**IN THE COMPETITION APPEAL TRIBUNAL**

Case No: 1689/7/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

20th November 2025

Before:

The Honourable Mr Justice Waksman (The Chair)
Michael Cutting
Professor Alasdair Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**Applicant / Proposed Class Representative**

# Consumers' Association ("Which?")

And

**Respondents / Proposed Defendants**

# Apple Inc., Apple Distribution International Limited, Apple Europe Limited and Apple Retail UK Limited

## A P P E A R AN C E S

PHILIP WOOLFE KC, JACK WILLIAMS (instructed by Willkie Farr & Gallagher (UK) LLP) on behalf of the Consumers' Association ("**Which?**")

MARIE DEMETRIOU KC, MAX SCHAEFER, MICHAEL QUAYLE (instructed by Covington & Burling LLP) on behalf of Apple Inc., Apple Distribution International Limited, Apple Europe Limited and Apple Retail UK Limited

Thursday, 20 November 2025

(10.03 am)

THE CHAIR: Some of you are joining us live stream on our website, so I must start with the customary warning.

The official recording is being made and an authorised transcript will be provided, but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings in breach of that provision is punishable as contempt of court.

Housekeeping

THE CHAIR: Ms Demetriou, before you start, I've got a couple of points I want to raise with Mr Woolfe.

Mr Woolfe, going back to the funding agreement, we've just been looking in some detail at the latest case dealing with suggested amendments to the funding agreement, which is the Water case, which I think has been referred to. But the Water case from this year, the 2025 case.

I just want to check whether that's in the bundle or not. Is it in the bundle, the one we want from 2025?

MR WOOLFE: I think it was referred to in my learned friend's skeleton argument.

THE CHAIR: Sorry?

MR WOOLFE: I think it was referred to in my learned friend's skeleton argument.

THE CHAIR: It was, in the skeleton argument. I think it's about paragraphs 87 to 94. I'm not asking you to look it up now.

Paragraphs 87 to 94 in that decision deal with the question of the termination provisions. And they there -- didn't actually have a clause that said "after taking legal

advice", but they took issue with the fact that it said "if the funder in its reasonable opinion considers that the merits have changed or the economics have changed".

And what the CAT did there was actually to remove the word "reasonable", so that when the expert comes to consider it, if the dispute procedure is invoked, the expert will then be considering on an objective basis, have the merits changed, is it now no longer commercially viable, rather than assessing whether the funder had a reasonable opinion to that effect. And, it seems to us, that that is something which should be done here.

Now, I'm not drafting at this stage, but if you go back and look at those paragraphs, you will see pretty clearly what was suggested and what was in fact agreed to by the funder. So I'm just mentioning, that's the first thing.

Second point is, in relation to the Gutmann case, the recent one, Ms Demetriou distinguished the position there from the position here, one of the bases of that was that in that case, with LCM, 75 percent of the funding across the board came from the funds they were managing, whereas in this case that is true, but only for the first 15 million. Ms Demetriou said, therefore, in fact, the amount which is coming from the funds, as opposed to LCM itself, as it were, is only 35 percent.

I don't think he addressed that in your reply, but whether you did or not, can you just remind me of what your response is to that point?

MR WOOLFE: I didn't address that point.

THE CHAIR: No.

MR WOOLFE: So first, on the maths, that seems to be correct.

THE CHAIR: Yes.

MR WOOLFE: There's no issue with that.

THE CHAIR: Fine.

MR WOOLFE: We don't think there is any relevant distinction because, ultimately,

before any of this second half of the funding, I'll put it that way, were to become necessary, there's a long expanse of time before that would become necessary. And, if in the interim, LCM were to give notice under the litigation funding agreement that there had been a material adverse change and it didn't have the funds available, then Which? would be able to go and seek alternative funding. It could come before the Tribunal and explain that there is an issue.

That is a problem which could arise as it could arise in any case, irrespective. There's always the inherent problem of what if the funder went insolvent. That's not unique to this case.

THE CHAIR: No, I followed that, but I thought the point was that, in Gutmann, they had the assurance of knowing that for the whole period up to trial, for the whole of the costs, 75 percent was going to be funded by these funds that they manage. There isn't that assurance here, because that arrangement stops after £15 million.

Now, yes, of course, the funder might then decide to, if they're able to legitimately under the clause, come out and then it's open to the PCR at that stage to try and find alternative funding, but I'm not sure that really meets the point.

The point of distinction is meant to be that it's clear and secure all the way through in Gutmann, and it isn't here because you don't know what's going to happen after the £15 million worth of costs has been spent. I think that was Ms Demetriou's point.

MR WOOLFE: Okay. Well, in a sense, the point about the funds is a belt and braces point. And we say, under the funding agreement, we have funding lined up. No notice has been given that LCM is not able to meet its obligations, and it's the information we're given is that it will be able to do so. So that's the starting point.

Insofar as you happen to want a belt as well as braces, it is true that the belt is not as big as the one in Gutmann, but that doesn't mean that certification shouldn't be granted.

THE CHAIR: That's right.

MR WOOLFE: If I can just --

MS DEMETRIOU: Sir, sorry, just on that point, just so that Mr Woolfe has a proper opportunity to address it, can I just flag that there was a second aspect to our argument, which follows from the same paragraphs in Gutmann, which is not only the extent of the funding, but you can see from paragraph 270 of Gutmann that there was evidence about what would happen if LCM did cease trading. So there was evidence about the contingency that it was on the basis of witness evidence.

The Tribunal was able to take the view that it was reasonable that alternative funding arrangements could be put in place within a reasonable time. So that was another aspect of our submission.

I just flag it so that Mr Woolfe can address that, too.

MR WOOLFE: Well, Which? had witness evidence saying they thought they could get alternative funding if needed. We are making that by way of submission without the support of a witness statement, but it's the same essential point. So if I can --

THE CHAIR: Sorry (inaudible). (Pause)

Go on.

MR WOOLFE: So in terms of the points you've raised with me yesterday, so the priority point and the termination point and so forth, I was going to write anyway to say that we have been working on it overnight.

THE CHAIR: Right.

MR WOOLFE: Which? has engaged with LCM. They had, in fact, largely settled a position between them on the various terms and was taking final instructions.

We had hoped to be able to send a letter to you this morning before the hearing started. That hasn't quite been possible. We will get that to you before lunchtime in order that you can consider.

THE CHAIR: In any event, I've added something to the mix in terms of what I've just said about the Water case. But that's fine. I mean, sometimes it can't be done by the end of the hearing. I would hope it can be this time round, but let's see where we get.

MR WOOLFE: Well, my only reason for mentioning this is because you have raised a further point, which is entirely legitimate.

THE CHAIR: Yes.

MR WOOLFE: The funder, of course, is in Australia. So insofar there is --

THE CHAIR: I thought there was a London office?

MR WOOLFE: They have a London office, but certain personnel are in Australia. We'll do our best --

THE CHAIR: Okay.

MR WOOLFE: -- but, if it weren't possible, then that might be an issue.

THE CHAIR: All right. Thank you.

Now, Ms Demetriou.

Strike out application by MS DEMETRIOU

MS DEMETRIOU: May it please the Tribunal, this is our application for a strike out of part of the PCR's claim.

You heard yesterday that the PCR's claim comprises two distinct claims for damages. The first is on behalf of potential class members, who are said to have paid more than they should have paid for iCloud services as a result of the alleged infringement. So they've been paying for iCloud services, and the allegation is they've paid more than they should have done. That's, if I can put it that way, a conventional claim for damages, and that claim does not form the subject of this application.

The second claim which is advanced, which is the subject of this application, is a claim for damages on behalf of potential class members who obtained iCloud services but

never paid for them at all. That's because they obtained iCloud services, free iCloud services, so they never paid any money, and they are said to have suffered loss in the form of what's called "foregone consumer surplus". Now, Apple contends that this claim should be struck out because there is no reasonable prospect of recovering such damages at trial.

I'm going to make my submissions in the following order, if I may.

So, first of all, I'll take the Tribunal back to the Claim Form and make some brief submissions about how this claim is formulated.

Secondly, I will explain by reference to the authorities, why the claim is not reasonably arguable.

And thirdly, I'll make some short submissions by reference to the test we have to meet on a strike out application and explain why it is we say that the Tribunal should grasp the nettle now. So that's how I propose to proceed.

So if we could go to the Claim Form, please bundle A, tab 3 and we can pick it up at page 103.

Mr Woolfe took you yesterday through the structure of the claims. I don't need to go back through all of that. I just want to focus on the pleading of causation, loss and damage. You can see the heading on page 102, and I want to pick it up from page 103.

At paragraph 136, that's the conventional damages claim, if I can put it that way. And then it's paragraphs 137 to 138 that are the subject of this strike out application. I just want to go through those again just so that we're all clear what's being alleged.

So 137 says that, but for the abuse, class members who did not in fact pay for iCloud, would in respect of that part of the claim period.

And then you say you see this:

"If the class members valuation of cloud storage services equivalent to iCloud was

higher than the competitive price in the counterfactual, have purchased iCloud at the counterfactual price, or have purchased services equivalent to iCloud from an alternative provider of cloud storage at the counterfactual price, and/or have made use of a greater quantity of free storage offered in the counterfactual by iCloud or alternative providers if sufficient to meet their needs.

"Class members have therefore suffered loss and damage to the extent that their valuation of [the cloud storage services] was higher than the price for services that would have prevailed in the counterfactual; and/or in respect of the loss of opportunity to make use of free cloud storage services equivalent to iCloud in the counterfactual."

Now, the salient point here is that the consumer surplus claim is premised entirely on the subjective valuation of cloud storage services by each individual member of the class. And you can see that by putting it in this way: so assume an abuse is proven, and the PCR establishes that the annual price of cloud services would have been, in the absence of the abuse, £5 rather than the £10 that was actually charged in the real world, so assume that. The consumer surplus claim is advanced on behalf of a category of consumers whose subjective willingness to pay for those services, whilst varying from case to case, was in each case below £10, so none actually purchased them in the real world, but above £5, so all would, in the counterfactual, have paid the counterfactual £5 price. And the PCR says that these consumers lost the value of the services they did not actually pay for, but would have paid for at the lower price, and it claims each consumer's loss, measured as their individual valuation of the services, less the £5 they would have had to have paid for them, and we see that clearly from paragraph 138.1.

And so just continuing with the example, a claimant who valued the services at £9 is said to have lost £4, being the difference between £9 and the £5 they would have actually paid. In the counterfactual, a different claimant who valued the services at £6

is said to have lost £1, being the difference between their subjective valuation and the price they would have paid in the counterfactual. And a further claimant, who valued the services at £5, has suffered no loss at all, because that's the price they would have paid and the market price in the counterfactual. And these losses differ between individual claimants, not for any objective reason relating to the case, but because of their subjective valuations of the service.

And similarly, turning to the second limb of the consumer surplus claim, which is the one at 137.2, this relates to consumers who wouldn't even have paid the £5 in the counterfactual, but who allegedly lost a greater quantity of free storage in the counterfactual. And again, this turns on the subjective valuations of consumers, because the subjective valuation of each consumer of the counterfactual free service with greater storage and their valuation of the free service actually received, for which credit would have to be given. So again, it turns on the subjective valuation of each consumer.

THE CHAIR: Can I just ask you to pause there. On that second limb of this head, which mirrors the second limb of the primary (inaudible) if I can put it in that way, the thesis is that, in the counterfactual, quite apart from a competitive price, those who only had free storage would have more free storage than they did before, so they've lost that benefit, and that doesn't actually depend on whether they bought the extra storage or not; it's just looking at them at a base level. But why does that turn on subjective valuation? Because surely all that's being said is: these people have now got ten gigabytes of free storage, rather than five gigabytes free storage.

Now, that hasn't been separately assessed at the moment in the expert report. But why isn't that simply the loss of a benefit which can be objectively valued? You'd have to have some evidence about how you work out the difference in value between having five gigabytes rather than ten gigabytes, or the other way round. But it could be done,

and in fact in the pleaded case, they don't actually talk about their own valuation of the storage -- of the free storage -- in either of the limbs.

So why -- just looking at that -- is that problematic? After all, you don't take issue with the free storage point in relation to the primary claim.

MS DEMETRIOU: No. So, just going back to the claim and dealing with -- first of all -- your point, the last point you made, which is that they don't talk about individual valuation: they do. So in relation to the first part of the claim --

THE CHAIR: Yes.

MS DEMETRIOU: -- if you look at 137.1, they say:

"If the class member's [so singular] valuation of cloud storage services equivalent to iCloud was higher than the competitive price, then they've suffered loss." [as read]

And you see that -- this is the first limb, so I'm going to come back to the second limb in a moment, but you put to me that -- even in relation to the first limb --

THE CHAIR: No, sorry, that was my mistake. What I meant is that the lost benefit of having more free storage space --

MS DEMETRIOU: Yes.

THE CHAIR: -- which features in both claims -- in other words the primary claim, whether people have paid, and the argument is they've overpaid. And let's just go back to it. It's at -- just a moment. (Pause)

Yes, 135. Here's your primary claim.

MS DEMETRIOU: Yes.

THE CHAIR: 135.1. And this is all about class members who in fact paid for it.

MS DEMETRIOU: Yes.

THE CHAIR: Right. So first of all, 135.1, they've overpaid.

MS DEMETRIOU: Yes.

THE CHAIR: Second, they would have been able to make use of a greater quantity

of free storage.

MS DEMETRIOU: Well, the second point is that they have actually paid money, which they shouldn't have paid. So in the first part of the claim, we say that's conventional loss. That's different --

THE CHAIR: I know, but I'm asking you about the second bit. I'm asking about --

MS DEMETRIOU: You're asking about 135.2?

THE CHAIR: Yes. The reason I'm asking about it is because you're not saying that should be struck out.

MS DEMETRIOU: No, and I'm explaining why I'm not saying that should be struck out first.

THE CHAIR: Right.

MS DEMETRIOU: So looking at 135.2.

THE CHAIR: Yes.

MS DEMETRIOU: What said is that so looking at the beginning of 135, these are class members who in fact paid for iCloud. So they've spent money.

THE CHAIR: Yes.

MS DEMETRIOU: And 135.2. Is that in respect, absent the abuse, in respect of that part of the claim period, they wouldn't have spent that money, because there would have been more free storage available. So that's a conventional loss claim, because they've spent money which they shouldn't have spent. So that's different; that's why we accept that part of the claim.

And then in relation to 137.2, that's different, because the class members haven't actually spent any money at all, so they haven't lost any money. What's said is that they've lost the opportunity to have -- to make use of -- more free storage.

So there's no loss -- there's no pecuniary loss. It's an opportunity to have more free storage, which they're said to have lost.

Now, the counterfactual here isn't expressed as to how this loss has been valued. But the key point is that in both the factual world and the counterfactual world, they've paid nothing for something whose value was nothing. So in the factual world, they've paid nothing for free storage, and in the counterfactual world, but for the abuse, they would have had more free storage, and paid nothing for it, and so they haven't suffered any loss.

THE CHAIR: They haven't suffered any loss, even though they had less free storage in the actual, than they would have had in the counterfactual. That has no economic value.

MS DEMETRIOU: That's what we say. That's not a claim for pecuniary loss, because they haven't suffered any loss. I'm going to come to explain why we say, on the authorities, that's not a claim for pecuniary loss.

MR CUTTING: But footnote 26 of your skeleton, you say, "We're not saying that no loss can ever arise without payment".

MS DEMETRIOU: No, we're not. So we're not saying that.

MR CUTTING: You are saying it here. You're saying no loss can arise here --

MS DEMETRIOU: We're saying it here, and I'm going to come to this. So what we say is that pecuniary loss runs as follows: so either you lose money because you've spent money that you shouldn't have spent, so you wouldn't have spent absent the abuse, and we accept that that's not the only situation in which pecuniary loss can arise. It can also arise where you've suffered damage or lost an asset, so you haven't spent any money, but you've suffered damage to some sort of asset, and that's caused you loss. And it can also arise where you've lost the opportunity to make profits. And thinking about these, those are the three limbs really for pecuniary loss claim.

MR CUTTING: Okay. So then let me put this to you, and I appreciate it is not expressed by the PCR in this way, but in a sense, consideration has moved from the

customer to Apple, once they entered the Apple ecosystem by buying their iPhone, their iPad or their iTouch, and the iCloud service is then -- I was going to say bundled, but I know that's got antitrust implications that might set more hares running. But they have paid; they've paid into the Apple ecosystem, that includes iCloud in a more or less unavoidable way.

MS DEMETRIOU: So that isn't a claim that's been pleaded, and if it were a claim that was pleaded, I'd have to address that claim, but that's not how it's been put, and presumably on proper consideration it hasn't been put that way. They haven't said -- I think they would be in trouble, in terms of market definition, if they attempted to advance a claim in that way. (Pause)

Yes, and as Mr Schaefer says, if they've paid -- even if you follow that logic through, sir -- to join the ecosystem, that price is the same in the factual and in the counterfactual. So they haven't lost anything.

MR CUTTING: You've objected to the fact that they haven't paid, whereas on my -- possibly impermissible -- approach, they've paid something, and they didn't get the counterfactual level of free storage.

MS DEMETRIOU: But the point is not just that they haven't paid -- can I take the submission through? Because I think it might be -- I'm going to address these points, but can I deal with it in order, rather than just jumping in, if that's okay?

So, I think in a way -- let me just try one more thing, and then before I go to some of the authorities. So I think, in a way -- let me put it this way: the reason we say the proposed claim is bad in law is that it doesn't sound in damages at all, and let me just explain in a nutshell why, and I'll then follow my submissions through.

So, we say that the alleged foregone consumer surplus is not a pecuniary loss, because those consumers have not lost anything that's recognised as a pecuniary loss. The only basis on which the PCR is mounting an argument that consumers have

lost something is by relying on their subjective valuations of the service. And we say that the assessment of pecuniary loss is an objective exercise.

And then we say that the alternative attempt of the PCR to claim damages for non-pecuniary loss fails, because it doesn't fall into the limited categories in which damages for non-pecuniary loss can be recovered in tort. (Pause)

Let me just take you to -- let me start with pecuniary loss, and take you to McGregor --

PROFESSOR SMITH: Sorry, Ms Demetriou, before you come to authority, can I just ask you to expand on that a little bit?

MS DEMETRIOU: Yes.

PROFESSOR SMITH: In relation to what I might regard as the classic consumer surplus argument, which is 137.1 and 138.1.

MS DEMETRIOU: Yes.

PROFESSOR SMITH: The customer who didn't buy at a higher price, but would have bought at the lower price -- it might be helpful to look at a diagram. It's on page 2404 of the authorities bundle. It's a European Commission document. (Pause)

MS DEMETRIOU: Sorry, just bear with me. 2404. (Pause)

Yes, I've got it.

PROFESSOR SMITH: So there we have the higher price, P2, the lower price, P1, and the consumers who are buying at the higher price, Q2 and there's no -- it's not the argument about the damage in A, that represented in A.

Now, you earlier said, when we're looking at customers willingness to pay, we know the customers are already buying Q2 are willing to pay the price P2.

MS DEMETRIOU: Yes.

PROFESSOR SMITH: The ones between Q2 and Q1 were unwilling to pay P2, but they are willing to pay P1.

MS DEMETRIOU: Yes.

PROFESSOR SMITH: So they know -- and you're happy with the end points, those two end points, in that diagram?

MS DEMETRIOU: Yes. We're happy with --

PROFESSOR SMITH: But what you're unhappy about, as I understand it, is -- well, first of all, you seem not to be disputing the fact that those customers may have lost something. If a customer had been willing to pay £9, but not willing to pay £10, then the opportunity to buy at £5 is a benefit to them. They have lost that benefit, but you seem to be focusing on the fact that we don't know how many of those consumers there are, and we don't know how to add them up.

MS DEMETRIOU: No, that's not right. So we accept the factual premise for present purposes. But let me explain it. Let's forget about services because it can confuse things a little bit. Let's think about a good, so a widget.

A consumer in the real world doesn't buy a widget because the consumer values the widget at £5 and the defendant sells it at £10. So they don't buy anything. In the counterfactual, the widget is £5. So they buy the widget for £5. The widget is worth £5. So that consumer has suffered no loss, no loss, because in the factual they didn't suffer any loss and in the counterfactual what they would have got in the counterfactual is a widget worth £5. They paid £5 for it and they could resell it for £5. So there's no loss that's been suffered. It's netted off at zero in both the factual and the counterfactual.

PROFESSOR SMITH: But, in the factual, they wouldn't be selling off the widget. They would not have bought it.

MS DEMETRIOU: They wouldn't have bought it, no. So they wouldn't have bought it. So, in the real world, they haven't bought a widget. They wouldn't have bought it. If the abuse hadn't happened, they would have bought a widget for £5 but that widget would have been worth £5, which is the market value of £5. So there's no -- again,

they would have bought the widget for £5. They would have spent £5 on the widget which was worth £5 and so the net result is zero. So there's no loss because -- there's just no financial loss because what they've bought --

PROFESSOR SMITH: Yes, there is no financial loss but the consumer who would have bought at £9 was not able to buy this widget at £9. Had they been able to buy it they would have had a widget worth, to them, £9 for which they paid £5. So that's what we call consumer surplus.

MS DEMETRIOU: Yes.

PROFESSOR SMITH: They have been deprived of consumer surplus of £4.

MS DEMETRIOU: And so our point is, how does that submission, how does that point, translate into the law in terms of what's available in terms of damages. And we say that it doesn't translate into pecuniary loss; the law distinguishes between pecuniary and non-pecuniary loss. We say it doesn't translate into pecuniary loss because it depends on the subjective valuation of each consumer, and it doesn't translate into non-pecuniary loss because the law only recognises non-pecuniary loss in certain confined circumstances. That's what I'm going to come to. But that's how our argument works. We say that damages have to be assessed objectively. That's fundamental. And I'm going to take you to the authorities on that.

PROFESSOR SMITH: But before we go, can we just come back to the diagram. When you look at that picture, what we're looking at is, presumably in an actual case, the economic adviser would have estimated somehow a demand curve and estimated the number -- well, we know the number of people who bought at the higher price. We're estimating, guessing, whatever, the number of consumers who would have bought at the lower price. You're happy with both of those things?

MS DEMETRIOU: Yes.

PROFESSOR SMITH: And then you say the way this calculation will work is we don't

know the marginal value. We don't know when each individual consumer would have entered into this market, if the price were gradually reduced from ten to five.

MS DEMETRIOU: Yes.

PROFESSOR SMITH: But if the price was gradually reduced from ten to five, you would expect that for a small price reduction, some consumers would come in. Price reduction gets bigger, more consumers get in. So what you would expect is there would be some spread of consumers between those who came in once the price had dropped a little bit, and then there would be some further consumers who only came in once the price got very close to the competitive price.

And all that's going on when you calculate what is being calculated in this sort of case is what's represented by that triangle --

MS DEMETRIOU: Sir, yes --

PROFESSOR SMITH: -- is a broad averaging of the lost consumer surplus across this spectrum of consumers and I am struggling to understand what's subjective about that, that isn't subjective in all sorts of other companies (inaudible).

MS DEMETRIOU: So that's what I was going to develop.

Let me put it this way. So we accept that consumer surplus, obviously, is an economic concept that exists. We accept that. Our case is that we don't accept that it sounds in damages as a matter of law. That's the premise for our application. So in a sense, I'm not disputing much of what you say, but we say that that concept of consumer surplus and economics doesn't sound in law as a damages claim.

MR CUTTING: You're going to have to explain at some point how we allow volume effects in antitrust damages cases, because they're allowed in abuse and cartel cases, and each time they come from an aggregation by economists of where the supply and demand curves would be, but for the antitrust infringement.

MS DEMETRIOU: Yes --

MR CUTTING: And the issue here is how is that different?

MS DEMETRIOU: It's different --

MR CUTTING: And particularly in the second case of the forgone volume.

MS DEMETRIOU: It's different because it's a conventional loss of profits case. It's saying but for the abuse we would have sold more and so that's a conventional loss of profits case. Here, what's going on -- I want to start with the way it's put, first of all. I'll come back to the storage point. But let me start with the first way it's put.

Here, the PCR concedes that if a consumer -- going back to my £10/£5 example -- if a consumer valued subjectively the service at £5, then they would suffer no loss because in the counterfactual £5 is what it's worth and £5 is what they paid. So they accept that, even though, going back to the point put to me by Professor Smith, that even if they've forgone an opportunity of getting more cloud storage, they won't have suffered loss if their subjective valuation is £5 because that corresponds to the market price.

What they're saying is that consumers that subjectively valued the service differently, say, at £9 or £7, can recover in those circumstances. And our point, our submission on the law, is that the law is quite clear that damages have to be assessed objectively, and I'll take you to the authorities.

But an objective assessment of an asset with economic value must examine the market value of that good or service. Going back to the extra storage point, sir, the market value of the extra storage is zero and that's true whether or not the Tribunal takes into account the consumer spending £1,000 or whatever on the iPhone. So that's really how we put the point as a matter of law. We're not saying that consumer surplus doesn't exist as an economic concept. We're saying that as a matter of law, it doesn't translate into a damages claim. Can I show you the authorities that we rely on?

If we start with McGregor, please. The fourth bundle of authorities, tab 61, page 2151. And --

THE CHAIR: Yes.

MS DEMETRIOU: Let's look at paragraph 2-002. So:

"The heads or elements of damage recognised as such by the law are divisible into two main groups: pecuniary and non-pecuniary loss. The former comprises all financial and material loss incurred, such as loss of business profits or expenses of medical treatment."

So underline those words: "all financial and material loss incurred, such as loss of business profits". So, coming back to Mr Cutting's point, volume effects are a loss of business profits. They fall squarely under pecuniary loss.

"The latter [non-pecuniary loss] comprises all losses which do not represent an inroad upon a person's financial or material assets, such as physical pain or injury to feelings. The former, being a money loss, is capable of being arithmetically calculated in money, even though the calculation must sometimes be a rough one where there are difficulties of proof. The latter, however, is not so calculable. Money is not awarded as a replacement for other money, but as a substitute for that which is generally more important than money: it is the best that a court can do."

So that's how the law organises claims for damages.

Now, pausing here. As I say, pecuniary loss is all financial and material loss incurred, such as loss of profits or expenses for medical treatment. Now, the Tribunal may have seen that the PCR relies on the EU Damages Directive, which sets out what damages must be available for breach of competition law. But I want to show you that the Damages Directive takes precisely the same approach. Can we turn that up in the first authorities bundle, tab 6. Sorry, I've got the wrong bundle here.

THE CHAIR: It's the same bundle as McGregor, isn't it?

MS DEMETRIOU: Same bundle. Exactly. So sorry. It's tab 6, page 66, and here we have an excerpt from the recitals and recital (12) is relevant. So:

"This Directive reaffirms the acquis ... on the right to compensation for harm caused by infringements of ... competition law ... as stated in the case-law of the Court of Justice. [And then this] Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (damnum emergens), for gain of which that person has been deprived (loss of profits or lucrum cessans), plus interest, irrespective of whether those categories are established separately or in combination in national law."

Those are the same categories that domestic law envisages, as I've just shown you in the passage from McGregor. Just over the page, this is reflected in the substantive provisions of the Directive and you can see that from Article 3, "Right to full compensation" and at 3.2 that defines compensation:

"Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest."

So again, it's the same point. Could I just, on this point, also take you to the recent Court of Appeal judgment in the Bittylicious case?

PROFESSOR SMITH: Before we leave this. On paragraph 12, "gain of which that person has been deprived (loss of profit)".

MS DEMETRIOU: Yes.

PROFESSOR SMITH: So you're saying if the deprived person, the company which has lost profits as a result of an excessively high price, that's a pecuniary loss, which it can be. But if the person is a final consumer who's been deprived of the opportunity of buying a good at the competitive price and has lost that opportunity, you're saying

that's not a loss that covers under the -- I don't see the words that -- the loss of profits is in brackets, but again, "of which that person has been deprived", so are we not here looking at an argument that these persons have been deprived of the opportunity of buying storage at a lower price?

MS DEMETRIOU: If a person had been deprived of an opportunity of buying a gold bar from Apple, which it could then resell at a profit, then it would have a claim. But here it's a net zero sum game and the way that the -- so going back to the excerpt in McGregor, there's no financial loss because nobody spent anything and they wouldn't have spent anything in the counterfactual. There's no material loss to an asset that can be compensated for in damages, and there is no loss of profit claim.

As I say, if the abuse meant that a consumer lost the chance of gaining some gold bar from Apple, which it could have sold on for money, then that's a loss of profit claim for which it could mount a claim for damages. But that's not what's going on here. A loss of profits claim is always based on an objective assessment and this completely turns on a subjective valuation and that's anathema to the English law of damages. And we see that, going through the law of damages in its entirety, because, you can see, as we've said in our skeleton argument, when the court is assessing damages, a claimant must give credit for any benefit received, that's always assessed objectively. The same objective approach underpins the doctrine of mitigation. So a claimant can't recover for reasonably, i.e. objectively, avoidable loss. And tortious damages are also limited by the principle of remoteness, which applies the objective standard of reasonable foreseeability of harm. And so that's really the key distinction.

So yes, claims for loss of profit are permitted, but not claims which sound in damages, which simply turn on a consumer's subjective valuation of what they've lost.

Now, I just wanted to show you the Bittylicious case of the recent judgment of the Court of Appeal, and that's behind tab 52.1 of the authorities, starting at page 198.1.

THE CHAIR: Just a moment, please. (Pause)

MS DEMETRIOU: This is a recent judgment of the Court of Appeal upholding the Tribunal's decision to strike out an allegation of loss. I'm going to return to the judgment later because it supports our argument about grasping the nettle now, and it's a point of law. But for present purposes, can I show you paragraph 25, which is on page 1989.7.

What you had in that case was, we submit, a bit similar to the position here, where economists have taken an economic concept and sought to translate it into a claim for damages. And so the Master of the Rolls there says that:

"The representative's claim is pleaded by reference to the experts' reports ... damages are pleaded in terms of ... the so-called foregone growth effect. I note immediately that these are not legal concepts, but an expert's construction. The issues in this appeal would have been easier to grapple with if the claims had been pleaded in a more orthodox fashion ..."

And then this:

"The loss of or damage to an asset is normally pleaded as a loss of or reduction in value of the asset with or without consequential losses."

And so, again, that reflects the orthodox position, as set out in McGregor, that when we're looking at pecuniary loss, we're looking for a loss of money, or damage, or loss of an asset, or a loss-of-profits claim, and that's all assessed objectively.

Now, as I said, we don't say that pecuniary loss can't arise where a claimant has not spent money. That's not our position. But, if there's no financial loss, if the claimant hasn't spent money, there still needs to be material loss or a loss of profits.

And pausing here, the simple point is that foregone consumer surplus is not in those categories. It's not a financial or material loss, and it's not a loss of profits at all. Putting it in the language of the EU, to take material loss, damnum emergens, nothing

was in fact spent or given up.

What, in fact, has happened is that those members of the class have received free services and paid nothing, and to take loss of profits, the consumers would not have made a profit in the counterfactual. So the law allows loss-of-profits claims where, but for the abuse, a claimant would have made a profit. Here, the class members we're talking about would have received paid services in the counterfactual, whose market value was £5, for which they would have paid £5.

And so, in both the factual and the counterfactual, the market value of the asset obtained and the expenditure adds up to zero, so no pecuniary loss at all. We say that the claim is based on an economic concept which doesn't sound in law, and it relies on the subjective views of the various class members as to the value of the service.

I now want to show you the authorities establishing that the quantification of pecuniary loss in English law is an entirely objective inquiry. And if we could go back to McGregor, please. So authorities bundle tab 61, page 2155.

Here we've got at paragraph 5-002. Does the Tribunal have that? So this is concerned with contracts:

"Contracts are concerned with the mutual rendering of benefits. If one party makes default in performing their side of the contract, then the presumed basic loss to the other party is the market values [I emphasise the words ‘market value’] of the benefit of which that party has been deprived through the breach. That is the cost of rectifying the breach of contract. Put shortly, the claimant is entitled to compensation for the loss of their bargain. That is what may best be called the normal measure of damages in contract."

So that's an objective measure. And then if we go, please, to page 2156 over the page, we have the position in relation to tort and the first paragraph there, 5-051:

"Where the claimant's goods have been damaged, the normal loss of the cost of rectifying the wrong is their diminution in their value which is normally measured by the reasonable cost of repair [again, an objective measure], and generally without making any deduction from the damages on account of the fact that after repair the goods are in better condition than they were before the tort. On the other hand, the normal pecuniary loss is the market value [underlined] of the goods where they've been destroyed or misappropriated. Where it's land that's been damaged, the basic pecuniary loss is again the diminution in value and this may, if the circumstances warrant, be measured by the cost of replacement or repair."

And so you see that again, in tort, the measure of damages is always an objective measure. It's always an objective question. And, as I've said already, that same objective approach runs through the law of damages.

That really reflects a fundamental, very fundamental principle of English law, because objectivity ensures consistency and equal treatment before the law, rejecting individual subjective valuations of interests means that claimants in like situations will be treated alike. So just because one claimant values an asset more highly than another, the law does not give that claimant more compensation.

This objective approach also enhances legal certainty. Liability is not dependent on unknowable individual preferences, but is reasonably measurable. And, as I say, it's a fundamental point running through English law.

PROFESSOR SMITH: You're emphasising that this paragraph 5-002 is describing an objective valuation. So, if instead of looking at damaged goods, we were looking at anti-competitive behaviour, then the people who actually pay an excess price, the objective measurement of the damage to them is the difference between the price that they paid and the price they would have paid, absent the abuse or the collusion or whatever it is.

MS DEMETRIOU: Correct.

PROFESSOR SMITH: And that price, you say, is an objective price.

Now, in some cases it would be a market price, but in many cases of anti-competitive behaviour, we have to make a judgment about the counterfactual. And counterfactual price is not necessarily an objective market price. It might be something that requires quite a lot of economic analysis to determine. We're talking about principles here, not about this specific case.

But let me pick up something from this specific case. One of the areas of abuse alleged is that Apple uses techniques that help to persuade their customers to do things that they might not otherwise have done. So we have the evidence of Mr Hunt in the bundle. And we're not going to that in detail. But if there were an argument that had been put that part of the abuse is that customers are manipulated in a certain kind of way, then to establish a counterfactual price, you would need to say, "Well, what would the price have been if the customer had been fairly treated by the seller?" And that surely is every bit as subjective an exercise as working out consumer surplus.

So I don't understand why the counterfactual price is an objective price in circumstances where the market price is agreed to be not the counterfactual price.

MS DEMETRIOU: So --

PROFESSOR SMITH: And just to finish my question.

MS DEMETRIOU: Yes, of course.

PROFESSOR SMITH: If you'll allow me to expand the definition of a question a little bit.

There is no market price for Apple services because Apple does not sell its cloud services in an open market. So I'm struggling with the idea that the counterfactual price is an objective price.

MS DEMETRIOU: Let me tackle that head on.

I entirely accept that in some cases -- and competition cases are a very good example -- it will be difficult to establish the price that would have been charged in the counterfactual absent the abuse. I accept that.

When I talk about a market price, I'm using that as a shorthand for objective price. So when you're constructing the counterfactual, you're quite right to say that that will often depend on quite complex economic and factual evidence, because, by necessity, it's a hypothetical construct, the counterfactual, and it may be difficult to ascertain what the price would have been absent the abuse.

The court may have to wield a broad axe as it often describes the process. But what it's trying to do in that exercise is still to determine the objective counterfactual price. What it's not doing is taking account of the individual valuations or individual views of different consumers, and that's really the fundamental distinction here.

So completely agree that the exercise may be difficult, may be a broad brush exercise, may require economic evidence, may require use of the broad axe. But it's still trying to figure out what the true -- I'm going to say market price -- what the objective counterfactual price is doesn't depend on the valuations of individuals. That's the key distinction.

PROFESSOR SMITH: So you're comfortable with an economic expert doing economic analysis to determine the counterfactual price --

MS DEMETRIOU: Yes.

PROFESSOR SMITH: -- that includes somehow or other, from market research or econometrics or whatever, estimating a demand price that goes into the economist's calculation of the counterfactual price.

MS DEMETRIOU: That may be a relevant technique, depending on the case.

PROFESSOR SMITH: But you would then object to using the same demand curve to say, the demand curve would indicate that there are some customers who would have

paid just under £10, and other customers would have paid £8, and other customers would have paid £5.10.

We don't know the names of these customers. Even Apple doesn't know their names. Nobody knows their names. But we've just done a piece of analysis that says there's this spectrum of customers arranged along the demand curve, and you're not willing to use that.

You are willing to use that information, the information and the demand to estimate a counterfactual price, but you're not willing to use it to estimate consumer damage?

MS DEMETRIOU: Yes, that's correct. But let me be clear as to why I say that's correct. It's correct because it's not recognised as a form of loss by the law. And also, to be clear, we're not disputing – and it doesn't form any part of our strike out claim to get into – the methodology that's been put forward, so we're not disputing the methodology for calculating this type of loss.

We're saying that this is not loss recognised by the law, and that there is a very key distinction, in our respectful submission, between that and an exercise, no matter how involved and how complicated, of calculating the counterfactual price, which is what we have in all of these competition cases.

So a price is calculated that in the counterfactual instead of -- again, go back to my stylized example -- £10, the price would have been £5. Now, that's an exercise which has to be done because of the conventional loss claim that's been put.

And so anyone that's paid £10 per year in the real world will recover damages, because absent the abuse, they would have been paying £5. We're not disputing any of that for these purposes.

But what you can't do is say: oh well, that's involved some quite difficult economic theory, that process. We're now going to use the same evidence to show that actually consumer valuations varied quite considerably, and we're going to give a loss -- make

a damages award to those consumers that have paid nothing and lost nothing, because it's not recognised by law, because that would involve subjectivity being brought in to the question of whether loss has been suffered, not so much calculation, but whether loss has been suffered, will turn on the subjective facts.

I want to show you an example in one of the authorities. If we go to the first authorities bundle, tab 15. This is the UBAF case, but can I just show you the example at page 221, which illustrates -- 221. So this is tab 15 of the authorities, page 221. (Pause)

And if you start between letter E and F:

"To establish a cause of action, they must establish not only a breach of duty, but that such breach of duty occasioned them damage. This is axiomatic."

And then later on:

"This must depend on the evidence. The mere fact that the innocent but negligent misrepresentations caused the plaintiff to enter into a contract which they otherwise would not have entered into, does not inevitably mean that they've suffered damage by merely entering into the contract."

And this is really -- the next bit is the example I want to take you to:

"To take and somewhat modify an example canvas during the course of argument: A tells B that he wishes to sell his vintage Bentley which he innocently but negligently represents is a blue label long chassis. In fact, it's a red label short chassis. If A had known, he would not have agreed to buy the Bentley, because he only collects blue label long chassis Bentleys. Assume, however, that the red label short chassis Bentley's were at all material times significantly the more valuable cars so that he was able to re-sell at a profit. He has then no cause of action."

And so this really is an illustration of our point, that unless, objectively, there has been a loss that's been suffered, comprising a loss of money, or material damage to an

asset, or loss of profits, the fact that a claimant may subjectively value something differently doesn't give them a good claim in damages.

And so we say -- again to repeat the point -- the PCR can't displace this objective measure on the mere basis that they subjectively placed a higher value on the thing that's been lost. But that's precisely what the PCR case entails, and I want to show you now what the PCR says about this argument. So can I take it from their Reply? (Pause)

And if we go to -- this is the first core bundle, tab 5, their skeleton argument deals -- I'm not going to their skeleton argument, because it deals very shortly with this whole thing, so I'm going to take it from their Reply, where their arguments are set out more fully. And if we take it from page 154 of their Reply, we see that the primary argument is that -- the primary argument advanced by Which? is that its consumer surplus claim is "a claim for pecuniary loss", and we see that at paragraph 15.

And then at 16, we see:

"In the alternative, the PCR submits that even if consumer surplus falls to be characterised as non-pecuniary, it's nonetheless recoverable ..."

So those are the two limbs of the argument, and I'm going to come to non-pecuniary a bit later.

But if we take the primary argument first, you can see that on page 155, you can see the heading "pecuniary and non-pecuniary loss". And then they say -- they erect the strawman at paragraph 18:

"Apple is wrong to suggest there can be no claim for pecuniary loss where a Claimant has not expended money."

Well, as I've said, that's not our argument.

Then they say at paragraph 20:

"...a pecuniary loss is one that is inherently susceptible to valuation in monetary terms

or is one that money is capable of remedying."

Now we accept, of course, it's trite to say that a pecuniary loss has to be able to be valued in monetary terms. But again, we say that has to be an objective process. The fact that you can introduce subjective valuations and put a figure on it doesn't translate it into pecuniary loss.

And then if we go on to paragraph 25, please -- sorry, not paragraph 25. (Pause)

Yes, so if we look at -- sorry just to follow this through, so I'm going to come back to the paragraphs in between. But again, just following this through, paragraph 25 on page 158, that's the strawman that we're not arguing. So loss of a sum of money.

And then 26.2 and 26.3 on page 159, again they make this point that if you can put a monetary valuation on something, therefore it's a pecuniary loss, and we say that that doesn't follow. Of course it's right that in order to be -- it's sufficient that -- it's necessary, in order for there to be a pecuniary loss, that you can put a monetary sum on it. But we say that that can't involve taking account of subjective valuations; that's our key point on the law.

Now, going back to the authorities relied on by the PCR, none of these authorities make good its case. Now can we take it please from paragraph 20 on page 155. So the first authority relied on by the PCR is the H West v Shephard case, and this case actually concerned non-pecuniary loss rather than pecuniary loss. And can I just ask you to turn it up, just to show you one passage? So if we go to the authorities bundle, tab 11, page 128, please. They show the passage relied on by my learned friends. (Pause)

So they rely on the passage at the top of the page. That's the passage they set out in their Response -- sorry, in their Reply.

THE CHAIR: Sorry, 128?

MS DEMETRIOU: 128, so at the top of the page. And you can see there that:

"Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost."

So again, pecuniary loss -- something tangible, money that may be awarded -- so something tangible may be procured at the market price, in other words. It's an objective measure.

And then non-pecuniary loss, further down, we see:

"... money can't renew a physical frame that's been battered and shattered."

So we're now into non-pecuniary loss:

"All that judges and courts can do is award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach."

So again, it's an objective approach even under non-pecuniary loss. You see that further down:

"... common assent awards must be reasonable and must be assessed with moderation. Furthermore, it's eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards."

Again, it's an objective test. So that's H West v Shephard; doesn't assist the PCR. Going back to their Reply, please, to look at the other authorities they rely on under their pecuniary loss claim, can we go to page 156, paragraph 20.2 of the PCR's Reply. They rely on the Forster v Outred case, which is, I'm sure, familiar to the Tribunal. Do you have that? Page 156. It's paragraph 20.2 of the PCR's Reply.

THE CHAIR: Yes.

MS DEMETRIOU: Now, that doesn't help the PCR. What the PCR says about that is that actionable loss arose when the claimant incurred a liability under a mortgage deed, even though she didn't suffer any financial loss until years later. In other words, this case found that loss could be incurred on a contingent basis, even though it didn't

crystallise till later. But the loss issue was still an objective market value, and can I just show you briefly the relevant parts of that? So if we go to authorities bundle 1, tab 14.

(Pause)

Starting at page 206. (Pause)

So 206, by letter D:

"... I would accept Mr Stuart-Smith's statement of the law and would conclude that, on the facts of this case, the plaintiff has suffered actual damage through the negligence of her solicitors by entering into the mortgage deed, the effect of which has been to encumber her interest in her freehold estate with this legal charge and subjected her to a liability which may, according to matters completely outside her control, mature into financial loss -- as indeed it did. It seems to me that the plaintiff did suffer actual damage in those ways ... and was entitled to claim damages ..."

And then just to show you page 208 -- top of page 208:

"In this case, as soon as she executed the mortgage deed the plaintiff not only became liable under its express terms but also, and more importantly, the value of the equity of redemption of her property was reduced."

So there was actual damage suffered at the time, which was then going to crystallise into further loss down the road, depending on future events.

So this is a claim which is entirely on all fours, with our submission, that there is an objective measure of damages. There's nothing subjective about the loss that was claimed in that case. So that authority doesn't help the PCR either.

Going back to the PCR's skeleton argument, paragraph 23, page 156 of the core bundle, the PCR there relies on the Court of Appeal's judgment in Liffen v Watson, and they say that case involved the loss of a benefit in kind, namely board and lodging provided by the employer. And again, we don't dispute that the loss of that benefit is a pecuniary loss. The claimant had a loss because she was deprived of board and

lodging, which she was going to get without paying for. (Pause)

But if what the claimant had lost was the opportunity to pay £10 for board and lodging that was worth £10, there would have been no loss. So again, that's not a point that helps the PCR, that's not an authority that helps the PCR.

I'm conscious that we need a break. Can I just --

THE CHAIR: Go on to finish your --

MS DEMETRIOU: Can I just finish this?

THE CHAIR: Yes, of course.

MS DEMETRIOU: So then the next authority is at paragraph 24, of the PCR's Reply, on page 157, and there they rely on "The Mediana".

The Mediana was a case involving negligent damage to a ship. So there was material damage, and the claimant got the cost of repairing the ship, and a sum of money, that of user damages, to reflect the use of the spare that they owned, rather than the cost of replacement, because they had a spare, they didn't have to go out and get a replacement. But the House of Lords said, well, that's recoverable damages, because were it not for the negligence, you would have been able to realise profits on hiring out that spare, and so we're going to give you user damages. But again, it's well established that user damages are assessed on an objective basis. Usually, what's the value the objective value of renting out the asset?

So, again that's not at all relevant, that doesn't help the PCR in advancing its argument here.

So, we say that none of these authorities assist the PCR. They don't support, or even bear on, the core proposition that they seek to advance, which is that forgone subjective consumer surplus represents actionable pecuniary loss. We say it doesn't.

I think now might be a good time to take a break. I've got a bit more to say about pecuniary loss. I'm going to then turn to non-pecuniary loss, but I'm well on course for

finishing in time.

THE CHAIR: That's helpful. We'll take our break now, please.

(11.16 am)

(A short break)

(11.28 am)

THE CHAIR: Yes.

MS DEMETRIOU: Sir, I was saying that none of the authorities relied on by the PCR in that section of their skeleton in support of their claim that this is pecuniary loss assists, because those are all concerned with an objective measure of damages. Could I just show you a footnote in our skeleton, which is apiece with what we've been saying? So our skeleton's at the core bundle, tab 2, if you could go to page 24.

THE CHAIR: What paragraph would you like us to go to?

MS DEMETRIOU: It's paragraph 12 of the skeleton argument, where we say, "The quantification of pecuniary loss in English law is an entirely objective enquiry", which is the submission that I've been making. It's internal page 5 of the skeleton. And I've made my submissions on that, but we've footnoted an article. You can see that at footnote 12. I'm not going to take you to the article, but what it says is helpful. So it says that:

"When the court is tasked with translating detriment into money damages, we have a well-established mechanism existing outside of the law, namely the market, to operate the translation for us'. The market is 'a stabilisation mechanism which affixes a prima facie value to an injury, independently from the award maker'."

And that's really encapsulating the point. I just want to return to a point that Professor Smith put to me, if I may. Shall I do that first and then -- or do you want to ask a question first, sir? I can see --

PROFESSOR SMITH: Well, I'm just going to remark that the second line of 12(1), "It

does so objectively, by reference to its market value", I thought we agreed earlier that in many circumstances, it's not the market value that's used as the standard, but some counterfactual value.

MS DEMETRIOU: Yes. But still it's an objective counterfactual price and so I give the same answer there. I'm using market value as a convenient term. It's the market value in the counterfactual, which may be a complicated hypothetical question.

THE CHAIR: But I think if you want now to respond to one of the points that Professor Smith made, probably helpful to do it now.

PROFESSOR SMITH: Yes.

MS DEMETRIOU: Yes. Okay. I'll do that now. So it was the diagram that you showed me in the staff working document. Can we go back to that. That's at tab 63 of the authorities bundle. And this is -- so let me just --

THE CHAIR: Let's get the page number again.

MS DEMETRIOU: Yes. Can I just take you to the beginning of the document first. It starts at 2364. You can see what the document is:

"Commission staff working document – Practical guide – Quantifying harm in actions for damages based on [the competition provisions]."

Now, I'm going to come to the diagram in a moment, but can you just go, first of all, to page 2370. Do you have that?

"Context and general approach to quantifying harm in competition cases."

And we have, at paragraph 1, under the heading, "The right to compensation":

"Everyone who has suffered harm because of an infringement of [the competition rules] has a right to be compensated for that harm. The Court of Justice ... held that this right is guaranteed by primary EU law. Compensation means placing the injured party in the position it would have been in had there been no infringement. Therefore, compensation includes reparation not only for actual loss suffered (damnum

emergens), but also for loss of profit (lucrum cessans) and the payment of interest. Actual loss means a reduction in a person's assets; loss ..."

So pausing here. No reduction in a person's assets if they haven't paid anything for iCloud services.

"[L]oss of profits means that an increase in those assets, which would have occurred without the infringement, did not happen."

So again, going back to Mr Cutting's point that embraces volume effects, but not this claim.

Now I want to go forward to the diagram that was put to me by Professor Smith. If we go to page 2404, that's where the diagram is.

THE CHAIR: Yes.

MS DEMETRIOU: Can we go over the page, please. And what we see, at paragraph 133, is the Commission making exactly the same distinction as I've been making based on that diagram. Can I just explain that. So 133 says -- so the previous paragraphs explain the diagram -- paragraphs 129 through to 132 -- explain the diagram in the way that Professor Smith was putting to me.

Then 133:

"Some customers use the product in question for their own commercial activities -- for example to sell it on or to manufacture other goods. When they do not buy at price P2 (or buy less) they forego the profit they would have made had they been able to purchase at price P1. They can claim reparation for this loss of profit and Section III below will be how to quantify this harm."

So pausing here, that's the conventional loss claim that is not the subject of this claim.

"Other customers are end-consumers. If these do not purchase at price P2 this means that they fail to enjoy the utility of these products or services, for which they would have been prepared to pay price P1. Applicable legal rules may provide [and I'm

emphasising 'may'] that some or all of such harm should be compensated for such failure to enjoy the usefulness of the product. At a minimum, end-consumers who have to bear higher costs (for example for the purchase of a substitute good) and who therefore have suffered an actual loss must be able to obtain compensation."

Now, pausing here, the Tribunal will know that the question of what damages are available for breach of EU competition law is left to national courts, subject to the Directive and subject to principles of effectiveness and equivalence. What this guide is saying here is that although national law may -- there's a discretion -- national law may make provision for loss to be recovered to reflect the lost consumer surplus, in that diagram, that isn't compelled by EU law. At a minimum, there has to be recovery for actual loss that's been suffered. You can see the very distinction that we're drawing drawn here in this paragraph. It's the very distinction in a nutshell that we are drawing. And our simple point is that that second part of the loss, the consumers who don't purchase -- whose claim is put on the basis of failure to enjoy utility of products is not a claim recognised by English law and it's not a claim that EU law requires or required English law to recognise even before Brexit.

So that's what we say in response to Professor Smith's question. It's a valid economic concept. It may be that some legal systems provide for recovery in those circumstances. Ours does not. And it really would be a revolutionary development of English law if this Tribunal were to rule that this were a pecuniary loss case, based on subjective valuation. It would fly in the face of all of these authorities and really subvert the very important tenet underlying quantification of damages, which is that they are to be quantified on an objective basis.

I want to show you two more points that the PCR makes about the pecuniary loss argument, and that requires us to go back to the Reply, please. Can we go to A5, page 164. They make two more points. I've covered, I think, all the points so far in

this section, and there are two more points remaining for me to address.

At paragraph 35, they say that this is "not a basis for a strike out". That's their point at 35.1. And they say, essentially, that there's a methodology that's been put forward by Mr Hughes. They say:

"If it is accepted that the loss of the relevant services is a recoverable loss, then the question of what is the appropriate measure of damages is quintessentially a question for trial. In particular, to the extent that Apple submits that the economic concept of 'consumer surplus' being applied by Mr Hughes is a subjective one ... (which the PCR does not accept) [this] is a matter which should be subject to proper expert evidence ..."

We say that that's a non-point; it's wrong. Because, of course, we're not challenging Mr Hughes's valuation. We are challenging the pleaded case, which is expressly premised on the subjective valuations of the consumers. That's the basis on which loss has been put. So that's the first point.

Then they make a point at -- if I just take, first of all, 35.4 on page 165, they say that.

"... the claim[ant here] seeks an aggregate award of damages ... representing loss to the class of a whole ... not seeking to advance a bottom-up individualised assessment ..."

We say that that's a bad point. The fact that Which? is proposing to aggregate the putative averages of the subjective valuations makes no difference. The fundamental reason for that is, of course, that collective proceedings are combinations of individual claims and if the loss can't be claimed in an individual claim because it's not recognised by English law, then it can't be claimed in a collective action.

Let me just take you to this briefly. So if we go to authorities bundle, tab 40, one of the Merricks judgments of this Tribunal. Page 1242 of the authorities bundle. You can see, at paragraph 26:

"The bringing of collective proceedings by the proposed class representative combines actual claims by the proposed class members and a CPO is required for those collective proceedings to continue. Accordingly, the individual claims of potential class members are not contingent claims ... It is therefore fundamental ... that all the potential class members have existing claims at the time the application is made."

So that's really emphasising that as a matter of the statute, each proposed class member must have their own claim under section 47(a) and if they don't, because the claim as here is not recognised by law, you can't improve the position by saying, "Oh, don't worry, we're aggregating all of the loss in a collective action". So that's a bad point.

I'm going to deal with -- the other points made are Ruxley, which I'm going to come back to in a moment because the Ruxley judgment of the House of Lords is relied on by the PCR in the context of non-pecuniary loss, so I'm going to come back to that.

And then thirdly, the principle of full compensation. And I've really made my point on that, which is that the principle of full compensation is said to stem, effectively, I think, from EU law, is the argument, and I've shown you the provision in the staff working document which says what EU law requires is that conventional loss is available -- so, damages for material loss and loss of profits -- and this other category of damages to compensate for foregone consumer surplus is something which is not compelled by EU law.

If there's some other point on principle of full compensation that I'm not grasping, I'll have to deal with that in reply.

THE CHAIR: Are you going to say something about the observations of Mr Justice Marcus Smith in the BritNed case?

MS DEMETRIOU: Yes.

THE CHAIR: Well, then that's fine.

MS DEMETRIOU: Yes. I'm going to come on to that because that's put forward as a basis for the non-pecuniary loss point. So I'm going to address that now. Now, the starting point is that --

THE CHAIR: So we're now moving to the non-pecuniary loss?

MS DEMETRIOU: Now moving to non-pecuniary loss. Yes, sir.

THE CHAIR: Thank you.

MS DEMETRIOU: The starting point, and indeed, we say, in a sense the end point, is that awards for non-pecuniary loss are only available in certain categories of claim, none of which apply in this case. The categories are Ruxley-type damages, which are by definition contractual and I'll come back to those. And then in tort, can I take you back to another section of McGregor. Authorities, page 2158 behind tab 61.

Sorry, just bear with me a moment. I've got the wrong volume. The reference I gave you is correct. Tab 61, page 2158.

You can see on that page paragraph 6-003 and the heading at the top of the page, you see is:

"Heads of Compensatory Damages

"Non-Pecuniary Losses

"Tort

"Five heads of non-pecuniary loss were set out in the 1961 edition of this work, the first written by Dr McGregor, and were considered there in relation both to tort and to contract. They comprised: (1) pain and suffering and loss of amenity; (2) physical inconvenience and discomfort (3) mental distress; (4) social discredit; and (5) loss of society of spouse or child. Apart from the fifth and last of these heads of loss, which had a very limited range and became only of historical interest ... the first four have stood the test of time."

And so these are the heads of non-pecuniary loss in tort and this claim doesn't fit into any of these categories. And so what is the PCR's argument? Well, as you put to me a moment ago, sir, they rely on certain comments made by Mr Justice Marcus Smith in BritNed but we say that they've misunderstood the scope and nature of those comments. Can I just turn up BritNed. This is in the second authorities bundle behind tab 29. We can take it from page 775. This is the section referred to by the PCR. You can see the heading:

"My assessment of the overcharge

"The 'gist' damage: Accrual of a cause of action."

Now, standing back. The first point to make is that the loss that was claimed in this case was not lost based on any subjective valuations. That's not the territory we're in. Now, the passage quoted in my learned friend's reply is expressly concerned with the establishment of gist damage. In other words, damage that's sufficient to give rise to a cause of action. And that, as you'll know, is typically -- although it wasn't in this case -- a concept that's normally relevant when you're applying the limitation rules.

Now, this passage -- so paragraph 424, we're on page 775 -- cites Forster v Outred. Do you see that, in the middle of the paragraph, as an example of gist damage occurring, even though there hasn't yet been any financial loss.

And so what Mr Justice Marcus Smith is grappling with in this case, and that's why he referred to Forster v Outred, is a position whereby you haven't yet got to a point where you've been able to evidence that financial loss has occurred, but there's some gist damage because it's liable to lead to loss in the future, like a kind of latent damage that's going to arise later on, which is the position in Forster v Outred.

And, going over the page, we see at the bottom of page 776, just following through the reasoning that he says that where when seeking to articulate what constitutes actionable harm, you need to look at the object and scope of the statutory provisions.

And he distinguishes here between Article 101 and Article 102 cases. Do you see that? So, he has a subparagraph:

"Cartel cases do not, by definition, involve a single actor. [They] involve two or more actors, by agreement or concerted practice, acting with the object or effect of preventing, restricting or distorting competition. It is not possible, in cartel cases, to identify the act of a single person that can be tested as being the cause of a claimant's harm. It is the collective failure to compete that is the wrong at which Article 101 TFEU is aimed."

And then he says that that's "different even from abuse of a dominant position under Article 102 TFEU, which is directed towards the unilateral conduct of dominant firms ..."

Now, that distinction is important because it illuminates what it is that the judge was getting at in the next section, in the next few paragraphs of the judgment. Because what he's saying at for at subparagraph (3) of that same paragraph, just moving on, he's saying that it's too restrictive in an Article 101 case -- remember, this was a bid rigging case -- too restrictive to require the claimant to show monetary harm, like harm suffered at the end of the process, as the gist damage. That's because there might be some harm which, like in Forster v Outred, occurs at an earlier stage, which may lead to actual damage at a later stage.

And so in a bid-rigging case, an example would be in a reduction in the number of suppliers properly participating in the tender process. And so, you can see here, that that's the context, that's what the judge is describing. So, rather -- I'm looking at C -- what the --.

THE CHAIR: I'm sorry, I didn't hear that.

MS DEMETRIOU: Letter C:

"Rather, what the claimant must show, as the 'gist' damage, is that the unlawful

conduct of the defendant has, on the balance of probabilities, in some way, restricted or reduced the level of the claimant's consumer benefit."

Now, my learned friends, say, "Aha! Consumer benefit. That sounds like consumer surplus. This tells us that we have a good claim here for consumer surplus." But that is not what the judge is getting at, and we can see that if we read on, because he says: "Such a restriction or reduction of consumer benefit might take the form of an increased price payable, but equally it might take the form of a reduction in the number of suppliers properly participating in a tender process. I regard consumer benefit as being a broad concept, and there will be many ways in which conduct infringing Article 101 TFEU will adversely affect it."

Now, moving on. 428 and 429 are important:

"This Cartel had its origins in a desire to substitute for competition a form of allocation amongst the cartelists, determined by the cartelists. In order to maintain a semblance of competition, rival bids might be put in, but these would be unattractive in terms of price and/or technical specification and/or non-compliance in terms of the tender. In this way, the customer's hand could be forced and a particular tenderer foisted upon it. This is exactly what happened here: (1) BritNed entered into a contract with ABB for the supply of the Interconnector. (2) That transaction was entered into, in the form that it was, by reason of the Cartel. But for the cartel, BritNed would (as I find on the balance of probabilities) have been presented with a different commercial environment, with different tenderers tendering on different terms."

Now, importantly, 4.29:

"Those facts are sufficient for me to hold that the cause of action is made out."

In other words, there's been gist damage.

"Of course, this says nothing about the quantum of BritNed's loss. The process of quantification may show substantial damages (as BritNed contends) or it may show

nominal damages (as ABB contends)."

And then he proceeds to the quantification point.

So, pausing here, this is about gist damage. What the judge is saying here is in order for this damage to be suffered in an Article 101 case, you don't have to go through the process of saying, "Well, in the counterfactual, I would have suffered loss. Look at my evidence because this is how things would have panned out, this is how the counterfactual would have evolved."

What you have to show is that there's been a damage to the competitive process in the form here of a rigged bid, which was apt to lead to financial damage down the line. That was sufficient for the gist damage, just as the mortgage deed was sufficient in Forster v Outred, which is why the judge relied on it. It's a form of latent damage. It's almost like a notion of latent damage.

None of this had anything to do with a loss assessed by reference to BritNed's willingness to pay, so completely irrelevant to this analysis. And all, really, my learned friends are doing are seizing on some words in a completely different context, the words being not even "consumer surplus", but "consumer benefit" and saying, "Aha! This means that the law recognises that damages can include damages for loss of consumer surplus."

But the authority's not saying that, and it can't bear anything like the weight that my learned friends place on it, because, as I say, it simply wasn't concerned with a claim for damages based on subjective valuation. In all of these competition claims we've seen going through the courts, there has been no claim alleging seeking damages for such a loss. So that's what we say about BritNed.

Now, the PCR also suggests that, as I've said, foregone consumer surplus should be recognised as a head of loss because it falls within the principle of full compensation. I've dealt with that point, I think, already. The submission's based on Article 3.1 of the

Damages Directive, but I've shown you Article 3.2 that that completely reflects English law. So, it's actual loss suffered because of financial expenditure or material loss and it's loss of profits, and I've taken you to the commission's working paper.

I think, really, the last point I have to deal with is the point based on Ruxley. We don't need to turn it up. I'll turn up the authority, but I don't need to turn up the PCR's rReply, I'll just tell you what it says. It says at paragraph 32:

"They rely on Lord Mustill's reference in Ruxley to consume a surplus for the proposition that there's no policy of the common law which excludes claims for consumer surplus." [as read]

So what they're asking you to do, on the basis of what Lord Mustill said in Ruxley, is for the first time in these proceedings establish a right of action for foregone consumer surplus. And I want to turn up Ruxley and show you why that doesn't provide a proper basis for doing so.

So that's tab 18 of the authorities bundle. Starts at page 268.

I'm going to summarise the facts essentially from the headnote. The breach of contract was a failure to build a swimming pool to the depth that had been specified by the claimant, and that had not led to any diminution in the value of the claimant's assets. So the swimming pool and the premises were worth exactly the same, even though the swimming pool was built a bit less deep than the claimant had wanted it to be built. Now, reinstatement of the specified depth would have cost £21,500 approximately, and the claimant sought damages based on the reinstatement costs. The trial judge found that the sum was out of all proportion to its benefit and refused, awarding instead £2,500 for loss of amenity.

The claimant appealed to the Court of Appeal, and the claimant undertook to spend the reinstatement costs so the £21,500, on actually rebuilding the pool.

He succeeded in the Court of Appeal, but the House of Lords reversed that decision.

So that's how it all arose.

We say that Ruxley is therefore directly contrary to the PCR's case. Let me explain why. Because the £21,500 was the claimant's subjective valuation of proper performance, measured as his willingness to pay for it, backed up by an undertaking to the court to spend that amount on reinstatement. But his claim for that sum failed because it was not objectively reasonable. So that's all apiece with our submissions on the need for an objective approach.

Now, my learned friends, of course, rely on the £2,500 awarded for loss of amenity. And it's true that the House of Lords approved that payment obiter, but I'm not relying on the fact that it's obiter for these purposes. But the key point here is that their Lordships' speeches and subsequent authorities make clear that awards of that nature are directed to a specific category of contractual claim, namely where the point of the bargain, or a point of the bargain, is for promises that are not purely commercial -- so contracts which are not purely commercial, but which have as their object the provision of enjoyment, comfort, peace of mind or other non-pecuniary --

THE CHAIR: The holiday cases.

MS DEMETRIOU: The holiday cases.

And so, let me just show you a few passages, if I may, in the judgment. So if we start at page 277. This is in Lord Bridge's speech. And if we go to around letter E:

"In some minor respect the finished work falls short of the contract specification. The difference in commercial value between the work as built and the work as specified is nil. But the owner can honestly say: 'This work does not please me as well as would that for which I expressly stipulated. [And I underline those words.] It does not satisfy my personal preference. In terms of amenity, convenience or aesthetic satisfaction, I have lost something."

So we're looking at contracts, the purpose or a purpose of which, is to satisfy

a personal preference. And then if we go forward to page 284, please, at letter B, and this is in Lord Mustill speech. My friends rely particularly on Lord Mustill. But if we go to letter B to page 284:

"Yet the householder must surely be entitled to say that he chose to obtain from the builder a promise to produce a particular result because he wanted to make his house more comfortable, more convenient, and more conformable to his particular tastes [not because he had in mind that the work might increase the amount he would receive if he sold the house]."

And then, finally, page 298. Letters A to B at the top of the page. This is in Lord Lloyd's speech:

"Addis v Gramophone established the general rule that in claims for breach of contract, the plaintiff cannot recover damages for his injured feelings. But the rule, like most rules, is subject to exceptions. One of the well-established exceptions is when the object of the contract is to afford pleasure, as, for example [the holiday cases, as you've put to me, sir]."

And subsequent authorities also make clear that Ruxley damages are concerned with that case. In other words, the case of an object of the contract being to give pleasure or peace of mind, or to provide amenity, where that's one of the things that the parties are contracting to provide, that that's part of the bargain.

And let me just briefly show you one example of a subsequent authority. It's Farley v Skinner in the House of Lords, and we see that starting at page 307, and briefly, the facts -- we can see from the headnote -- were the purchaser of a house engaged services of a surveyor, and specifically asked the surveyor to ascertain whether the house would be affected by aircraft noise, and the surveyor said "no", and he was negligent in saying no. The claimant then discovered that it was affected by aircraft noise, but he didn't sell the house and the judge awarded him £10,000 for

discomfort. The Court of Appeal reversed that and the House of Lords then allowed the appeal.

But let me just show you what Lord Steyn said. If we go to page 323 in the bundle. He considered, at letter F --

THE CHAIR: Just give me the page number again.

MS DEMETRIOU: 323. So letter F, Lord Steyn considered Ruxley. You can see that he begins to consider Ruxley at letter D, paragraph 21.

THE CHAIR: Yes.

MS DEMETRIOU: And if you see at F, he says:

"It is sufficient for present purposes to mention that for Lord Mustill, the principle of pacta sunt servanda would be eroded if the law did not take account of the fact that the consumer often demands specifications which, although not of economic value, have value to him."

So it's a point about this being the purpose of the contract pacta sunt servanda.

He then says, further down the page:

"Labels sometimes obscure ... I do not therefore set much store by the description 'consumer surplus'. But the controlling principles stated by Lord Mustill and Lord Lloyd are important."

And then just going forward, please, to page 325, he states the test as follows, at letter C:

"There is no reason in principle or policy why the scope of recovery in the exceptional category should depend on the object of the contract as ascertained from all its constituent parts. It is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind."

Now, some of the subsequent cases talk about major object of the contract. Some of them say possibly just an object of the contract, but that doesn't matter. The rationale,

the point that matters, is that the rationale for Ruxley damages is that the claimant is deprived of a personal interest for which they have specifically contracted. So fulfilment of that interest was part of the bargain. We say that's not relevant to competition claims. It's a purely contractual principle and it's not relevant to this claim because, pausing here, the PCR cannot say that non-paying subscribers did not get what they paid for when, by definition, they paid for nothing at all.

THE CHAIR: Just a moment.

MS DEMETRIOU: And so we say --

THE CHAIR: Just one second. (Pause)

MS DEMETRIOU: Yes.

THE CHAIR: Yes.

MS DEMETRIOU: And so we say that Which? has, on proper analysis, identified no support for its assertion that foregone consumer surplus should be recognised as a form of non-pecuniary loss in tort. It has no realistic prospect of showing that English law should take what we've called that revolutionary step, and it would be revolutionary. So those are our submissions on the law.

I now want to very briefly address the strike out test. I can do that quite quickly because the test for strike out is common ground. We can take it from the oft cited Easyair judgment, which you see in the authorities; begins at page 518. But we can see the test set out by Mr Justice Lewison, as he then was, at page 522. If I just ask you to turn that up. This will be familiar to the Tribunal. Paragraph 15 sets out the principles. That was a claim for summary judgment but it's the same standard on a strike out.

Can I draw attention to some of the principles. The first point:

"The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success."

Second point:

"A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable."

Then we see, at paragraph 6 further down the page, that a question should be left to trial if:

"... reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

And our point is that we're not within that territory, because although the PCR says that the Tribunal should wait until a trial, it's not actually identified any facts that might become available that would change that analysis. So we are within the territory of the next subparagraph, subparagraph 7. And let me just read that:

"On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it an argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the [issue]

of construction."

We say that we're firmly within the grasp the nettle territory because the PCR, as I say, has shown us no facts that are going to change. This really is a purely legal question. I said I was going to come back to Bittylicious. May I do that quickly now?

THE CHAIR: Yes.

MS DEMETRIOU: That's page 1989.1 of the bundle, behind tab 52.1. It's a recent judgment of the Court of Appeal, as I said. If we take it from page 1989.3, paragraph 6:

"I asked Mr John Wardell KC, leading counsel for the representative, at an early stage ... how the representative could possibly claim hundreds of times more than the value of the assets that the defendants had allegedly damaged. ... [not able] to give any answer. Nonetheless, the representative argued that the Tribunal ought not to have limited the claims of the sub-class B holders at the summary judgment stage. As Mr Wardell put it orally, evidence was required as to 'precisely what BSV is, how unique it is, whether or not there is a substitute, [and] how reasonable was it to hang on to the coins after ... the delisting'. Moreover, Mr Wardell introduced a new argument that all the sub-class B holders wanted was to be able to argue at trial that their damages should be assessed as at that date. Presumably that was an argument that they should be compensated by the difference between BSV's putative value at that date, had it become a top-tier cryptocurrency (like Bitcoin), less its actual value at the date of trial.

So you can see the argument that's put is this needs to wait till trial because there are facts that need to be determined.

But then if we go to the next page, we see what the Court of Appeal said, at paragraph 13:

"... decided that the representative's appeal must fail on both points, because it is clear

now, without a trial, that those sub-class B holders who knew of the delisting events could have mitigated their loss by divesting themselves of BSV on the basis that there was an available market of substitutable cryptocurrencies."

So no need for a trial. And then we see, at page 8, paragraph 30, the court saying that:

" ... the Tribunal said that the loss of chance analysis was not applicable here. That was not a fact-sensitive question that needed to await a full trial."

And then finally, paragraph 37:

"I agree with the Tribunal's approach [as] to the legal position. There was no need for a trial as to whether there were suitable substitutes for BSV ..."

And then again at 39, this is not a fact sensitive question that needed a full trial.

Now, of course every case is different but it shows, in a recent competition case, the Court of Appeal endorsing the Tribunal's decision to strike out a claim that was not reasonably arguable, even though in that case, the claimant did at least attempt to identify some facts that might be available at trial that might move the dial. We don't even have that here, so we are a fortiori. None of our submissions turn on the facts at all. No part of our submissions question the PCR's factual or counterfactual case. Our case is much more fundamental. We say there's no realistic prospect that the PCR will establish that this is an actionable head of loss at all as a matter of law.

We say that if the Tribunal does not grasp the nettle now, there will be significant wasted costs and time. And this is my final point. Can I remind you of what Mr Hughes says. So that's in the B bundle, tab 5, page 139. I think you saw this yesterday, but let me just remind you of it for these purposes.

THE CHAIR: Yes. So page 139?

MS DEMETRIOU: Of the B bundle.

THE CHAIR: Yes.

MS DEMETRIOU: This is the "Proposed methodology to assess harm to Non-Paying Subscribers".

THE CHAIR: Yes.

MS DEMETRIOU: And what he's saying, at 5.3.1, is that he will have to explore the extent to which, in the counterfactual, there would be more free storage. And then over the page, 5.3.3 to 5.3.4, you can see that consistently with how the loss has been pleaded in the counterfactual, Mr Hughes's methodology involves establishing --

THE CHAIR: Sorry, just bear with me a moment.

MS DEMETRIOU: Sorry.

THE CHAIR: Just a second. 5.3.1 was the first paragraph you took me to.

MS DEMETRIOU: Yes. And then I'm taking you to 5.3.3 over the page and 5.3.4.

THE CHAIR: Yes.

MS DEMETRIOU: What those paragraphs say, in a nutshell, is that consistently with how the claim's been pleaded, Mr Hughes's methodology involves establishing the subjective valuations of each individual class members.

5.3.5 accepts that this means that not all non-paying subscribers will have foregone consumer surplus. You've got to try and distinguish those who have from those that haven't, and 5.3.6 he says that he'll need to:

"... gather information on iOS Users' willingness to pay according to their requirements and the options open to them in the Counterfactual ... This is a matter to be explored through market research. [And disclosure applications as against Apple.]"

My short point is that this exercise is entirely separate, it appears, to the methodology for establishing pecuniary loss on the part of consumers who've paid for iCloud services, and it's an important reason why the Tribunal should grasp the nettle now, particularly if it certifies this claim in light of the very serious financial troubles that LCM

is subject to and the doubts that remain as to its ability to fund these proceedings. It makes eminent sense, if this is a point which we're right on, on the law, to strike out the claim now to avoid all of this additional cost. And one would have thought that that would be something that the PCR and its funders would welcome, given their precarious situation.

If you just bear with me for one minute, see if there's anything I've forgotten. (Pause) I think there was one point I wanted to come back to, which is the free storage point; I said I'd come back to it.

THE CHAIR: Yes.

MS DEMETRIOU: Can I just explain why we say that depends on subjective valuation?

THE CHAIR: Yes, that would be helpful.

MS DEMETRIOU: So, take a situation where somebody in the factual world, a consumer gets five gigabytes of free storage, so it doesn't pay for anything additional, and subjectively values that storage at £2.

THE CHAIR: Yes.

MS DEMETRIOU: So they've got it for free, but they subjectively value it for £2. In the counterfactual, the argument is that absent the abuse, they would have been able to make use of more free storage.

THE CHAIR: Yes.

MS DEMETRIOU: So let's say that in the counterfactual, that consumer would have got ten gigabytes of free storage, and valued that at £4.

THE CHAIR: Yes.

MS DEMETRIOU: As we understand it, the claim seeks to subtract the £2 from the £4, to say, here's the loss. It's £2, so it's the difference --

THE CHAIR: Sorry, I didn't catch that.

MS DEMETRIOU: Sorry, it's the difference between the subjective valuation of the free storage in the factual --

THE CHAIR: Are you getting this £2 and £4 from something in Mr Hughes's report?

MS DEMETRIOU: No, but we don't know. Mr Hughes hasn't explained --

THE CHAIR: Well, that's the point. That's all I was saying was that, at the moment -- and that's exactly why I pointed to the fact that there's no reference.

MS DEMETRIOU: Yes, it's --

THE CHAIR: So sorry, can I just finish the point?

MS DEMETRIOU: I'm so sorry.

THE CHAIR: That's exactly why I made the point, that there's no pleaded reference to valuation by the consumer when they are dealing with this question of getting more storage space. Whether it's in relation to those who've paid for it, or in relation to those that haven't paid for it. And Mr Hughes quite candidly says, "this is something I'm going to have to look at".

MS DEMETRIOU: Yes.

THE CHAIR: So at the moment, all we do know, because Mr Woolfe confirmed it yesterday, is that in some way or other, this factor of extra free storage space has been built in to their claim for the actual losses of 1 billion and 168 million.

MS DEMETRIOU: Yes.

THE CHAIR: Mr Hughes has somehow built it in, which is why I understood there was not a separate claim for it. But the point I was -- so I quite take your point, that if they were going to say that the way they calculate loss, in relation to free storage, is based on differentials about subjective valuation, you would have the same objection to it.

MS DEMETRIOU: Yes.

THE CHAIR: All I'm saying is, at the moment, I have no idea, and the reason why I suggested it might conceptually be different is because you could envisage

a situation where it is possible -- with difficulty, but nonetheless objectively -- to value the worth of ten free gigabytes as opposed to five free gigabytes. It may be done by reference to comparators, where that makes the difference between whether you pay for something or you don't pay for something. But if it's that kind of exercise, it didn't seem to me to be objectionable for the reasons that you gave about subjective valuation. That's all I was saying. Because they haven't done a calculation for it, as a separate head of loss, we don't know anything more about it.

MS DEMETRIOU: No. Sir, can I try and respond just briefly to that?

THE CHAIR: Yes.

MS DEMETRIOU: So, I would -- and I say that subject to this proviso -- which is that I would like to hear what actually they say is the proper approach to this and return to it and reply, because it can't be right that through obfuscation in the pleading, they managed to escape a strike out, if actually it's not a proper claim in law. So I make that point by way of proviso.

THE CHAIR: Sure.

MS DEMETRIOU: Now, we take the point as follows: so we completely accept that for conventional loss -- and you see this earlier in the pleading -- you will have people who exceeded the free storage limit in the factual world, and so paid something for additional storage in the factual world. And if the PCR succeeds in its claim of abuse, they will be able to show that in the counterfactual world, they shouldn't have paid anything, because they would have been within the free storage limit, which would have been larger in the counterfactual world. That's their conventional loss claim, and we're not challenging that. So those are people who have lost out, because they've had to pay for, say, seven -- say the free storage is five gigabytes. They've paid for an additional two gigabytes. In the counterfactual, there would have been ten gigabytes free. So they've paid something they shouldn't have paid, and we

accept that that's a conventional loss claim.

THE CHAIR: Right.

MS DEMETRIOU: We are addressing the paragraph 137.2 and 138 of the claim, which is different from that. Those are people who have not paid for any iCloud services in the factual.

And so, what we apprehend is the basis for the claim, is the difference between the subjective valuation and the factual of the iCloud services, which they receive for free, and their subjective valuation in the counterfactual of the larger iCloud services they would have received for free. That's my £4, £2 point.

THE CHAIR: Yes.

MS DEMETRIOU: But to put the point another way, what you have in this scenario are people who didn't pay for storage in the factual world, and they didn't pay for storage in the counterfactual world, and we are unable to see that unless you introduce the concept of subjective valuation, how you arrive at any loss at all, because it's a net zero sum game. They didn't pay for free storage; they got it free. They didn't pay for larger amount of free storage; they got it free. So unless you are introducing these subjective concepts, we don't see how you can confect any claim at all in 137.2 or 138.

THE CHAIR: As I understand it, what you're really saying is there can't be a way to objectively value a loss here, and that is because they never paid for anything, and that's really your point.

MS DEMETRIOU: And they wouldn't -- the second point, they didn't pay for anything, and they wouldn't pay for anything in the counterfactual.

THE CHAIR: Yes. Just a moment. (Pause)

MS DEMETRIOU: And so in both cases they would have got something -- free storage whose market price was zero, that's what they would have got in both cases. And so we say unless you introduce subjective valuations, you just don't get any loss. And

that's how we've tackled it.

THE CHAIR: Just a moment. (Pause)

Is there anything further you wanted to add?

MS DEMETRIOU: No.

THE CHAIR: Professor Smith would like to come back.

MS DEMETRIOU: I thought I'd got away from Professor Smith.

PROFESSOR SMITH: With apologies, Ms Demetriou, but I would like to come back to the diagram on page 2404 of the authorities bundle.

MS DEMETRIOU: Sorry, I didn't quite hear the page number.

PROFESSOR SMITH: It's 2404.

MS DEMETRIOU: Yes.

PROFESSOR SMITH: The page before the paragraph to which you refer. (Pause) I'm trying to understand why it is, in your submission, that consumer losses of a certain kind are not recognised in English law as liable to damages, but other kinds of losses are. We could look at this diagram as a diagram representing the demand for ordinary consumers -- final consumers, you called them widgets. And what you said is you don't recognise area B as an actionable loss, because it's subjective, and also it varies, in an unknown way, between the objective facts -- at a high price we have a certain level of consumption, and as the price goes down, more consumers come into this market, because they're now willing to pay the lower price.

MS DEMETRIOU: Yes.

PROFESSOR SMITH: Suppose, however, the widgets are not a good of interest to final consumers, but a good of interest to businesses of some kind, traders.

MS DEMETRIOU: Yes.

PROFESSOR SMITH: And these traders are a heterogeneous bunch, and some of them can make a profit by buying these widgets and using them for their business at

a higher price of P2, but there are other potential buyers, who can only make a profit, maybe they're in different business, or their costs are high, can only make a profit if the price is low.

MS DEMETRIOU: Yes.

PROFESSOR SMITH: So we're looking at a demand curve now from businesses --

MS DEMETRIOU: Yes.

PROFESSOR SMITH: -- for buying widgets, some of whom are willing to pay £10, and the willingness to pay is an objective thing -- they're willing to pay because they can make a profit at £10. Others are only willing to pay £5, because that's -- the objective fact -- the price at which they can make a profit. And no doubt there are some in between who can make profits by buying widgets at £7, and no doubt they're making more than the minimum requirement of profits to attract them into the market.

MS DEMETRIOU: Yes.

PROFESSOR SMITH: They're making what economists would call some excess profits. They would have come in at a price of £7, so they're happy to come in at a price of £5.

MS DEMETRIOU: Yes.

PROFESSOR SMITH: Now, without going into any detailed discussion of how we would compute the profits of those marginal traders who come into the market when the price falls --

MS DEMETRIOU: Yes.

PROFESSOR SMITH: -- and there are different -- they're a heterogeneous bunch -- their willingness to pay for widgets varies, from ten down to five, because they're heterogeneous businesses. Do I understand from you that this would provide an actionable case for damage, that these traders, who were excluded from the market by the high price, can come into the market at the lower price, could claim damages,

because their businesses were harmed by the excess price?

MS DEMETRIOU: Yes. So if -- and this is the distinction made in paragraph 133, which expressly recognises that there can be claims for loss of profit -- a business can show that the widget in the real world was £10, and it didn't buy it, because it was too high, but it would have bought it if -- absent the abuse -- the widget were £5, and they would have bought a widget at £5 and then used that to make something else, which would have led to them making profits, and we accept that that's a recognised -- that's a conventional form of loss, that's recognised by the law.

Now, just to finish up on your question, if you have a business that would not have bought at £5, but would only have come in if it had been £3, lower than the counterfactual price, obviously they've suffered no loss, because they haven't lost any profit. Now, that means, of course, that in one sense, you are, there, looking at willingness to pay. So we're not saying that, in that sense, you can't measure willingness to pay, you can ask yourself, well, would objectively this buyer have come in at £5 or £3?

So, the loss you're looking only arises -- the loss of profits -- if somebody can show that, on the facts -- the business can show on the facts -- they would have come in if the price had been at £5, would have bought those widgets and would have made a profit. And those are all objective questions. They're not about the value that the business places on the widget.

PROFESSOR SMITH: But the objective evidence might be that some economist has estimated a demand curve for the widgets as goods being supplied to these producers. It's not necessarily that you've gone and spoken to 500 individual producers to estimate their losses.

MS DEMETRIOU: No, but this isn't a point about proof. So there may be different ways of estimating what the price would be absent the abuse, and I accept that. There

may be all sorts of complicating ways of estimating it. But then that's the objective measure. So if the widget had been £5, looking at whatever economic evidence you want to, or factual evidence to construct that counterfactual price, if the widget would have been £5, then you ask yourself: what loss have people suffered? What you can't do is say, well, different people would have valued the widget differently, and that leads to different measures of loss for different people.

PROFESSOR SMITH: But in the business case, it just isn't a matter of objective fact. You would expect there to be some businesses who are making bigger profits --

MS DEMETRIOU: Absolutely.

PROFESSOR SMITH: -- from the £5 price, who weren't willing to come in at the £10 price, now come in at the £5 price. Some of them are making bigger profits than others --

MS DEMETRIOU: Absolutely.

PROFESSOR SMITH: -- and that's not a barrier to estimating the total damages in this case.

MS DEMETRIOU: No, that's not a barrier at all, because you're there bringing into account objective factors relating to their situation. So, what you're doing is you're measuring objectively what the market or the counterfactual price is; you're saying that's £5.

PROFESSOR SMITH: But what's objectively different about estimating a demand curve for -- sorry to use the jargon, for intermediate goods going to firms, and estimating a demand curve for consumers. Why is one more objective than another?

MS DEMETRIOU: Well, what you're doing is -- the evidence is being used for different things. And so it's not -- our argument here on the strike out is really an argument of law, rather than anything about proof or economics. And so what we're saying as a matter of law is that it really would be revolutionary -- I keep saying that, but it would

be, as there is no other case establishing this -- for somebody to be able to claim for breach of statutory duty damages based on their subjective valuation of a product. That's completely counter to how the law operates.

We're not saying that you can't measure willingness to pay; obviously you can carry out a survey. We're saying that willingness to pay is not recoverable in law.

So put it this way: let's say A agrees with B to buy an apple for £0.50, and B doesn't deliver, and A never pays, by definition, in economic terms, A values it at more than £0.50, or A wouldn't have agreed to buy it. But if the market price is £0.50, then Apple suffered no loss. A trader who could have sold at £0.60 has made a loss; that's really the difference.

So you can't say, well, I value this apple at more than £0.50, therefore I can claim more for it, because of my evaluation. And so that's really the point of law.

PROFESSOR SMITH: I'll avoid the temptation to comment about apples and apples.

MS DEMETRIOU: Fair point.

PROFESSOR SMITH: But if I can reread paragraph 133 on the next page --

MS DEMETRIOU: Yes.

PROFESSOR SMITH: -- in the light of what you've very helpfully clarified. You're pointing out that this paragraph says, the diagram could apply to producers, and producers can claim reparation for this loss of profit. And section 3 below will illustrate how to quantify this.

MS DEMETRIOU: Yes.

PROFESSOR SMITH: "Other customers" -- or the diagram could have applied to final consumers, they are the customers -- and "if they do not purchase ... they fail to enjoy". So they're the description there of the effect of the higher price on consumers. "Applicable legal rules may provide [et cetera]".

MS DEMETRIOU: Yes.

PROFESSOR SMITH: And what you're saying is the sentence about producers triggers an applicable legal rule that allows a damages claim to be made. And the next sentence, the parallel sentence for consumers, says, unfortunately, in English law, the exactly parallel claim cannot be made for end consumers.

MS DEMETRIOU: No. So we're not saying that there's a distinction between direct purchasers and end consumers. We're saying in both cases the law requires damages only to be recovered on an objective basis. So we're not drawing a distinction between direct and indirect purchases here.

What this stylised example -- I mean, you can see at the beginning, some customers use the product in question for their own commercial activities, so a direct purchaser. Well, not necessarily, for example, to sell it on or to manufacture other goods. And so where they don't buy at price P2 or buy at less, they forego the profit they would have made, so that's all conventional loss.

PROFESSOR SMITH: Yes.

MS DEMETRIOU: They can claim reparation for this loss of profit. And a consumer would be able to do that too. So, if a consumer has paid too much for a product, they can claim too much in the sense that the price they paid is lower than it is higher than it would have been in the counterfactual, or they can claim lost profits if they would have put that to some use and made a profit further down the line.

But the point here is -- and it applies both to direct and indirect purchases -- that if the claim is based on foregone consumer surplus, which is connected with the subjective valuation of the purchaser, be they direct or indirect, that's not recovery which is mandated, and so legal rules may, and we emphasise the word "may", provide for that, but do not have to. And we say it's anathema to English law. And so English law does not provide for recovery of such damages.

MR CUTTING: Thank you. (Pause)

THE CHAIR: Thank you very much indeed. I think let's make a start, Mr Woolfe. (Pause)

Submissions by MR WOOLFE

MR WOOLFE: Thank you, sir.

In terms of, submissions, I'm going to begin by making certain preliminary points, picking up on some submissions made this morning.

Then I'm going to take you back to the pleadings and briefly into Mr Hughes's evidence --

THE CHAIR: Yes.

MR WOOLFE: -- to identify what we see the head of loss is, and also our position as to how that head of loss is to be valued and quantified, and we do say, throughout, it's important to keep distinct the question of what is the head of loss, and secondly, how it is to be quantified.

As we understood, Apple's original attack on us, it was both that the head of loss is not allowable and that there is not a sufficiently objective way of quantifying it. But, in any event, those are two distinct points, and Apple has since tended to blur them together.

Secondly, I'm going to go take you through the authorities, which we say support the proposition that our pleaded head of loss, which, as I'll show you, is that the non-paying consumers have failed to receive a service that they would have received in the counterfactual. We say that is a recoverable loss, and that loss can appropriately be valued by reference to the consumer surplus. The authorities I will take you to for that are Liffen, BritNed and Ruxley in particular. It's important to go to the authorities and not simply read McGregor as if it were a statute.

Thirdly, I will address you briefly, much more briefly, on the other authorities that have

been mentioned.

Fourthly, I think, I will then address you on full compensation.

Fifthly, I'll make some residual points about the pecuniary and non-pecuniary loss distinction. Then I'll address the strike out test at the end.

So, my preliminary points, I think I've got three.

First point is that it was observed that there aren't any authorities previously dealing with this point in the context of competition damages claims. As to that, first of all, we are still in relatively early days of consumer claims in this jurisdiction. But more to the point, it's actually quite hard to find people who haven't bought something normally when you think about it, whereas this case with, the Apple ID, it's people are signed into iCloud automatically, who make some use of it. We're in a situation where you can actually identify the people who haven't bought. Therefore, in a sense, the game is worth the candle here, in a way that it may not be in another case.

Second preliminary point. It was said this morning, essentially there are three limbs to pecuniary loss. First of all, as I wrote them down, a loss of money, secondly, damage to an asset or thirdly, loss of profit. You weren't taken to any authority that said that those are the three and only three heads of pecuniary loss. We say that that's not exhaustive of what constitutes pecuniary loss, and, in particular, that's where we rely on the authority of Liffen. We say that non-receipt of a service or benefit in kind is also a form of pecuniary loss, where that service or benefit in kind is something that can be valued in monetary terms.

My third preliminary point does relate to the diagram.

THE CHAIR: Sorry.

MR WOOLFE: The third preliminary --

THE CHAIR: Does relate --

MR WOOLFE: To the diagram.

THE CHAIR: The diagram, yes.

MR WOOLFE: Which is at authorities bundle page 2404.

THE CHAIR: Yes.

MR WOOLFE: And if I perhaps take you to that. I have a few points to make about it. First of all, we say, this does show that the dispute, as Professor Smith rightly observed, is about area B on that diagram. And, we say, it does show that the loss is real. That area of that diagram shows services not being provided to people, services which they would otherwise value and wish to purchase. And, we say, that fits with -- and I'll get to the case of Liffen -- that non-receipt of the relevant good or service is the nature is the very nature of that loss. You obviously have to take account of anything that's paid for that good or service in the counterfactual.

Second point is to say this diagram shows that this really is about valuation in money terms. Area B is inherently a monetary valuation because it's multiplying a price by a quantity.

Third point to note is that this is a classic formulation of the harm caused by monopoly pricing and market power. It's absolutely standard in many economics textbooks, nothing novel about it or unusually peculiar to the European Commission. And the control of the harm caused by monopoly and market power is precisely what competition law seeks to prevent.

In that regard, if we just go briefly over the page. You'll note that this explanation relates to both Article 101 and Article 102.

THE CHAIR: Sorry, which particular --

MR WOOLFE: If you just go over the page to paragraph 129.

I'm simply observing that the diagram was put forward as an explanation of what is happening, in respect of prices being raised, either as a result of Article 101 or Article 102.

And you can see that also if you look at paragraph 134, the first two sentences.

THE CHAIR: Just a moment. (Pause)

Yes.

MR WOOLFE: It was said this morning that, somehow, loss of consumer surplus might be allowable in the peculiar category of claims for breach of contract in contracts relating to holidays and so forth.

We submit simply it would be bizarre for English law to take the position that this kind of head of loss is allowable in that context in terms of contract, but is somehow not allowable in a claim for breach of competition law when it is of the essence of the harm caused by anti-competitive conduct. And I'll show you what Mr Justice Marcus Smith said about the importance to have regard to the statutory purpose, the objects of the tort you're looking at.

The final point, I was going to make about the diagram on page 2404 is simply to observe that the demand curve, or demand line in this case, it is derived in some sense from the subjective wants and desires, if it's consumers we're looking at rather than businesses. It is ultimately derived from their subjective wants and desires. But that does not mean that it itself simply represents their subjective wants and desires. It represents the price that they would be willing to pay to fulfil those subjective wants and desires. In that sense, it is a monetary valuation. It's a willingness to transact in the market if a supplier were available to sell to them at that price.

Thank you.

With those preliminary points, if I can take you to our pleading. So the Claim Form is at core bundle, tab 3, and I'm taking you to page 104. Actually can I, because there's some discussion, I'll take you back to 103 for a moment. Page 103, paragraphs 135 and 136 where we plead harm arising to paying subscribers.

THE CHAIR: Yes.

MR WOOLFE: 137 to 138 to non-paying.

And you asked Ms Demetriou, what is the difference between 135.2, where free storage is pleaded in respect of paying subscribers, and 137.2, where we plead free storage in respect of non-paying subscribers. Ms Demetriou's response was to say the difference is that these people have paid something, and we do accept that as a point. There is a genuine distinction between these two paragraphs.

In 135.2, the paying subscribers, in the factual they paid something for their storage. In the counterfactual, they would not have paid. What they received by the service is the same in both cases. The loss, therefore, doesn't consist in the loss of the service. Their loss does consist in the fact they paid, when in the counterfactual, they would not have paid. So --

THE CHAIR: Are you able to help on this point as to what is said, if anything, about compensation claim for lack of -- that they would have got more free storage? In other words, the 135.2, and indeed the 137.2?

What we were told yesterday is that this had somehow been built in --

MR WOOLFE: Yes.

THE CHAIR: -- and there is no separate claim for 135.2 and 137.2 as freestanding claims.

MR WOOLFE: In a sense they are -- can I deal separately with 135.2 and 137.2? I think --

THE CHAIR: Certainly.

MR WOOLFE: In terms of 135.2, there is no separate calculation of the loss in Mr Hughes's report. His method of quantification wraps up both 135.1 and 135.2, together.

THE CHAIR: Just a moment. Yes.

MR WOOLFE: As a matter of pleading, we -- in a sense, 135, we separately explain

that there are two situations: one, where you would have paid something in the counterfactual, and one where you would have paid nothing in the counterfactual. But we intend to draw those together at paragraph 136 to say they've suffered loss and damage to the extent the amounts they paid for iCloud exceeded the amounts, if any, that they would have paid in the counterfactual.

You can itemise them separately as separate heads of damage but we've pleaded both, here at 135, but in a sense, they amount to the same thing. Because if in the -- in either case, the measure of damage is simply what you would have paid in the counterfactual -- what you did pay in the factual less what you would have paid in the counterfactual -- and what you would have paid in the counterfactual might be zero.

So if we take an example of somebody who stores 20 gigabytes' worth of photos in their iCloud account, that's more than the 5 gigabytes that is provided for free, and it falls within the 50-gigabyte tier. At the moment, they have to purchase the 50-gigabyte tier. And if it were found that, in fact, there would have been 25 gigabytes of free storage, the result would be that that person, hypothetical person, would not have had to pay anything for storage in the counterfactual, and therefore their loss is the entire amount they paid in the factual for buying the tier of storage they in fact purchased.

If it were found, if you had somebody else who had 30 gigabytes of photos, they still would have to purchase something in the counterfactual, but it would have been cheaper than they in fact paid.

Those are the two scenarios that we're laying out at 135.

THE CHAIR: Just so I understand, how does what you've just said fit into the actual calculations?

MR WOOLFE: Okay, so if I can take you to that then. So if you go to Mr Hughes's report, bundle B, tab 5. If we take you to page 148, table 6.6 sets out -- this is his comparator charging method. Table 6.6 sets out his chosen comparator, iDrive,

iDrive's storage tiers and the prices associated with them and that includes, for up to 10 gigabytes, a zero charge. And he has some figures as to the share of iDrive users who fall within those bands.

If we go to table 6.7 at the top of page 149, you can see, in this table what he's doing, in the grey bar, he's calculating an average weighted price. So he's taking price bands on the left-hand side; on the right-hand side he's taking the counterfactual price based on iDrive prices for those bands, which includes the ones which are free. And you'll see there he's attaching some figures for the share of iCloud users who fall into those bands and therefore he's deriving a weighted average price that includes the totality of the price that would have been paid. It includes those, in fact, who would, in the counterfactual, have paid nothing and then that feeds its way into his calculation below at table 6.8.

THE CHAIR: Right.

MR WOOLFE: So there's a single unitary calculation which encompasses both 135.1 and 135.2. You could, if you wanted, try and separate out that calculation to two parts, and that might be in issue, but in a sense that's how he's done it.

THE CHAIR: Right.

MR WOOLFE: Is that --

THE CHAIR: It's not as if they're seeking to strike out 135.2 on your principal claim. I just wanted to understand. What about 137.2?

MR WOOLFE: Sir, I'll come down to 137 -- can I come to 137 as a whole?

THE CHAIR: Come to it when you want. Yes.

MR WOOLFE: Thank you. Now, 137 pleads how loss arises to non-paying subscribers -- class members who did not, in fact, pay for iCloud. We distinguish -- again, we set out two cases for the sake of clarity. We say, in the first case, if their valuation was higher than the competitive price that they would have

purchased the services or the second eventuality, they would have made use of a greater quantity of free storage.

Now, in either case, what we are asserting is the loss, is the fact that they did not receive, in the actual, services they would have received in the counterfactual. (Pause)

The difference between the two and the reason why we then go on to paragraph 138 is that obviously the former category, people who didn't pay in the actual but we say would have paid in the counterfactual, have to give some credit in the calculation of loss for what they would have paid in the counterfactual.

But both 137.1 and 137.2, they have not received a service they would have received. The only difference is that one would have paid in the counterfactual, the other not.

In either case, this is where I come to 137.2, the loss in question consists of -- the primary loss consists in their valuation of the storage. That's true for both 137.1 and 137.2. But in the case of 137.1, there's some credit needed to be given for the counterfactual price and 137.2, no such credit needs to be given. And that's what we are setting out at 138.

If I can focus very briefly on the way that Mr Hughes then would seek to quantify that loss. If you go back to bundle B, tab 5, page 140.

Yes, I'll also come back to you at this point, before lunch, about that query about Mr Hughes's report, from yesterday. I'll deal with that.

THE CHAIR: Oh, yes, on whether it's half the price (inaudible).

MR WOOLFE: Yes. Yes. So go to paragraph 5.3.2, which starts back on page 139. It sets out the -- this is looking at this essential question.

At the top of 140, he says:

"The central issue to be explored is to identify those iOS Users whose willingness to pay exceeds the competitive price absent Apple's Conduct, and to seek to estimate

this gap, which is commonly referred to as the consumer surplus."

Now, Apple, I think, are trying to say not only that -- they're trying to characterise this measure of loss as being somehow subjective. So in their Reply -- that's paragraph 33 of their Reply, I'll give you the reference, but you needn't go there, A, tab 4, page 131 -- they suggest that it's the willingness to pay element they object to. They don't object to the use of the counterfactual market price. It's the top line, the willingness to pay. And they say that this is a "subjective measure of economic value"; that's a quote from their Reply. And then you've heard this morning they use that epithet of subjective a great deal, both in the skeleton arguments and in submission.

Now, we submit that willingness to pay -- this is the point I made in respect of the diagram -- although it may arise from a consumer's subjective desires, it is not in itself a subjective desire. It is a willingness to hand over cold, hard cash up to a certain amount to fulfil those desires and a market wide demand curve similarly reflects consumers' underlying subjective desires but that does not mean it is somehow a subjective measure of demand.

Now, Apple insists that the measure should be an objective one based on market price, but that would lead to absurdity. If you take the actual market price, we could say these consumers have lost 10 gigabytes of storage that they otherwise would have --

THE CHAIR: (Inaudible)

MR WOOLFE: -- they've lost 10 gigabytes of storage that they would otherwise have received. And we could say, well, those 10 gigabytes should be valued at the actual prices that Apple today charges for 10 gigabytes, or the relevant tier. But that would be to grossly overvalue what the consumers have received and we don't attempt to do that.

Alternatively, Apple say --

THE CHAIR: I'm sorry, I don't understand that point.

MR WOOLFE: I'm saying that these consumers have (inaudible) lost the service which they would otherwise have received, but for the conduct. If we were to use -- and what Apple says --

THE CHAIR: We're talking now about those who didn't pay?

MR WOOLFE: Those who didn't pay. If you were to say that they have not received 10 gigabytes of storage, we need to value that --

THE CHAIR: Free storage. You're back to the free storage, now, here are we?

MR WOOLFE: Well, no, it doesn't matter, sir.

THE CHAIR: Not necessarily. All right.

MR WOOLFE: They've not received 10 gigabytes of storage that they would have received in the counterfactual. Either that they would have paid for or that they would have got for free.

Valuing those at the actual market price, so what Apple currently sells those gigabytes of storage for, would be obviously wrong because it grossly overvalues the loss to those consumers.

Conversely, if you look at the counterfactual market price and say, "Right, well, in the counterfactual they would have had to pay £2 for that storage", that's the value, then you're always going to come to the conclusion that they've lost nothing because they -- in the counterfactual, they would have paid --

THE CHAIR: But that's exactly -- that is a matter of law is exactly the point that's being made against you.

MR WOOLFE: Yes, it is an absurd result because it means that you inevitably come to the conclusion these people have suffered no loss. But we've seen from the diagram that Professor Smith drew our attention to, this loss is a real thing. The law might choose to disallow it but saying, "Oh, you would look at the counterfactual

market price" that was suggested at one point this morning, is an absurdity. It's never going to achieve a sensible answer.

THE CHAIR: But then you've got to show that that is a proposition which is backed up by the law.

MR WOOLFE: Yes. Okay. I'm going to come on to that.

THE CHAIR: What you're saying now, effectively, is if that's the law, it's absurd. Well (overspeaking).

MR WOOLFE: I shall come on to that.

THE CHAIR: Yes.

MR WOOLFE: It was being said that, as I say in Apple's Reply, that willingness to pay is a subjective measure; somehow market price or counterfactual market price is a more objective measure. And that's what I was taking issue with there.

THE CHAIR: You're saying now it doesn't depend on subjective valuation, this calculation, for the way you have framed 137.1, you're saying, is not about subjective valuation.

Is that right?

MR WOOLFE: That's right.

THE CHAIR: So why does Mr Hughes say that some people would value it at £8 and some people would value it at £7, and other people would value it at £6, it depends on them.

MR WOOLFE: Because those valuations may differ between individuals.

THE CHAIR: So that's why he's saying it's subjective.

Well, what's the answer? I mean, you may be right that you say it is subjective, but actually the law does allow us to use that. I think that probably is going to be the main point. But if you're taking a prior point, which is this doesn't depend on subjective valuation of talk, I'd like to hear a bit more about it.

MR WOOLFE: I think it may actually turn on a slight ambiguity in the way people are using the term "subjective".

Subjective can mean relates to a subject, relates to a person. And if you look at European law, you refer to reference to subjective rights, by which they mean rights that belong to a person as opposed to general rights set out in statute. Subjective may mean that.

Subjective may mean "it depends upon my whims". And what I was seeking to say is that this reference to willingness to pay is something that ultimately is about money, and a willingness to hand over money.

THE CHAIR: All right. Thank you.

MR WOOLFE: Can I briefly give you the correction to Mr Hughes's report. It's paragraph 1.5.6, I believe, that you inquired about.

THE CHAIR: Yes.

MR WOOLFE: At page 100 of the supplementary bundle.

He says, just towards the bottom of that paragraph that:

"I assume the average willingness to pay is approximately 50 percent of the iCloud price."

THE CHAIR: Yes.

MR WOOLFE: But that doesn't match what he, in fact, does in section 6 of his report, where at paragraph 6.4.5, on page 153, he says he assumes that:

"... willingness to pay ... is on average the midpoint between the agreed price and the benchmark iDrive price."

And that's what he does in the tables.

Mr Hughes has confirmed it's a drafting error in respect of 1.5.6.

THE CHAIR: The midpoint is the correct thing.

MR WOOLFE: Well, it's the correct description of what --

THE CHAIR: The correct description of what he did, which makes sense because you've got -- that's the top and bottom. You've got the deemed competitive price on the one hand and the actual price on the other.

MR WOOLFE: Yes. That's right.

THE CHAIR: That's very helpful.

Is that a convenient moment?

MR WOOLFE: That is. And when we come back, I'm going to be turning to the authorities.

THE CHAIR: Before we do that, though, Mr Cutting has a couple of questions for you.

MR CUTTING: You might have been coming on to this, but just one other thought that's been prompted.

Given the Hughes analysis of lining up the range of customers and working out where their propensity to pay would be, is there a problem -- which, I think, Apple have put in my head, which maybe it shouldn't be there -- but does that mean that there's going to be a subset, possibly up to a half of the class, who wouldn't have an individual claim because their value would be below?

And are you going to deal with that in the class question at some point, please?

MR WOOLFE: I'll come back to you (inaudible). But it is inherent in Mr Hughes methodology. There are some people whose willingness to pay will fall below the counterfactual market price, and who wouldn't have purchased either in the factual or in the counterfactual.

MR CUTTING: Then are you going to answer the question about what that means for your class?

MR WOOLFE: Well, the short answer --

MR CUTTING: Can a class action be brought on behalf of people who individually would not have a claim? That's just the question.

MR WOOLFE: So in terms of what you need to do to get to award of aggregate damages --

MR CUTTING: No, I understand --

MR WOOLFE: -- it doesn't matter, because in a sense, these people, no loss applies. It never gets sucked into the award. You end up with the right figure in any event. There then would be a question of (inaudible) to arise on distribution as to whether or not it is possible to accurately identify those who would not have purchased in either eventuality, and somehow exclude them from distribution.

MR CUTTING: I don't think the issue here is whether there's a prior question, it's whether you've lumped into the class a bunch of people who actually don't have individual claims.

MR WOOLFE: I don't --

MR CUTTING: You don't need to give me an answer now, but that's gnawing away at me.

MR WOOLFE: Okay.

MR CUTTING: The other thing that was slightly gnawing away at me, which is a question for both sides -- and you might well tell me that, actually, if there was anything in it, it would have been in the documents, and I shouldn't raise this point -- but you said this morning there's no English precedent, but have both sides checked Australia and Canada for consumer surplus forgone-type cases and the missing area B on the curve --

MR WOOLFE: Um --

MR CUTTING: -- because those regimes are further developed in relation to this area of law. I just wondered whether there are cases where no one's looked, or whether you've looked and there's nothing there.

MR WOOLFE: When looking, I didn't do a comprehensive trawl, I would say, of either

of those, but nothing was popping up --

MR CUTTING: Okay.

MR WOOLFE: -- easily to hand. It may be there was something, and I missed it.

THE CHAIR: Thank you very much. 2.00 pm, please.

(1.05 pm)

(The short adjournment)

(1.55 pm)

MR WOOLFE: So I was going to turn to the authorities.

Before I do that, can I very briefly respond to give Mr Cutting the pith of my response to his question about the class definition?

You asked, are we encompassing people in the class who didn't suffer any loss? That's not the case because, we say, that everybody in the class would have had the right to use a larger amount of storage for free but for Apple's conduct, and that right to use it for free is sufficient damages, gist damages, as Mr Justice Marcus Smith phrased.

Even if only nominal damages in the sense of a payment of damages would flow from that, but they have a course of action and a property to be included in the class, even if they would never have been very interested in that extra free storage. Of course, those who are interested in the free storage would then have more than nominal damages. For that reason, I wasn't going to go there, but I'll take you to another case, the Mediana, which I'll come to in sequence, if I may. It's the one about the lightships.

So the authority, I'll take you to there now, Liffen, now the Mediana as well, BritNed and Ruxley. Liffen is in the authorities bundle, tab 10, page 105.

And I'll say at the outset, the proposition which I'm seeking to take from that case. The proposition that I am seeking to draw is that non-receipt of a service or a benefit in kind is a recoverable head of loss, and, indeed, is treated as a pecuniary loss.

For the facts, you can take them from the head note. It concerned a domestic servant who had suffered personal injuries, not in the course of her work, but separately, owing to a collision by a taxi driver. She had lost her employment as a result of that injury, and she was claiming for the loss of wages at £1 a week and loss of board and lodging, valued at 25 shillings a week.

At trial, what had happened was the trial judge had refused the damages for loss of board and lodging, because following the accident she had received board and lodging from her father. So, in a sense, there was a benefit that had occurred, and the question is, was that a collateral benefit that eliminated the loss of the board and lodging?

The judgments are very short. I'll take you to the judgment of Lord Justice Slesser, which starts on the next page, page 106 of the bundle. And he says:

"If the judge at the new trial comes to the conclusion that the plaintiff's contract with her employer was, as she alleges, that she should be paid a certain amount of wages in cash and given certain benefits in the shape of board and lodging in kind ... [that] being excepted from the Truck Acts ..."

So there's a factual question as whether or not this was, in fact, true.

"There is no reason why, in the assessment of damages, the loss of the board and lodging should not stand on the same footing as the loss in cash of the wages."

So the loss of the benefits in kind, the board and lodging was, in this judge's view, a pecuniary loss. And, as you recall, I said at the outset, my learned friend said there were three categories of pecuniary loss. There was loss of money, damage to an asset and loss of profit. But this is another category. There's a loss of a valuable service or benefit in kind, and that is a valid form of loss.

And then he goes on to decide, essentially, that the fact that she's received money from her father is irrelevant. He finds it's a collateral benefit, although he doesn't use

that language. And he goes on to say:

"[There] is no reason why she should not be heard to say that her loss of the board and lodging previously provided by her employer was as much a loss to her as if she had lost the actual sum in money. It has been said there was no authority on this matter. None is needed. This is a matter of general principle [it refers to the Banco de Portugal v Waterlow for the general principle] ... that a wrongdoer must recompense a plaintiff for all the damage which naturally flows from the wrongdoing."

Lord Justice Luxmoore simply agrees, and Lord Justice Goddard also agrees, and he similarly, this is a concurring judgment, and similarly identifies the loss of the board and lodging as a loss on a par with the loss of money. You see that in the middle of the following page, 107, just in the last sort of six or seven lines of the report:

"She lost the value of the board and lodging just as she lost her wages and she's entitled to be compensated for that loss."

Now, board and lodging can be called a benefit in kind. It could also be called a service in the sense that board is a provision of a service rather than goods.

So we say that case establishes the proposition that where a tortious conduct causes a claimant not to receive a service or benefit in kind which they would otherwise have received, that is a recoverable loss. That is actually part of the ratio of the case. If the loss had not been recoverable, the claim would not have succeeded, irrespective of the point about her father giving her free board and lodging, and it is also explicitly part of the reasoning.

That proposition alone is sufficient for us to succeed on Apple’s strike out. Our claim is that through its cautious, anti-competitive conduct, Apple raised the price for iCloud and, in consequence, non-paying subscribers, so those who did not pay any actual, did not receive services they would have received in the counterfactual, either for payment or for free.

Apple mischaracterises our argument on this case. In the Apple skeleton, paragraph 24, they characterise us as simply making the point based on Liffen that loss can arise absent any expenditure of money, and they say that's trite.

Our point was never simply that loss can arise without expenditure of money, although it can. Our point was, rather, that the loss consists precisely in the loss of the service itself, rather than anything consequential like the need to procure a different service, and the loss of a service is itself a recoverable loss. We say that in our Reply at paragraph 22, core bundle, page 156.

Now if I can move to the Mediana. It's actually --

THE CHAIR: You're going to go to the Mediana case?

MR WOOLFE: Yes, that's right.

THE CHAIR: Yes.

MR WOOLFE: The Mediana, the lightship case.

THE CHAIR: Yes.

MR WOOLFE: That's the authorities bundle, tab 8, page 87.

The facts of this are somewhat more complicated. We summarised them in our Reply, in fact, in the core bundle page 156 to 157, and you can refer to that if it's helpful when you come to write your judgment.

In essence, there had been a collision in which the claimant was the harbour board, that the respondents in this report, they were the claimants below, and you see in the headnote that their lightship had been damaged in a collision caused by the negligence of the appellant, so the defendants. The place of the damaged lightship during the period of her repair was taken by another lightship belonging to the board and maintained as an annual expense for the purpose of such an emergency. Slightly hard to follow in the headnote, what they meant was that the harbour board had more than one lightship. It had the one that was damaged, and had another one, which it's

maintained, standing by in case any of its lightships were put out of action. (Pause)
And the findings you see in the head note is that the harbour board was entitled to recover not only out of pocket expenses caused by the collision, so the repairs, but also damages for the loss of the service of the damaged lightship, during the time her place was taken by the substituted lightship. Essentially, the argument was because you had another ship ready and waiting, in practice, you never lost anything of value; you had something to replace it with. (Pause)
The (inaudible) is that of Lord Halsbury, who is the principal judgment, and that begins at page 89 of the bundle. And in the first couple of paragraphs, he discusses a previous case called the "Greta Holme" and why, in fact, that does give the answer. But that's not the key point.
Over the next page, page 90, he says -- he begins by remarking on the distinction between damages and nominal damages, and he says, about halfway down page 90:
"'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but you are affirming by your nominal damages there is an infraction of a legal right which, although it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed."
So essentially, there can be a situation where you have a cause of action and suffered nominal damage, but you haven't necessarily -- you're not going to get a lot of money when you turn up to the court, and he goes on to discuss that, and he discusses this further on page 90, that the case is of pain, suffering and loss of amenity.
Now, what I want to take you to is over the page, at page 91, the passage starting: "Now in the particular case before us":
"Now, in the particular case before us, apart from a circumstance which I will refer to immediately, the broad proposition seems to me to be that by a wrongful act of the

defendants the plaintiffs were deprived of their vessel. When I say deprived of their vessel, I will not use the phrase 'the use of their vessel.' What right has a wrongdoer to consider what use you are going to make of your vessel?"

Then he gives some examples, including:

"Supposing a person took a chair out of my room and kept it for 12 months, could anybody say you had the right to diminish the damages by showing I did not usually sit in the chair, or that there were plenty of chairs in the room?"

And so forth.

And towards the bottom of the page, he says:

"Here, as I say, the broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing that was taken, except -- and I think this has been the fallacy running through the arguments of the bar -- when you are endeavouring to establish the specific loss of profit, or of something that you would otherwise have got which the law recognises as special damage. In that case you must show it, and by precise evidence."

And over the page:

"But when we are speaking of general damages no such principle applies at all, and the jury might give whatever they thought would be the proper equivalent for the unlawful withdrawal of the subject matter then in question."

The reason for showing you this is simply, in relation to this point, that we say those users -- all those who only talk about those who did not pay in the actual at the moment -- of those users, some would have found it worthwhile to pay in the counterfactual, and they have suffered real damages; they are actually deserving of some compensation. You will have others who would have made greater use of free storage, and they also are deserving to receive some damages to represent that loss.

You may have some people included in the class who didn't care about online storage

at all, and wouldn't, in fact, have made any significant use of free storage. However, they still would have had the greater right to free storage in the counterfactual, would have been given for free by Apple or other people, and the deprivation of that does constitute an actionable loss, even if only nominal damages would attach to it.

So that is why we say there isn't a problem with there being anybody in the class who doesn't have a cause of action. (Pause)

If I can turn now to BritNed, that is in the authorities bundle at tab 29, page 649. And we cite BritNed for the proposition -- I'll say this carefully -- that loss of consumer surplus, constitutes actionable damage in respect of competition law torts. (Pause)

Factors you should be aware of: the claimant owned a submarine cable system that connected the Netherlands and the UK; the defendants had won a tender to supply the cable that had been party to bid rigging and market sharing agreements.

Then, if I can -- before we go to the main part of the judgment, which my learned friend took you to, can we briefly look at page 661, paragraph 10, and this explains why he's looking at the actionable harm question, or at least it's a slight precursor to it. And he explains there that it's a breach of statutory duty:

"To establish a claim, two things must be shown: (i) an infringement of competition law; and (ii) actionable harm or damage, caused by infringement."

And he goes on to say that that is by quoting, I think, from an article by Professor Stapleton, that that is what's called the "gist damage":

"The cause of action will not accrue until actionable damage occurs."

Anyway, so that's the background.

The passage that my learned friend took you to is where I want to go as well. So that's on page 775. (Pause)

Sorry, I'm having trouble with my technology. (Pause)

If we begin at paragraph 422, and he then turned again to the question of what

constitutes actionable harm, and he was treating it, in a sense, as an open question, not constrained by authority, because he was looking at this as the first judgment in an English court for a claim for breach of Article 101. (Pause)

And notably, he didn't consider -- and this is an important point -- that what constituted actionable damage should be determined by judgments in respect of other torts. You see that from paragraph 424, he says:

"Although it is possible that, in order to make good the cause of action and show actionable damage, a claimant must have to show that he [or] she has sustained some monetary harm [using monetary non-pecuniary] by reason of the defendant's breach of statutory duty, it seems to me most unlikely that this should be the case for this cause of action."

He doesn't treat other torts as necessarily informative.

He goes on to say, at paragraph 427 on page 776, it's an important point:

"When seeking to articulate what constitutes actionable harm, it is necessary to have regard to the object and scope of the statutory duty imposed. In this case, the object and scope of the provisions is the preservation and protection of competition from collusive efforts to undermine it."

There he is talking about Article 101.

"This purpose must inform the 'gist' or actual damage that a claimant must show, and bring a private action for damages."

Some of Apple's submission seems to be: this is the way the English law damages works, this is how contract works, this is how tort works. Tort is not one undifferentiated bucket marked "tort". We're talking about the action for breach of statutory duty, specifically breach of competition law, and to be informed by the object and scope of the statutory duty.

Now, my learned friend took you to subparagraphs 1 and 2 of 427, and I think was

arguing that the judge was drawing some fundamental distinction between Article 101 and 102, such that a claim for consumer benefit, as the judge puts it, consumer surplus, might be made out in respect of Article 101 but not Article 102. We submit that that's not the case.

When you read 427 as a whole, what the judge was doing was identifying that, in respect of Article 101, a failure to compete fairly for the bid was itself a form of harm, and that is an agreement not to compete fairly; it's something that is specific to Article 101.

But he was making some comments about competition law more broadly. (Pause)

There is no -- we say -- justification for implying that you can have a claim for consumer surplus, in respect of Article 101, but not in respect of Article 102. As you will recall, I showed you in the commission staff working document, in the text under the graph that Professor Smith took us to, and they were there referring to the harm arising both from Article 101 and 102, that the harm arises from a price being raised above the competitive level, and that harm is exactly the same, whether that is caused by a breach of Article 101 or 102.

In terms of what he says about Article 102, he refers to -- it might be possible to ascertain what loss the abuses caused, applying the approach of Lord Justice Stuart-Smith in Allied Maples. Now, Allied Maples, as you recall, sir, is a loss of a chance. It doesn't suggest that he had some view that this somehow gave the answer to that --

PROFESSOR SMITH: Sorry, can you repeat -- it doesn't suggest --

MR WOOLFE: It doesn't suggest that he was expressing a view that somehow loss of consumer surplus is excluded from Article 102, whereas it is allowed for Article 101.

PROFESSOR SMITH: I'm sorry, could you clarify where is it? Where are the words that imply that consumer surplus is allowed in 101?

MR WOOLFE: So this comes in 427(3). (Pause)

There we are. So if we read that:

"What the collusive misconduct ... does is prevent, restrict or distort competition. To require claimant to show monetary harm in order to found a cause of action is to ignore the purpose of Article 101 TFEU and to impose too great a burden on the claimant. Rather, what the claimant must show, as the "gist" damage, is that the unlawful conduct of the defendant has, on the balance of probabilities, in some way restricted or reduced the level of the claimant's consumer benefit."

PROFESSOR SMITH: But the cartel behaviour he was considering was cartel behaviour affecting firms, not final consumers.

MR WOOLFE: Yes, that's right.

PROFESSOR SMITH: So when he refers to consumer benefit, talking about a different kind of case from the present.

MR WOOLFE: Yes, yes, I accept that. Just to complete it, if you look and see he goes on to say:

"In other words, that the claimant has suffered as a result of the prevention, restriction or distortion of competition created by the cartel. Such a restriction or reduction of consumer benefit might take the form of an increased price payable, but equally it might take the form of a reduction in the number of suppliers properly participating in the tender process. [That was the case before him. This is important.] I regard consumer benefit as a broad concept, and there will be many ways in which conduct infringing Article 101 will adversely affect it."

THE CHAIR: The context here, of course, was that the claimants were making an overcharge claim.

MR WOOLFE: Yes.

THE CHAIR: And in fact, that claim actually failed before Mr Justice Marcus Smith,

because he concluded that nonetheless, the bid rigging didn't actually have any causative effect because BritNed had negotiated very hard and so the price they actually offered was a competitive price.

MR WOOLFE: Yes.

THE CHAIR: And that's why we have the whole question of actionable damage arose because the defendant was saying there's no loss here at all and the judge, here, then says no, because what he then did was award these two other species of loss. One was passing on inefficiencies and one was something else. One of them was then knocked out by the Court of Appeal, but they let one of them go through. That's the context, isn't it?

MR WOOLFE: That is the context. I do fully accept that the consumer benefit he had before him was different to what we are considering here, and I don't say it any other way. In a strict sense, this is not the case. We've got sufficiently close facts. You can say this constitutes binding authority that you must find in this case that the consumer benefit we are alleging is allowable, but it is -- we do draw attention to the proposition of law that his view is you have to have regard to the statutory purpose, and the consumer benefit is what matters and that's a broad concept. And there are many ways in which that can be (inaudible) affected.

THE CHAIR: Thank you.

MR WOOLFE: Now, the other point Apple makes in response to what we said about BritNed, in their skeleton at least.

MR CUTTING: Sorry, can I just ask. Against you, you could lift up this section of BritNed and apply it to your case, and it just gets you to the actual damage rather than the non-paying subscriber damage, right? I mean, these sentiments and these thoughts could be applicable -- and only applicable on Apple's case -- to the paid subscriber benefit and all of that language still works in terms of actionable harm and

thinking about the objectives of the abuse provisions. It doesn't necessarily get you to the non-subscribing --

MR WOOLFE: Sir, that's why I started with Liffen because Liffen, I say, is a binding authority that says the loss of a service is a head of damage, for which is recoverable. Then there's a question of how you value it, and I'm going to come on to that. But we have a recoverable head of loss that our non-paying subscribers have not received something.

MR CUTTING: (Overspeaking) against you for Liffen is that that was a service that was provided for before and after.

MR WOOLFE: Sorry, I don't (overspeaking).

MR CUTTING: The board and lodging was a service she was acquiring before the damage as well as after. The argument against you would be that the level of storage that the non-paying subscribers is not a service they were getting before or after because they didn't pay for it. So there's a continuum in Liffen that may not be in relation to the non-paying subscribers.

MR WOOLFE: I'm not going to think about that but the comparison in that case was: something bad had happened and you have a before and an after and in the "but for" situation is the same as the prior situation. She would have received the service.

MR CUTTING: Okay.

MR WOOLFE: She would have continued to have the benefit going with her employment and in the actual she lost it. So the comparison, the actual world is she doesn't have the service, she gets it from her father, but he doesn't -- and in the counterfactual she would have had it. We do say it is on all fours.

PROFESSOR SMITH: But the service that she was no longer getting was valued at something that looked like a market price?

MR WOOLFE: Yes, that is correct. There was and I simply use that as an authority

for the proposition that the head of damage of not receiving a service is recoverable. Then you have the question of how you value it. And come on to that.

In terms of what you can take from BritNed and you asked me, does this actually take you to say the consumer surplus, as we say, should be recoverable? We say "yes" because Mr Justice Marcus Smith says it's necessary to have regard to the object and scope of the statutory duty imposed. The purpose of both Article 101 and Article 102 is the prevention of the harm that arises from, in a sense, the aggregation and misuse of market power. But --

MR CUTTING: So what you're saying is that BritNed gives us the reason for taking the amazing step that Apple say we shouldn't take.

MR WOOLFE: It is a reason why -- I say it's not an amazing step -- but that it's a reason why --

MR CUTTING: (Overspeaking) Apple. I can't remember which one --

MR WOOLFE: They said (overspeaking).

MR CUTTING: -- was describing the step. Oh, it's revolutionary.

MR WOOLFE: Revolutionary. Well, I say it's not revolutionary. It fits entirely with the object and scope of the statutory torts we're looking at. Breach of competition law is different from other statutory duties. It's different from Which?'s environmental regulations, for example, or the law of defamation. Different torts have different things that the account is recoverable loss. And (inaudible) defamation is a very good example. There's nothing surprising about consumer surplus being recoverable in competition law because of the graph, essentially.

I should say when referring to the object of competition law, I said it was to prevent the misuse of market power. I'm generally comfortable with that. But I'm reminded that in Gutmann in the Court of Appeal -- so that's at page 1162 of the authorities bundle, you might want to go there -- Lord Justice Green said that the law relating to abuse is

concerned with consumer unfairness.

THE CHAIR: Sorry, that was in which case?

MR WOOLFE: In the authorities bundle, in Gutmann.

THE CHAIR: Yes.

MR WOOLFE: The Gutmann Trains Court of Appeal case. That's a 2022 judgment. Paragraph 93 of the judgment, page 1162 of the authorities bundle. Consumer welfare being an aim of competition law as well.

Now, can I show you Apple's skeleton, paragraph 27. So that's at core bundle, tab 2 at page 29. Just want to make sure I've dealt with it.

THE CHAIR: I'm terribly sorry, I missed the page reference there.

MR WOOLFE: Core bundle. Starts at page 28. It says we've misunderstood BritNed. They say that that's concerned with the establishment of gist damage. We accept that. But we say it would be very surprising if something was allowed -- some did form gist damage, but then could not also form actual damage if it was proven.

What they go on to say, over the page, at the top of 29:

"... proving actual loss is (obviously) what Which? ultimately needs to do, so even if foregone consumer surplus represented a 'gist' loss (which it does not -- see below) it would not show (as Which? must at this stage) that it has a realistic prospect of establishing such loss on a class-wide basis."

That seems to be a different point. The one that I haven't heard advanced here, which is it's not really a strike out point. It's saying that somehow we haven't given you sufficient evidence to show we might have reasonable prospects of establishing actual loss.

We have shown you section 6 of Mr Hughes --

THE CHAIR: Yes.

MR WOOLFE: Well, that's the first time in the skeleton that that point was made. We

say it's a bad point. Then taking you to the point about abuse of dominance being different.

Now, can I then move to Ruxley. That's in the authorities bundle, tab 18, page 268. We cite this -- judge, two propositions from it I'm going to try and persuade you of. Firstly that my learned friend said that somehow subjectivity was anathema to the common law, I think was the phrase she used. She used the phrase "anathema". This authority shows first that English law does not preclude all claims based on some form of subjective valuation or consumer surplus and in fact such claims can be maintained in respect of at least some causes of action.

You've got the facts of that. The pool wasn't deep enough; cost of rebuilding was about £21,000; made no difference to the value of the house; but £2,500 had been awarded for loss of amenity.

The one point I want to slightly correct my learned friend on is consent of the undertaking that the householder had given because it is important. If you go to the judgment of Lord Justice Lloyd, who's the one who actually deals with it, that is at page 287. He says, in the middle of page 287, opposite the letter E, the judge had found:

"... the cost of rebuilding was wholly disproportionate to any prospective benefits ... Since Mr Forsyth had no intention of rebuilding the pool he would, if his second argument were to succeed, have a pool which was substantially complete ... plus a windfall profit of £21,[000]."

He didn't actually want to rebuild the pool. He was just going to take the money.

However, then, in the Court of Appeal -- if you go down to the top of page 289 -- by that stage:

"Mr Forsyth had now offered an undertaking to renew the pool if he recovered the cost of doing so as damages ..."

He wasn't going to just rebuild the pool anyway. He was only going to rebuild it if he received his award of damages. I'll show you what Lord Lloyd says about this, and then I'll make my submission briefly about it.

At page 297, he says -- opposite the letter E again:

"Does Mr Forsyth's undertaking to spend any damages which he may receive on rebuilding the pool make any difference? Clearly not. He cannot be allowed to create a loss, which does not exist, in order to punish the defendants for their breach of contract."

There is further detail in the judgment. Essentially, there had obviously been quite bad blood between Mr Forsyth and the builders and Lord (inaudible).

The reason this matters is because it's said against me -- this is at paragraph 29(2) of Apple's skeleton -- that somehow the £21,560 represented Mr Forsyth's -- the claimant's -- subjective willingness to pay and somehow the undertaking shows that and that somehow, because the House of Lords rejected that measure, that somehow is then rejecting subjective valuation.

Now, the fact that the undertaking is conditional is very important. He did not himself value the difference between having a six-foot deep pool and a pool that's seven foot six inches deep at £21,000, in that he wasn't actually willing to spend £21,000 of his own money, freely, on deepening the pool.

If when faced with a choice between not receiving any damages at all and not having a deeper pool, or getting the £21,000 and deepening his pool, he was willing to give the undertaking. £21,000 in no way represents a valuation of Mr Forsyth's subjective Valuation of the difference between the shallower and the deeper pool.

That's my response to the point up front, as it were. If I can take you to -- I'm going to show you Lord Bridge and Lord Mustill. Lord Bridge's speech is nice and short and begins on page 277.

THE CHAIR: Just one moment, please. 277?

MR WOOLFE: 277.

THE CHAIR: Just a second. Thank you.

MR WOOLFE: He begins with the proposition that "damages for breach of contract" -- but, I think, applicable more broadly:

"Damages for breach of contract must reflect, as accurately as the circumstances allow, the loss which the claimant has sustained because he did not get what he bargained for."

And, important to note, in the remainder of that paragraph, what he essentially does is to point out that the law of damages for breach of contract has evolved in a commercial context, so you need to be careful about transplanting that to other non-commercial contexts.

Then, if I draw your attention to between G and H, the way he summarises the householder's arguments. You can see that the way it arose:

"The cogent argument of Mr Jacob, for the respondent, reduced to its bare essentials, can, I think, be summarised in three propositions.

"1. The judge's award of £2,500 ... for 'loss of amenity' demonstrates that the respondent suffered a real loss for which he is entitled to be compensated.

"2. In a building contract case, there is no admissible head of damages capable of assessment by reference to concepts such as loss of amenity, inconvenience or loss of aesthetic satisfaction. These are imponderables which the court can only evaluate by plucking figures from the air. If a possible head of damage of this nature were to be admitted in building contract cases, this would introduce chaotic uncertainty into the law and undermine clear and well-settled [cases]."

If we replace the word "imponderables" with "subjectivity", that would be a fair summary of many of my learned friend's submissions, I would say.

And the third proposition --

THE CHAIR: Sorry, you say the word "imponderables --

MR WOOLFE: Yes.

THE CHAIR: -- be replaced by the word "subjectivity"?

MR WOOLFE: I was saying -- that's a rather unfair point. I was saying that point 2 is very similar in nature to many of the points being made against me by my learned friend.

THE CHAIR: Right.

MR WOOLFE: She hasn't used the word "imponderable", she used the word "subjective".

Third proposition of their argument was:

"By these well settled principles damages in a building contract case can only be assessed by reference to diminution in value [market value] or cost of reinstatement. There being no diminution in value, the only available measure to compensate the respondent for his loss is the cost of reinstatement."

And see what the judge says:

"Attractive as [this argument was], it seems to me to suffer from an inherent logical flaw in that it leads from the premise that a loss has been suffered which is incapable of economic measurement to the conclusion that it must be compensated by reference to a measure of economic loss ... the cost of reinstatement, which has not been and will not be incurred."

And then explains why the loss of amenity point, although it is not under appeal:

"The propriety of that award is strictly not in issue. But since the attack on the principle of the award [the loss of amenity award] was central to Mr Jacobs' argument, I think the issue is one which we may properly address and I agree with my noble and learned friend, Lord Mustill, for the reasons he gives ... there is no reason in principle why the

court should not have power to award damages of the kind in question, and indeed in some circumstances such power may be essential to enable the court to do justice."

That is the short reason why Lord Bridge favoured the builders, that he thought the court did, in an appropriate case, have power to award loss of amenity damages.

Lord Jauncey, it's fair to say, I think, decided the case on quite a broad ground, that what constitutes loss is a question of fact and degree. And you get that from 281 to 282, but especially in the middle of page 282. And I don't try and draw any particular support from that.

Then we come to the speech of Lord Mustill that begins at 283. And if we can -- and I would say that Lord Mustill starts by rejecting the suggestion that the market should always constitute the measure of loss, because he says he agrees with Lord Jauncey and Lord Lloyd:

"I add some observations of my own on the award by the trial judge of damages in the sum intermediate between, on the one hand, the full cost of reinstatement, and on the other the amount by which the malperformance has diminished the market value of the property on which the work is done ..."

On the bottom of that paragraph:

"I think it proper to enter on the question here, although there is no appeal against the award because the possibility of such recovery in a suitable case sheds light on the employer's [case] that reinstatement is the only proper measure of damage."

So, for the same reason that Lord Bridge had given, this is central to the argument. Then, I think, he sets out, again, the employer's case. And then, the bottom of page 283, on the top of 284:

"The attraction of this argument [so that's the householder's argument] is its avoidance of the conclusion that, in a case such as the present, unless the employer can prove that the defects have depreciated the market value of the property the householder

can recover nothing at all. This conclusion would be unacceptable to the average householder, and it is unacceptable to me."

So what Lord Mustill is saying is, "I don't like the idea of diminution in value being the only measure, because otherwise we'll have cases where no remedy is due even though the contract has been breached, and, therefore, for that reason, at least having reinstatement valuers matters." And he refers to the common type of building case where the householder has specified something important.

Then I want to take you to the middle of that page, opposite E:

"In my opinion there would indeed be something wrong if, on the hypothesis that cost of reinstatement and the depreciation in value were the only available measures of recovery, the rejection of the former necessarily entailed the adoption of the latter; and the court might be driven to opt for the cost of reinstatement, absurd as the consequence might often be, simply to escape from the conclusion that the promisor can please himself whether or not to comply with the wishes of the promise ... in the contract."

Goes on to say, between F and G:

"In my opinion ... the hypothesis is not correct. There are not two alternative measures of damage, at opposite poles, but only one; namely, the loss truly suffered by the promisee. In some cases the loss cannot fairly be measured except by reference to the full cost of repairing the deficiency in performance. In others, and in particular those where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract. But these remedies are not exhaustive, for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as 'the consumer surplus' [there's a reference to an article

by Harris, Ogus and Phillips]. Phillips is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective, non-monetary gain. [Nonetheless] where it exists, the law should recognise it and compensate the promisee if the misperformance takes it away."

He gives some examples, bathroom tiles and the like.

Now, in its terms, that was a case about contract, and it was a case specifically about building contracts. But we do say it shows, for a start, that in an appropriate case, there is nothing incompatible with the English law of damages, the idea of awarding a claim for the amount by which somebody's valuation may exceed -- awarding damages in respect of loss of some sort, where the loss arises from the fact that the claimant's valuation of an asset or a thing or service exceeds the market price of that thing.

THE CHAIR: So in this case, what is the claimant's valuation of the service that exceeds the market price?

MR WOOLFE: That's Lord Mustill's upholding of the £2,500 for loss of amenity.

THE CHAIR: That's the claimant's valuation, you say?

MR WOOLFE: Well, I'm referring to the statement which I'm relying upon from Lord Mustill is broader, and to that extent may be obiter.

THE CHAIR: Yes, but you just said this case shows that in that context, even, you can have a case where the claimant's valuation exceeds the market price, I think is --

MR WOOLFE: Yes.

THE CHAIR: But how does that compute into the award of £2,500?

MR WOOLFE: Because he started off this whole discussion. So he started this whole discussion -- if we go back to page 283. He's only talking about the award of damages for loss of amenity.

THE CHAIR: Yes.

MR WOOLFE: He starts off by saying that:

"[Having agreed with Lord Jauncey and Lord Lloyd] I add some observations of my own on the award by the trial judge of damages in some intermediate between, on the one hand, the full cost of reinstatement, and on the other [hand] the amount by which the malperformance has diminished the market value of the property on which the work was done: in this particular case, nil."

So the difference in market value was nil. The trial judge had awarded £2500 for loss of amenity, and everything that follows is Lord Mustill's views as to why that is, in fact, appropriate. And the key phrase, key principle, that I want to take from this judgment is on page 284, just above the letter H, that:

"... the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure."

That's a case where -- he's phrased in terms of a promise because it's a breach of contract case, but it's talking about a situation where the service or goods or asset that the claimant is obtaining is worth more to him than the market value, and Lord Mustill is saying the law must cater to that situation. And yes, that is a case about breach of contract. But if it's allowable for breach of contract, we say it should be allowable for the tort of breach of competition law when the object and purpose of competition law is so in line with the importance of the consumer surplus.

Now if I can say one last thing on Ruxley, because I don't want to overstate it. Trying to distil a single ratio out of the whole of Ruxley is difficult. We gave some references in our Reply. That reference is in core bundle, tab 5, at page 163 of the bundle, footnote 19 of our Reply.

We explain that we have this complex pattern in the House of Lords. They agree with each other, but give slightly different reasons. So I'm not trying to argue. It's not that

I don't want to enter into that. This is what Lord Mustill says:

"We take it as persuasive authority for the proposition. There's a complex web of people agreeing with each other for slightly different reasons. But we do say that the general thrust of all those judgments is that the law of damages can respond flexibly to achieve justice, and is not strictly limited to those measures of damage that are commonly used in commercial cases." [as read]

THE CHAIR: Okay.

MR WOOLFE: Now, that's everything I was going to say on most of the authorities. There are a few points to pick up from my learned friend's submissions this morning. Firstly on, Bittylicious. There are a few Bittylicious cases. So it's the one that's at page 1981.1, which is the 2025 Court of Appeal judgment. There's also the underlying CAT judgment in the bundle. And I think you were taken to paragraph 25 of that case, which is on page 1989.7.

And the point was made that a criticism was, being made in that case that the claim was pleaded by reference to so-called "immediate and persistent effect and foregone growth effect".

And the chancellor said:

"I note immediately these are not legal concepts, but an expert's construction. The issues ... would have been easier to grapple with if the claims were completed in a more orthodox fashion. The loss or damage to an asset is normally pleaded as the loss of, or reduction in value of, the asset, with or without consequential losses."

That is true as a matter of general pleading, that that case concerned an asset which hadn't appreciated in value. The judge is making some comments about how that claim should be pleaded; it's a very different case. (Pause)

Doesn't really bear upon our pleading, or our case, at all.

Now, you've also taken to the cases of West and Forster, which we ourselves had

cited, and it was said that those don't support us. I think West related to non-pecuniary loss, and Forster related to, essentially, a form of latent damage. I don't dispute my learned friend's point about those; we never said that those cases were the ones which we relied upon to make our case. We simply cited them for their formulation of the distinction between pecuniary and non-pecuniary loss. The point being made against us was founded on that distinction between pecuniary and non-pecuniary loss; we simply gave what are quite standard references to the cases, which discuss that distinction. (Pause)

Now, having dealt with the authorities -- so I'm going to move on to principle of full compensation. I'm happy to accept that the EU principle of full compensation, as stated in the Damages Directive, does not specifically require that consumer surplus damages be available. (Pause)

PROFESSOR SMITH: Thank you.

MR WOOLFE: The point we made against is the recitals of the Directive refer to actual profit and loss of profit. And we accept that. We do, however, rely upon it for a more limited point, which is that if you conclude that the head of loss is recoverable -- so the loss of the service -- the Tribunal should not shy away from awarding damages, on the basis that there are difficulties with quantification or valuation. Once you realise -- once you come to the view that it's allowable, the principle of full compensation is relevant.

I'm actually going to refer you to the principle of full compensation as a matter of English law, so nothing to do with Brexit, because it's easier to not have to distinguish different periods. That is the case of Pickett, which is in the authorities bundle, tab 13, at page 155. Pickett v British Rail Engineering. That was a mesothelioma case -- the defendant, who was employed by British Rail, exposed to asbestos dust, contracted mesothelioma and sadly died. The issue concerned whether the plaintiff, in fact his

widow, was entitled to be compensated for loss of earnings, and what I want to take you to is the judgment, or speech rather, of Lord Scarman, which is at page 187 of the bundle, and he's there making some comments about assessment of damages for pecuniary loss. So this is within the scope of pecuniary loss:

"When a judge is assessing damages for pecuniary loss, the principle of full compensation can properly be applied. Indeed, anything else would be inconsistent with the general rule which Lord Blackburn has formulated: [in Livingstone v Rawyards Coal]

"Where any injury is to be compensated by damages [so once you get to the head of damage being allowable]. In settling the sum of money to be given, you should as nearly as possible get at that sum of money which will put to the party who has been injured, or who has suffered, in the same position as he would have been in if he had not suffered the wrong.

"Though arithmetical precision is not always possible, though in estimating future pecuniary loss a judge must make certain assumptions ... it makes sense in this context to speak of full compensation as the object of the law."

So, to make a more limited point there, the difficulties in valuation should not deter you.

Now, you'll notice, turning to the question of pecuniary or non-pecuniary loss, on my feet, I've not spent a great deal of time addressing you on the question of whether this is to be characterised as pecuniary or non-pecuniary. I've mainly gone through establishing propositions about whether it's recoverable. That is because the authorities themselves do not spend a great deal of time discussing recoverability, in terms of the pecuniary/non-pecuniary distinction. It seems that that distinction is largely used by textbook writers, or on occasion, judges, when they're trying to organise the mass of decisions in front of you, to try and draw some broad conclusions,

and they're descriptive in that sense. So it's easier just to consider: does this head of damage fall within the scope of the tort?

THE CHAIR: Yes.

MR WOOLFE: But for what it's worth, we do unequivocally say that the loss of damage -- the loss in this case -- is a pecuniary loss. (Pause)

Apple's conduct meant that some people who would have received a service did not, in fact, receive that service. That service -- so cloud storage -- is something that can, in fact, be purchased. This is not like a broken leg, where you can't go out and buy a new leg. Cloud storage is a purchasable service. On ordinary principles, that is a pecuniary loss.

We also submit that the way in which we are proposing to measure the loss is entirely focused on the financial valuation. It is the difference between one financial measure, willingness to pay, and another financial measure, counterfactual market price.

Now, what I have left, sir, is to address you on strike out, and whether it's relevant that you may have further evidence at trial, and then a small number of reply points. I can do those two points now, and it'll probably take me about --

THE CHAIR: How long will it take you?

MR WOOLFE: About 15 minutes for those.

THE CHAIR: Let's take our break now, because we're going to stop at four anyway.

PROFESSOR SMITH: Can I ask one question. In paragraph 28, of your Reply. It says in the alternative -- sorry. (Pause)

"In the alternative, even if consumer surplus was to be characterised as non-pecuniary ..."

Are you resigning from that position as an alternative?

MR WOOLFE: No, I'm not. In a sense, I've addressed you on the authorities that come under that, simply for the primary question that consumer surplus should be

recoverable.

PROFESSOR SMITH: Right.

MR WOOLFE: Irrespective of whether it's categorised as pecuniary or non-pecuniary. For what it's worth, we do say it's pecuniary. If it's not, we still rely upon these same authorities. As I say, it should be recoverable, even if it's non-pecuniary. I've organised my material differently, but the same point is maintained.

PROFESSOR SMITH: But you are saying it is a pecuniary loss?

MR WOOLFE: Yes. The fact that I chose to go for that material first shouldn't be taken as me somehow conceding the point about it being pecuniary. It is pecuniary loss.

PROFESSOR SMITH: Okay.

THE CHAIR: Thank you.

(2.56 pm)

(A short break)

(3.10 pm)

THE CHAIR: Yes, Mr Woolfe.

MR WOOLFE: So I had actually one more point on the merits, as it were, before turning briefly to the relevance of this being a strike out.

THE CHAIR: Yes.

MR WOOLFE: That is the point that's made in our skeleton argument at -- so that's core bundle, tab 1, page 19, paragraph 38, where we refer to the fact that we:

"... seek an aggregate award of damages ... representing loss to the class as a whole, by way of a top-down methodology based on willingness to pay. The PCR is not seeking to advance a bottom-up individualised assessment of loss nor one based on a purely subjective measure."

My learned friend said, quite fairly, if the individual claims are not allowable in law, you

can't add them all together, and that's true, and we accept that. We do say that the individual heads of loss are -- for each claimant -- allowable. However, the relevance of the aggregate award is that it may make the quantification and valuation more straightforward than it would be if you're trying to value -- or it makes it a different exercise from that which you're trying to do with an individual claimant, but that's a point about quantification.

THE CHAIR: Yes.

MR WOOLFE: And we say that economic techniques can be used to do that in an objective way.

THE CHAIR: Yes.

MR WOOLFE: Finally turning to the strike out test, and possibly some minor reply points. We do say the Tribunal should not decide this point on a strike out. The relevance of potential further evidence is twofold. At trial, there will be expert economic evidence, which can be relevant in two respects: first, it can address the nature of the consumer surplus as a matter of economic principle; and secondly, more to the point, it would be clear at that stage, from the nature of that evidence and the quantitative work that goes with it, whether there is anything in Apple's contention that what we are proposing is a subjective measure. You would have a much clearer view on that if you had Mr Hughes full assessment and Apple's response to it.

In that regard, if I can just take you briefly to the work that Mr Hughes says he would do, that's bundle B, tab 5, towards the end of section 6 of his report. So that's bundle B, tab 5, page 140.

THE CHAIR: Yes.

MR WOOLFE: Paragraph 5.3.6. He refers to the:

"... need to gather information on iOS Users' willingness to pay according to their requirements and the options open to them in the counterfactual ... this is a matter to

be explored through market research. My starting point will be to look at Apple's internal documents and market research on consumer willingness to pay, and then determine whether further consumer research is required."

Any case that somehow the assessment of willingness to pay is too subjective an exercise, would be informed by those documents, which may stem from Apple themselves. For instance, if Apple try and do some work to -- what the price sensitivity of consumers is, how many consumers will leave if they put the price up, et cetera, they may well do it on -- who knows what information they may have.

The economists looking at that point, you'll be able to determine if it's too subjective, or not.

PROFESSOR SMITH: I'm not clear how that helps us on the strike out. This paragraph is saying we can make a better assessment of damage if it's allowed, if the more work we do on working out what the demand curve looks like, what consumer willingness to pay is. But Ms Demetriou's argument is that no matter what the demand curve is, calculation of consumer surplus as a triangle against the -- derived from the demand curve is contrary to English law. So having a better demand curve is just going to get us a better estimate of a measure of damage that is not actionable under English law, according to that.

MR WOOLFE: I can see that the quality of the information may or may not -- well, I think, the Tribunal has to decide whether or not the head of damage is properly allowable for a particular tort, by reference to the objects and purposes of that tort. (Pause)

That assessment may be informed by the type of evidence that can be available.

Moreover, just as a matter of, in a sense of case management, generally speaking, the courts, we say, have taken the approach -- I think this is referred to in the CAT Bittylicious judgment, which is in the authorities bundle -- I don't have the reference for

you to hand -- that where if you're deciding a novel point of law, it is preferable to decide a novel point of law by reference to real and found facts, rather than assumed facts, because the process of trial can often reveal subtleties that aren't apparent to the Tribunal when it's dealing with something on a strike out basis, and we do rely on that as well. And having economists do the work could inform you as to the validity of this as a head of damage.

Finally, simply on some reply points. A criticism was made of paragraph 35 of our skeleton. Paragraph 35 of our skeleton, core bundle, tab 1, page 18.

We were addressing, there, Apple's argument, as we understood it, that consumer surplus is an impermissibly subjective measure. Part of our response is to say that that argument is about the measure of damages and is not a basis for strike out. Apple is conflating the primary question of whether or not a head of loss is recoverable; the secondary question of quantification and measuring it. We say that if it is accepted that the loss of the relevant services is a recoverable loss, then the question of what is the appropriate measure of damage is quintessentially a matter for trial. And at that stage, did we say the principle enunciated by Lord Scarman in the Pickett case comes into play.

The only other point I had was, my learned friend set out the principles applicable to strike out and Easyair. She was right; those are common ground. The only point we would add to that is this point about the need to be cautious in a case involving a novel point of law. It does not state it in Easyair; that is stated in the Bittylicious case. I now have the reference for you. That's in the authorities bundle at page 1718. And I believe the relevant passage is paragraph 38 of that judgment. The case begins at 1718. The paragraph is at page 1730 of the bundle.

THE CHAIR: Thank you.

MR WOOLFE: Unless I can assist you further, those are my submissions on this

(inaudible).

THE CHAIR: Thank you very much indeed, Mr Woolfe.

Reply submissions by MS DEMETRIOU

MS DEMETRIOU: May it please the Tribunal, let me start my short reply by going back to some fundamentals, and I'm going to go back to my example. I'm going to substitute an orange for an Apple. Take a claim where a claimant buys an orange or contracts to buy an orange for £0.50, that's the contract. The seller never delivers the orange and the claimant doesn't pay the £0.50. So there's been no delivery and no payment. Can the claimant claim for a loss? Now, if the market price for the apple is £0.50.

PROFESSOR SMITH: Or even an orange.

MS DEMETRIOU: Orange. Freudian slip. If the market price for the orange is £0.50, then the answer is no. If the market price is £0.60, then the answer is yes because the claimant has suffered a loss in the form of an opportunity to resell the orange and gain a £0.10 profit.

That fundamental point, that fundamental distinction, runs through our law of damages. So it's not the case that the claimant would be able to say, "Well, I value the orange differently therefore I can bring a claim". That's not the way in which our law proceeds. And we saw that vividly explained in the UBAF case, in the form of the example about the blue and the red Bentley. So I value -- just because I value blue Bentleys more highly than red Bentleys, and I'm delivered a red Bentley, if the red Bentley in fact, is more valuable, I've suffered no loss, even though I value the blue Bentley more highly and would have paid more for it.

Now, my learned friend, at some point in his submissions, referred to the law of defamation and he said, "Well, there's an example of subjectivity", but with respect,

that's not true. If a claimant recovers damages because of defamation, those damages seek to reflect the objective loss that he suffers as a result of defamation; so lost to reputation. The damages award doesn't differ depending on the view that the claimant has of his or her own reputation. So if the claimant is a narcissist, they don't get more in the way of damages than a claimant who is modest. And that's a really fundamental point that runs through our law.

Now, the cases relied on by the PCR do not support the PCR's position. There's nothing in terms of the case law that the PCR's pointed to, which gives this Tribunal any basis for subverting that basic point that loss is recoverable if it suffered on an objective basis.

Before I get to the cases, one short point to note is that my learned friend accepted -- this is on the 137.2 point, the point about the claim based on more free storage being available in the counterfactual. He accepted that that's also based on subjective valuation. In his submission, the claims in 137.1 and 137.2 go hand in hand. He made a point about subjectivity. He said that the claims that are being put forward in 137.1 and 137.2 are not properly described as subjective and he said that's because they can be translated into cold, hard cash, therefore they're not subjective.

And we say that that submission is flawed. It's incorrect. The fact that the foregone consumer surplus can be measured in monetary terms doesn't mean that it's not subjective. The very premise for the loss sought and claimed in those provisions is a subjective one. And you can see that on the face of the pleading, because it depends on the valuation placed by each individual member of the class on the service. So it is, in that sense, subjective. And it's in that sense that subjectivity is deprecated by the English law.

Now, I'm going to now go to the authorities or make some short points on the authorities, and you'll have apprehended that the high point of my learned friend's case

is the Liffen authority. That's the case on which he placed reliance and he went so far as to say that it was sufficient by itself for them to succeed in opposing this strike out application. But it's not. It's really not analogous to the present case. The loss of the benefit --

So first of all, we do accept and we've never sought to suggest otherwise -- we accept that the loss of an asset, including an asset in the form of a benefit in kind, like board and lodging, is capable of giving rise to pecuniary loss. We accept that point. But that is not enough for the PCR to succeed.

Liffen concerned the loss of an asset which the claimant was receiving under her employment contract. So she was receiving board and lodging under her employment contract and she lost that benefit as a result of the accident, which meant that she had to cease her employment. So not only did she lose her salary, but she lost a benefit in kind that she was receiving under her contract and that really is straightforwardly conventional pecuniary loss.

It's not dependent on -- it wasn't dependent on the claimant's subjective valuation. On the contrary, we see reference in the judgment to the benefit in kind being valued at 25 shillings per week. That was the objective valuation of what the board and lodging was worth. It's really very far removed from the present case.

The PCR's argument is incredibly simplistic. They say, "Well, that's a benefit in kind. Here, the class members are missing the opportunity to buy a benefit in kind ergo, it's the same head of loss." And that, we say, is not only simplistic, but it's wrong because the Liffen case did not depend -- the loss claim did not depend on the subjective valuation of the board and lodging, which was an asset being received, which was lost in a conventional way because of the tort. So that's what we say about Liffen. It really does not bear anything like the weight the PCR seeks to place on it.

The next authority was the Mediana. Now, in the Mediana nobody asked the claimant,

"At what price did you value the use of the vessel? What's your subjective view of the use of the vessel?" Damage was based on an objective rental value. In other words, user damages. And the Tribunal will be aware that user damages claims are indeed based on the objective market rental value that could be achieved had the property not been used improperly in breach of, for example, the tort of trespass.

And if we very quickly pick up the authority. It's at tab 8, page 91. You can see, halfway down, the analogy of what the claimant would give to hire, for example, a chair. So, you can see:

"What right has a wrongdoer to consider what use you are going to make of your vessel? More than one case has been put to illustrate this ... supposing a person took away a chair out of my room and kept it for twelve months, could [anyone] say that you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? [And then later on] I know very well that as a matter of common sense what an arbitrator or a jury very often do is take a perfectly artificial hypothesis and say, 'Well, if you wanted to hire a chair, what would you have to give for it [in that] period'."

So again, that's looking at the objective market value. What would you have to give if you were to use a chair? Not, what's the subjective valuation? The defendant may be completely attached to this chair, it may be an heirloom, but that doesn't come into the mix. So the fact that the claimant would have placed a very high value on use of the chair, subjectively, is not taken into account.

Ruxley: the two key points on Ruxley are that there was a very specific -- Ruxley, there's a very specific contractual rationale and you have my submissions on that. Just for your note, in our skeleton argument, footnote 37, which is to paragraph 29, subparagraph 3, we've set out further examples of authorities that make clear that the rationale for Ruxley is the specific contractual one of losing the object or an object of

the bargain.

The second point to make is that the payment for loss of amenity, which is what's relied on -- the £2,500 -- did not depend on the subjective valuation by the claimant of his loss. And let's just pick up Ruxley. So that's in volume 1 of the authorities bundle. Sorry. Just give me a moment. It's page 298E of the bundle, behind tab 18. This is in Lord Lloyd's speech.

The point in Ruxley was that the amenity loss was rewarded -- we can see this between letters E and F:

"Suppose there is no measurable difference in value of the complete house, and the cost of reinstatement would be prohibitive. Is there any reason why the court should not award by way of damages for breach of contract some modest sum, not based on difference in value, but solely to compensate the buyer for his disappointed expectations?"

So what's being canvased here is a "modest sum". It's not a sum which is constructed by reference to a subjective valuation. What's going on here is that the contract, an object of the contract, was to build a pool of a specific depth, because that was what the claimant wanted. He was disappointed in that because although it made no difference to value, it disappointed him and so therefore frustrated or was in breach of one of the objects of the contract. And the court didn't say, "Well, now let's investigate exactly what value this claimant places on the pool". It says, "It's sufficient to give him a modest sum to reflect the disappointment." Now, that's an example of non-pecuniary loss.

In this case, it's fair to say that my learned friend didn't primarily put his case in terms of recovery of non-pecuniary loss, and it's very easy to see why because no claimant, no class member in this case, has suffered that sort of disappointment, for the reasons I gave earlier. They did not contract with Apple. They did not pay anything and so

they were not disappointed in what they received. There's no claim and there couldn't be any claim that they've suffered mental distress or disappointment.

Instead, what's going on here is that the PCR's not seeking a modest sum to reflect mental distress or disappointment. They're constructing a substantial sum of so-called pecuniary loss based on subjective concepts of valuation by individual class members and it's that which is impermissible.

BritNed, finally, on the authorities. Well, context is all. This is not a case where the loss claimed was based on any subjective valuation. The consumer benefit that Mr Justice Marcus Smith referred to was, in fact, the benefit in having a fair, unrigged tender process. And that is harm -- so the absence of a fair unrigged tender process is harm which is apt to lead to conventional pecuniary loss. And as he said, at paragraph 429, the claimants would have to establish that pecuniary loss at trial. So the fact that they could claim as gist damage, that there hadn't been a fair tender process, was not conclusive of whether or not they could actually claim damages at trial.

So this is simply not a basis for departing from all the well-established authorities that we've taken you to. None of which, none of which established the proposition that it's permissible to construct a claim for pecuniary loss on the basis of subjective valuations, and all of which proceed on the opposite assumption.

Unless you have any questions for me, those are my submissions in reply.

THE CHAIR: Thank you very much.

Mr Woolfe, are you any further down the road on the litigation funding agreement?

MR WOOLFE: Yes.

THE CHAIR: Haven't had time to get --

Discussion on new evidence

MR WOOLFE: With apologies, this has come in so late in the day. A letter has been sent to the Tribunal.

THE CHAIR: Right.

MR WOOLFE: I think it was when I was on my feet, or possibly my learned friend was. It has gone in, and it gives a response on those points.

I appreciate that the Tribunal won't have had a chance to read it yet. There's not very much time remaining, but I don't know whether --

THE CHAIR: It might be worth just (overspeaking) --

MR WOOLFE: -- and decide how you want it to --

THE CHAIR: Will it now have appeared?

They've got it there. Well, to see whether this might be a short and efficient answer to at least our inquiry.

MR WOOLFE: Yes.

THE CHAIR: Without prejudice to all the other points, maybe we should, before closing today, just retire for a few minutes and have a look.

MR WOOLFE: And then you can decide how to deal with it.

THE CHAIR: And then we can decide how to deal with it, exactly.

MR WOOLFE: (Overspeaking) tonight or whether it needs some further --

THE CHAIR: Let's do that.

Thank you.

(3.35 pm)

(A short break)

(3.48 pm)

THE CHAIR: Mr Woolfe, thank you very much indeed for the, obviously, substantial amount of time that your team and funder have spent on this.

All we're going to do now, because there's quite a lot of meat to get through in the key

parts of this letter, is give you an indication of what our provisional views are. We, the Tribunal, will then write formally to the parties about this in terms of which it regards as necessary before certification can be given.

But, just informally, we've noted what you have said so far as clause 17 is concerned, but at the moment we take the view that it should be the Roberts terms, if I can put it in that way, which you've said, that's something you can consider.

And then, again, secondly, on the expert determination point, we take the same view. In other words, it's Roberts.

So far as clause 10 is concerned, we were not ourselves suggesting that clause 10 should be amended. It was a question of -- what we were keen to find out. Is what you understood that it meant, because we seem to have a different understanding as to what it meant. So far as that is concerned, the way we will deal with this, it's not a question of agreeing any amendments. In the course of our judgment, we will make clear what we consider it means, which will no doubt be austere to them.

MR WOOLFE: Thank you, sir.

Can I just note one point -- I was reading the letter myself a few minutes ago. In terms of -- if you were going to give any indication of what you think is required in respect of clause 17.1 and of clause 50, you may notice that in the text, quote under paragraph 3, says "such needs to be reached based on independent legal and expert advice".

THE CHAIR: Yes, I do notice that.

MR WOOLFE: There was a reason for experts in there. Lawyers can't necessarily be good at judging economic viability or something of that nature. I just want to draw your attention to that.

THE CHAIR: We've got that point in mind. We're giving you what our provisional view is. We've noted what's being said in paragraph 5 about the decision-making process, but we will communicate with the parties by letter formally about this.

MR WOOLFE: Thank you, sir.

THE CHAIR: All right?

Unless there's anything else. Ms Demetriou?

MS DEMETRIOU: Sir, we would like a chance to respond to this. We say that it's an improper approach, regrettably, to the litigation, because the letter doesn't only concern the clauses, but concerns a lot of assertion and submission that wasn't made by my learned friend in the course of his submissions. There's no justification for -- if you look at the top of the bottom of page 3, they say that they're responding on the case law because it's become evident overnight the three decisions of the Tribunal that Apple cited in its skeleton argument.

Now, those are decisions that were cited in our skeleton, that we made submissions on, and that Mr Woolfe had an opportunity to respond to. So this was not an opportunity now, after all submissions have closed, to put in substantial further submissions.

Sir, one further point is that, you can see at the bottom of page 6 that starting at paragraph 16 rather, Which's conduct in respect of funding. Now, we made a point which you have -- I'm not going to repeat my submissions -- that by contrast with the position in Gutmann, where there was evidence of proactive grappling with the LCM funding issues supported by a witness statement, there was nothing of the sort in this case.

Now, these paragraphs seek to rebut our submissions by way of supplemental written submissions after all of the submissions in this hearing are finished, and that's inappropriate. And if you look at paragraph 18, you can see that they positively rely on the two letters of assurances procured from LCM. But you have my point, that they have refused to disclose, hiding behind a misconceived privilege claim, the letters written by them, by the PCR to LCM, to which those respond. They've… those letters

were never privileged, and if so, even if they were, they've waived privilege.

So what you have here is wholly inappropriate reliance on a partial picture of the correspondence, and it's wholly inappropriate for them to do this in this letter -- this wasn't the purpose of what the Tribunal asked them to do -- and to present it at the very last moment, after all submissions have closed and we have no opportunity to deal with it. And I'm afraid, regrettably, it's another example of the inappropriate way in which Which? is conducting these proceedings.

THE CHAIR: Right, Mr Woolfe. Do you object if they want to write a letter in relation, effectively, to the narrative here, leaving aside the actual clauses themselves?

MR WOOLFE: I'm not going to stand up and argue at length that there shouldn't be a chance to see (overspeaking) you want to have issues ventilated.

THE CHAIR: I mean, I'm not sure it's going to assist all the narrative, because what we're concerned about are the clauses themselves.

MR WOOLFE: Yes, so I divide two parts, really. There's the part of the review of the litigation funding agreements, paragraphs 7 through to 15. That is, in a sense, the narrative explaining to the Tribunal --

THE CHAIR: Yes.

MR WOOLFE: -- so in order to address the Tribunal's concerns, we've come back with some suggested possible wording on the clauses and the narrative explains why we've done so. To that extent, we are just responding to what the Tribunal has asked. I do accept that the paragraphs 16 through to 18, defending our position in respect of funding, that does cover criticisms that have been made before. I don't think it says anything in substance that I haven't already said. It gives references to stuff that is in the bundle. If my learned friend wants to put in a further submission about --

THE CHAIR: You can put in a reply if that's what you would like to do. As I say, we're just concentrating really on the clause here. But if you feel that they've made other

submissions that haven't been made before and you want to say something about them, that's fine.

MS DEMETRIOU: Sir, you have my point that our submissions are not confined to the clauses but that we made wider points which they've also sought to address in this letter.

THE CHAIR: I understand that, and, in fact, we don't really need further submissions on the clauses because it's really a matter for us.

MS DEMETRIOU: Yes.

THE CHAIR: You've made your points about what you think the present situation is and why they're defective, and we'll take those criticisms on board. You're really talking about the rest of it.

MS DEMETRIOU: The funding issues, which, of course, colour the clauses as well. But as quite aside from the clauses, the funding issue, the lack of transparency and that the two points, as I say, emerging from Gutmann, the point of distinction that there they had proactively investigated the LCM funding issues -- there's no evidence of that having taken place in this case -- and they had put forward reasonable contingency plans. And what they're doing is seeking to rebut our submissions, but by way of assertion, and very late in the day after we've made those submissions.

THE CHAIR: All right, I think the sensible thing is, if you want to say anything, all I would say is don't go back over the ground that you've already covered, please, because we want to bring this matter, this aspect of the matter, to a close.

Now, when are you going to do that? By end of tomorrow? If you're able to articulate it now, it's not going to take that long.

MS DEMETRIOU: Could we have till Monday, please?

THE CHAIR: Monday. You can have till Monday. Right.

Anything else on your side, Ms Demetriou?

Anything else on your side, Mr Woolfe?

Thank you all very much indeed.

(3.57 pm)

(The hearing was adjourned)

**Key to punctuation used in transcript**

| | |
|---|---|
| -- | Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking |
| … | Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence. |
| - xx xx xx - | A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption. |
| - | Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there? |