the claim that he has pleaded -- I emphasise that, it's the claim that he has pleaded -- raises a serious issue to be tried. That's how we got into this whole argument. It was the same in Unlockd, you need to answer the question of whether the pleaded claim is arguable.

That means that he has to show that it is at least arguable that UK law applies to these claims and, subject to the point that I am coming on to, that they fall within the territorial scope of UK competition law.

The only basis that he has put forward to support that is to say that the UK developers are domiciled in the UK and that, therefore, gives rise to the market definition analysis which we have seen from Mr Perkins which supports a market defined by reference to UK domiciled developers.

The reason, the practical reason, why he's had to do that is, of course, he can't plead anything else about them. He can't tell us anything else about these legal entities that happen to be domiciled in the UK and to have signed the DPLA and to be routing their global commerce through those legal entities. He can't tell us where their apps were made, he can't tell us where their software engineers are, he can't tell us anything about them, except that they are domiciled here.

Whilst it is true that in my submissions to you yesterday -- and I will respond to the criticisms of them in my reply today -- I do say that the answer to a claim of this kind that has been pleaded in this way is that the competition law that applies is the competition law of the country of the storefront. That is what I say, because that's the way in which you apply the territorial limits of Article 102. That was what most of my submissions have been about.

The other point I developed yesterday -- and this

was the point of going to Bumble and Flo Health as examples -- is just to illustrate that trying to define the market and the scope of UK competition law by reference to the domicile of the particular company that is routing the commerce through the App Store is arbitrary and wrong in principle. What it seeks to do is to make a substantive economic phenomenon about the boundaries of economic regulation of a country's right to regulate, answerable to a legal happenstance that tells you nothing of relevant substance.

Of course, domicile is important for lots of reasons, but what it doesn't tell you anything about is where a restriction of competition happens or where there are effects on the market in which you have competition for any services.

So it is important, we say, not to lose sight of this. He needs you to find that it is arguable that both applicable law and territorial scope run with the developer's domicile, because if he's not right about that, he has no other basis -- and he's advanced no other basis -- to assert that UK competition law applies to his claim. That was my second question.

The third question is a short one. This is the new point that territoriality is not a separate requirement, so once you have finished applying Rome II or I suppose

before that, the Private International Law (Miscellaneous Provisions) Act, and you have found out that the applicable law in private international law claims, the applicable law for the tort is English law, he says that's the end of the analysis and you don't also need to ask yourself the question of whether UK competition law actually applies to the conduct that you are saying is infringing that prohibition.

I say that is fundamentally wrong in principle. It is also contrary to authority. Why is it wrong in principle? Well, thinking about Article 102 in particular, just in terms of the hierarchy of norms, I am sure this tribunal doesn't need to be told that the hierarchy of norms under EU law has the treaty at the top and regulations like the Rome II regulation are actually called the secondary law or secondary legislation in EU law terms, because they are enacted by the council and the Parliament on a proposal from the European Commission and they can't change the scope of the primary law which is effectively like constitutional status which is the treaties.

So if Articles 101 and 102 have a territorial limit that is set by primary EU law, giving effect to principles of public international law, that's what the treaty provisions have in terms of their scope, the

council and the Parliament cannot extend that through some secondary legislation that is made under the treaties. They can't apply Article 102 through Rome II to conduct on a market in Australia. Least of all pursuant to the election that is made by someone after the fact in a private damages claim.

So that is just entirely wrong-headed in terms of the constitutional order of these things. But it is also contrary to clear authority. Firstly, it is inconsistent with the way the Court of Appeal conducted its analysis in the Iiyama case. I will just show you that briefly. Iiyama is page 1969 of the authorities bundle. I will just get the tab, tab 41 in volume 3.

Iiyama was a case where the Court of Appeal adopted Mr Stanley's preferred approach of starting with applicable law to decide what is the private law that governs the tort claim. It had resolved that question. And then what we came to is paragraph 61, headed "Jurisdiction: the territorial scope of Article 101 and indirect effects".

What the court says is:

"We now turn to what we regard as the central issue in the case. On the assumption that the claims are governed by EU law ..."

That's reference to the applicable law analysis.

"... do they lie outside the territorial scope of Article 101?"

Entirely conventionally, the Court of Appeal regarded that as a separate question which still needed to be answered.

In that case, they found that it was within the territorial scope of EU law, and that's for the reasons that we discussed yesterday, because it was an indirect purchaser claim, where there were purchasers of cartel goods in the EU at an overcharge.

So that's why territoriality was made out. But it is clear from this that the Court of Appeal regarded it as a separate question which has to be answered, and that's right.

So that's one authority. Then the other authority is, of course, Unlockd, which is the case that we went through yesterday. Again, Unlockd is a case in which Mr Justice Roth applied the principle of territoriality to conclude that the claim in front of him raised no serious issue to be tried. Unlike Iiyama, that was a Rome II case. It was well after Rome II, in 2018. Rome II applies to conduct from 2009. So if my learned friend is right about this point, for which he cites no authority at all, then not only is the analysis in Unlockd wrong, but the outcome in Unlockd is wrong.

I do say that itself is something that is plainly wrong.

So that is the third question.

The fourth question was: can article 6(3)(b) be invoked by the PCR in this case? You remember yesterday I had two reasons why it can't. The first was that you need to look at the restrictions of competition separately and the charging of a high price for distribution in Australia is a separate thing, a separate restriction, from the charging of a high price for the distribution of an app in the UK or in the US or wherever. That was my first point.

My second point was that even if I was wrong about that, you can't extend it extraterritorially outside the EU.

Now on the first point, my learned friend actually accepted that I was right about that in principle. Indeed, he said that was obvious. In other words, he accepted that all of the effects in all of the markets need to be arising from the same restriction of competition. But then he says on the facts that doesn't cause him any difficulties because in this case, what he said is that it's not just a single decision made by Apple, he says it's a single practice which is being applied through a single agreement. He also used the metaphor of it being a single contractual and commercial

machinery. That's the way he put it.

My response to that is that that is just not true. That is not an accurate characterisation of the single contract that you have before you. The critical starting point is this: if we can just turn up the DPLA -- that's in the core bundle, page 496 -- my learned friend took you to quite a few provisions of it yesterday which were not very interesting, in the sense that they were not provisions that were challenged as being unlawful in any way in these proceedings.

But in schedule 2, which is what you have on page 496, you can see in the middle of paragraph 1.1, which is under the heading "Appointment of Agent and Commissionaire":

"... The most current list of App Store regions among which You may select, shall be set forth in the App Store Connect tool ..."

What is clear from that is that the starting point for all of this, before there can be any commission paid or anything or any service being provided, is that the developer needs to make a choice about which distribution services it actually wants to purchase. It has to make a decision about whether it wants to distribute its apps in Australia or not.

And under paragraph 1.2(a), which you can see on

this page as well, it is only authorising and instructing Apple to market the apps in these different storefronts, in the storefronts that have been selected by the developer. So that is a real commercial choice that is being made by the developer and it is actually a commercial choice that was analysed substantively by Mr Perkins in the expert evidence I showed you yesterday, where he was thinking about would they change their decision in response to a change in commission.

So my learned friend was quite wrong to say that storefronts are metaphorical, that's what he said yesterday, just because they are not physical. The software is real, the storefronts are real, even if they are not physical and they have real effects and real consequences, as you can see here, both in terms of which end-users Apple is being appointed to market these apps to, and also about how they are going to be marketed and presented in each of those jurisdictions, in terms of the curation.

So that's the starting point, that the developer is deciding in this contract which distribution services it wants to procure.

The second point is that Apple has made different decisions about what commissions should be applied on different storefronts. Again, it doesn't matter why,

what the regulatory background to those decisions was or how different they are, what matters is that there are different commissions that are applied on different storefronts. We say where that leaves my learned friend is really with one point, which is that all of this is done in a single contractual document. The mere fact that Apple has done this in one contractual document rather than ten contractual documents or 175 contractual documents, is a complete irrelevance. That is a pure point of form that is devoid of any substance.

Again, we went through Westover yesterday and my learned friend didn't respond on this, but it really is the same, as I said yesterday, as the position of domestic MIFs around Europe. You know, you might have a four party payment scheme like Visa that might have one single document setting out its rules, setting out what the MIFs are in every country. And that document might even have exactly the same domestic MIF in every country around Europe, to comply with the interchange fee regulation. We saw the tribunal's analysis in Westover on that yesterday and that's not the way the tribunal looked at it. What the tribunal said was that each domestic MIF in each European country is creating its own restriction of competition, affecting the market, irrespective of how you define the market,

affecting the market there, in those countries.

So that's my first reason why we say article 6(3)(b) just can't be invoked in this case. You can't make the Australian bit of the claim UK just by election.

The second reason I said that was because article 6(3)(b) cannot be invoked in relation to the effects of restrictions of competition outside the EU. My learned friend's only real response to that was to say that 'Gosh, that's an interesting question that should be left for trial'. I don't think I detected any submissions as to why I might be wrong about it. Why is that an appropriate point for trial? That is a pure point of law that doesn't turn on any facts at all. It's not going to be any easier to decide at trial than it is today, and it is crucial that it is decided now, if the tribunal is otherwise going to proceed on the basis of allowing this claim because of an election under article 6(3)(b). I don't need to repeat the submissions I made yesterday as to why I am right, but I do say that you should engage with them and you should adopt them.

So that was the fourth question. That then takes me to the final question which is the critical one, which is: how are these services, the conduct at issue, to be characterised?

The first point in relation to that question, which is, again, a new point that arose only in my learned friend's oral submissions, is the question about what the services are. Because all through the claim form and all through the expert evidence with Mr Perkins, all you have is an analysis of distribution services. So what my learned friend now says is that my case at trial, Apple's case in its defence, is going to be that the services that Apple provides are not distribution services but other services and that when the developers pay the commission, they are not just paying for their apps to be distributed, what they need to be paying for is the value that Apple provides through its ecosystem and through its technology which provides the basis on which developers have their apps in the first place.

I think he's right about that. You saw what was said in Kent and, of course, that is Apple's position, that they are not just a mere store, they are much more than that, and developers need to pay for the economic value that they derive from the technology that Apple provides.

But, again, there is a fundamental confusion here on the part of my learned friend about the nature of the exercise that we are engaged in here. What we are doing is asking the question of whether the claim that has

been pleaded against us raises a serious issue to be tried. As I said, that is a case that is limited to the allegation that the commission is an unfair price for the distribution services that are being provided. That's the only thing that is said to be unfair.

No claim has been pleaded, nor has any methodology been advanced to prove that 30 per cent is too high a fee, if what developers have to pay for is the value of Apple's technology that is being made available to them.

Instead, as Mr Stanley showed you yesterday in his submissions when he was talking about the stores that Mr Perkins uses as comparators, what he was talking about there was the Epic store and the Microsoft store purely carrying out the function of distributing the apps to the end-users. That's the sole basis for their case. That it is too high a fee for that service.

In any event, even if it were open to them -- which it is not -- or even if it were the right question to ask at this stage, whether a claim of that kind, based on the contention that the fee that Apple charges for its technology, for the use of its technology, is too high, there is no pleading that class members engaged those services in the UK. There is no reason to think that they did. If a developer wanted to plead a case

that there was the market for the provision of technology to develop the app in the first place, then they would have to have some basis for saying that they -- I don't know, carried out the programming activities or whatever it is that is being said against us in the UK, and that's not been said and it's not clear to me how it could be said, simply on the basis of the domicile of the developers. So that's the first point under this heading.

The second point, my learned friend said --

THE CHAIR: Sorry, I understood the point, really, that the point that was being got at was the distinction between the services provided to app developers and the other side of the market, what was being provided to end-users. I didn't really understand a distinction was being drawn between certain development services and other development services.

MR PICCININ: If that's the case, then the problem that I have just been answering doesn't arise.

THE CHAIR: No.

MR PICCININ: Because as I've said, I said yesterday as well, we have no problem with looking at this case today, for the purpose of today, through the lens of the service that's being provided to the developer. The service that they had been addressing all along is their

case that that service is the distribution of apps and nothing else. If that's where we are, then that's where I was trying to get with that submission.

So that was the first point. Which perhaps doesn't arise.

The second point was they say that the tribunal has to accept their expert evidence on what the market is. They say that my submissions exploring the logical flaws in Perkins 2 in particular, effectively constituted economic evidence being given from the bench.

At the outset, I should say that that is nonsense. There is no proposition of law that says the tribunal is bound to accept all assertions that are made by an economist in an expert report. The tribunal can -- and indeed, this tribunal regularly does -- read the economic evidence, hear submissions about it, about its logical consequences, about contradictions or logical flaws in it, about its implications and then decide whether there is an arguable point for trial or not. I don't need a counter expert report in order to do that.

But actually, this is all a side show, because in any event, the critical point is that I don't actually need to persuade you that Mr Perkins is wrong about anything. That's for several reasons. One of which is,

as I showed you yesterday, he agrees in his first report that the market has to be defined by reference to the storefronts as well. I shouldn't say that's him agreeing, that was him just setting out his analysis. If I can just show you that again, it is in page 230 of the core bundle. It is 4.68.

You can see that this is dealing with the part of the case that they want me to be dealing with. This is "Considering app developers first --"

THE CHAIR: Sorry, I don't have the page.

MR PICCININ: 230, in the core bundle. You might have had it open because we were looking at the DPLA before.

THE CHAIR: Sorry, I am looking at the wrong page.

Yes, carry on.

MR PICCININ: Yes, it is paragraph 4.68 at the top of the page. As I was saying, you can see that I am looking at the right part of this now, as in the right part from my learned friend's perspective, because he says:

"Considering app developers first, it is highly unlikely that a small increase in the commission rate would lead many app developers to choose to switch away from distributing their apps in the UK."

He's talking about that selection that the developers make pursuant to paragraph 1.1 of schedule 2 of the DPLA. That's what he's analysing there and he's

asking if Apple made the decision -- which it could -- to increase the commission in the UK, how many developers would change the election that they make? He concludes that they wouldn't -- not many of them would -- and that then points to his conclusion that you have to limit the definition of the market to the UK storefront.

That was his analysis. I am entirely taking here their point that you should be looking at the service provided to developers, that you could have a different market definition for the upstream market from the downstream market. I am happy to take all of that. And this is the upstream market that we are talking about. But it is the upstream market for what service? It's the service of providing distribution of apps on the UK storefront. That was his analysis.

That's the first reason why I don't actually need to persuade you that what he said was wrong. But even more basically than that, as I said before, our case doesn't actually turn on -- no one's case should really turn on these questions of geographic market definition, as to precisely which customers on one side of the market or the other are included within it.

In particular, the question is not whether there is a separate market for services to developers in the UK

or whether it is a global market on any of those bases. What we see in Westover under applicable law is that you need to be looking at where the restriction of competition has its effects. What the tribunal said in Westover was that whether the market is national or global, the question you had to answer was whether the Italian MIF is affecting competition in Italy or the UK. Just for your reference again, that was paragraphs 57 to 58 in Westover, which was on page 2579 of the bundle. So that's in relation to applicable law.

Similarly in relation to Unlockd. You saw it had been pleaded that Google was dominant in various markets: the global market, European market, UK market. It doesn't matter for the analysis whether the market is defined in one way or the other. The substantive analysis under territoriality was about the exclusion of Unlockd, whichever subsidiary it may be doesn't matter, from the storefront of the Play Store and from the AdMob services that would be provided by Google in relation to end-users outside the EU. Again, it is not the fact that the end-users are outside the EU, that's the point.

This is a confusion that runs through my learned friend's submissions. I am not saying the law is always the place of the end-user. That's not the submission at all. The submission is we need to look at the services

that are being provided. It doesn't matter who the end-users are or who the developer is, it's the services that are being provided, in exchange to which the price is being charged.

So finally now under this heading, we come back to the same basic argument. What is going on here? Apple is setting a price on their case -- not the way we characterise it -- Apple is setting a price for the distribution of apps in Australia. We have the question: Apple sets the same price for all developers everywhere for those distribution services in Australia - is that price too high? They say that in order to answer that question of whether the price that Apple is charging to developers who have elected to distribute their apps in Australia, you need to first answer the question of where the developer is domiciled, by which they mean the particular legal entity who has entered into the DPLA and, therefore, funnels their commerce through. Where is that one domiciled?

So that will determine which law you apply to this question of whether the commission is too high. So on that basis, Apple's commission for distribution in Australia might be too high for an app that is supplied by a developer domiciled in the UK, but not for an app supplied by a developer domiciled in the US. In other

words, Apple may therefore be required to set different prices for developers, depending on their domicile, and prices can also be too low for competition law, under some competition laws.

Similarly, in the UK, Apple's commission for distribution in the UK, charged to any developer who chooses to distribute here, might be too high for an app supplied by a developer domiciled here but not too high for a developer that is domiciled in the US. And yet, when Dr Kent brings her claim on behalf of all users of the UK storefront, somehow the legality of all of those same commissions, whether they are charged to developers in the US or whether those commissions are charged to developers in Australia or developers in the UK, are all, all of a sudden, assessed for compliance under UK competition law. The question of whether they are too high or not is now a question for UK competition law. If that's right, if that is the correct legal analysis, it is a recipe for chaos. It is impossible to know what price to sell at, to sell your service, of distributing apps in the UK. It is like Schrödinger's law. It is simultaneously the same commission being charged on the same provision of service to the same developer that will be said to be unlawful, and lawful. That just doesn't make sense.

But indeed, that's not the end of it. Because their case actually seems to go further than that. They say that these same developers -- forget consumer claims -- can apply Australian competition law to their commerce in Australia and the same developers can apply UK competition law to that same commerce in Australia. Presumably, on their analysis, the same developers again -- the UK domiciled ones -- could go to the US and pursue claims there or in other countries around the world, applying yet further laws, again to exactly the same commerce.

We say that that analysis is obviously wrong and it is also entirely inconsistent with the analysis in Unlockd, because if that were right, if all that matters is where is the developer located, domiciled, then the second and third claimants in Unlockd could have argued that Google's exclusion of those companies from AdMob or from the Play Store all around the world engaged English law because that's where they were domiciled.

My learned friend now says: no, that's different, because that was a case about refusal of access and this is a case about the charging of a price for access. But we say that distinction makes no sense at all. In both cases, the service that's being provided is the same. It is the service that allows you to have your app, your

technology, distributed in a particular place. Whether it is charging a high price or restricting the terms of access or providing no access at all, you must have the same answer.

Indeed, if it were otherwise, then the Kent claim which includes both exclusionary conduct and the charging of a high price to developers, could be subject to two different laws which is something that my learned friend deprecated yesterday when he was saying that you should have the same -- the provision of Rome II governing all claims in relation to the same conduct under Article 102.

Similarly, I made the point yesterday, what if you charge a very high price that results in no supply? In those circumstances, how do you distinguish between charging a high price and refusing access? They are substantively the same.

So we say that there is no basis on which the PCR can distinguish Unlockd. He criticises me for engaging in the task of asking whether the facts in that case and this case are similar or different. That's not the exercise that I undertook with you yesterday when we went through Unlockd. What I was doing was the task of looking at the reasoning in Unlockd and seeing whether that reasoning applied to the facts of this case. Both

as to what was included in the scope of EU law and what was excluded. It's actually my learned friend who is playing the game of identifying factual features of this case that are different from the facts of Unlockd. As you know, that's not how we do legal analysis. You need to look at the reasoning in the case.

So I think this may be the only point that we agree on, is that the critical paragraphs of the reasoning in Unlockd are paragraphs 37 and 38, which are on page 2026. I will just get those back up. Volume 3.

The point that was being made by the judge in both of these paragraphs was that Unlockd wanted to supply its product in a number of markets and it was denied access by Google for its services. And Unlockd needed those services in order to supply its product in those various markets that it wanted to supply its product in. What we say is that that transposes exactly to this case because in this case, what is happening is that the developers want to sell their apps in various markets around the world, they have made that election themselves, and what they are complaining about is the price that Apple charges for the services that they need in order to do that, in order to sell their apps in the various places they want to sell them.

So in both cases, the answer needs to be the law of

the storefront. What is completely missing from this, paragraphs 37 and 38, is any hint that what matters is the domicile of the particular company that wants to sell its product in different markets around the world. In both cases -- both their case, Unlockd, and this case -- you can say: I have an English company which is feeling an impact on its bottom line -- wherever its bank account may be, that might be somewhere else -- by virtue of the conduct that's complained of. That's not what the discussion is in these paragraphs.

What Mr Justice Roth is saying and what I have been saying all along is what matters is which services are being refused or being subject to a high price. And what are those services for? In both cases they are services that the claimant needs to supply their product in markets around the world and that's why you need to be looking to the laws of those markets around the world.

Sir, unless you have any further questions for me, those are my submissions.

THE CHAIR: Thank you very much, Mr Piccinin.

MR PICCININ: I am grateful.

THE CHAIR: The tribunal will reserve judgment.

(1.02 pm)

(The hearing concluded, judgment reserved)