IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13th November 2025

Before:
Ben Tidswell
Dr William Bishop
Tim Frazer

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr. Rachael Kent
Class Representative

v

Apple Inc. and Apple Distribution International Ltd
Defendants

A P P E A R AN C E S

Mark Hoskins KC, Tim Ward KC, Alexander Hutton KC, Matthew Kennedy & Antonia Fitzpatrick (Instructed by Hausfeld & Co. LLP) On behalf of Dr. Rachael Kent

Marie Demetriou KC, Daniel Piccinin KC, Hugo Leith (Instructed by Gibson, Dunn & Crutcher UK LLP) On behalf of Apple Inc. and Apple Distribution International Ltd

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email:
ukclient@epiqglobal.co.uk

Thursday, 13 November 2025

(10.33 am)

Housekeeping

THE CHAIR: I will just start, Mr Hoskins, with the live stream warning. Some of you are joining us via live stream on our website, so I must start with the customary warning. An official recording is being made and an authorised transcript will be produced. But it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as a contempt of court.

Good morning, everybody.

MR HOSKINS: I am not going to do introductions because --

THE CHAIR: No, I think --

MR HOSKINS: -- except for Mr Hutton who's here to deal with costs for the Class Representative.

THE CHAIR: Yes.

MR HOSKINS: Thank you. You've seen the agenda; are you happy for us to work through it?

THE CHAIR: Yes, I did wonder -- well, first of all, can I say thank you very much, everybody, for the material you've sent in. It's clear that it’s involved quite a lot of work in quite a short --

MR HOSKINS: You're quite echoey.

THE CHAIR: How's that? Is that better?

MR HOSKINS: That sounds a bit better. Sorry, I'm having slight trouble, so I don't know.

THE CHAIR: Yes. No, I'll try again. Thank you very much, everybody, for the material you've sent in. It's clear that it's involved lots and lots of work and so we're very grateful

for the effort you've put in.

Also, just as a preliminary point, I've got a 4.30 pm meeting this afternoon, so we'll need to finish promptly. Now, I'm hoping that's not going to be a problem and I hope we can get through it all, but just if anybody thinks that is going to be a problem, we ought to have a discussion about how we deal with that. I will have to leave just before 4.30 pm.

In terms of the agenda, I wondered whether it was worth slightly rejigging the order and dealing with what I think are probably the harder, or at least --

MR HOSKINS: We're in your hands; we're here to help. So whatever works for you.

MS DEMETRIOU: (Inaudible) as it is echoey, would you mind repeating what you're proposing we deal with first?

THE CHAIR: Yes. I don't know why it is. (Pause)

Let's see if that's any better. Is that any better?

MS DEMETRIOU: I think so.

THE CHAIR: Well, if it keeps doing it, let me know and we can see -- it's obviously something -- I don't know whether it's the microphone or me.

MR HOSKINS: I think it's the microphone.

THE CHAIR: The microphone is easier to replace. But you may not think that.

My suggestion was that we would deal with what I think are probably the heavier items first and get them out of the way. In that category, I've put the amendment application, the permission to appeal application and the costs application. We'll do those in that order and then move on to disclosure, quantum, distribution and then I've got some observations on the form of the order. I'd quite like to have a conversation about that. Is it still a problem?

MS DEMETRIOU: No, subject to one point. I wonder if before costs, we could do -- there's a prior point, as it were, which is payment of the damages.

THE CHAIR: Yes. I don't mind dealing with that before, if you think that makes more sense.

MS DEMETRIOU: It would make more sense to us, if that's all right with you.

THE CHAIR: Of course. Yes. Of course. And then the last thing I think is confidentiality, which I assume we should be doing in private. And I guess in that circumstance, it would be helpful to do that at the end rather than the middle. So, that's my suggestion.

MR HOSKINS: Can I just make --

THE CHAIR: Yes.

MR HOSKINS: On the disclosure application for further transactional data, that's agreed, so I think --

THE CHAIR: Yes.

MR HOSKINS: -- and it slightly has a crossover with the amendment application, so I was going to deal with that first very briefly because it is agreed.

THE CHAIR: I don't mind if you want to get it out of the way like that. I think I ...

MR HOSKINS: I need to refer to it in any event when I make my submissions about the amendment, so --

THE CHAIR: Yes. Well, I think the only point actually I had noted to discuss was the payment, the suggestion of the payment by Apple, and so that probably is going to -- in that case, we will pick that up at some stage earlier on.

MR HOSKINS: Yes, but they are separate -- we're going to deal with them separately. I'm going to deal with the disclosure application for further transactional data --

THE CHAIR: Yes.

MR HOSKINS: -- and Mr Ward is dealing with the quantum element which includes when Apple should pay, the (inaudible) point.

THE CHAIR: Okay, so you're going to wrap up disclosure as part of your amendment

application?

MR HOSKINS: Exactly.

THE CHAIR: And to the extent that anybody has anything to say about that, and then we will deal with the payment point before we deal with costs. Does that make sense?

Disclosure Application

MR HOSKINS: So, if we begin with the application for updated transactional data, you'll have seen that we applied for disclosure of what's been defined as the UK transactional data from Apple for the period from 1 March 2024 to 23 October 2025. So we currently have data up to the end of February 2024, but not thereafter. That data is necessary to calculate quantum; that's why we need it. Apple's agreed to provide that disclosure. If you go to the draft order; that's in the core bundle, tab 5.

THE CHAIR: We got a new version of this last night, I think. I don't know how different it is from the one we had previously?

MR HOSKINS: I'm not sure there have been -- I think the changes have been becoming more minor, as I understand it. Certainly, it's the one last night that you should be working from.

THE CHAIR: Yes.

MR HOSKINS: But I don't think there's been any sort of --

THE CHAIR: It looked to me like it was actually going backwards in the sense that paragraph 16 disclosed less agreement than more, but maybe I misunderstood that.

MR HOSKINS: Can we go to the top of page 2.

THE CHAIR: Yes.

MR HOSKINS: You'll see the first title at the top of that page that "Apple has agreed to provide the further tranche".

THE CHAIR: Yes.

MR HOSKINS: And then if you look at paragraph 4 of the draft order, that's the order

we're asking the Tribunal to make. It's by consent, if you just read that. And so we ask you to make that order.

THE CHAIR: Yes. That is indeed by consent. (Pause)

You seem to be having discussions about the extension of time.

MS DEMETRIOU: It's -- exactly.

MR HOSKINS: So, we ask you to make that order. Now, the eagle-eyed amongst you will have noted that the current relevant period for the claims runs up until 15 November 2024. So, Apple has actually agreed to provide the relevant data up until the Judgment date, which is the application I'm about to turn to. I don't know why Apple has done that, but they've agreed to give that disclosure in any event.

The point I want to make is that clearly there's no practical obstacle in respect of our application to amend the claim period up until the Judgment date, because it just requires the data to be provided and that's the crossover.

In relation to the application to amend the duration of the claims, you'll have seen our application.

THE CHAIR: Before you do that, should we deal with the -- is there a point about these extensions of time? Are you going to deal with that?

MR HOSKINS: I don't -- it's not in my (overspeaking).

THE CHAIR: No, well, if we're dealing with it, let's get it out of the way.

MR HOSKINS: Of course, yes.

MR KENNEDY: Sorry, just a minor disagreement which is reflected in paragraph 16.

THE CHAIR: Yes.

MR KENNEDY: Apple have proposed that there should be an ability to extend the period provided in paragraph 4 by up to ten working days. We think that that's probably more than is required and we proposed five working days. So that's the first disagreement: the amount of time by which the agreement to extend can be made.

The second disagreement, sir, is whether that ought to apply to paragraph 4, which is the provision dealing with the UK transactional data application, or whether it should also apply to paragraph 15, which is the paragraph that deals with the quantum process, if I can call it that, sir. And the Class Representative's position is that it ought to apply only to the UK transactional data, and that the dates in paragraph 15 ought to be rather firm, if I can put it that way, sir, and that in the event that there is a problem with the dates in paragraph 15, then Apple or the Class Representative, as the case may be, can apply under the general liberty provision.

So those are the two points of difference.

THE CHAIR: Why does 16 refer to paragraph 6?

MR KENNEDY: Sir, if the amendment application is not granted -- you'll see sir, if you flick back to the current paragraph 6, that if the amendment application is not granted, then what is currently paragraph 15 becomes paragraph 6.

THE CHAIR: Oh, I see. Okay.

MR KENNEDY: I had the same question, sir, and Ms Fitzpatrick had to explain it to me.

THE CHAIR: Yes, fine.

MR KENNEDY: So, it's just the alternative version, sir.

THE CHAIR: Yes, I understand.

MR KENNEDY: But substantively, there's only two issues: it's whether it should only apply to UK transactional data, or whether it should also apply to the quantum process.

THE CHAIR: And just help me: this obviously requires agreement, so why are we having an argument about the time in which you might agree to something if you've got the ability not to agree to it?

MR KENNEDY: Sir, we just took the view that the timetable was already quite extended and that it wasn't necessary to have a period of up to ten days for the

agreement, sir.

THE CHAIR: Well, I mean, you obviously don't have to agree to that, do you? Am I missing something? You can say no if they ask you, can't you?

MR KENNEDY: That's correct, sir. And maybe in that instance, then the position can be that we can take it away and seek to agree it.

THE CHAIR: Well, I mean, I don't want to encourage people to then start suggesting time limits that are not sensible, but it just seems not a productive use of the time of solicitors, counsel or indeed the Tribunal to be arguing about the length of time of something which you've got in your gift anyway.

MR KENNEDY: Sir, perhaps I can take instructions on that, and we won't take up any more of your time --

THE CHAIR: I think that probably would be helpful.

MR KENNEDY: -- right now, sir. Yes. Thank you.

THE CHAIR: Mr Hoskins.

Amendment Application

Submissions by MR HOSKINS

MR HOSKINS: So, if we turn to the application to amend the duration of the claims, I'm not going to take you through our application; you'll have seen that. The current claims period is 1 October 2015 to 15 November 2024. The application seeks to amend the claims period to run from 1 October 2015 until 23 October 2025, which is the Judgment date, and Apple opposes that application.

So, what's the issue? Well, if these were High Court claims, the particulars of claim could have sought damages up until the date of judgment. That's perfectly normal in the High Court.

THE CHAIR: Sorry, (inaudible) --

MR HOSKINS: No, no, of course. It's not a good start.

THE CHAIR: (Inaudible). So, if you had a -- just thinking about a section 47A claim and maybe -- there will probably be some shudders around the court at the mere mention of the word MIF claim, but if you took a MIF claim as an example, and just an ordinary 47A claim and so someone who issues a claim form says, "I'm claiming damages for continuing infringement", and that would be quite normal, would it then -- indeed, I think they probably are framed like this and someone will correct me, I'm sure, who knows these things better than I do -- but these would normally say, "Claiming for continuing infringement up to date of judgment".

MR HOSKINS: In the High Court, yes.

THE CHAIR: In the High Court.

MR HOSKINS: Absolutely.

THE CHAIR: Well, then indeed in the MIF proceedings here, presumably. Certainly, the ones that are transferred from the High Court must --

MR HOSKINS: Oh, sorry. You mean individual as opposed to collective claims?

THE CHAIR: Individual claims, yes.

MR HOSKINS: Yes, absolutely. The difference -- the procedural issue that we're debating only arises because of the position in collective claims, yes.

THE CHAIR: Partly, although -- and I'm probably now taking you way off course, so tell me if you want to come back to this later. But the point is made that it's a combination of the period and the class that gives rise to the problem. Because you could say -- and I'm not saying this is the right answer, but there is a distinction, isn't there, between people who are already members of the class that say (inaudible) 15 November and any argument about a continuing infringement up to the date of judgment, and people who are not members of the class at that date and who only can have a cause of action after that point in time.

MR HOSKINS: I'm going to --

THE CHAIR: You were going to come to that specific --

MR HOSKINS: Absolutely, yes. So, if these were High Court claims or, sir, as you pointed out, not collective CAT claims, then you can bring a claim for continuing loss and that would apply up until the date of the judgment. In a High Court trial or in a CAT non-collective trial, the fact that there was no specific evidence given during the trial relating to the period after the trial would not be an impediment to granting damages on that basis.

Indeed, that was the position that Dr Kent adopted in the original claim form in this case in terms of the scope of the claim. If you go to the claim form, it's core bundle, tab 13, page 591. You see paragraph 20. The original claim was:

"For the purposes of this class definition, and as utilised in this Claim Form, 'Relevant Period' means the period from 1 October 2015 [until] the date of final judgment or earlier settlement of the present collective proceedings."

It's the words in purple that were the original claim.

So that's what was claimed at the outset, but after that claim form had been filed, there was the Judgment of the Tribunal in *Alex Neill v Sony*. That gives rise to the issue that we are discussing today. As a result of *Alex Neill v Sony*, in collective proceedings before the Tribunal, pleaded claims must be extant as at the date of the claim form or any later amendment thereto. Sir, you'll be familiar with *Alex Neill v Sony* because you were the Chair in that case. If we go to the authorities bundle, tab 19.

(Pause)

We need to go to page 276.

THE CHAIR: Yes.

MR HOSKINS: Paragraph 62, at the bottom of the page:

"The PCR's proposed class definition is as follows:

"'All PlayStation users domiciled in the United Kingdom ... who during the Relevant Period made one or more Relevant Purchases'."

You will see the similarity to what we originally put in our pleading.

Then, paragraph 63:

"The Relevant Period is defined as:

"'... the period between 19 August 2016 and the date of final judgment or earlier settlement of the collective proceedings'."

Again, that's what we originally pleaded.

Then, 64:

"Sony's argument is that the purpose of the collective proceedings regime is to combine claims, which must be extant as at the date of the claim form."

Then the Judgment sets out the wording of section 47B(1) and 47A(2) and (3) of the Competition Act.

Then if I could ask you to read paragraph 67, please, just to refresh your memory. (Pause)

Do you see that the Tribunal in Merricks had held that:

"It is ... fundamental to the CPO application that all the potential class members have existing claims at the time when the application is made."

So that's the principle.

Then if you go over the page, and I ask you to read, please, paragraphs 70 and 71. (Pause)

THE CHAIR: Yes.

MR HOSKINS: You see the Tribunal in *Sony* said that the definition of the relevant class, as was, was "liable to be struck out", and directed that it be amended. So that's why the amendment was made in our case, because clearly we had to do it in light of *Sony*.

That takes us to the procedural gymnastics, and as you're well aware, a practice has been established that a class representative makes periodic applications to amend the duration of the claims. That's happened twice in this case. There was an order of 8 August 2024. We don't need to turn it up, but the reference is core bundle, tab 15, page 655. That order extended the relevant period of the claims to run up until 8 August 2024. Then there was a second order of 21 November 2024, at core bundle, tab 16, page 657. You can turn that one up. (Pause)

THE CHAIR: Yes.

MR HOSKINS: This amended the Relevant Period of the claims up until 15 November 2024, and is worth just glancing through, because the order that we are seeking, effectively, reflects this. We've just taken this as the basis, but obviously with the new date that we're seeking.

So paragraph 1, the amended claim form has to be amended. Paragraph 2, the relevant paragraph of the collective proceedings order is amended. Then paragraphs 3 to 5 deal with the new claimants. Sir, it's the point you made to me, that there are new claimants. So that's provision for the domicile date. In order for the opt out and opt in to work for the new claimants, that's paragraphs 3 to 5. Paragraph 6, a further CPO notice is approved. 7, the further CPO notices to be published. Then at 10, file and re-serve the claim form. I'll come to that when I show the order we're seeking, but it's basically this order with the different date put in.

Now, it's important to realise that pursuant to the ruling in *Sony*, an amendment to include the period up until judgment in these claims could only be made at or after the judgment date. It can't be made before, and that's fundamental: so we couldn't have brought this application any earlier. The earliest time it could have been made was the day of the Judgment handing down. That follows from *Sony*.

THE CHAIR: Sorry, just explain that to me again just to make sure I'm clear about

that. Because ...?

MR HOSKINS: Because *Sony* says that the claims must be extant at the time of the application.

THE CHAIR: Yes. So, you're saying the applicant -- yes, I see. The application to amend is because you were already -- yes, I see.

MR HOSKINS: In *Sony*, it was about the application for certification, but equally applies to that at the time the application to amend is made, you can only apply to amend up until the date of the application to amend.

THE CHAIR: Yes, I understand.

MR HOSKINS: That's why you see the procedural gymnastics: we couldn't just, at some stage prior to the judgment date, make an application forward-looking; we can only ever make an application up to the date of the application. That's the problem.

THE CHAIR: Yes. I mean, I think the application that is being talked about in *Sony* is not the application to amend.

MR HOSKINS: It wasn't an amendment application.

THE CHAIR: It's the CPO application.

MR HOSKINS: Exactly.

THE CHAIR: But you're saying if the application to amend has the effect of changing the CPO application, i.e. the claim form, then you can't do that earlier? Is that the submission?

MR HOSKINS: That's correct.

THE CHAIR: Yes.

MR HOSKINS: That follows not just from *Sony*, but also from *Merricks* as well.

THE CHAIR: Yes.

MR HOSKINS: That's a really important point, is that the first time we could have made the application was when the Judgment was handed down. As you're aware,

we wrote within days of the Judgment being handed down saying we're making this application, so that the Tribunal knew and so that Apple knew. Now, Apple's --

THE CHAIR: Sorry, can you say -- I mean, maybe you're going to come to this as well, but was it made plain in November 2024 that there was an expectation of a further amendment? In other words, have you signalled clearly that 20 November wasn't the last one? In terms of Apple's position, an expectation that this issue was going to arise again? Do you know --

MR HOSKINS: I wasn't at -- even if I was at the PTR ... But, I mean, we'd originally pleaded for the claim up until the judgment date, Sony came down and then we'd taken the opportunity. The last opportunity we took was at the PTR to amend as far as we could.

THE CHAIR: Yes.

MR HOSKINS: Whether it was formally stated, I don't know, but it was obvious what was happening. Apple is not at any disadvantage by us making the application within days of the Judgment being handed down, and here we are having the debate.

Now, Apple suggests, first of all, that the Tribunal does not have jurisdiction to allow this amendment after the Tribunal has handed down its judgment, but that is not correct. First of all, stating the obvious, this Tribunal is not functus officio. If it were, we wouldn't be here today. The Tribunal is still dealing with this matter, still has jurisdiction to deal with this matter generally. The second point is -- do you have the Purple Book or the Tribunal Rules in some form to hand?

THE CHAIR: The Tribunal Rules, yes.

MR HOSKINS: If we go to Rule 32(1) of the Tribunal Rules.

THE CHAIR: Do you have a page reference for the Purple Book?

MR HOSKINS: Sure. Let me just -- it should be page 1863. (Pause)

4.35 on the paragraph numbering (inaudible) and 1863 on the page number. It's Rule

32(1).

THE CHAIR: Thank you.

MR HOSKINS: The heading, "Amendments to Claim Form":

"(1) a claim form may only be amended (a) with the written consent of all the parties; or (b) with the permission of the Tribunal." [as read]

So, the Tribunal has a completely general power to permit amendments to claim forms. The power is not limited to the period prior to any judgment, and what Apple is effectively asking the Tribunal to do is to read a limitation, a jurisdictional limitation, into the Rules which is simply not there. It is a general power; it is not limited in any way.

The third point on jurisdiction is this: Apple argues that the "findings and orders" made by the Tribunal in the Judgment only relate to the claim period. If we can go to the Judgment, core bundle, tab 10, page 556.

THE CHAIR: Can you give me the paragraph number?

MR HOSKINS: The paragraph number is 1079. (Pause)

THE CHAIR: Yes.

MR HOSKINS: So, it's the section of the Judgment under the heading, "Disposition", the Tribunal says, "We make the following findings and orders", and then you see the paragraphs that follow.

If we go to Apple's skeleton, so that's core bundle 3, page 15, paragraph 11. You see the argument that Apple makes at paragraph 11. It says:

"Here, the Tribunal's orders have been made. It accordingly has no jurisdiction to revisit them."

With respect to that, this submission is wrong as a matter of both fact and law.

First of all, I'm sorry to jump about, but if we go back to the Judgment at paragraph 1092, so core bundle 10, page 559. You see the penultimate paragraph,

the Judgment says:

"The parties are to seek to agree a draft order reflecting the outcome of this judgment [et cetera] ..."

So the Tribunal has not made its final order in these proceedings, let alone drawn up its final order.

But as a matter of law, the Tribunal does have a general power to vary or revoke any order that is made. That's Rule 115(2) of the Tribunal Rules. (Pause)

That's page 1-8-9 -- oh you've seen it, sorry. So again, a general power to vary or revoke any orders made.

THE CHAIR: You say an order hasn't been made in the sense of the decision in *In the matter of L and B (Children)*, but if it has been made, we've still got a power under Rule 115 to vary.

MR HOSKINS: (Overspeaking). So in our submission, the Tribunal does clearly have jurisdiction to permit the relevant period to be amended.

The second element of the application is: should the Tribunal exercise that power? The first point is this: the purpose of the collective proceedings regime is, first of all, to ensure that consumers obtain compensation where they have suffered loss as a result of infringements. The flip side is to ensure that those who have infringed competition law are required to pay compensation caused by the infringements -- but obviously, the flip side is the same thing, but they are different objectives. Neither of those related objectives would be fully met if the amendment were not made. That is a simple point, but it's a very powerful one.

The second point is this: as I've already explained, in accordance with *Neill v Sony*, it was not legally possible for Dr Kent to make a claim for damages up until the date of judgment, until after judgment had been delivered. As I've already indicated, once the Judgment had been handed down, Dr Kent made this application very promptly.

Apple's skeleton at paragraph 119. If you can look at that, that's the point you raised with me, to a certain extent, sir. Core bundle, tab 3, page 16. (Pause)

THE CHAIR: Yes.

MR HOSKINS: Paragraph 19. Apple says:

"... there is no good reason why this application could not have been made sooner ..."

We can read through, and then at the bottom of the page:

"That does not explain why, insofar as individuals were already members of the class (and thus had 'extant claims') their period of loss could not have been pleaded from the beginning as continuing until the date of judgment, as it previously had been. Dr Kent made an informed choice not to pursue the claims on that basis, and must now be held to that choice."

But that is just simply wrong as a matter of law as a result of *Sony*. You can go back to *Sony* if the point is not obvious, but in *Sony* there was the class as defined, and that class as defined in the claim form could only claim up until the date that the claim form was filed. So that again is simply wrong as a matter of law.

THE CHAIR: Is that right? Perhaps we do need to go back to *Sony*, because I think -- I've certainly been thinking about this as being a problem about claims being extant. Are you saying the claims -- you're talking about the claim not being extant because the further loss hadn't been suffered. Is that the point you're making?

MR HOSKINS: That's right.

THE CHAIR: But there is a distinction, isn't there --

MR HOSKINS: You can also -- sorry, you can also -- maybe it helps to go back to *Sony*, because remember there the claim was for a certain class of purchasers. They were claiming damages up until the end of the relevant period. The relevant period was defined there as the date of judgment or earlier settlement.

THE CHAIR: But surely the problem that *Sony* highlights is not the problem of existing

class members suffering future losses, because in that case, you wouldn't have a section 47A problem. The whole point of *Sony* is that you can't bring claims that aren't section 47A claims. So, if, as we've established, somebody ordinarily can bring a claim up to the date of judgment under section 47A, then *Sony* doesn't prohibit that. The problem in *Sony* was that when you got the date after the claim form had been issued, you didn't have claims that were extant. The claims after that were not extant at the time it was issued. That was the problem.

MR HOSKINS: There was an existing class that had valid claims up until the date of the claim form, but that class could not claim for losses after the date of the claim form.

THE CHAIR: Because ...?

MR HOSKINS: Because of the principle in *Merricks*. Let me go back to it, please.

THE CHAIR: Well, the principle in *Merricks*, that's all derivative on -- the whole point of this is that it's all derivative on whether or not you'd have a claim as an individual claimant, isn't it? I mean, tell me if that's not right. If that is right, then obviously an individual claimant is able to bring a claim for a loss that's not yet suffered at the point of the trial.

MR HOSKINS: Well, let's go back to *Sony*, because that's certainly not the way I understood it. And it's not the way I don't think the general practice has been, because you've seen that the way the orders have been made.

THE CHAIR: Well, I think --

MR HOSKINS: To the extent that the orders -- sorry.

THE CHAIR: Carry on, please.

MR HOSKINS: The orders -- first of all, in *Sony*, it was said that you couldn't claim up until the date of judgment. It said that was liable to be struck out, the definition of the relevant period, and that's what we did. And then, when we came back before this Tribunal to extend the periods, we're extending the periods for the existing class

members and that would inevitably have brought new class members in. That is the understanding of *Sony* that has been applied, and in our submission, it's the correct understanding. Because you see at paragraph 63 of *Sony* ... Let's look at 62 first. The proposed class definition:

"All PlayStation users ... who during the Relevant Period made one or more Relevant Purchases."

You see the definition of relevant period, you see what was said in *Merricks*; we've said that before. But then the Tribunal says at paragraph 71:

"In the meantime, we agree with Sony that the present class definition is not adequate for the purposes of the Eligibility Condition ... and is also liable to be struck out. We direct that the PCR should amend the class definition so that the Relevant Period terminates as at the date of filing of the Claim Form."

So, what had to happen was that the relevant period at paragraph 63 had to be amended: the relevant period was defined as being the period between 19 August 2016 and the date of the claim form. That meant that that defined the class: not just the extent of the claims that the people within the class had, but also who was within the class. It had both effects.

THE CHAIR: But that's because the Class Representative in that case, and indeed in this case, had chosen not to distinguish the relevant period or apply the relevant period to different parts of the potential class. So, you couldn't make any distinction of the sort we're now trying to draw because of the way it was drafted. And so, I think it would have been open to the Class Representative in *Sony* to go away and say, "Here's my amendment, but by the way, I'm still persisting in my claim in relation to those members who are already class members" and to draft it a different way but they didn't.

But I mean, this is a section on class definition. That's what this is about. So, I'm not

sure at the moment I'm accepting the submission that *Sony* is a prohibition on someone who, were they an individual claimant and would have a section 47A claim, could not plead a case that gave them damages until judgment.

MR HOSKINS: Well, in *Sony* as in *Merricks*, part of the reasoning was that section 47 only deals with persons who have suffered loss. So, in that respect, it is looking at the extent of the claim, we say.

Now, if -- so, the interpretation you're putting, I must confess, is not one that I've seen in any other case, but you may be right. Let's assume you're right for a moment. That still leads us to the question: does this Tribunal has jurisdiction to make this amendment? The answer is yes. And the question: should it make the amendment in the circumstances of this case? We say it's yes.

If we've in fact misunderstood *Sony*, we've been here twice before to make the amendment and nobody's suggested that actually, why are we bothering to do this? Because you could just say for the existing class up until the date of judgment, earlier settlement, and you only have to do this for new class members. That's never been raised. So, in my submission, when we come to the question of should the amendment be made, even if that legal point you put to me is right, sir, that has to be taken into account; that would not be a good reason for refusing to allow this class to be extended so that the compensation is paid.

THE CHAIR: Yes, I think I'm certainly -- there's no criticism from me on it, I think we're all only thinking of it now because I think the issue, to the extent there's an issue and you may say there isn't, but the issue only arises once you do get, at least, to trial and judgment.

Because I think the point that's being made, putting aside the existing class members for a moment, is that there's something quite odd about somebody joining a claim and becoming a participant in a class in a matter where the trial has taken place. On the

face of it, it is a bit odd and I think I have some sympathy for that point because it does seem to me to be a different sort of -- it's certainly one step further on from anything else we've been talking about. And so, if there's anything in that which I have to decide, there is the potential for a distinction between these two groups.

Now, I suspect that as a matter of practicality, no one's needed to think about it before and also actually, it's probably, in a lot of cases, not a very helpful distinction because it's quite hard to tell. How would you know, for example, in boundary fares, whether someone had bought for the first time or had bought previously? It's almost impossible to work out, I would have thought. But it may be that that is not the case here; it may be that it is possible to work out which users were purchasers before and after 15 November and which were only after. So, I don't know, I don't know the answer to that question and I suspect that no one in the room does.

MR HOSKINS: There's obviously an important point, so I'd much rather have this --

THE CHAIR: No, absolutely. Well, it's a difficult --

MR HOSKINS: It's clearly important to the Tribunal that we get this right.

THE CHAIR: It's a difficult one. I think we absolutely take your point about the policy provisions, but the question, I think, is, there are other mechanisms to deal with these problems; for example, to the extent that there's a continuing infringement, which somebody might choose to assert today, clearly no one's suggesting that that could be dealt with by amendment. And so, that does illustrate that -- and obviously, if somebody (inaudible) as far as I can see, there's no reason why somebody couldn't choose to take that as a basis for a claim, indeed, a collective proceeding if they wanted to. I mean, that's not suggesting anybody should; I'm just saying as a matter of principle, I can't see why that shouldn't be open to somebody if the infringement were to be continuing. People might say it's not, I don't know. But the discussion we're having does throw up the possibility that the appropriate mechanism to deal with

the problem you've identified may not be a single one.

MR HOSKINS: That's fair. We have a slightly different -- well, you have two sort of driving forces. I selfishly probably only have one because there is the question of how should this be dealt with in the future; this is still developing jurisprudence. My immediate concern is, how do I get justice for the class?

THE CHAIR: Of course. Absolutely.

MR HOSKINS: So that's why I sort of go to the submission which is, even if there is a sort of more nuanced legal way through this, my application is for the amendment for the class, both to extend the existing class's claims and to bring new class members in. The first question in relation to that application is, does the Tribunal have jurisdiction in relation to both those types? And I've shown you it does, in our submission, because the powers are general. So, then the only question, or the next question, is should the Tribunal grant the amendment in this case? The fact, for example, that the legal position is not clear and it's the first time it's come up in this way is something that I would pray in aid in my favour, in a sense. It cannot be the case that it is said, "Haha, you missed this trick and therefore you can't do it". You'll see that the claim has been brought in a sort of responsible way to deal with this point, to try and react to *Sony*; we've made two applications and this is the first time this has come up.

So, do you have jurisdiction to this: absolutely, yes. In relation to the existing class members, i.e. the ones who are already in the claim form, you have my submission about the policy behind that. They absolutely should have compensation for the loss due to a continuing infringement.

In relation to the new class members, they could not bring a claim before the date of the Judgment, up until the date of the Judgment. So, there's an odd situation: at what stage could or should they have done so? Because, of course, every day there could

be new class members. So, either you say, "Well, you must make the application shortly before trial or in the first day of the trial or during the trial or on the last day of the trial", but you will never get justice then, because even then -- you'd have to produce the Judgment very quickly -- but X months after the date of the trial, are we still supposed to be making applications?

THE CHAIR: Well, I think your --

MR HOSKINS: Not knowing when the Judgment is coming? Or, sir --

THE CHAIR: Yes.

MR HOSKINS: -- you can say we do have jurisdiction to grant the amendment which would include new class members, because this is a continuing infringement. It's just that we should do so. We have the power to do so, and it's just that we should do so yes.

THE CHAIR: So, just putting aside jurisdiction for a minute and also any question of whether the Class Representative hasn't done things when she should have, just dealing with the problem analytically, if one can put it that way -- and I'm putting this to you because I would put it to Ms Demetriou, who I expect is going to stand up and deal with this; I give her plenty of notice to think about it and indeed, I think it's something that probably your client needs to think about as well -- is there a possibility that the right answer for this, from an analytical point of view, bearing in mind that the objection that I think resonates most strongly with us from Apple is this idea that people who have had no involvement in the case whatsoever suddenly become involved in it after the trial, after all the evidence has taken place. And it may be you say that's something we shouldn't be that concerned about, but just thinking, if that were a point of differentiation between the groups we're talking about, is a potential solution to this, assuming jurisdiction for present purposes, that, in relation to existing class members -- well, it's simply the other way round: that people who are not subject to

the 15 November, whatever it was, the November amendment, should be permitted -- the amendment should be permitted in relation to them up to, say, the last day of the trial.

MR HOSKINS: So, is that -- can we call them the existing class members?

THE CHAIR: No, this is the new class members.

MR HOSKINS: This is the new class members.

THE CHAIR: I'm doing it in this order because it seems to me that, once you've got that group, they then become the existing class members at the end of the trial, and they should be entitled, on the ordinary principle under section 47A to have a claim for damages through to judgment.

MR HOSKINS: Sorry, just so I understand what you're putting, is it new class members up until the date of --

THE CHAIR: So, the proposition would be you'd be entitled to amend up until the date of the Relevant Period, up until the date of the last day of the trial, 28 February. So, the amendment becomes, in relation to class definition, that's the relevant date, and you've got to do all your notices again and so on for that. And that meets the objection that you've got people who are just joining afterwards -- whether that's a good point or not, just assume for present purposes that's something we need to deal with. Now, at that stage, you then have your class finally constituted. At the moment, it's not obvious to me why that class shouldn't be entitled, because they could if they were 47A cases, to have their claim adjudicated for them for loss suffered all the way to the date of judgment. And so, it's that group that gets the benefit. The group that misses out is the group that purchased for the first time after 28 February. Their remedy, if they wish to pursue one, is they've got to issue fresh proceedings.

I mean, I'm not saying that's the answer because it does presuppose that Apple's point that people not participating in the trial, new class members who weren't class

members at the point of the trial, has some force and we'll hear Ms Demetriou on that and it's a point I'll test with her. But that does seem to me -- I just want to get your reaction to that. I appreciate you'd have to take instructions before you could do anything about that. But just analytically, is there any reason why that doesn't make sense?

MR HOSKINS: It's an approach you could adopt. Certainly, I'd much prefer a situation in which we have some new class members rather than no class members, just in terms of the objectives of the regime. If I could just address you then on new class members after the date of trial, there's no reason of principle why they shouldn't be brought into this. There is a continuing infringement, and the infringement continues up until the date of judgment. On this basis, and on your approach on *Alex Neill v Sony* you've put to me, when could these people have applied to come in after the date of trial? Of course, they don't know when the judgment is coming, so, again, are you in a situation where you make the application the day after your trial is finished for these people --

THE CHAIR: I think -- yes, sorry.

MR HOSKINS: -- or two days after, because they can't do it before, is the problem.

THE CHAIR: Well, no, I think the, the proposition I'm putting to you, which again is entirely provisional, presupposes that they don't, they cannot come in. And in that sense, as I think you've just said, that's a departure from the rule that would normally apply to proceedings and judgments, but there's a reason for that, which is the peculiarity created by the collective proceedings and by the requirement that claims be extant at a certain point of time and, I suppose, a choice that that period shouldn't be extended past the trial finishing.

So, the argument really, I think about whether it's right in principle, is there a good reason in principle why we should pick something like the end of the trial so the people

who have not participated in any way are not getting the benefit of that? That's, I think, the point of principle, really.

MR HOSKINS: Well, if you have the power to make the amendment, on which I've already made the submission that you do have the power to make amendment, including an amendment of that sort, up until your functus, there is no difference in terms of justice. If you think of the two priorities, why should class members -- i.e. people who purchased the relevant products, et cetera -- be left out? Why should they be told, "No, no, you must make a new claim" when, because there's a continuing infringement, there's nothing new to say? I mean, that strikes me as an oddity in a sense, that if you have the power to do this and you're saying to these people, "Well, you couldn't bring a claim before the last date of trial; you can only do it after the last day of trial but you don't know when the judgment is coming. You have suffered loss. The Judgment has established a continuing infringement. These people are not a new category of claimant beyond the date; they're exactly the same types of purchasers. I can understand the argument being made, "No, no, you can't bring new class members in if they're qualitatively different from the existing class", but they're identical to the existing class except for the date of purchase.

THE CHAIR: Well, you can say that about people who are making purchases today, can't you? I mean, there has to be a point at which the process stops.

MR HOSKINS: Absolutely.

THE CHAIR: Obviously, there's a lot of history that says judgment is that point, but then --

MR HOSKINS: That's right.

THE CHAIR: -- I suppose it's being said that there is a particular circumstance here that's different, that should take you away from that rule. And the particular circumstance is you've got all these people who have turned up after the trial and were

not in any way involved in it, and --

MR HOSKINS: But they've not turned up and they're not involved. That's the whole point about collective proceedings, that the class isn't involved, that the Class Representative is acting on their behalf. So, it's a fiction to say they're not actively involved.

I mean, the only "oddity", and I put that in inverted commas, is if you're one of the new class members, and you're asked, "Do you want to opt out", I can guess what the answer is going to be from them. So that's not a problem, but the idea that there's some injustice or the class has not been properly treated because they weren't actively involved in the trial is a fiction. Because the class isn't actually involved a trial; that's the whole point, the *raison d'être* of opt out proceedings. It's the class representative who acts on their behalf and takes decisions on their behalf.

The way in which the class exercises its choice, the way the class participates in the proceedings, is by opting out if they wish to. And we know that the opt out in this case has been minimal. I think there was one person who did it on a point of principle, you remember, a member of Brick Court Chambers, I believe. Nobody else opted out. How many people are going to opt out, if you say, "This judgment has established that you're entitled to money; do you want to opt out?" This is all a fiction. I mean, you can draw distinctions between these people and new class members up until the date of trial, but it is, in reality, a fiction. The real issue here is, given that the Tribunal has jurisdiction, what is the best way to give effect, exercising your discretion, to the regime? Is it to limit people who can claim artificially, in my submission, or is it to allow them in? What does justice? What pursues the objective? And you have my submission on that.

THE CHAIR: I don't know if anyone's had the opportunity to look at Canadian authority or Australian authority, which are probably the areas of the most use. Is there any

guidance to be had from how they deal with it?

MR HOSKINS: I don't know. We haven't looked at it. I don't know if the *Alex Neill v Sony* issue exists. I've not come across it in my personal experience, but that's the best I can do.

THE CHAIR: No, thank you.

MR HOSKINS: I just don't know if it's an issue there in the same way.

I think I've covered most of the ground here. I don't want to sort of trample on anything. There is a legal point -- there's one point I will make. I said there's a continuing infringement. I don't think there's any doubt about that. To make it clear, despite having ample opportunity to do so post-judgment, Apple has not opposed this application on the basis that there has been any material change of circumstances since the end of the trial. Apple has not suggested that if you are right to have found an infringement, it is not continuing until the date of judgment. There is no suggestion that circumstances have changed.

Then a legal point --

THE CHAIR: One second, sorry. I think they do say that the task we set ourselves was to find whether there was an infringement, between -- I mean, if it was in 2015 and 15 November 2024.

MR HOSKINS: Yes.

THE CHAIR: So all of our findings are by definition preferable to that period, but you're saying if it applies from then until the trial or from then until the Judgment, you're saying what's changed --

MR HOSKINS: You'd have heard this in evidence.

THE CHAIR: What's changed in the market? What's changed in the practices?

MR HOSKINS: You'd have heard this -- if our claim had been unamended, if we hadn't amended it following Sony, (inaudible) and so the claim for the class up until

judgment -- you'd have heard exactly the same evidence.

THE CHAIR: Well, I think there was hardly any evidence that was given that was time-specific, was there? There was a little bit of discussion about the implications of 2015, and quite a lot of the material we had was around about 2022.

MR HOSKINS: That's right, a lot of the evidence was -- but even there were some instances of evidence being referred to the -- postdated the current claim period as defined. There was material in relation to Roblox.

THE CHAIR: Yes.

MR HOSKINS: Which I believe postdated -- there was -- I remember during the trial there was a -- Apple drew attention to it. I think it was some sort of porn app store that they'd had to allow onto the app store in Europe. That postdated, for example, the end date of the class, as was during the trial. So, Apple itself was putting forward evidence that wasn't constrained to the period.

I make the point that now, if they'd wanted to come to the court today and had said, "Don't allow the application because things have changed", they could have done so and they haven't. This is a continuing infringement. Their business model remains the same in the UK, that's the point.

These legal points -- in its skeleton argument, Apple cites a number of High Court and Court of Appeal judgments in support of its suggestion that in the High Court, an amendment of the sort now sought by Dr Kent would only be allowed in exceptional circumstances. They say that's the test in the High Court, but I'm afraid that's again legally incorrect.

Apple, in support of that proposition, refers to the majority judgments of the Court of Appeal in *Stewart v Engel*, and the High Court judgment in *Shebelle Enterprises*. In *Shebelle*, it's simply a case in which Mr Justice Henderson considered that he was bound by the majority in *Stewart v Engel*. It's not a new state of principle;

it's just an application of *Stewart v Engel*.

But neither of those authorities are good law, and that's because they've been overtaken by the Supreme Court judgment in *In re L (Children)*, which Apple does refer to for other purposes. If we go to the authorities, tab 11. You'll see this is a judgment of the Supreme Court in 2013. If you read the headnote from (d) to (f), you'll get the background.

THE CHAIR: Yes.

MR HOSKINS: You don't need to read beyond (f). (Pause)

You will see the point of principle upon which I rely at (f) and I'll show you the reasoning of the court. The test is not exceptional circumstances. The test is dealing with the case justly.

THE CHAIR: Yes, but this is the test for changing the judgment -- you're talking about the test for changing the judgment, not the test for amendment.

MR HOSKINS: That's right. I'm going to show you another -- these are the authorities that Apple relies upon to try and constrain --

THE CHAIR: Yes, yes. No, I understand.

MR HOSKINS: -- the scope of your discretion. But absolutely, this is changing the judgment. So it's quite an extreme case, but even in that sort of case it's not exceptional circumstances; it's doing justice. If you see on page 143, the judgment of Baroness Hale and the rest of the court agreed with her, paragraph 16:

"It has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected."

Paragraph 21 refers to what's been called the "Barrel jurisdiction". If I can ask you to read paragraph 21, please. This is where the notion of "exceptional" first arose. (Pause)

Then the next page. If you read paragraphs 23 and 24. It explains *Stewart v Engel*.

(Pause)

The law, as stated by the Supreme Court, paragraph 27 over the page. If you read that paragraph 27. (Pause)

"The test is doing justice, not exceptional circumstances." [as read]

Apple also relies on one other authority to try and constrain the Tribunal's discretion. That's at authorities, tab 15. It's the *Quah Su-Ling v Goldman Sachs International* case judgment of, as she then was, Mrs Justice Carr in the Commercial Court.

If you go to page 202, paragraph 37, you see:

"37. ... the relevant principles applying to very late applications to amend are well known."

As we'll see in a minute, applications for very late amendments are those made before trial which would lose the trial date.

"38. Drawing these authorities together, the relevant principles can be stated simply as follows:

(a) whether to allow an amendment is a matter for the discretion of the court….

(b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed ... Rather, a heavy burden lies on a party seeking a late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. [So, the touchstone, again, is justice.] The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

(c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost."

I don't think we need to go any further in detail. So even in the case of a very late amendment that will cause a fixed trial date to be lost, the touchstone is: what does

justice require? And of course, by definition, in this case, there is no risk of the trial date being lost.

You have my submissions, you have jurisdiction. You have my submission on why you should exercise that jurisdiction, and I particularly focus on the objectives of the regime, I just keep coming back to that submission. It's clearly just that people have suffered loss as a result of the continuing infringement should be compensated. Equally, Apple should pay compensation for its infringement.

Then in terms of the order that we seek, the draft order is at core bundle, tab 5. We pick it up at paragraph 6. (Pause)

If I can take this very quickly because, sir, I showed you the order you made --

THE CHAIR: Yes.

MR HOSKINS: We've just simply taken that as a template, but changed the relevant dates as appropriate. You'll see it's paragraph 6 to 13. That's it.

We have the particular provisions for the new class members, if you allow that. I've made my point: if they want to opt out, they can. If they want to obtain compensation for the loss that they have suffered as a result of Apple's infringement, this will give them that.

Unless you have any further questions for me, that's the application we wish to make. Thank you very much.

Submissions by MS DEMETRIOU

MS DEMETRIOU: May it please the Tribunal. This is, with respect, a really extraordinary application because the Class Representative is seeking permission not just to amend its claim form, but is asking the Tribunal to change its judgment, and to change its judgment in a way which effectively is asking the Tribunal to issue a new judgment, a different judgment, on a new question that hasn't been tried without allowing Apple to defend itself in relation to those issues. That really is an

extraordinary thing to be asking the Tribunal to do.

When one thinks about justice, the justice here, the question of justice, clearly militates against such a course, because what this course is effectively providing for is that it's saying that Dr Kent and, by extension, members of the class, should be able to await the outcome of the trial before deciding whether it wishes the findings of the Tribunal to apply in respect of a later period. In other words, hedge their bets.

So, they fought a trial where they haven't risked anything in relation to that later period. Had they lost, they would have had been able to bring a fresh claim in relation to that later period. So, they didn't risk that. Now, what they're doing is saying, "Well, we've won", so we now want, retrospectively, for that period to be included in the claim.

Now, the reason why this is very unfair is that had Apple succeeded at the trial, it would not have been open to Apple to seek an order extending the period covered by the Tribunal's findings and thereby precluding any new claim on behalf of the same class in respect of a later period, or indeed new class members. That would not have been something that the Tribunal would have countenanced.

So, if we had won and I'd come here and said, "Well, the claim only extended to 15 November, but we would like you retrospectively to change your judgment so as to bring it right up to date and preclude any new claims being brought for the next period of time". I would never have dreamt of making such an application and the Tribunal would never have dreamt of allowing one.

Now, further, of course, if the Class Representative had lost, it would not be seeking to amend its claim to add the extended period of time or bring new class members into the class, it would have wished to conserve the rights of class members not captured by the claim to bring a fresh claim. This is all cakeism of the highest order. They're saying, "With the benefit of hindsight, please, let's cram as much of this into the claim as possible because we've won", and that's not how litigation works.

It's fundamentally unfair to Apple for this reason, because in its judgment, the Tribunal rejected Apple's position in part on evidential grounds. You'll recall some of the examples. You found, for example, that the argument advanced by Apple in relation to Roblox was not sufficiently evidenced. You found that Apple didn't adduce valuation evidence in relation to its tools and technology. Those are examples of areas where you, the Tribunal, found that Apple's evidence was insufficient to substantiate its case. Now, if this application is dismissed, as we say it should be, then consumers would need to bring a fresh claim against Apple in respect of the extended period and new class members would need to bring a fresh claim, which Apple would be able to defend with different evidence. That's a right Apple has, and it's a right which the Tribunal would be taking away retrospectively if this application is acceded to. Granting permission in relation to this application deprives Apple of this opportunity, which is its right, and that is fundamentally unjust.

Now, those are the overarching points, but you've heard that the premise, and what Mr Hoskins put first and foremost as the basis for his application, was the *Sony* judgment. At some point when opening the application, he said, "Well, the fundamental point here is that the earliest time this application could have been made is when the Tribunal handed down its judgment. That's why it's just to grant it". He put that as a central feature of his application, and we, with respect, are completely bemused by that submission because it rests on an obviously incorrect reading of the *Sony* case.

The Tribunal, I can see -- and we've flagged the point in our skeleton argument -- has the point. But let's go back, please, to *Sony* just to make it crystal clear. It's in the authorities bundle, tab 19. If we take it from page 276.

THE CHAIR: Yes.

MS DEMETRIOU: Now, before I take you back to the relevant paragraphs, can I just

say what the distinction is?

THE CHAIR: Yes.

MS DEMETRIOU: The distinction is -- so what is not permitted is to have people in the class definition who did not have extant claims at the date of certification. But what is permitted and has always been permitted is for those people that are properly within the class because they have extant claims to extend their claims if there's a continuing breach until the date of judgment. That's the distinction. It's a clear distinction and we don't see any room for confusion at all when you look at the *Sony* judgment.

Now, the reason -- if we start at the bottom of page 276, the Tribunal can see that in *Sony*, as in the present case, the class representative exercised a choice when it came to defining the class, and they did so by reference to the relevant period. So, the relevant period did two jobs, as it were. You can see that here:

"The PCR's proposed class definition is as follows:

"'All PlayStation users domiciled in the United Kingdom ... who during the Relevant Period made one or more Relevant Purchases'.

"[Over the page] Relevant Period is defined as:

"'... the period between 19 August 2016 and the date of final judgment or earlier settlement ...'"

So, what that combined definition did was to bring into the class people who may not yet have a claim; have suffered and may not yet have made a relevant purchase as at the date of certification. That was the vice. You see that at paragraph 64:

"Sony's argument is that the purpose of the collective proceedings regime is to combine claims, which must be extant as at the date of the claim form."

You can see that that's based on the wording of section 47B. So, there must be an extant claim, but that doesn't mean that all of the damages had to have been suffered by that point. It's a really obvious point.

Then you see the Tribunal's reasoning by reference to the *Merricks* case and you see the citation of *Merricks*. If you just look, please, at page 278 of the bundle, paragraph 26:

"Bringing of collective proceedings combines actual claims [so claims under section 47B]." [as read]

It really is trite to say that a claim under section 47B can, if appropriate, claim damages up to the date of judgment. We see it time and time again. Then, the Tribunal says:

"Accordingly, the individual claims of potential class members are not contingent claims or potential future claims which can start or crystallise only if and when a CPO is granted. It is therefore fundamental to the CPO application that all the potential class members have existing claims at the time when the application is made." [as read]

So that's the point, that they have to have a claim. Their claim is not limited in time. They're not precluded from having a claim which extends up to the date of judgment.

Then if you go over the page to 279, paragraph 70:

"In our view, Sony's interpretation of these provisions is the only sensible one and we adopt the Tribunal's reasoning in Merricks 3 which explains clearly why Sony are correct in their current argument." [as read]

The procedural gymnastics is bringing in scope people that don't have an extant claim at all. That's what's meant by procedural gymnastics.

Turning to Dr Kent's own claim form, so in the core bundle, tab 13, page 591, which Mr Hoskins took you to. (Pause)

What you see here is a similar way of defining the class as was used in Sony. And so, the proposed class members are defined by reference to transactions in the relevant period. Now, they didn't have to do that. They could have separated out the definition of the class -- so those are people who have a claim up to the point of

certification -- and loss, which runs to the point of judgment. That was an option open to Dr Kent, which she did not avail herself of. They chose to define the class in this way, but the fact they exercised that choice does not provide a good reason now for seeking to make this application and ask the Tribunal to change its judgment.

So, Mr Hoskins is absolutely wrong when he says what he called the "central feature" of his application, which was that this application could only be made now. He's absolutely wrong to say that. It could have been made at any time.

THE CHAIR: Well, part of it could only be made after judgment, couldn't it? Because at least in respect of -- I don't think we need to come up with a name for them, but I -- sort of the left behind people or people who come after this after November for present purposes. If the Class Representative wanted to find a way to include them, she couldn't have made any application until judgment, could she? I mean, you say, "There's no jurisdiction. We shouldn't do it anyway", but if --

MS DEMETRIOU: Do you mean the new class members, sir?

THE CHAIR: Yes, yes.

MS DEMETRIOU: Well, for the new class members, we say, well, when you look at *Sony*, *Sony* requires all class members to have an extant claim as at the date of certification. So, we say it's simply impossible to see how you could be introducing new class members post-certification, unless what you're doing is asking the court to re-certify the claim.

THE CHAIR: Well, that can't be right, can it? Because that's not what we've done. Surely, if that was right, you would have objected to the last two applications, wouldn't you?

MS DEMETRIOU: Yes, so -- sorry, I'm sounding very loud when I go down to the microphone.

THE CHAIR: I should say we should take a break when it's convenient as well. Just

in your hands, but we should take a break at some stage.

MS DEMETRIOU: Shall I take one now, so I make sure -- because I see Mr Piccinin's hastily scribbling something, so I want to make sure I've got his point.

THE CHAIR: Yes, shall we do that? Why don't we take ten minutes and we'll come back. Thank you.

MS DEMETRIOU: Thank you.

(11.47 am)

(A short break)

(12.01 pm)

THE CHAIR: Yes.

MS DEMETRIOU: The Tribunal was right to say just before the short adjournment that there is jurisdiction to add new class members.

THE CHAIR: Yes.

MS DEMETRIOU: What we say about that is that there's no jurisdiction post-judgment that comes down to the power point, which I've still got to address you on, that the Tribunal has no power to do that post-judgment.

THE CHAIR: Yes, the jurisdiction point.

MS DEMETRIOU: Yes. Secondly, we say that in terms of justice, there comes a point where it would be unfair to exercise any discretion to do it. That point really would be, we say, after the first day of the trial, because at that point one gets into the one-way bet unfairness, which is that the Class Representative is able then to say, "Oh, well, this is how the evidence is panning out. We think we should or shouldn't add new class members in", and that's what creates the injustice: that it's a one-way bet that the Class Representative is able to exercise.

THE CHAIR: I mean, one assumes that the Class Representative is always going to add the maximum number of class members, isn't she? Because there's -- I mean --

MS DEMETRIOU: Well, no, I mean, if the trial's going horrifically badly for the Class Representative, then the interests of potential class members lie in not being in the class so that they can bring a fresh claim afterwards.

THE CHAIR: So, you're saying that she might take the view that they'd be better out than in and not make the application?

MS DEMETRIOU: Yes, absolutely. So that's why I put it this way: that if Apple had won this trial, then obviously there would be no interest in adding new class members to the class because those class members would be stuck with a judgment against the class.

THE CHAIR: Yes, I certainly understand that point. So, I suppose so if you -- because if you ask yourself the question: how sensible is it that you have a rule that says "On 14 November, if you're a purchaser, you're in, and on the 16th, you're not", I mean, that doesn't seem obviously very sensible. You're saying there is a rationale for having a point in time use at the beginning of the trial.

MS DEMETRIOU: That's what we say. We say that after that there would have to be -- it would be unfair to allow amendments, because then you're getting into the one-way bet territory where you're making guesses about how things might pan out and you're --

THE CHAIR: Yes.

MS DEMETRIOU: Yes, so --

THE CHAIR: That's all subject to your jurisdiction point, I understand. So, you're not giving that point away. But if you're wrong about jurisdiction, then you're accepting that there's a different -- you could take a different view of the merits of your position before and after that date. Is that fair?

MS DEMETRIOU: If we're wrong on jurisdiction, then we accept that there's a discretion, but we say it would be manifestly unjust to exercise that discretion.

THE CHAIR: At all, or beyond the date of the first day of the trial? I mean, I suppose I'll put it -- sorry, I'll form the question a slightly different way.

MS DEMETRIOU: After the first date of the trial.

THE CHAIR: Yes. You're saying that after the first date of the trial, different considerations apply that you may say it's unfair before, but you're saying it is more unfair afterwards because of the point you make.

MS DEMETRIOU: Exactly. And we also say that the other part of the application, which is extending the damages period to the judgment date, is unfair in any event for the same reason, because of the one-way bet reason. But essentially what's been tried has been a claim for damages up to 15 November 2024. Those class members did not risk their claim after that date. And so, what they're now doing is saying, "We've won and so we now want the judgment extended".

And it's no answer -- Mr Hoskins says, "Oh, well, it's a continuing breach and so fairness dictates that time should be extended". We say no, because the Tribunal's made its decision on the claim for damages up to 15 November 2024. What you're being asked to do now is to change your judgment to make a ruling up to a later point of time in circumstances where Apple has not had the opportunity of defending itself in relation to that claim. No opportunity.

So, to put it this way, if the application is refused, as we say it should be, then anyone wishing to claim damages after 15 November would have to bring a fresh claim and Apple would be entitled to defend itself on the basis of different evidence. That's the fundamental unfairness: that Apple will be deprived of that opportunity, which is its right.

THE CHAIR: So, your position, I think is that if -- putting aside jurisdiction for a minute, I know you're going to come to that -- just hypothetically, let's say there is jurisdiction; we're in discretion territory. You say you're not pushing back as hard in relation to

a class definition date of, whatever it was, I can't remember what date the trial started, 1 February or something that the trial started?

MS DEMETRIOU: If the amendment had been made at that time. We are pushing back on it now because now, they have the benefit of hindsight. That's completely unfair to say, "Well, now we know the result, we want the class definition to be amended from the first date of trial". I was answering a different question, which is, what would the Tribunal's position have been had Mr Hoskins on the first date of trial --

THE CHAIR: Oh, yes, I see. Okay, but why -- yes. So, that's your point about this happening after judgment anyway, isn't it? So, you're saying -- yes, I understand. Okay, we have to do this in layers, don't we. So, there's the jurisdiction point.

MS DEMETRIOU: Yes.

THE CHAIR: And then there's your point that says we shouldn't be doing this after judgment anyway because it allows unfair incentives, if you like.

MS DEMETRIOU: Yes. It's fundamentally unfair for two reasons. The first is because it allows the Class Representative to hedge her bets.

THE CHAIR: Yes, yes.

MS DEMETRIOU: And the second is it's a one-way bet. So, if Apple had won, it would not have been able to say -- so there's three reasons. The first is it allows the Class Representative to hedge their bets. The second is that Apple would not have had the same right if it had won, to extend the Tribunal's findings going forward so as to preclude new claims. And the third and very fundamental point is it deprives Apple of its right to defend these claims which have not been tried, did not form part of the trial, on the basis of new evidence. So those are the three very fundamental points why exercise of discretion, if you have it, would be unjust.

THE CHAIR: Yes. But you're accepting, I think, that if this had all happened before anyone knew what the answer was, there might be a case to be made for extending

the class --

MS DEMETRIOU: And damages.

THE CHAIR: -- to the beginning of trial and extending damages to the beginning --

MS DEMETRIOU: Yes, on the first day of trial. If they had come to you -- sorry.

THE CHAIR: (Overspeaking). Yes.

MS DEMETRIOU: Yes, all the way to judgment. If they'd come to you on the first day of trial and said, "We've got an amendment application, we want to add in new class members and extend damages for everyone until the date of judgment", I can't see any basis on which we could have resisted that at that stage.

THE CHAIR: Yes. No, okay, that's helpful. And of course, the reason, just to be absolutely clear, why -- I mean, obviously, I think, as Mr Hoskins has pointed out and I'm sure you have in mind, this is not just about this case and clearly, we have to be able to understand how this affects the regime generally and be able to articulate that and (overspeaking).

MS DEMETRIOU: Yes, sir. We very much endorse that and it would be a terrible, in our respectful submission, precedent to permit a class representative who could have made that amendment application, in which case everything would have been fair, and failed to do so for no good reason, based, it seems, on a misreading of *Sony*, to then come to the Tribunal at the date of a following judgment and say "Hurray, we've won; we'd now like the amendment". That is fundamentally unfair to the defendant.

THE CHAIR: Yes. That's a combination, isn't it, of the way in which, as you say, the definition and the loss are bundled, and then apparently a misunderstanding about *Sony*. Yes.

MS DEMETRIOU: Yes. And you'll remember from the *Quah* case of which Mr Hoskins took you to part of the principles that a very heavy burden lies on the applicant who is seeking permission to amend to explain why the amendment couldn't

have been made sooner. There, frankly, is no good explanation in this case; none.

THE CHAIR: He says that's all just about trials and about whether the trial gets adjourned or not and the risk of all that. So he says that doesn't really apply here.

MS DEMETRIOU: Well, we're a fortiori that, with respect --

THE CHAIR: Because you're saying it should have been done?

MS DEMETRIOU: Yes. Because in the case of *Quah*, where a trial date is lost, obviously that leads to expense, but the fundamental injustice of not being able to raise defences, not being able to try the issues, doesn't arise. Here, we're in a much worse position because the trial has been and gone.

THE CHAIR: But of course -- I mean, the reality is, and I think Mr Hoskins described it as a fiction, that the identity of the class members would have made no difference to the course of the trial, would it?

MS DEMETRIOU: Well, had they made the application, as I say, on the first date of the trial, then he may have a point. But the difficulty is that now, it's unfair, because now the trial has proceeded on that basis --

THE CHAIR: Yes, that's fine.

MS DEMETRIOU: -- and you have my point --

THE CHAIR: I'm just thinking about the broader picture again. In other words, if we're going to say to people -- in a sense, I think class representatives are going to be expecting us to tell them what the right way to deal with this problem is.

MS DEMETRIOU: Yes.

THE CHAIR: And if the right way, in your submission, to deal with the problem is you need to make that application on or about the first day of the trial, then I suppose I'm testing with you whether you're not going to then find people popping up and say, "Well, this doesn't comply with *Quah* and it's very unfair" and we're back once again and the CR is in a difficult position.

MS DEMETRIOU: So that may be -- I'm not saying that it would always be fair or always be right.

THE CHAIR: No, of course. Of course.

MS DEMETRIOU: So, there may -- in every case, the application to amend would have to be judged on its merits.

THE CHAIR: Yes. But I mean here, you know, I suppose -- and you heard me ask the question about whether this had been signalled, but I think we all knew from *Sony*, and then, of course, it was borne out in August 2024 and November 2024. We all knew that there was going to be a practice here of doing this. And so, in a way, you know, perhaps another thing that hasn't gone quite right here is a lack of focus that that would need to be done again in a dialogue about when it was going to be done and when it should have been done, and what the consequences might be.

MS DEMETRIOU: Well, that all stemmed from the way in which the class definition was constructed, which, as I say, didn't have to be done like that and so that's really a problem of Dr Kent's own making. We certainly were not on notice that an application was going to be made after judgment that would extend the period of damages and extend the members of the class. That came as a very big surprise to us, an unwelcome surprise, obviously.

THE CHAIR: I think -- I'm sorry, I don't want to take you out of course, but I'm just trying to think of some analogies for the proposition that there's a certain point at which you shouldn't be entitled to join in for the reasons you've advanced.

MS DEMETRIOU: Yes.

THE CHAIR: I suppose I was thinking about what the position might be if we're in an opt in proceeding. I guess the opt in proceedings generally have a requirement for that class to be settled quite a lot earlier than -- under the Rules, as I recall, they have to be settled quite early. Indeed, I think I've got something coming up in December

about whether, in fact, that has been done in the case and what should be done about it. And then of course, also came to mind the umbrella proceedings where you've got cases being tried in chunks and with people being party to different parts of the proceedings of those chunks. And I suppose you also -- so, I'm thinking about 47A claims, is the point I'm making. If you come back to a 47A claim and think about what would be fair or not fair in a situation where those claims are being consolidated, how would we approach it in that circumstance? I think probably the answer is, at least at some point, it would be thought to be unattractive to let somebody join proceedings once they had a fair idea what the answer was. Is that your submission?

MS DEMETRIOU: Yes, absolutely right. And you're absolutely right in relation to opt in proceedings, that you couldn't have a new opt in after judgment. That's absolutely correct.

So, sir, just one point on the authorities. Can I just ask you to turn to page 84 of the authorities bundle, so that's authorities bundle tab 6, page 84, *Stewart v Engel*.

THE CHAIR: Yes.

MS DEMETRIOU: Mr Hoskins sought to criticise us in terms of framing the test. He says that *Stewart v Engel*, the test is not no longer one of exceptionality. In fact, we didn't frame the test in that way in our skeleton. We relied on *Stewart v Engel* for a different point, which you can see at letter D to E on page 84. The point here is being made that it's not satisfactory for the plaintiff to be allowed to see the outcome of the defendant's application and then, if the judge decides in the defendant's favour, to apply for an amendment. That was what we relied on it for, which is precisely the point that I've been making to you.

So, I think you have my submissions on --

THE CHAIR: Sorry, just to be clear, you accept, do you, that on exceptional circumstances, *In the matter of L and B (Children)* changes the position and it is --

MS DEMETRIOU: Yes, although that was a very different case --

THE CHAIR: Of course, I understand.

MS DEMETRIOU: -- about the safety of children, the well-being of children. Of course, the question of what's just in any particular circumstances will vary depending on the circumstances. So it is, in a sense, not very helpful on its own as a test. We say --

THE CHAIR: Well, yes, except, I mean, you're advancing essentially points of fairness, which are in the scope of that point.

MS DEMETRIOU: We say it's unjust. Yes, exactly.

THE CHAIR: That is the test, though, isn't it? We're not here in (overspeaking) circumstances.

MS DEMETRIOU: That's the test if you -- sorry -- if you have power.

THE CHAIR: If you have power, yes.

MS DEMETRIOU: So, turning to power, sir, we say that you don't have power in any event to allow the proposed amendment. Of course, it's basic that the Tribunal's powers are conferred by statute. Section 47A allows a person to make a claim for damages in respect of an alleged infringement, and the Tribunal's function is to determine that claim. Our short point is that the Tribunal has now done that; it's determined the claim. If we could go to the Judgment, so in the bundle page 556 -- Mr Hoskins took you to the relevant paragraphs, but can we please go back to them -- paragraph 1079.

THE CHAIR: Yes.

MS DEMETRIOU: And so you have, at the bottom of page 556, the heading "Disposition":

"We make the following findings and orders".

I just emphasise the word orders for now. Then those findings and orders, the

substantive findings and orders that are under that heading relate to the claim period, and you see that all the way through. So that's what's been determined at the trial. And claim period, of course, is defined consistently with Dr Kent's pleaded case as the period from 1 October 2015 to 15 November 2024. So that's the only period in respect of which the Tribunal heard argument or evidence in relation to the issues of liability and quantum that are determined in the Judgment, and it's the only period in respect of which the Judgment makes findings in relation to liability and quantum.

Now, contrast, if we go over the page 558, there's a heading, "Consequential matters", just above paragraph 1091, and that provides that:

"The Tribunal will convene a hearing ... to hear submissions on all consequential matters, including costs, any applications for permission to appeal and the process for resolving any questions relating to the calculation of quantum.

And "the parties are to" -- under the heading consequential matters, the order that the parties are to seek to agree relate to the consequential matters. The Tribunal has already made its orders on the substance of the case which it's tried.

THE CHAIR: The order -- and this all comes back to *Bittylicious*, and the Court of Appeal's expressed desire to see us produce orders that reflect the findings of the Judgment.

MS DEMETRIOU: Yes.

THE CHAIR: So, 1092 is asking for an order to reflect the outcome of the Judgment. So, doesn't that put us fairly and squarely back into the High Court position that you contrast it with, where you've got a judgment and then you've got an order and the order hasn't been perfected? Is that not the same position?

MS DEMETRIOU: Well, we say not because the Tribunal here has made orders. It hasn't just said, "We've made findings", it's made these orders. And the orders it's made are orders on the substance. So, let's say, for example -- so, Mr Hoskins point

is, well, we're still here for consequential matters, therefore you're not functus officio. But that, with respect, doesn't work. What if the Tribunal had split the trial into liability and quantum? It wouldn't be functus officio, and it gave a judgment which made findings and orders on liability. It wouldn't be functus officio in the absolute sense if it was still to hear quantum, but it would be functus on the issues of liability that it had determined. It wouldn't be possible for someone to pop up in the quantum trial and say, "We've got additional arguments on the application of the Chapter II prohibition", because that would have been done and dusted. That's really the point.

So, the simple point is that the Tribunal's made its findings on liability, made them by reference to the claim period, and what you're being asked to do is to reopen them. We say that you have no power to do it; you've determined those points.

Now, the position in the High Court, of course, is different because the High Court has inherent powers rather than statutory powers. And for the High Court, the point of no return is the order that it makes, the final order, when that's perfected. Between giving judgment and making a final order, the High Court does have power to permit amendments or to reopen findings, a power which it exercises infrequently. And you've seen the authority, so you've seen the *In the matter of L and B (Children)* case in the Supreme Court.

Now, of course, getting back to *Bittylicious*, there's no equivalent in the CAT to CPR Rule 40.2, and no requirement that the Tribunal's decisions are recorded in order separate from the Judgment. So, to the contrary, the Tribunal often doesn't produce separate orders and is not required to do so. It's not required to do so, but that can't be a reason for upsetting finality. Once the Tribunal's decided and given judgment on the substance, it can't be an answer to say, "Well, you haven't perfected your order" because there's no obligation in the Rules for the Tribunal to make orders at all. Here, in any event, the Tribunal has made its orders on the substantive claim, as I've said.

Now, Mr Hoskins said that he relied on Rule 32.1 of the Tribunal Rules, which gives a general power to permit amendments, and he also relied on Rule 115, which allows the Tribunal to revisit orders. But those powers can't be read as allowing the Tribunal to allow amendments or reopen orders once it's given a final judgment on the substance, because that would completely fly in the face of principles of finality.

Now, I'm aware of, but Mr Hoskins didn't take you to, case law under the CPR, because of course there are equivalent powers to amend and which permit the High Court to quash or revisit its own order, vary its own order. There are equivalent powers. And there's case law which provides that generally, those powers do not permit, should not be read, even though they're broadly drafted, as permitting final orders to be changed or amendments to be made after a final order has been made, because that would fly in the face of the principle of finality. Mr Hoskins -- I don't have those cases; I didn't know this was a point Mr Hoskins was going to make -- didn't take you to those cases. I don't have them all to hand, but they're referred to in the White Book. I can give you the reference. It's the notes at section 3.1.17. So those provisions, those Rules don't help Mr Hoskins's case.

THE CHAIR: I mean, we'll look at those. Just to be clear, I'm not anticipating we're going to give you a ruling on this today because it's quite difficult and I think it needs some consideration. So, if you wanted to say anything further about those cases, there's an opportunity to do so and of course, Mr Hoskins will have an opportunity to respond. I'll leave that with you. Helpful to have that reasonably promptly.

MS DEMETRIOU: Yes.

THE CHAIR: But I don't want you to feel you've not had the opportunity to put those forward. I mean, I think you can read Rule 115 as being very broad. It certainly seemed to me when I was looking at it before the hearing that -- before Mr Hoskins read it -- that (inaudible) and I had identified, and it seemed to me to be a very broad

provision. But if you're telling me that similar provisions have been dealt with differently, we ought to see that.

MS DEMETRIOU: Sir, yes. In a sense, Mr Hoskins's argument proves too much, because if it were right that the Tribunal could vary any order, then you could have a judgment, the Tribunal may decide pursuant to *Bittylicious* to make an order, and then someone could come along and say, "Hang on, we'd like you to we'd like to reopen this point of substance". That plainly isn't permissible because of the principle of finality. At some point, the Tribunal has to be functus. We say it's now, on these points. Mr Hoskins disagrees, but in any event, his argument proves too much because the Tribunal would never be functus if that were the correct way of reading the provisions, reading those Rules.

THE CHAIR: I suppose the point, as a point of principle, is this: if what you're saying is that because we don't normally do orders, you have to treat a tribunal judgment as being effectively perfected, then that means that in this jurisdiction, there's no ability to do what's done in *In the matter of L and B (Children)* ; on your analysis, we just can't do it.

MS DEMETRIOU: Yes.

THE CHAIR: And there's a good reason why there is that jurisdiction in *In the matter of L and B (Children)*, because occasionally, very occasionally, there might be reasons why it's a helpful thing to do. And if Rule 115 isn't an answer to that, then there is no answer to it and it's an absolute rule. Now, that isn't a very satisfactory position to be in either from a point of principle, and particularly in circumstances where, in this case, actually, we have contemplated that there would be an order drawn up. So, you can see the difficulty. I mean, I think either way, it's not really terribly attractive.

MS DEMETRIOU: Sir, I put it this way. Even when one's looking at the High Court, where there's a distinction between the judgment and the order, there comes a point

of finality.

THE CHAIR: Yes.

MS DEMETRIOU: So, when the order's perfected, that's it. Now, finality is an important consideration. The question is when does finality -- so there always may be good reasons to reopen final orders, but those reasons have to give way at some point because you've got an overriding principle of finality on the other side.

THE CHAIR: Yes.

MS DEMETRIOU: Now, the question is when does the principle of finality bite here? Because the Tribunal is not required to give orders, we say it bites when the substantive determination has been made of the issues in the Judgment. That's our first point.

Second point is that even if one is looking for an order, the Tribunal has here made an order. It's said in terms, "These are our determinations and orders". And the further order that's contemplated is under the heading "Consequentials" and is connected with the consequential matters which we're debating. And it will reflect the orders that have already been made. The Tribunal has made orders expressly and any further order will simply reflect the orders that have already been made. That's what it says.

So, sir, unless there's anything else, that's what we say about power. You have my submissions on fairness.

THE CHAIR: Thank you very much. Mr Hoskins.

Reply submissions by MR HOSKINS

MR HOSKINS: I'm aware we're using up all the valuable time, so I'll be as brief as I can. I'd like to go back to *Sony* first of all. This in a sense is why we're here having this discussion today. Authorities bundle, tab 19, page 278.

There's a citation from *Merricks*, paragraph 26:

"... The individual claims of potential class members are not contingent claims of

potential future claims which can start to crystallise only if and when a CPO is granted. It is therefore fundamental to the CPO application that all the potential class members have existing claims at the time when the application is made."

Now, that begs the question, what does "existing claims" mean? Does it mean someone who has a claim at all, or does it mean someone who doesn't at that stage have a claim? So that's one aspect, the new claimants type point we've been debating. But that language can equally apply to someone who does have a claim; they have suffered loss up to the period of the claim form and could exclude claims by them in the claim form because, as you know, a new cause of action accrues each time loss is suffered in a continuing infringement. So, I might have suffered past loss, and I have a claim for that, but I have a new claim -- if we're using this language -- every time that I suffer a further loss after the claim form.

So, there is -- and it's not a criticism at all of the Tribunal, because the point is that it wasn't being required to look at it in this nuanced way, but that's the source. This is why we're here having this debate today, because that language is not apt to make the distinction we're discussing today.

Let's look at what the Tribunal did in *Sony*. And again, this is absolutely no criticism of the Tribunal, but at paragraph 71, the Tribunal directed that the PCR should "amend the class definition so that the Relevant Period terminates as at the date of the filing of the Claim Form". So, it hadn't been debated before you, sir, this distinction between those who already have claims and want them to be for longer and those who don't yet have claims. But the impact of the Tribunal's direction fell on both those types of claimant.

So, the suggestion by Apple that this was all crystal clear is simply not correct, and you'll understand why we were guided by the direction that the Tribunal made. Now, that may be right; it may be wrong, but that's how we get here. That's why we're having

this discussion.

THE CHAIR: I was hoping to tell you, it wasn't a point that we were alerted to in the hearing. And actually, you'll see at paragraph 69, what happened was that the counsel for the class representative rather put up the white flag pretty quickly on this point. And so actually, there wasn't much discussion at the hearing about it at all. If you look at the transcript, you won't see very much about it.

I do think, though, that certainly my understanding of it -- not sure whether I should be saying what I thought at the time; it's certainly what I think now -- is that this is really all about section 47A. If it could be a section 47A claim, then that's fine, but if it's couldn't, then it's a problem. Yes.

MR HOSKINS: Sir, I understand that, but the problem is the direction the Tribunal made.

THE CHAIR: Yes. Well, that's because it --

MR HOSKINS: (Overspeaking) counted both (inaudible).

THE CHAIR: Well, that's because they were bundled in the pleadings.

MR HOSKINS: That's right.

THE CHAIR: That's the reason. I suppose you're right; we could have said, "You've got to unbundle them".

MR HOSKINS: That's right.

THE CHAIR: And that's probably not something that came to the surface because no one had discussed it in the hearing.

MR HOSKINS: That's right.

THE CHAIR: So, in a way --

MR HOSKINS: This is how the law develops, sir.

THE CHAIR: Yes, exactly. And I suppose in a way that the -- you know, the fact of the bundling, which was the choice of the class representative in that case and this

made it inevitable that that had to be the right answer, I think.

MR HOSKINS: There are two issues here, and I averted to them when I stood up the first time round, and they're related issues. One issue is: given where we are now in this case, if the Tribunal has discretion to allow the amendment, should it allow those discretions to be made? That's why I take you back to Sony, because it explains how we got here in this case.

THE CHAIR: Yes, I understand that.

MR HOSKINS: Then there's a separate question, which is the more general one, which is: what should happen in future cases? Now, it may well be -- given the debate we've had, it wouldn't necessarily surprise me if you write a judgment to say, "This is what should happen in future cases". But my point is, that doesn't mean that you shouldn't allow the amendment in this case, because, as Apple has accepted and as is obvious, the question in this case if you have jurisdiction is: what do you need to do to do justice in this case? So, it doesn't follow, merely because you allow the amendment in this case, that that is the precedent. Because if it's not the precedent you want, you will make that absolutely clear in your judgment.

I'm not going to say anything more about jurisdiction. You have my points. I'm not going to repeat myself.

I mean, on the power. I've just made the point about: how did we get here? Is it right that class members should have to forgo compensation as a result of these infringements which have been found and are continuing? Because Apple's business model has not changed. It's all very well to turn up and say, "Oh, well, we might have run different arguments", et cetera. They haven't pointed to anything specific at all to say that these infringements aren't continuing.

Now, the way it was put was -- words were used like "cakeism" and "safe bets", et cetera but these are all hypotheticals. Again, we're looking at: should you allow the

amendment in this case? Well, it's said that our Class Representative can hedge her bets. Well, you can see that's not what's happened here. The Class Representative has been acting responsibly throughout and trying to do the best for the class, taking account of things like what happened in *Alex Neill v Sony*. There has been no hedging of bets. It's said it's a one-way bet for the Class Representative and Apple wouldn't have the right to extend if it had won, but Apple didn't win. We know what's happened. Apple has lost and it's been found to have committed this infringement and the infringement is ongoing.

So, it's all very well to throw out these hypotheticals but -- if you excuse the language -- so what? We know what's happened in this case.

Then it's said it deprives Apple of the benefit of defending itself with new evidence in a new claim. But again, we're in a fantasy world. We know what's happened: the class has won. One would hope Apple as a responsible company would take stock of the finding in terms of its future conduct.

But we're not in a world where there's a new claim sitting waiting to come for the period, et cetera. We've had a detailed trial. Apple has defended itself up hill and down dale and you have made your findings, and that's what matters. The question is only whether compensation should be available for the class members who are able to come in as a result of the application we seek, and that's where justice lies.

So, sir, unless you have any particular questions for me, that's our application to amend.

THE CHAIR: I suppose just the point I made to Ms Demetriou about -- whether it's a good analogy or not, I don't know, but if you're thinking about opt in cases or other section 47A cases where there might be some form of consolidation, I think you might well take a view that there was a point in time at which people shouldn't be joining those proceedings because so much had happened. I don't know whether you have

a view on that.

MR HOSKINS: Those are different in a sense, though, because -- and it's the point I made about the nature of opt out proceedings, is opt out proceedings, the class members don't participate, and that's the whole point of them. Whereas there is a difference, obviously, in opt in proceedings, and there is a difference in an individual action even more clearly. So those are different in quality. I don't dissemble from the point you're making to me, but they are different from an opt out case, which is a class which doesn't participate.

THE CHAIR: Because one of the difficulties with this is that if the whole premise of these proceedings is that they're based on the, if you like, a template of the section 47A case -- I mean, they are the aggregation of 47A cases.

MR HOSKINS: Combined section 47 --

THE CHAIR: Yes, exactly. And of course, we've got the decision of the Supreme Court in *Merricks* telling us about how we assess suitability by reference to whether it would be better to bring them individually or not. I mean, this could materially change that balance, couldn't it? Because actually, on your argument, it could put class members in a better position than an ordinary section 47A claimant. It indeed, actually on Ms Demetriou's argument, could put them in a materially worse position, because 47A claimants can -- but perhaps, to be fair, I think Ms Demetriou is only saying it's a matter of timing and discretion. But there is this question, isn't there, about aligning the outcome here with the outcome you might expect in an analogous section 47A situation?

MR HOSKINS: So, let's go to *Merricks*. I mean, the point was made by the majority in Merricks about they drew a comparison between individual section 47A claims and collective actions for the purposes of whether it should be effectively just a strike out or whether certification should give the Tribunal more teeth.

But also, the Supreme Court made it absolutely clear that this is a new regime, and that you can't just read across everything from section 47A claims. The aggregate damages is the most obvious one. So, with respect, you can't say for all purposes, there's a read across the section 47A individual claims, because it's absolutely clear from what the Supreme Court said that this is a new regime, and the function of the regime is to allow access to justice for people who would not otherwise have it. In our submission, this is a paradigm of that in the circumstances we are in now.

THE CHAIR: Thank you very much. We will reserve our decision on this. If anybody wishes to put in further submissions on the point about the application of Rule 115 and what it might mean, then they're welcome to do so. We would certainly invite any extra assistance on that. I think if we're going to do that, it probably should be Apple first and then the Class Representative.

MR HOSKINS: We'd only want it sequentially.

THE CHAIR: Yes.

MR HOSKINS: I don't want to tilt it (inaudible).

THE CHAIR: Yes, you've got nothing to say at the moment. Exactly. It may be helpful perhaps to set a timetable for that. Is it something that you could do within a week, do you think, Ms Demetriou? This is the supplemental submissions on the application of Rule 115.

MS DEMETRIOU: Did you say within one week?

THE CHAIR: Yes.

MS DEMETRIOU: Yes, that's okay.

THE CHAIR: And then in perhaps a week --

MR HOSKINS: Sir, can I just ask what -- I just want to be clear about what we're doing. It shouldn't be a sort of open field. The specific point that Ms Demetriou made was a reference to the cases in the White Book.

THE CHAIR: Yes, that's exactly the point we're talking about.

MR HOSKINS: So, it is limited --

THE CHAIR: We are absolutely(?) talking about that point. So, this is just about whether the cases in the White Book which refer to the equivalent provision to Rule 115 are helpful in clarifying what Rule 115 means.

MR HOSKINS: I think Mr Kennedy has an update on that provision of the order that you flagged this morning, if we're about to move on to something else.

THE CHAIR: Yes, of course. Thank you.

MR KENNEDY: The transaction data, sir. So the Class Representative has agreed Apple's wording at paragraph 16 and I've communicated that to Ms Demetriou. So, I think that that means that the UK transaction data application is now entirely agreed and you can take that off the agenda.

THE CHAIR: Good, that's very helpful. I think the next thing on the agenda, certainly in my mind, was the permission to appeal application.

MS DEMETRIOU: Sorry, if you just bear with me.

THE CHAIR: No, of course. Take a minute if you need it. (Pause)

Permission to Appeal Application

Submissions by MS DEMETRIOU

MS DEMETRIOU: The Tribunal has seen Apple's grounds of appeal which we've submitted in writing. I'm, in a sense, in your hands because you're obviously very familiar with the issues in the case. The grounds are, I hope, self-explanatory, and I think going through them one by one would be inefficient. But I can take it however you'd like. I'm happy to answer questions or to try and deal with them thematically or whatever you think is best.

THE CHAIR: Well, firstly, I think the first point is if there's anything you wanted to say

further about them, then you're very welcome to. We have read them very carefully and spent quite a lot of time talking about them, so you don't need to worry about whether we've grasped the point and there's nothing we want to ask you about them. We've understood all the points.

I suppose the obvious point is that we haven't had any reaction from Mr Hoskins about that. I'm not sure that -- ordinarily, if it can be done on the papers, then we might not care too much about that. But clearly, in the circumstance we're in, we may not care about it, but it would play a lesser role, if one could put it that way. So, it may be sensible to see what Mr Hoskins has to say about it.

MS DEMETRIOU: That would be sensible, and then I can reply as necessary.

THE CHAIR: You can reply as necessary. But if there's anything you wanted just to highlight or draw out as a preliminary point, then obviously you're very welcome to do so.

MS DEMETRIOU: I don't think so. I think at the outset we sort of set out the principles, and so I'm not going to repeat those. So, I think that that would be the better course.

THE CHAIR: Yes. Good, thank you.

MS DEMETRIOU: Thank you.

Submissions by MR HOSKINS

MR HOSKINS: I mean, that puts me in some difficulty because again, I don't want to tilt at windmills. There are 34 grounds, and you don't want me to go through -- I'm not even able to go through the 34 grounds, having received them on Tuesday. So, I think the best I can do is say if there's any way I can assist you on particular points, I will obviously do so, but otherwise I'm not sure what I can add by going through 34 grounds.

THE CHAIR: Yes, so perhaps ... (Pause)

DR BISHOP: 34?

MR HOSKINS: Well, I counted -- is my arithmetic --

DR BISHOP: Under sub-headings?

MR HOSKINS: Sorry, absolutely. Yes, it's eight split into ...

THE CHAIR: Yes, yes.

MR HOSKINS: You're not missing 26 (overspeaking).

DR BISHOP: Did I read the wrong document?

THE CHAIR: Thank you. I understand. I don't think there is anything in particular we want you to deal with. So, I think probably -- again, Ms Demetriou, I don't want to cut you off, but I'm conscious that the timing has been quite tight, I'm sure. If there's anything you really want to emphasise. Otherwise, I think the proposal will be that we retire now. Although, I suppose we could try and deal with the costs point. But we will endeavour to give you -- I just need to consult with my colleagues, but the answer is we would either be able to give you a ruling this afternoon, or actually, we might put it in a reasoned order and give it to you very quickly. I'm not quite sure which of those we'll do, but we'll be able to answer that question after lunch.

Reply submissions by MS DEMETRIOU

MS DEMETRIOU: Sir, no, I don't think -- I mean, I think it's all self-explanatory. I would say that there are, of course -- Mr Hoskins counts 34 sub-grounds, but of course, there are points which, because of the nature of the issues, sound under different headings.

To take, for example, the tools and tech point. Sir, we say, of course, that the Tribunal erred in not taking account of the value conferred by Apple in permitting developers to use its tools and technology. That point really sounds in, I think, 1, 2, 3, 4, 5 of the sub-grounds. So, it goes to market definition, demand side value, unfair pricing analysis. There's a point about misconstruction of the DPLA and quantum.

That's true of other points. So, for example, you've seen that we make a point about

Steam. We say that the Tribunal should have used the 27 per cent effective rate, and that that would have been the proper comparison. That's a point which is relevant to market definition, unfair pricing and quantum.

So, to some extent, the reason why there are a relatively large number of sub-grounds is because of the nature of the issues before the Tribunal, which were that there were two abuses that were alleged, and then of course there was the quantum point. But also the Tribunal's reasoning, which essentially used -- because of the way the case was argued -- some of these points, like comparators, in various parts of the analysis, so market definition, unfair pricing and quantum. That's why it looks like there are a reasonably large number of grounds, but actually they can be boiled down to relatively few points of principle.

THE CHAIR: I'm not sure whether any criticism was implicit in Mr Hoskins's observation, but certainly there's no criticism from us about that. I mean, it's obviously a lengthy document, but it was a lengthy judgment and there's a lot on it, so that's understood.

MS DEMETRIOU: Sir, let me just take instructions to see if there's anything (inaudible). (Pause)

No, we're (audio error).

Unless you have any questions, which I think you don't, we're content to leave it there.

THE CHAIR: Okay, thank you. We'll work out exactly how we'll deal with it. Is it sensible -- I mean, I think the costs point, just where are we with that?

MS DEMETRIOU: Could we deal with the payment of the award? Just because --

THE CHAIR: Ah, you want to deal with the payment point? Well, why don't we deal with that first? Let's do that right now while you're up. Yes.

MS DEMETRIOU: This relates to -- if you've got the draft order there.

MR HOSKINS: I think it's for Mr Ward.

MS DEMETRIOU: Oh, sure.

THE CHAIR: Mr Ward, do you want to kick off? Yes, tell us the answer.

Application for Payment of Damages

Submissions by MR WARD

MR WARD: Thank you. The point is, of course, that the Tribunal has found for the Class Representative. The Defendants have been found liable to pay damages. The claimant in a trial of damages is entitled to be paid damages as of right, and indeed, both the Act and the Rules place an obligation on the Tribunal to make an award of damages. If it's helpful, I can just take you to that.

THE CHAIR: Actually, I think perhaps if we just step back for a little bit.

MR WARD: Yes.

THE CHAIR: I wasn't completely sure I understood what was being proposed. It sounds like -- I should be clear, but I think you're -- for a start, we don't have a number yet, do we? So, we don't actually know --

MR WARD: No, so if we turn to the draft order, then we can see what's proposed. It's at page 6.

THE CHAIR: Yes.

MR WARD: It's item 15.

THE CHAIR: Yes.

MR WARD: There's a small dispute about dates in the finest tradition of the bar about exactly the timetable. But roughly speaking, it goes as follows.

That Apple will pay the damages in the amount to be determined by the following procedure.

THE CHAIR: Yes.

MR WARD: (a) I think is now, common ground in the sense that it's:

"... 4.00 pm on 11 December, the [Class Representative] will provide Apple with details of the total amount of damages and interest claimed ..."

THE CHAIR: Yes.

MR WARD: That may, of course, depend upon the ruling that you're going to give in light of this morning's judgment. So, of course, we have the period that has been calculated, which is about £1.2 billion for interest and damages. We've got the additional period that Apple has agreed to provide transactional data for. Indeed, as Mr Hoskins says, they've in fact agreed to provide it for a bit longer period.

Then, of course, we will find out in due course whether you're going to allow that longer period of claim. But there is an arithmetic exercise of applying the damages calculation and the interest calculations and working out what sum is actually due.

THE CHAIR: So, basically a value of commerce point and then knocking off the bits that we've said should be knocked off, is that broadly ...?

MR WARD: I suppose that's one way of --

THE CHAIR: Putting it rather crudely.

MR WARD: Something like that.

THE CHAIR: Yes.

MR WARD: But it's basically applying the findings in the Judgment to the data using the damages methodology in the expert report.

So, what we have is at (a) --

THE CHAIR: Sorry to interrupt, Mr Ward, but just I suppose it's possible that you might not get our ruling on the amendment point much before or indeed before 11 December. So, will you just do it on an alternative basis? Is that the --

MR WARD: We might have to contemplate -- perhaps we'll contemplate that over the short adjournment, because, of course -- given the complexity of the argument this morning, it's abundantly clear why you wanted to reserve that point, sir.

THE CHAIR: Yes.

MR WARD: But perhaps we'll need an indication from you, really, about when you're likely to give a ruling on that. In the short adjournment, we will sort of wargame what that would mean.

THE CHAIR: Well, I think it would be helpful to know whether it's going to be very difficult for you to do the same thing twice, how much more onerous it is to do it on (inaudible) basis. That would be helpful.

MR WARD: Yes, well, I'll find out. But we're also assisted by the point Mr Hoskins made that Apple has actually already agreed to provide the transaction data.

Now, where this might get exciting, though, is if we have to find a way to distinguish between different subclasses within that data. In other words, for example, when did a certain Apple ID first become active? Now, I imagine Apple can answer all those questions.

THE CHAIR: So, if, for example, we were to end up on the proposition I put to Mr Hoskins, then you might be having to distinguish between different people at different times. Although, actually I think on the proposition I put to Mr Hoskins, you probably didn't because it ended up with a single unified class at a certain point.

MR WARD: So, of course that's all in your hands, but obviously the arguments this morning showed that there were various permutations that were at least on the table.

THE CHAIR: Yes.

MR WARD: It's Apple's data, and so no doubt they'll be able to help with how difficult or easy any of that would be. But so obviously, what you have in front of you is premised on the assumption that that issue would be disposed of one way or another this morning, but of course we'll think about that.

So, if we read it with that very much in mind, we know we're going to get the transaction data on 4 December, and then a week later:

"The Class Representative shall provide Apple with details of the total amount together with the calculation."

And then we have green and red options, but then Apple gets an opportunity to raise any objection. And we say 9 January, that's plenty of time; Apple wants an additional week. Then if it proposes a revised amount, it has to provide the calculations so we understand the basis. Then, again, two different dates for a couple of weeks later, the Class Representative will respond and go back with alternative calculations. Then, alas, if necessary, it comes back to you, sir, to determine it on the basis of submissions in writing as to what the issue in dispute is.

So that takes us then to (e) where, thinking forward, whenever that is, it's not immediately:

"Apple will make payment to the [Class Representative] of the final award of damages within 14 days of [(d])."

In other words, once the process of discussion and resolution has gone through, if it ends up back on your desk, one can see that date might be, for example, sometime in February or March, if these directions run their course. If, in fact, it's all agreed much more quickly and my clients provide their calculations by 11 December, Apple checks the arithmetic and it agrees, then it's very quick.

THE CHAIR: What is the Class Representative going to do with this?

MR WARD: Well, obviously, put it in a secure place where it will accrue interest.

THE CHAIR: And -- because we know that at least on the -- and I would like to have a discussion about this, no doubt a bit later, but we know that whatever happens, there's going to be some delay before distribution.

MR WARD: Yes. You can -- that's important to get that clear now, sir. If you look at paragraph 18 of the order, there is no suggestion of distribution before appeal rights have been exhausted.

THE CHAIR: Of course. Yes.

MR WARD: So that's an important premise.

THE CHAIR: Which could be quite a long period of time or could be quite a short period of time.

MR WARD: Might not be long at all.

THE CHAIR: But it could be quite a considerable period of time.

MR WARD: Indeed it could.

THE CHAIR: And so, there's going to be £1.2 billion sitting in a bank account somewhere.

MR WARD: On the other hand, if the Tribunal refuses permission to appeal, Apple goes to the Court of Appeal, the Court of Appeal considers it and refuses permission to appeal --

THE CHAIR: Yes, of course.

MR WARD: -- we might reach the end of the line very quickly.

THE CHAIR: It could be relatively short. Exactly. Well, we'll come back to that later.

MR WARD: Yes.

THE CHAIR: I would like to talk a bit more about that, but just tell me about the interest position. So, is it really -- is the Class Representative -- what is the position on interest if Apple continues to hold the money and what's the position of the Class Representative?

MR WARD: There's provision in the order that governs that, which is -- I'm so sorry -- 17, thank you.

THE CHAIR: Yes.

MR WARD: "Any judgment debt arising in relation to the sums ..."

And we say "awarded", because that's what it would be; for some reason Apple prefers "calculated" under this order:

"... shall carry daily interest at the rate stipulated by the Judgments Act from the date of judgment until final payment."

And that rate is in fact 8 per cent.

THE CHAIR: 8 per cent?

MR WARD: Yes.

THE CHAIR: And is it -- obviously, once you get paid that money, once the Class Representative is paid, that money ceases to accrue interest?

MR WARD: That's right. But the Class Representative will, I'm instructed, place the money in a secure UK bank so that it can continue to bear interest on that account.

THE CHAIR: At 8 per cent?

MR WARD: Well, I don't know what the rate would be, sir.

THE CHAIR: Well, I mean, surely -- and I don't know what Apple is going to say about this -- from the Class Representative's point of view, if the consequence of asking for the money, all other things being equal, is to receive less interest on it, then that doesn't seem terribly clever. And of course, one can understand that all other things might not be equal, but we are, I think, unless I'm reading the situation wrong, not worried about the risk of recovering the money.

MR WARD: Well, sir, let me answer that in two stages. There's a jurisdictional point, and then there's a point about, if you like, why are we concerned about this.

THE CHAIR: Yes.

MR WARD: If you think about the jurisdictional point, it goes back to the question that's already been ventilated about when does the Tribunal become functus. By the time it's made its order disposing of the issues before you today, absent something very unusual, the Tribunal will be functus.

Now, of course, if this case goes to the Court of Appeal, the Court of Appeal has the same powers as the Tribunal. It's trite, and it has at least a discretion to make

whatever orders it thinks fit in light of its findings on appeal. Indeed, if it decides to reverse any payment the Tribunal makes, it can even award interest to Apple when it gets the money back. But if this case doesn't go to the Court of Appeal for whatever reason, after this process that we're engaged in now, the Tribunal will be functus.

THE CHAIR: You can deal with that by just drafting point 15(e) in a different way, can't you?

MR WARD: Of course.

THE CHAIR: The Tribunal --

MR WARD: But I'm starting with the jurisdictional reason why this matters, because as we understand it so far, Apple's position has been outright opposition to the making of any order for payment. So that's why one starts with the --

MS DEMETRIOU: I'm sorry to interrupt, but that just isn't correct. So, we raised this issue; we had a point in the order which deferred consideration of payment to after Apple's rights have been exhausted. We asked at counsel-to-counsel level and via solicitors what the proposal was, and we've had a nil return. We've been pressing on this point. So that's just not a fair characterisation. It really does beggar belief in our respectful submission that this point hasn't been grappled with by the Class Representative, because it goes to the interests of the class.

MR WARD: Well, if we can just put aside the elevated language, the short point is obviously we need an order today. I of course accept there is scope for that order to be drafted in various different ways. But then the question is, why are we doing this, in essence? I'm not suggesting that Apple is a credit risk; obviously not. But what my clients are concerned to do is secure the fruits of the Judgment in a UK bank account. We don't want there to be any doubt about the obligation to pay. It's of course a large sum, but once it is in an account bearing interest, then there really isn't any doubt about my client's ability to secure the fruits of the Judgment. Subject, of course, to

whatever appeal rights Apple should seek to exercise in due course.

THE CHAIR: I just wonder whether the best way to deal with this -- and I will hear from Ms Demetriou in a minute -- is to park it. Because at the moment, I would have some quite considerable reservations about making the order in (e) without some better understanding of what's actually happening with this money.

MR WARD: Well, sir, I anticipated you might say that. I can assure you that those behind me are making steps to get more clarification about that, to give the maximum reassurance they can. So, with your permission, what we will do is write to the Tribunal – I may just turn around for a moment and just make sure I'm not about to --

THE CHAIR: Let's hear what Ms Demetriou has to say about it. You can take instructions, of course.

Submissions by MS DEMETRIOU

MS DEMETRIOU: Sir, it just isn't the right approach to seek an order for payment of this very large sum without coming to the Tribunal with chapter and verse of what's going to happen to the sum. Because, as my learned friend has accepted, it's an irresponsible approach. As my learned friend has accepted.

MR WARD: I don't think I accepted that.

MS DEMETRIOU: If we succeed -- no, he didn't accept that. I interjected to say it's irresponsible because, as my learned friend has accepted, if we succeed on appeal, then we have a right to this payment back plus interest. And so, it has to be kept secure.

It's impossible -- no, absolutely nothing has been put forward in terms of proposal for keeping these very large sums of money secure. There is obviously a risk, any time funds are placed in a bank account, that they will go missing; not, of course, we hasten to say, because Dr Kent is going to do anything wrong but because the bank may go out of business. And we can provide you with an authority where that was recognised

by the High Court. So, that's a risk which Apple would incur if the money were placed in a UK bank account.

But more than that, it's impossible to see how any of this can be in the interests of the class. Because it really is impossible to envisage how Dr Kent could, in an interest-bearing account, achieve, with no risk to the sum, more than 8 per cent interest. And of course, the 8 per cent interest is additional money for the class. So, what Dr Kent is proposing is something which is detrimental to the interests of her own class members.

So this is a half-baked proposal which on its face seems detrimental to the class members and which is obviously risky for Apple's position. As you've said, this is a case where it's absolutely clear that Apple is good for the money. We don't have to adduce specific evidence of that; you can take that as read.

My learned friend made a point about jurisdiction which we didn't really understand, but in any event, the point, the functus point can be dealt with either, as the Tribunal said, by making appropriate provision in the order, which is what we had previously suggested. But in any event, judgment debts are, of course, enforceable in the High Court. So, there's absolutely no risk at all to the Class Representative here. But the proposal, which is half-baked, really does risk the interests of class members.

THE CHAIR: Yes. So, I think you're saying you agree that it's something that should be put off for consideration; at the very least, it should be put off for consideration at the moment?

MS DEMETRIOU: Well, our preferred order would be for payment to the Class Representative to be stayed pending exhaustion of Apple's appeal rights. We think that can be determined now. If you want to put it off because you want to give the Class Representative a chance to come back and explain what she's going to do with the money and persuade you that she can achieve a better interest rate than

8 per cent, then I don't think --

What we had suggested -- and it hasn't come out in the order, I don't know why -- is if you look at paragraph 18 --

THE CHAIR: Yes.

MS DEMETRIOU: -- our wording in paragraph 18 was to say:

"... within two months of ... [this] Order, (ii) the final dismissal of any application by Apple for permission to appeal, or (iii) the final dismissal of any appeal(s) by Apple [whichever is later], the Class Representative shall write to the Tribunal to propose next steps in relation to [the payment of and] distribution to the Class of the sums awarded [under paragraph 5] ..."

That was our proposal, and we say that it's right for you to make that order now.

Reply submissions by MR WARD

MR WARD: Sir, just very briefly, I would like the opportunity to take instructions further on the question of security. I'm obviously not able to give you an answer to that over lunch, but just on this form of wording at 18, this is a question of writing to the Tribunal to propose next steps. I thought where Ms Demetriou was going to go with this was simply an order for payment on the exhaustion of appeal, which obviously would be a lot more appropriate than some mystery next steps.

MS DEMETRIOU: We wouldn't object to that either.

MR WARD: Well, that's reassuring.

THE CHAIR: I think what we might do, is why don't you take instructions? I have to say, Mr Ward, I feel very uncomfortable about even having this conversation without even knowing how much money is involved, and certainly without having any idea, really, of what the proposal is. I think there is a point here, this is not litigation by private parties and obviously, the Tribunal has an oversight role here which makes it a different discussion, I think. And so, I do think it's incumbent on Dr Kent to come

with a fairly full explanatory proposal which deals not only with the economic points but also with the risk points. I mean, I think the point is, if you're saying that there's something which justifies a sacrifice of economic outcomes, then we need to be clear about what that is and why it is. If there's not, then it's quite difficult to see why the class interest is satisfied by the sacrifice, if that makes sense.

MR WARD: We'll take instructions over lunch, including as to a timeline in which we could write to you with more detail.

THE CHAIR: I mean, I think really, the obvious thing to do would be to revisit it once we get to, 15(d).

MR WARD: Yes.

THE CHAIR: That would be my suggestion. I mean, in a way, I haven't discussed it with my colleagues, but I can't at the moment see why we need to be dealing with this now and with the degree of ignorance that we've got.

MR WARD: Sir, I see the time. Shall I take instructions on that over lunch?

THE CHAIR: Yes, that would be good.

Before we rise, just on the costs point, can I understand what is and isn't in play here? Because obviously there's a question about indemnity costs which we'll hear argument on, I'm sure, but I am concerned about the application in relation to the payment on account, because it does seem to me that there is considerable force in Apple's point that it's quite difficult for us to make a payment on account order without having any idea what the costs are, let alone how they might look on some form of cost schedule. Mr Hutton, is this your final schedule?

MR HUTTON: Yes, it is. There is a cost schedule in the bundle at tab 17.

THE CHAIR: Well, that is news to me.

MR HUTTON: Oh, I'm sorry --

THE CHAIR: When did that find its way into the bundle?

MR HUTTON: Yesterday.

MR PICCININ: So, the first version of it arrived on Tuesday afternoon, despite the fact that we'd chased several times before. There was then a further version that arrived, I think it was yesterday, with a small correction to it, and we do say this is inadequate. There is a further point, sir, which is that the same points that have just been made about the damages award also apply just a couple of orders of magnitude down in relation to the payment on account. Because you haven't seen the amount that they're seeking, but they're seeking £19 million.

THE CHAIR: 1-9?

MR PICCININ: 1-9, and that's the payment.

THE CHAIR: That's the payment on account?

MR PICCININ: That's the payment that they're seeking. All of the same points that have just been ventilated apply equally in relation to that, because you're now talking about levels of money for which there is a real concern as to how, if something went wrong with the bank in which that money was sitting, on earth we would get that back from Dr Kent personally.

THE CHAIR: Just to understand your position and your ability to deal with that -- I mean, we haven't seen this, I don't think. I certainly haven't seen (inaudible).

MR PICCININ: We also say it's unfair (overspeaking) --

THE CHAIR: Are you in a position to deal with that?

MR PICCININ: Sir, if you say you're going to deal with it whether I like it or not, then I will make what points I can. But it has not been an adequate time to prepare, and indeed it's been disorderly, because this Tribunal gave directions that skeleton arguments were to go in on all of the orders that were being sought on Friday last week. We've been pressing them on this time and time again since well before that. We needed to have this schedule sufficiently in advance of Friday last week in order

to address it in our skeleton. Instead, I get it for the first time the afternoon of the day before yesterday, when our specialist costs counsel was not available to give it his attention.

Sir, it really is unfair on us. That's a further point. But actually, you don't need to deal with it at all, because the whole exercise of giving £19 million or even, you know, £10 million to Dr Kent is a pointless exercise if all she wants to do is put it in a bank account for however long it takes for the appeal to be resolved, which is what she's said.

THE CHAIR: I mean, you're welcome to try and persuade us otherwise. I have to -- at the moment, it doesn't seem like a very attractive proposition. I'm certainly not going to spend our short adjournment poring over it. But we're in your hands if you want to try and persuade us that we should be dealing with it today. You're welcome to do that. It's 2.00 pm.

MR HUTTON: Can I take the opportunity over the short adjournment to get instructions on that?

THE CHAIR: Yes.

MR HUTTON: I mean, in relation to the schedule, the difficulty -- and I accept they didn't get it until Tuesday afternoon, and it is a large sum of money. It won't come as a great surprise to them it's a large sum of money, and indeed part of the argument on indemnity costs is we warn them what our costs were, and these costs aren't very different. So, it wasn't a great surprise on Tuesday. It is, you know, fair to note that it was on the same day that we got the 34 grounds of appeal. So, the parties have been working -- the difficulty that we had was that we couldn't get our costs lawyers to get on to the schedule until the Judgment had been handed down, so that's the starting gun.

THE CHAIR: I understand, and there may be very good reasons. I am conscious,

I should say, that this applies both to the permission to appeal application and in the costs application. This hearing has come quite quickly after the Judgment, and that's as much as anything my fault because, as I think I indicated, we're being encouraged to deal with consequential matters in oral hearings rather than on the papers. I think one learns a bit from convening in those hearings about the timings of them and the things that are required.

So, to the extent that people are being put under pressure, I'm sorry about that and that's really my fault. But I think there is a point here, isn't there, that -- I mean, you mentioned costs lawyers. It's not just about the number. One might expect that Mr Piccinin would have had the benefit of somebody having a really good look at the different costs and the categories and maybe comparing them with the costs that have been incurred by his client and therefore be in a position to make some observations about the reasonableness of the fees. I think, given it is a large amount of money, it's quite a hard proposition to have expected them to do that from Tuesday, and particularly if that wasn't the final document.

But I mean, I don't think -- in a sense, I think maybe I might leave you to take some instructions on that. Why don't we rise and we can see at 2.00 pm exactly how we deal with it. It would do no harm I think if you would have a conversation about it. Thank you.

(1.09 pm)

(The short adjournment)

(2.04 pm)

MS DEMETRIOU: On costs, can we just go back to paragraph 15 of the order? Because I think we just didn't finalise the date.

THE CHAIR: Yes, of course.

MS DEMETRIOU: It's just a very small point. We're seeking until 15 January rather

than 9 January. It's just an extra six days. The reason for that being that the period of time straddles the Christmas and new year period, that we need to get instructions from the appropriate people within the business and we don't yet know exactly what's going to be presented to us. So, we do think we need the additional six days. I'm hoping it's not pressed.

THE CHAIR: Well, I mean, Mr Ward, does it really make any difference? I mean, we're talking about a matter of days. I'd rather that people had time to do it properly and get it right. Are you going to push back?

MR WARD: Not against us.

THE CHAIR: No. Good, thank you.

MR WARD: (Inaudible) the more sensitive issue was (inaudible) --

THE CHAIR: Yes.

MR WARD: -- just before lunch, which is the timing implications of your ruling on the application to amend. Of course, Apple has said it will provide the data anyway. Of course, you will know and I don't know how quickly that ruling is likely to come, and I obviously don't -- nobody wants wasted work.

THE CHAIR: Well, firstly, I think we've invited some further submissions and the timetable of that is a couple of weeks, and actually, for various reasons, I probably wasn't going to get anything out before then anyway. So, we are looking, I suspect, uncomfortably close to 11 December before it arrives. I think the options are either you do it two ways, or you wait until you've got the ruling and then do it one way. That, really, I think is a matter for you as to which you prefer.

MR WARD: Sorry, I --

THE CHAIR: Yes, of course.

MR WARD: I thought I had instructions, but (inaudible) if I just --

THE CHAIR: Yes, of course. No, that's fine.

MR WARD: We're happy to take our chances and proceed with this timetable, given that Apple is going to provide the data anyway on 4 December.

THE CHAIR: Yes. Look, I think that probably -- that seems to me to be perfectly sensible.

MR WARD: Thank you, sir.

THE CHAIR: Thank you. So just before we move on, is there anything else on the table before lunch? We thought we should give you our decision on the PTA application, so I'm going to do that just in very short form. The reasons will follow.

(2.07 pm)

Ruling on permission to appeal

(2.08 pm)

MS DEMETRIOU: Sir, we agree that time should start to run when we receive your reasoned order. Could we ask for 21 days from that date?

THE CHAIR: Yes.

MS DEMETRIOU: Thank you.

THE CHAIR: Well, unless there's any objection to that. But that would seem perfectly sensible to me.

MR WARD: I was going to pop up (inaudible).

THE CHAIR: No, fine. So that's 21 days, then, from the date on which you receive the reasoned order. I anticipate that that will arrive and may even arrive this evening, but it certainly should arrive tomorrow. I don't want to promise that, but that's the time frame in which you can expect it to arrive.

Mr Ward, you're next.

MR WARD: The other thing I said I would take instructions on over lunch was the application for an order for payment, which is 15(e).

THE CHAIR: Yes.

MR WARD: We heard what you said and we respectfully accept the proposal that that should be deferred until we've got through this process, which is 15(a) to (d). There may even be scope for further discussion with Apple about it.

THE CHAIR: Yes. Well, I mean, what I suggest is that 15(e) simply says something like, "The Tribunal will make such orders in relation to any application for payment as the parties may choose to make in due course", or whatever, something like that. So, leave it open, if you like. That's not to say, of course, that we will make such an order. You've heard what we've said about needing to be satisfied about where the money is going and what the commercial purpose of that is.

MR WARD: Absolutely. Thank you, sir.

THE CHAIR: Good, thank you.

I think we're back to costs, Mr Hutton.

Costs Application

Submissions by MR HUTTON

MR HUTTON: (Inaudible) come to costs. Sir, just in relation to the matter that you raised before, which is connected with what my learned friend, Mr Ward, has just dealt with. I mean, there are two aspects to costs that are potentially before you: one is indemnity or standard basis; and the second is the application for a payment on account. It's the second that is obviously linked to what happens to the damages. We are content not to push that today, so that can be parked.

The issue then arises in relation to a payment on account of costs: does this Tribunal simply put that off until after any appeals process, or does it proceed with that in writing -- in a certain number of days or whatever -- fix a figure and then you will have that figure, and then it's paid at the end of the appeal process? We don't have strong views either way, but either way we'd like the position in relation to a payment on

account of costs not to be forgotten, because we don't want it to be said it's functus as a result of the Tribunal not having dealt with it today.

THE CHAIR: I think the point that Mr Piccinin made was there's an overlap with the point we've just discussed, which is albeit of perhaps a lesser significance, but nonetheless still a significant amount of money. What's the purpose of it? Where's the money going to go and what's going to happen to it? So, I think that needs to be part of the assessment as well.

To the extent that we're being asked to deal with any judgment about the reasonableness of costs, I would have thought that that was best done sooner rather than later, because we're only going to forget the things that would make it easier to deal with that. So, I think if we're going to be asked for an order of any sort in relation to cost that engages reasonableness, then we would want you to get on with that. That's not to say that we're necessarily going to accept that a payment on account of costs is the right thing to do. That is still an open question.

MR HUTTON: You could at least fix the figure. Whether it's paid at that time or not may be a matter to be decided later.

THE CHAIR: So, you're thinking about the possibility that we might still be in a world where appeal rights had been exhausted and in this world, hypothetically, without success by Apple, and the detailed assessment hadn't taken place.

MR HUTTON: Yes.

THE CHAIR: Because presumably no one's going to start work on that until we know what the position is. Then there's still the question as to when the right time -- whether the payment should be made on account prior to the detailed consideration of distribution. So that's the question that would need to be addressed.

MR HUTTON: Yes.

THE CHAIR: So, your suggestion would be that we might work out what the right

proportion would be and leave open the question of timing for a later point. Is that the suggestion?

MR HUTTON: Yes, exactly. So to fix a sum for the payment on account of costs, but to stay it, pending the appeal process.

THE CHAIR: Yes. Well, and pending a decision about whether any --

MR HUTTON: (Inaudible).

THE CHAIR: I mean, the question is whether we grasp the nettle now and decide whether or not you should be getting the payment, whenever that happens. Because it's not just about the appeal, is it?

MR HUTTON: No.

THE CHAIR: It's actually a question as to whether there's any point giving the Class Representative a whole lot of money which she can't do anything with.

MR HUTTON: Yes. I mean, what we've said is it would go into a dedicated client account and accrue interest, but we don't know precisely what that interest rate would be.

THE CHAIR: No. So, there are two options. One is we either do all that upfront, we work out what the amount is, we work out whether we're prepared to order it, subject to the outcome of the appeal, and then we wait for the outcome of the appeal. Or we just work out the amount and then the appeal outcomes, and then we'll decide whether we're going to give it to you or not. I don't have a strong view either way. I'm not sure arguing about it upfront is that helpful.

Mr Piccinin, I think --

MR PICCININ: It seems to me to be a waste of everyone's time and money to do that. I mean, we (inaudible) do that in short order after the appeals have (audio error).

THE CHAIR: Which bit of it? All of it or the --

MR PICCININ: All of it.

THE CHAIR: All of it?

MR PICCININ: Yes. Since there's no point actually handing over any money, there is also no point working out what the sum would be now that (inaudible).

THE CHAIR: Well, the only thing about that is that -- I suppose you might say it doesn't matter very much, but if the appeals were to run their course, you know, it's conceivable they might all end up in the Supreme Court, and that could be years away, couldn't it? And then you're going to come back and start making submissions to us about the reasonableness of costs, which is not particularly helpful for us because we won't remember anything about the case. I mean, I take your point.

MR PICCININ: I didn't understand my learned friend to be pressing terribly hard to do this now anyway. But it's just my submission is having a hearing or a paper process that is producing an order saying that the (audio error).

THE CHAIR: How hard are you pushing it?

MR HUTTON: No, I mean, I'm leaving in the Tribunal's hands on the basis that -- I mean, there is an obvious advantage about doing it as soon as you said so, in the sense that things are fresher in your mind than they might be in two years' time. But, you know, I mean, I'm in the Tribunal's hands as to whether you fix a figure, when I say "now", by a written process, or you simply park it completely. (Pause)

THE CHAIR: Yes. I think what we'll do is I think we will park all of it, and I think that is with some reservation, because I am slightly nervous about how much extra work is going to be involved for us in two years' time -- if it is in two years; it might not be two years, of course.

But having said that, the exercise itself is a reasonably high-level one. It's not as if we're going to be summarily assessing the costs, which might be quite different, I think, if we were in that world. So, I'm sure we will manage, and if Apple does have a preference to push it off and you don't have a strong preference, then I think we've

been guided by that. So, I think the idea is we'll leave the question of payment on account open.

MR HUTTON: Yes, I'm very grateful. That will be helpful.

THE CHAIR: But you do want to deal with the indemnity costs application?

MR HUTTON: Yes, as long as the Tribunal is happy with that and are in a position to deal with that.

THE CHAIR: Yes, of course.

MR HUTTON: Yes, and as I understand it, Apple are in a position to deal with that. There's no difficulty in relation to that.

In relation to this issue about whether costs should be on the standard basis or the indemnity basis, the draft order deals with this at paragraph 19. It probably should have been made clear -- and it's a point that Mr Piccinin makes -- the Class Representative's case is that the costs should only run on the indemnity basis from after one of two alternative dates. Namely, on the first basis, the first date is 1 December 2022, because that is 21 days after the first letter inviting a meeting, which I'll come to.

The alternative basis is that it would be 6 December 2024 when indemnity basis costs would kick in, because that was 21 days after the offer that the Class Representative made. So, on our case, it would be standard basis until one or other of those dates and then indemnity basis thereafter.

In relation to it, as we understand, it's not in dispute that Apple should be ordered to pay the Class Representative's costs of these proceedings. There's no argument that it should be reduced by, you know, 10 per cent, 20 per cent or whatever. So, it will be an order that the Class Representative's costs of the proceedings should be paid by Apple and should be subject to detailed assessment in due course.

What is then disputed is whether any part of it should be on the indemnity basis, rather

than the standard basis. The guiding rule in relation to this is Rule 104 of the CAT Rules. That appears at tab 3.3, page 16 of the authorities bundle. I'm sure this will be very familiar to the Tribunal, but Rule 104 provides that:

"'Costs' means costs and expenses recoverable between the Senior Courts of England and Wales ..."

"(2) The Tribunal may, at its discretion ... at any stage of the proceedings make an order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings."

"(4) In making an order under (2) and in determining the amount of the costs, the Tribunal may take account of:

(a) [Firstly,] the conduct of all the parties in relation to the proceedings;

(b) Any schedule of incurred or estimated costs;

(c) [Thirdly,] whether a party has [been successful] on part of its case [Well, the Class Representative has been successful on all of its case] ...

(d) Any admissible offer to settle by a party which is drawn to the Tribunal's attention, and which is not a Rule 45 offer to which costs consequences under Rules 48 and 49 apply."

As the Tribunal will be aware, Rule 45, which is sort of the equivalent of the Civil Procedure Rule 36, doesn't apply in collective proceedings. That's Rule 74(3) of the Rules.

The reasoning appears to be -- why Rule 45 doesn't apply, is presumably that in collective proceedings, one has to make an application for a collective proceedings settlement order. It's complicated; there are all sorts of issues. So it's not as simple as civil litigation where there's a claim for money and simply it's paid. So Rule 45 wasn't, of course, open to the Class Representative in relation to that. The authorities on Rule 104, and I'm sure the Tribunal will be well aware of it, is to ensure that justice

is met in terms of the outcome on costs.

In relation to indemnity costs, although there's no specific provisions, as far as I'm aware, in the Rules that deals with this, in the Civil Procedure Rules, obviously that is dealt with. At tab 2.1 in the authorities bundle is CPR 44.2, and at (4), that deals with: "In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including --

(a) the conduct of all the parties;"

"(c) any admissible offer ..."

So reflected very closely in Rule 104.

Then at CPR 44.3. Sorry, I should go back to 44.2(5), which says:

"The conduct of the parties includes --

(a) conduct before, as well as during, the proceedings ... "

"(e) whether a party failed to comply with an order for alternative dispute resolution, or unreasonably fail to engage in alternative dispute resolution."

We say that is relevant here. It's not specifically in Rule 104, but there's no reason why it wouldn't apply in this Tribunal just as much as in the High Court.

Then in relation to CPR 44.3, that deals with the basis of the assessment. At (1), it gives the option as to whether the costs should be assessed on the standard basis or the indemnity basis:

"but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount."

Then at (2), it deals with the standard basis, and at (3), it deals with the indemnity basis:

"... the court will resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable in amount in favour of the receiving party."

So, there are two differences between the standard basis and the indemnity basis. On

the standard basis, the costs are in effect presumed to be unreasonable until the receiving party proves that they're reasonable. It's the opposite way round on the indemnity basis: on the indemnity basis, the costs are presumed to be reasonable until the paying party shows that they're unreasonable: either unreasonably incurred or unreasonable in amount. And then the second difference is that proportionality doesn't apply on the indemnity basis. So those two principles are the differences. Of course, even on the indemnity basis, costs are only allowed if they're reasonable. So, it never goes beyond reasonable costs.

In terms of the principles of where indemnity costs may be ordered. There's a passage of Lord Justice Coulson's in the case of *Thakkar*, which is at tab 21 in the authorities bundle and at page 327. At page 332 at paragraph 19, right at the bottom of page 332, Lord Justice Coulson summarised the principles and he said this. So just over the page at 333:

"The discretion to award indemnity costs is a wide one and must be exercised taking into account all the circumstances of the case, including but not limited to the conduct of the paying party."

And various authorities are cited for that. And then at (b):

"In order to obtain an order for indemnity costs, the receiving party must surmount a high hurdle. To be able to demonstrate 'some conduct or some circumstance which takes the case out of the norm'. That is the critical requirement. [Quoting Lord Woolf in *Excelsior*.] While it is preferable for the judge expressly to apply the test 'out of the norm', the use of the word 'exceptional' may be consistent with having applied the [principles in *Excelsior*]."

And then at (c):

"To the extent that the application is based on the paying party's conduct, it is necessary to show such conduct was 'unreasonable to a high degree' in order to

recover indemnity costs [and it cites Chiam, which I'll come back to] but it is not necessary to go so far as to demonstrate 'a moral lack of probity or conduct deserving of moral condemnation' on the part of the paying party."

And then at (d):

"Merely because the conduct in question may happen regularly in litigation does not mean that such conduct cannot be 'out of the norm'. In my view, the word 'norm' was not intended to reflect what whether what occurred was something that happened often, so that in one sense it might be seen as 'normal', but was intended to reflect something outside the ordinary and reasonable conduct of proceedings [quoting Lord Justice Waller from *Ensure*]."

And then at paragraph 20:

"Since the judge has such a wide discretion when it comes to costs, the courts have repeatedly made it clear that the court should avoid going beyond the CPR to identify rules, default positions, presumptions, starting points and the like, when addressing costs disputes. Lord Woolf made that point in *Excelsior* at [32]:

"'In my judgment it is dangerous for the court to try and add to the requirements of CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge ...'."

So, it is a very wide discretion as to whether to order indemnity costs, but it is accepted that when you're looking at conduct, it's necessary for me to show in these circumstances that their conduct was unreasonable to a high degree. And there is no principle that just because we made an offer which we then bettered -- and I'm going to come to that because, as I understand it, it's not disputed that we have bettered our offer -- it doesn't necessarily follow that we get indemnity costs. This is not a situation under Part 36 or Rule 45, as I've explained, where that would be an automatic result because we're not in that territory.

It's worth bearing in mind that many of the cases that are cited by both sides are cases where the party opted not to make a Part 36 offer in High Court proceedings, but instead made a Calderbank offer and they must be seen in that context. We, of course, did not have that option. Rule 45 wasn't available to us. So, the only basis on which we can make an offer is a Calderbank offer. But nevertheless, I accept the hurdle I have to show is that they acted unreasonably to a high degree in that context. In relation to where that might be shown, where offers have been bettered by a claimant and should have been accepted by a defendant, the case of *F&C Alternative Investments (Holdings) v Barthelemy*, which is at tab 10 in the authorities bundle, is helpful. So, *F&C* was a case where there was a fallout of an LLP between the various members of the LLP, which led to a dispute leading to a 95-day trial before Mr Justice Sales, as he then was. There were various offers going both ways in that case, and at paragraph 22, which is on page 117, two points were noted about an offer:

"Two points may immediately be noted about this letter:

(1) First, the offer of the amount the respondents were prepared to accept was in an amount which proved to be significantly less, in the result, than that to which the judge subsequently held they were entitled [so they had beaten their offer by some distance];

(2) Second, the offer was not, and was expressly stated not to be, an offer within the terms of CPR Part 36."

And at paragraph 24, there were further without prejudice settlement meetings; there were offers going both ways. And at paragraph 27, at the bottom of page 118, it was stated:

"Overall, this cannot be said to be a case where the parties were not trying to settle the litigation. They clearly were. But they plainly took a different view of the respective merits of the respective cases: that of the respondents, in the overall outcome, being

the one found to be right."

And then at paragraph 31:

"The reason why the judge made an order of indemnity costs (after 15 January 2010) was, in essence, by reference to the respondents' offers, and in particular the offer of 24 December 2009. He found that the respondents could not reasonably, for the reason given in the letter itself, frame that offer under Part 36. He accepted the submission that there was a 'glitch' in the wording of Part 36.10 in not extending to a case such as this; he considered that the offer in fact made 'mimicked' with appropriate adjustments the operation of Part 36 and that it was a sensible way to fashion the offer. He noted that the offer was much lower than the respondents' true [settlement]. He then reviewed the respondents' subsequent [open] letters ... and noted that all were below or at the level of their entitlement. He also considered that the subsequent requirements for the appellants to withdraw the letter to the FSA and transfer [et cetera]."

And so at paragraph 32, the reasoning of Mr Justice Sales was that he effectively accepted that because they had sought to mirror their offer with Part 36, even though it was expressly not a Part 36 offer, meant that they should be entitled to the benefits that they would have got if they'd made a Part 36 offer. And at paragraph 33, he then based his division between standard basis and indemnity basis costs on that offer.

Lord Justice Davis said that he was wrong in having done that. At paragraph 51, which is at page 129, he said this at paragraph 52:

"It was a fundamental feature of the judge's reasoning in this regard that an analogy could be drawn here with [CPR] 36.14. Mr Browne's submission was that the judge simply was not entitled to have regard, by way of analogy, with Part 36 for this purpose: and it was an error of principle for him to do so. Further, it is an accepted general principle that for indemnity costs, rather than standard [basis], to be awarded

something out of the norm by way of improper or unreasonable conduct is called for. And here, Mr Browne said, the judge identified no such feature; he essentially relied solely on the supposed analogy with Part 36 to achieve the result that he did.

And at paragraph 53, Lord Justice Davis says:

"In my view, the submissions of Mr Browne are correct. I simply do not think that the judge was justified in drawing an analogy ... with Part 36 to justify an [indemnity basis order]."

And at paragraph 68, he concluded that the only basis on which the judge had made an indemnity basis order was that he had used the Part 36 mirroring to give them the benefits that they would have got if they had made a Part 36 offer, which they had not done. And at paragraph 70, he said this:

"There may be special cases where refusal to accept reasonable offers of settlement is capable of justifying an award of indemnity costs: [he cites the Epsom College case]. But, as Rix LJ there emphasised, the failure to accept such offers, or to accede to an approach for settlement, must be unreasonable."

And then he referred to the case of *Kiam*. The quote from *Kiam* at paragraph 13 is:

"It follows from all this that in my judgment it would be a rare case indeed where the refusal of a settlement offer will attract under Rule 44 not merely an adverse order for costs, but an order on an indemnity basis rather than standard basis."

So there has to be something more than simply refusing an offer which the claimant then goes on to better at trial. But there is a discretion, and there may be cases where refusal to accept reasonable offers is capable of justifying an indemnity basis costs order. So, you've got to justify it on the particular facts; you've got to go beyond merely not accepting an offer which was then beaten.

Then, in the case of *Noorani v Calver*, which is at tab 9. This was a decision of Mr Justice Coulson, as he then was, and it was a case where, paragraph 2 at

page 103, there was an almighty fallout amongst the West Wirral Conservative Association, and there was a dispute --

THE CHAIR: Conservation association.

MR HUTTON: Oh, sorry, conservation. You're quite right.

THE CHAIR: There probably was a falling out of the conservative association as well, but in this case it was the conservation.

MR HUTTON: Absolutely, sorry. Conservation association. Absolutely right. And the defendant was the chairman of it and the claimant and defendant were in opposing camps in the split from top to bottom in the conservation association. This resulted in a claim for libel, originally libel and slander, but Mr Justice Coulson struck out the slander claim. At paragraph 4, he explains what happened: witnesses were called on the first and second day of trial; the principal evidence was given by the claimant. And: "In my judgment, for reasons which are explored in greater detail below, his evidence was nothing short of disastrous for his case."

And he was not therefore surprised when the claimant said he wished to discontinue the proceedings on day three of the trial. There was no dispute the claimant had to pay the defendant's costs of the action. There was a dispute about whether it should be on an indemnity basis or not. And there were two bases on which it was put why it should be indemnity basis: the parties' pretrial conduct and the nature of the claim itself. I don't need to deal with the nature of the claim because that doesn't arise here. But then, having set out the rules, at paragraph 8 on page 104, Mr Justice Coulson sets out the principles of indemnity costs, refers to *Excelsior* about being something out of the norm and unreasonable to a high degree. Then, at paragraph 10 on page 105, the second half of that paragraph, he notes that on 18 February 2008, the defendant's solicitors wrote to the claimant solicitors, referring to the defendants and inviting them to withdraw the claim form and the particulars of claim and pay the

defendant's costs to be assessed if not agreed. So, it wasn't much of an offer; they were basically saying, "Give up and pay our costs". And the response from the claimant's solicitors on that date was:

"We do not intend to take our client's instructions with regard to the contents of your letter of above date, to do so would be highly insulting."

Paragraph 11:

"There is no doubt that this is an important exchange. The defendant's defence had identified one of the critical parts of the evidence in the case ... [and] invited the claimant solicitors to withdraw the claim."

And he was not impressed with their response. And at paragraph 12:

"More importantly, however, is the stark fact that now, over 2 years on, the defendant has achieved precisely the same result that he would have achieved if the claimant had accepted his offer. The claim has now been withdrawn, at the claimant's cost. The only difference is that the defendant has had to incur considerable costs to achieve that result; costs which would never have been incurred but for the claimant's solicitors' wrongful dismissal of the offer."

And then that view was confirmed by consideration of the other offers made in the case which were to similar effect, namely, "give up and pay our costs". And then at paragraph 14, he says:

"[However], it seems to me that the defendant continued his reasonable attempts to bring about an end to these proceedings."

And he refers to further offers that were made. And then at paragraph 15, he says:

"I consider that this offer [which was to the same effect again] was more than reasonable in the circumstances. It was wrongly rejected by the claimant. Whilst the claimant did make some suggestions about mediation in the same period, it is difficult to see quite what mediation, at such a late stage, was intended to achieve. I note also

that the defendant had suggested mediation even before the proceedings had begun, and had been met with the unreasonable response that, if there was to be any mediation, it would have to be paid for by the defendant. The defendant had made a clear offer in his solicitor's letter of 17 February 2009, and that offer should have been accepted. It was not."

And at paragraph 17, he says:

"[However], it seems to me that the defendant's pre-trial conduct was eminently fair and reasonable. The defendant's offers, if accepted by the claimant, would ... have put the claimant in precisely the same position as he is now ... [And] the defendant has incurred [substantial] costs ... but for the claimant's intransigence, [the same result].

"For those reasons, I am in no doubt that the contrasting conduct of the parties prior to the trial makes this a case where indemnity costs are appropriate. The defendant's pre-trial conduct was unreasonable to a high degree and out of the norm."

I think he actually means the claimant's conduct, but anyway.

So, that is a case where more than one offer was made which was unreasonably rejected. And in those circumstances, Mr Justice Coulson said it was unreasonable to a high degree. So, it is a question, obviously, of degree.

I'm happy to deal with the other side's authorities, if need be, in reply, but they are very much to the same effect: namely, you've got to show unreasonableness to a high degree and not just the rejection of an offer, but it can be shown, that there can be unreasonableness to a high degree in refusing offers and *Noorani* is an example of that.

So why do we say that indemnity costs is the right order here?

If one goes to the correspondence bundle, and to tab 20 in that bundle, which is at page 83. This is a letter from Hausfeld, the claimant's solicitors, to Gibson Dunn, for

Apple, dated 9 November 2022. So, this is at a stage where a CPO has been made and, as rehearsed in paragraph 2 of that letter, the Tribunal had not only awarded certification but said that the claim was a “paradigm example” of a collective action and rejected Apple's arguments for summary judgment and striking out in relation to the excessive pricing claims and then notes that "your client's application for a split trial was rejected as well", so it was heading for a single trial. And then at paragraph 3, it says:

"It is clearly only a matter of time before your clients will be required to compensate UK App Store users."

Paragraph 4:

"With this in mind, and in light of the parties' obligations to consider alternative dispute resolution throughout the App Store Proceedings, our client has been giving careful consideration to the process for settlement under the UK collective actions regime and how such a process could be utilised in the App Store Proceedings."

Pausing there, I think I'm right in saying that there hadn't been any collective settlement approval orders at that time in 2022, but if there had been, it might be the Mark McLaren case had happened. But anyway, it was a new process, certainly. And the letter goes on to say:

"The benefits of a settlement to your client are obvious, not least, the provisions regarding undistributed damages in Rule 94(9)(g) of the CAT Rules."

So those are the provisions which say that, in a collective settlement, the undistributed damages or part thereof can go back to the defendant, which obviously doesn't apply in relation to where there's a damages award with no settlement. It also notes that:

"A settlement would potentially be of substantial benefit to Class Members in ensuring they are compensated [properly]."

And then goes on at paragraph 5 to note that there going to be substantial costs that

are going to be incurred in the future. They're going to have to get stuck into experts and witnesses preparation. And then at paragraph 6:

"Taking all this into account, our client invites your clients to meet on a without prejudice basis to collaboratively consider the options that may be available under the regime to settle her Claims. Our client recognises that the collective settlement mechanism is yet to be used. As such, she would envisage that any discussion about how any settlement could be structured to account for ... provisions for the payment of clients' costs ... a process for distributing claim proceeds to Class Members; and the use of undistributed damages ...

We look forward to your client's response, and we are available to discuss this proposal if it would be useful."

Now, that letter was not responded to at all. It was simply ignored by Apple. It was an invitation to sit down around the table and discuss the possibility of a collective settlement. And obviously, Apple didn't think that it was even worth responding to. So, it just lay there for another two years.

One of the points that my learned friends make in their skeleton is, "Well, in those two years, we didn't keep pushing the point". But we had laid it out pretty clearly that we would like to sit down and talk to them, and they simply ignored it. So, the question arises, well, what would be the point of simply writing the same letter every six months? The offer was still there.

Then two years later, at tab 21, in this bundle, page 85, there was a second without prejudice save as to costs letter. It's dated 14 November; for some reason, in the skeleton it says it was the 28th, but I apologise for that; it was the 14th. This is a long, detailed letter making an offer, specific offer this time: the last one obviously was simply just to sit down to discuss, whereas this actually makes a monetary offer. This is pretty much two months before trial. One of the points that was made in my learned

friends' skeleton was that November 2022, it was at a fairly early stage, and they didn't fully know the merits at that point or didn't have enough information. We don't accept that, but of course, they didn't have all the witness and expert evidence. By November 2024, they did have all of it. They were right in the lead up to trial so no such excuse could apply here.

Paragraph 1 of the letter refers to a very small window remaining for the parties to explore the possibility of settlement prior to the commencement of trial. They note the previous offer letter, which had been ignored, but they would make a further offer in this letter. Paragraph 4:

"On any reasonable view, Apple will be liable to compensate Class Members ... in an amount measured in the hundreds of millions."

And at paragraph 5, they refer to the governing principles of the CAT Rules, it being incumbent on the parties to engage in meaningful settlement dialogue. And at paragraph 6, they note that any adverse judgment will have effects on Apple. And then at paragraph 7, they make an offer of £1.2 billion in full and final settlement of the claims. The offer included interest; it also included costs under Rule 104. So those are obviously inter-partes costs, if I can put it like that, which are significant at this point. They note that the total funding commitment from the funders was £24.3 million.

And:

"As set out above, the offer is intending to have *Calderbank* effect. We therefore reserve the right to bring the Offer to the Tribunal's attention on the issue of costs [which of course is what I'm doing now]."

The offer value was:

"... calculated on the basis of the midpoint estimates of overcharge advanced in Singer 2, with the average value for the incidence calculations in Singer 2. [It] represents a substantial discount on the damages sums that the Class Representative

will be seeking at trial and her reasonable, recoverable costs."

Pausing there, there's nothing in Apple's skeleton which appears to take issue with the fact that we have beaten that offer. We have got more than £1.2 billion, inclusive of costs. It may be that my learned friend has something to say on that, but there's nothing in his skeleton that suggests otherwise. Indeed, we understand it is entirely clear that we have beaten that offer.

Then, in relation to the potential outcomes at trial, there was then setting out the counterfactual commission position and what figures that would give. That gave a mid-figure of £1.2 billion, which is what the offer was. And at paragraph 13, they say the offer represents a discount of over £500 million against Dr Singer's point estimate for the logit model, and also represents a discount of over £105 million if the Tribunal was to find that the logit model should be adopted with a counterfactual commission rate of 15 per cent. It talked about significant concessions in order to secure certainty and avoid delays. Then there's a section dealing with settlement mechanisms, mechanics and, by this time, of course, there had been collective settlement approval orders in the CAT. They note at what had happened in the *Gutmann* case.

Then at paragraph 17, they note that they would expect that the take-up rates in this case would be high. They note again in paragraph 17, Rule 94 9(g), which is the reversion of the undistributed damages, or at least part of them going back to Apple, compared to a damages award. At paragraph 18, they said if it's accepted, there will be a joint application by the parties. At paragraph 19, they set out the costs position. The offer was said to be inclusive of costs.

They set out at paragraph 20 the details of the costs position and the funder's fee, and what the funder would be entitled to. Of course, the funder's fee would be coming out of the £1.2 billion if it had been accepted. Then at (b), they deal with Hausfeld's costs which are on a partial CFA, and there are references to how that works in terms of

their fees being paid, and a total figure is mentioned in relation to Hausfeld's fees.

Then similarly, in relation to counsel, they're also on partial CFAs, and there's a calculation of what the counsel's fees would be. Those figures of course would not be included in the total funding outlay. They would be on top, because the funder is not liable to pay those figures as the case goes along; they're only liable to pay part of the fees under the CFA. So, there would be the uplift on top and the difference between the discounted element and the full element of counsel's fees and of Hausfeld's fees.

Then there is reference at (d) to the ATE premia. Again, that would be coming out of the damages and a total in terms of the costs. Then next steps, they point out the benefits, they point out the possibility of reversion. At paragraph 22:

"Once you have had the opportunity to consider this letter, we propose that a without prejudice meeting takes place in order for the parties to discuss the feasibility of any settlement ..."

They suggest a meeting in early December, and open to a mediation, "Can we have your response?"

In relation to that offer, there was an initial response back in the correspondence bundle at page 91, tab 22, which said, on the fourteenth day:

"Dear Hausfeld ...

"The Defendants are considering your letter and expect to revert next week."

There was no such reversion the following week, and indeed things went quiet until trial. The trial started on 13 January, so two months after our letter. Then on 29 January, this is at page 92.4 in the bundle, and actually starts at the top of 92.5. This is an email correspondence, obviously going backwards. There is an email from Lesley Hannah of Hausfeld on 29 January. This is during the trial. It is to Mr Watson at Gibson Dunn:

"I refer to our earlier discussion in which you stated that your clients are interested in exploring settlement of the proceedings. I am instructed by Dr Kent that she would be content to meet on a without prejudice basis to discuss their proposal. In light of your indication that this should take place before the commencement of the economic expert evidence, our preference would be to meet on Friday 31 January."

I think the Tribunal wasn't sitting on that day and would start again on the Monday:

"I have been instructed to communicate to you that her attendance is in the expectation that detailed consideration will have been given prior to the meeting to the sum of any settlement offer and to its terms on the client's part in order to ensure that her ... and her legal team's time is not inappropriately diverted from the trial."

There was concern on our side that this would be diverting, given that the trial was going on all the time. It was proposed that the addressees of the email correspondence be limited as a result of that so that others weren't diverted.

The response is on page 92.4 from Mr Watson in the middle of that page, which is, in response, 29 January at 8.29 pm:

"Thanks for your email. Sorry if there has been a misunderstanding: our clients' position is that there is a small window prior to the commencement of expert economic testimony next week (and the concurrent preparation of closings) during which Apple would be prepared to listen to a revised proposal from your client to resolve the proceedings. As mentioned when we spoke earlier, our clients' expectation is that any proposed settlement would reflect the progress of the trial to date."

So although we had made an offer two months earlier, the approach had been on behalf of Apple to us, but the approach was, "We're prepared to listen to a further proposal from the Class Representative", so it wasn't proposed that they were going to make any offers themselves. At the bottom of 92.3, Ms Hannah of Hausfeld responded:

"Thank you for that clarification. My instructions are that it is for your clients to put an offer (including terms) to my client, particularly given they appear to consider that there is some urgency as to timing."

Mr Watson's response to that -- and this is the end of closing the door, effectively, we say -- is at 17.31 on 30 January, so that's the Thursday:

"Thank you for your email. I note your instructions.

"Our client is confident in its position and intends to litigate this matter to a successful conclusion. Several key aspects of your client's case have now been fundamentally undermined during trial. Given your client had previously appeared interested in a settlement, our client wished to signal a willingness to listen to a reasonable proposal. If your client wishes to resolve this matter and avoid liability for our client's substantial costs, our client remains willing to listen to a meaningful proposal."

And there it ended.

The suggestion that the Class Representative should start bidding against herself, she having made an offer two months earlier, is a surprising one, we would suggest. Effectively, Apple's approach to this, having ignored the offer for two and a half months, then in the middle of trial to come back and to suggest that we make a further offer to them, which would involve, in some way, paying their costs given the way that the trial was going, in their view, was very unlikely to be attractive to the Class Representative. Indeed, her position has been entirely vindicated subsequently, because, if that was indeed their take, that they had fundamentally undermined various parts of our case and we needed to avoid liability for Apple's substantial costs, then their reading of the trial was obviously deeply awry, because obviously, what happened subsequently shows that they were completely wrong in that assessment.

And there it is. So, we have it. We made a proposal in 2022 to sit around a table to discuss things. They didn't even bother acknowledging that letter, let alone responding

substantively to it. They simply ignored it.

We then made a further proposal, which involved a specific offer, in November 2024, which they initially ignored. Having written an acknowledgment letter, they then never came back to us as they said that they were going to until, during the trial, they then make a further approach. It seems like Ms Hannah obviously thinks that they're going to actually make an offer, but no, they're not going to make an offer. They're going to invite us to make an offer, because we should see that we're doing terribly badly at the trial, our case has been fundamentally undermined in various respects, and we should be making an offer to them, bidding against ourselves, which is wholly unrealistic, in our submission.

So, we say that the combination of those, at the very least, is unreasonable conduct on Apple's part. One party wished to try and see if settlement was possible in this case, and that was us. Apple did not, realistically, and their approach during the trial was wholly unrealistic and inevitably led nowhere. We made an offer in circumstances where we didn't choose not to do an offer under Rule 45. It wasn't available to us, but we did our best to set out in detail what the offer involved and why we were making an offer at that level, including reference to the expert evidence in relation to the valuation of the claim, and a proposal to sit round a table and Apple simply refused to do so. In my submission, that is conduct which very much more comes within the kind of *Noorani* example, where those offers were made -- indeed, offers simply for the other side to give up, which were held to be sufficient to justify indemnity costs when those were repeatedly rejected by the claimant in that case.

In this case, we say we're in that territory. We were the ones trying to make the offers. They didn't make a single offer. They didn't make a single proposal of any kind. They ignored the first offer. And then in relation to the second offer during the trial, they then say, "Well, please, can you bid against yourselves". In those circumstances, we

say inevitably, you know, vast amounts of costs have been incurred thereafter, and their take on the case that our case was fundamentally undermined and we needed to make offers in consideration of having to pay their costs of the proceedings was a wholly unrealistic approach to this litigation. In those circumstances, we say that that is conduct which is unreasonable to a high degree, and that they should pay indemnity costs.

Those are my submissions. Unless (inaudible) any further (inaudible).

MR FRAZER: Thank you, and your proposal for them to pay indemnity costs precisely from which date?

MR HUTTON: So, the dates that we've identified in the skeleton is 21 days on from each offer, alternatively. Those dates on my calculations would be -- if the Tribunal was minded to do so on the basis of the first offer, then it would be standard basis costs to 30 November 2022, and indemnity basis costs from 1 December 2022 onwards. If the Tribunal was not to find that, but to find in relation to the second offer, whether on its own or in combination, we would say in combination with the first offer, it has to be seen as a piece, then that would be standard basis up to 6 December 2024 and indemnity basis from 7 December 2024 onwards.

MR FRAZER: So those remain alternative proposals?

MR HUTTON: Those remain alternatives, yes.

MR FRAZER: Thank you.

THE CHAIR: Mr Piccinin.

Submissions by MR PICCININ

MR PICCININ: The application for indemnity costs should be rejected. It doesn't come anywhere near the standard for indemnity costs that has been laid out in the case law. As to what the standard is in the law, we agree on the overall test described at a high level of generality. So, we're in agreement that you're looking for something quite out

of the norm and that you're looking for conduct that is unreasonable to a high degree, then that's the standard.

But it is useful to look in slightly more detail at the Court of Appeal judgment that my learned friend took you to specifically in relation to the rejection of settlement offers, since that seems to be the sole basis on which this application is brought.

So, if we could just go back to that, it's the *F&C* case. If we pick that up, it's tab 10, page 132 in the bundle. The reason I wanted to show you this was because my learned friend, for understandable forensic reasons, wanted to palm this case off as one that was exclusively about an attempt to elide Calderbank offers with Part 36 offers by means of an analogy, because that's what Mr Justice Sales had done at first instance.

But the case is actually more significant than that when you look at the reasoning, because on the appeal, which is the judgment that we're looking at here, the argument was put more fully than that and it was rejected. There are reasons for rejecting it that I want to look in slightly more detail at. So, if we've got page 132 in front of you, it's paragraph 69 that I want to look at, picking it up from the third line. Lord Justice Davis says:

"It seems to me that, ghosting[sic] Mr Thompson's argument [I think there's a typo there, but what he's saying is that Mr Thompson's -- the claimant's -- argument is] the notion that because a (very) reasonable offer was -- more than once -- made by the respondents, on terms conveying less than what transpired to be their true entitlement, and was rejected by the appellants therefore the appellants were unreasonable in rejecting that offer. [Then he says] That is a non sequitur. [This is important, he says] The position has to be judged at the time of the offer not only by reference to the maker of the offer but also by reference to the recipient. At that time [as in the time of the offers], the appellants were optimistic as to their prospects: and there was no finding

by the judge that that was an unwarranted or unjustified view to take. In the event, their high hopes were dashed -- a common-place of litigation generally [as we all know very well]. It transpired that the appellants had assessed the position wrongly. But [this is important] that is a hindsight call."

So, the mere fact that a defendant rejects a reasonable offer, even if the defendant rejects several reasonable offers, even if the defendant rejects several very reasonable offers, doesn't make the defendant's conduct unreasonable. What we see here is that there is nothing unreasonable within the meaning of the case law about a defendant being optimistic about the litigation and then having their high hopes dashed because, in the court's view -- or in the Tribunal's view, in this case -- the defendant assessed the position wrongly. As Lord Justice Davis said, that's a hindsight call. You've got to look at these offers at the time they're made and rejected.

The other thing I wanted to show you was a little bit more of the quote from Lord Justice Simon Brown's judgment in the *Kiam* case, which is just over the page. My learned friend showed it to you, but I think he only really read out from paragraph 13 of that quote, but paragraph 12 is important too. Lord Justice Simon Brown, said:

"I, for my part, understand the Court there [in another case] to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Rule 44 [and the same is true under the CAT Rules] does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory. The indemnity costs order

made on the principal appeal in *McPhilemy's* case was certainly of that character."

Sir, that is the reason why Lord Justice Simon Brown goes on in the next paragraph to say that it should be "a rare case indeed" where the refusal of a settlement offer which is made on a Calderbank basis will result in indemnity rather than standard costs.

My learned friend also took you to the *Noorani* case. I don't want to dwell too much on that because I don't think my learned friend was really drawing any additional points of law or principle from it.

But I think towards the end of his submissions, he did say that our case was in some way analogous to what happened in that case in our rejection of offers that would have resulted in the same outcome, had we accepted them at the time as compared with the result at trial. That certainly wasn't the gist of that case.

If I can just show you one paragraph to summarise how extreme the situation was in that case. If we just turn to page 109 in the bundle, it's paragraph 32. Mr Justice Coulson, who here is dealing with the other factor he relied on in reaching indemnity costs, which was actually the claimant's conduct of the claim. What he said was:

"Accordingly, I am driven to conclude that the claimant launched defamation proceedings either knowing that they were based on a lie or, giving him the greatest possible benefit of the doubt and assuming he was not responsible for the calls, [these were the calls that he said he'd been slandered by -- having made] knowing that his case depended on a number of odd coincidences. He started the action in the knowledge that he had made the silent calls ... and in the knowledge either that he had also instructed the malicious calls [to be made], or knowing very soon after the proceedings started that the evidence pointed inexorably to that conclusion. And yet he maintained the claim until the third day of the trial, allowing him over a day in the

witness box to make all sorts of unfounded and often risible suggestions about the defendant and a host of other people in the Association who were not even parties to the proceedings."

That is the critical context also for what Mr Justice Coulson was saying in relation to the settlement offers. It's a case where the claimant has brought a claim, probably fraudulently -- as in, it was in his own personal knowledge that the things he were alleging in the claim were false -- or at the very least from very, very early in the proceedings -- not right at the last minute, moments before trial, or during the trial, but from very, very early in the proceedings, it was clear that the overwhelming evidence pointed to him being a liar, even if somehow he wasn't a liar and that was just an unfortunate coincidence. So, it was an abysmal case that he was bringing; a truly hopeless one that must have been clear to him subjectively right from the outset.

And so applying what we saw from the *F&C* case, looking at his conduct in not accepting the offers, testing the reasonableness of that at the time the offers were made, in this case, you can understand why the conclusion was that the indemnity costs were appropriate because subjectively, not just in the view of the court, as it turned out, but subjectively in his mind at that time, he could already see that he was bang to rights; that the claim that he had brought was hopeless and probably fraudulent. So that's what we say about the law, specifically in relation to the rejection of settlement offers.

The only other thing I wanted to say about the law before turning to the facts was just -- if I can just show you paragraph 30 of our skeleton argument, because I don't think there's any dispute about the principles, having heard my learned friend -- that's on page 19 of the core bundle. This is where we're dealing with what I'm going to come on to shortly, which is the initial WP overture in 2022.

There are two propositions that we outlined there inside authorities 4: one is that the

mere fact that a party has a preference to have their claim determined through the courts rather than through mediation is not in itself unreasonable.

The second was that even if there was, in a particular case, an unreasonable refusal to engage in mediation, even that does not produce any automatic results in terms of a cost penalty, then it's simply one aspect to go into the overall in-the-round assessment.

If you did the exercise, which I don't intend to do today, of trawling through all of the indemnity cost cases, a bit like *Noorani* that I just showed you, what you generally see is that it's not just one thing that is relied on to establish unreasonable conduct that is worthy of a penal order. What you see is an in-the-round assessment of a number of aspects of unreasonable conduct that together amount to something that is worthy of the court's sanction and worthy of a penalty. All we're saying here is that the mere fact that you reject an offer to engage in settlement talks, or even something more structured, like mediation, does not in itself, amount to conduct that is liable to attract an indemnity cost to the board.

Those are the principles. Turning to the facts of our case, unlike in the *F&C* case, and I remind you, in the *F&C* case, indemnity costs were not awarded and yet that was the case in which there were several very reasonable offers of settlement that had been made and rejected. In this case, Dr Kent only ever made one offer, just one. Now, we need to look at it a little bit more carefully than my learned friend has in his submissions to you. When you look at it more carefully, what you see is that it's not an offer that was making any real concession on the value of their case. I'm not saying they had to make such an offer, but just that it wasn't one. And actually, it's an offer in which they were asking us to pay more than their claim was worth at that time on their own analysis in light of the Tribunal's findings in the Judgment and I'll show you what I mean by that when we look at the detail. It certainly isn't a very reasonable

offer, in the sense of the *F&C* case law.

If we could turn up the correspondence bundle and just go to page 85, tab 21. This is the one offer that they made. As my learned friend said, it was made on 14 November 2024. I can't remember if that was shortly before or shortly after the PTR, but it was very shortly before trial. It was just before the Thanksgiving break and it was just two months, not even two months, I think before the trial started. So, a very busy time for everyone.

The offer, as you saw, was for £1.2 billion in full and final settlement -- that's in paragraph 7 over the page -- and that includes costs and interests. But costs we can more or less forget about for these purposes with these numbers, because the costs you can see in paragraph 9 were only said to amount to, in total, at most £24 million, being the total amount of funding that they had.

Paragraph 11 is important. What's said there is that:

"The level of the Offer has been calculated on the basis of the mid-point estimates of overcharge in Singer 2, and an average value for the incidence calculations in Singer 2."

So just reflecting on what that means. The Tribunal will recall, at trial, that the way the case was presented, both in relation to Dr Singer's evidence and in relation to Mr Holt's evidence, was that there were a range of potential competitive outcomes; a range of different potential counterfactual commissions and then a range of different potential incidence levels. The ones that Dr Singer advanced were 50 per cent based on his linear model and 90 per cent based on his logit model. And then the counterfactual commission figures ranged from 10 to 20.

And so, what they're saying is that they've made us an offer here, which is from roughly in the middle of their case as to what the competitive counterfactual was and the true rate of pass on was.

I'm not saying that the parties have an obligation to make better offers than this but normally if you make an offer that you want the other party to consider, it will be an offer that's somewhere between your case and the other side's case. That's what a without prejudice offer is. You're making some concession on what your case is. This was an offer that was smack bang in the middle of Dr Kent's case, not halfway or even some way between Dr Kent's case and our case. As we'll see, it's an offer that was very, very substantially above the bottom end of the range of outcomes that Dr Kent was positively advancing to the Tribunal, as acceptable outcomes that the Tribunal could have reached in its judgment. Very, very significantly in excess of that. We'll see that on the next page.

On the next page, what you have is a table showing the damage of sums and the interest amounts.

THE CHAIR: Remind me what page you're on in --

MR PICCININ: I'm sorry.

THE CHAIR: -- the bundle.

MR PICCININ: Page 87 of the bundle.

And it's at the top of the page, sir. You can see that there are three columns showing incidence at 50 per cent, which is linear; 90.8 per cent, which is logit; and then 135 per cent, which was not even a figure that they were pressing at trial. And then down the horizontal axis, going down the rows, we have a counterfactual commission of 20 per cent, and then a counterfactual commission of 15 per cent, and then a counterfactual commission of 10 per cent. And of course, that works the opposite way from an overcharge perspective. So, the highest overcharge is at the bottom and the highest pass on is at the right.

Now, the findings that the Tribunal reached in its judgment, as you know, were incidence of 50 per cent and then for in-app transactions, which make up the vast

majority of the commerce, it was a counterfactual commission of 10 per cent. So, I can conservatively, from my perspective, take the bottom left as being the outcome that the Tribunal has arrived at, at trial, in terms of the parameters of the quantum assessment that you have determined.

What they were telling us, at this point in November 2024, based on their own evidence -- these numbers are highlighted yellow, but I think I can read out the ones in the bottom left, because those ones, at least the damages bit of it is reproduced in the Judgment.

So the total figure there is just over £1 billion, which is significantly less than the £1.2 billion that they were offering us in this letter. Even if you want to add costs to that, so if you want to then add another £24 million in costs, then, still -- assessed from the perspective of Apple, at the time of this letter, this offer is worse for us than how we ended up performing at trial, in terms of the outcome that you've reached.

Now, my learned friends say in their skeleton argument that they have now calculated damages up to February 2024 at £1.2 billion. We don't have any materials we can go through to interrogate the difference between that and this, but my understanding is that that includes interest all the way down to judgment. So that includes -- my understanding is that 1.2 figure that they have in their skeleton argument is an October 2025 number. Certainly not a February 2024 number and it's not even a November 2024 number.

Now, I don't know exactly how they've put together either set of numbers, but what I'm saying is that if you want to assess the reasonableness of Apple's conduct in not accepting this offer, the comparison you need to make is the comparison of the offer that was being made as against the parameters that the Tribunal found at judgment, as a starting point. And of course, it's nowhere near enough for them to say that they've beat their offer. (They haven't.) When you look at the wider picture, just have

a look at the top-left corner. I won't read that one out because that one's not in the Judgment. But if you can just do the little addition in your head of the one number and the other number, you get somewhere that is absolutely nowhere near, like not even within (inaudible) of £1.2 billion.

Those are numbers that they were saying to you, please find these numbers. Please just find somewhere in the box. So, in my submission -- that's what I was trying to say before -- that this is not really an offer that involves any kind of concession on Dr Kent's case. On the contrary, they're asking us to pay vastly more than the bottom end of their range as to what a competitive, counterfactual commission and a 50 per cent pass on rate would actually deliver for the class. Vastly more than that.

THE CHAIR: Just so I understand. Just so I'm clear about what you're saying. Are you saying two things there? One is you're questioning whether the Class Representative has actually beaten this offer, just as a matter of arithmetic?

MR PICCININ: Assessed at the time it was made.

THE CHAIR: Assessed at the time it was made, exactly. Whether, in fact, the outcome is a better one than the outcome she's achieved is better than this.

MR PICCININ: Exactly. Assessed at that time.

THE CHAIR: Yes. Assessed at that time. And secondly, you're saying that there are a number of good reasons why Apple might have taken the view that it was reasonable not to engage in this offer.

MR PICCININ: Yes.

THE CHAIR: And that goes to the question of hindsight.

MR PICCININ: Yes.

THE CHAIR: Is that right? So, there are two different points.

MR PICCININ: Yes, that is right but, sir, on that second point, what I'm saying is that the offer is actually vastly more than the bottom end of their case at trial. It's not even

somewhere between their case and our case at all. It's not a generous offer. It's an offer that is in the middle of the range of their case, which is vastly higher than the bottom end of their case, that they are inviting the Tribunal to adopt.

Now, it's true that as things happen in the Judgment, the Tribunal ended up alighting on an overcharge figure that was right at the top end of the range -- the extreme top end of the range that Dr Kent was asking for. But it can't be outside the norm for a defendant to reject an offer like this. As I say, it's scarcely a WP offer at all because it doesn't actually concede anything outside the boundaries of what their case at trial was.

What it was, was an invitation to Apple to capitulate and pay somewhere in the middle of the range of the damages they were seeking. That's what it was. And I don't criticise them for that. Of course, they're absolutely within their rights to insist on their case and to take it to trial and win, which is what they've done. But it can't be unreasonable for us to say in response to this, actually, we'll take our chances in the Tribunal.

MR FRAZER: Mr Hutton's case, as I understood it, that the unreasonableness lay in the failure to engage rather than in the recent rejection of the offer. Does that change your position in any case?

MR PICCININ: No, sir. And that's what I was just about to come on to. When you say "failure to engage", but bear in mind again, this was the eve of trial so this was not an offer made in a calm period of time.

MR FRAZER: There was an earlier offer to meet, of course, which was (overspeaking).

MR PICCININ: I'm coming on to that.

MR FRAZER: Okay.

MR PICCININ: But the other, the earlier offer to meet was not an offer; there was no

offer made there at all.

THE CHAIR: No.

MR PICCININ: Just looking at this one, it's true that we didn't make a counter offer in response. But in my submission, that's not terribly surprising. And it's certainly nowhere near unreasonable conduct, let alone unreasonable in a high degree. Given that their opening gambit, their offer here, wasn't a concession at all on what their case was, since all they were offering us was the midpoint of their case. Well, the midpoint of our case, as you know, would have been a drop hands offer.

Now, it's not true that we didn't engage at all. We did. You've seen the WP correspondence that that came later. What we said to them was that we were willing to engage if they made a significantly lower offer, i.e. one that's below their case, not what would normally be regarded as a commercial offer, a serious offer to settle rather than an offer, "Please capitulate". And Dr Kent's response, again, as you've seen, was no, she wasn't going to make another offer; it was for us to make one and if we didn't, she wasn't going to make a further one. Again, this isn't a criticism of her; she's entitled to take her case to the Tribunal and, as I say, she has been awarded damages at the extreme upper end of the overcharge which she was asking for, albeit at the bottom end of the pass on rates that she was asking for. But that is a hindsight assessment, not an assessment that you can make at that point in time.

From a reasonableness at the time perspective, the proper way to characterise this case is a case where neither side made any offers that were actually any kind of concession on the case that they were advancing at trial. Dr Kent made -- her only offer that she ever made was smack bang in the middle of the case that she was advancing at trial. So, this isn't one of those cases where you have repeated very reasonable offers being made. Even then, I hope you've got, from what I showed you in the Court of Appeal authority, rejecting out of hand repeated very reasonable offers

that really do make concessions on your case, that is not a basis for indemnity costs either.

So that takes me to the only other -- I'm going to be generous and call it an attempt -- attempt at settlement that they rely on. That is a single letter sent way back at the other end of the proceedings in 2022. That is on page 83 of the correspondence bundle. You've already seen this; I won't take you through it again, but just over the page on page 84, the punchline is in paragraph 6. It's not a settlement offer at all. It's not even a settlement offer, let alone a reasonable settlement offer, let alone a very reasonable settlement offer. It provides no indication at all, there's no statement anywhere in this document that suggests any willingness on the part of Dr Kent to make any kind of commercial compromise in the sense that I've outlined it; commercial compromise meaning an offer that is actually somewhere below the range that you're taking to trial. All this is, actually when you read it, is a request for a meeting to discuss the mechanics of how a settlement might work, given that there had not been any settlements of collective proceedings at that time. The only carrot that they're offering Apple is the idea that if they settle instead of going to judgment, then they might be able to get some of the money back that's not collected by class members. That's what she's offering us. There was never any communication, let alone a clear communication, from Dr Kent of a willingness to settle on terms that involved a departure from her case.

Again, I've shown you the case law that refusal to participate in mediation, refusal even to talk about participating in mediation, is not sufficient to warrant the kind of criticism from the court that is reflected in an order for indemnity costs. This is not really even that. This is nothing more than an invitation to come in and talk about the mechanics. Reading between the lines, reading this together with the November 2024 letter, one rather gets the impression that the reason why nothing is said here about that is

because what they wanted was for us to capitulate. And that's fine. It's absolutely fine to want the other side to capitulate. But you can't criticise them as being unreasonable after the fact if that's all you're ever offering.

So again, we say it's just impossible to say, on the back of this letter, that our lack of interest in this letter establishes the kind of high degree of unreasonableness that could justify an order for indemnity costs.

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

THE CHAIR: Just one quick question. I think I'm taking it from everything you've said and from the way the draft order appears, that you're not contesting any order that you that your client pays the costs?

MR PICCININ: Of course, sir.

THE CHAIR: I just wanted to make sure we're absolutely clear about that.

MR PICCININ: Absolutely.

THE CHAIR: Very good. Thank you very much, Mr Piccinin.

Reply submissions by MR HUTTON

MR HUTTON: Sir, I have to say, I'm taken a little bit by surprise at the submission that my friend makes that, viewed at the time that the offer was made, we haven't bettered it because that point is wholly absent from his skeleton argument. He's put in a skeleton argument dealing with this point, making various points about the fact that we don't meet the threshold, but not making, if it really is a good point, the fundamental point that we haven't bettered our offer. And he says today that, viewed at the time, we haven't bettered the offer. Well, we're not on notice about that point. We sent a letter to them on 7 November setting out what we said the damages calculation would be for the beginning of the period 1 October 2015 through to 29 February 2024, and we have not had that disputed by the other side. So --

THE CHAIR: I think he's making a slightly different point. I think he's saying if you

take the numbers back to November 2024, you've got to calculate the numbers in the 2024 context rather than in a --

MR HUTTON: Yes.

THE CHAIR: -- October 2025 context. I think, is that --

MR PICCININ: Just to be very clear, I'm not making that calculation. I'm showing all I'm doing is showing the Tribunal the numbers that Dr Kent put forward to us and asked us to accept. That was the basis that Dr Kent put forward for why we should accept her generous offer.

THE CHAIR: Yes. So, I think -- I don't think that's helpful, but I think that's what he's saying.

MR HUTTON: Well, I don't think ultimately he's then disputing the fact that we have recovered more than we offered in the £1.2 billion, inclusive of costs, as I understand it.

MR PICCININ: I'm sorry, I hesitate to interrupt, but there hasn't yet been a process to calculate what the damages are going to be. So, I'm taking no position on what the damages are going to be when calculated through to whatever final date we end up at. I make no submissions on that at all.

THE CHAIR: Yes, well, I think -- you carry on.

MR HUTTON: It would have been helpful if we'd been on notice that that was the position, because all we had was silence on that in the skeleton and simply, you know, it isn't sufficient to justify indemnity costs. The fact that they didn't engage and they didn't respond to that letter. You would have expected them to have made that point in the skeleton, in which case we could deal with it.

But dealing with the other points, I mean, the related point is we're not making a concession. But we clearly are making a concession, and you just have to read the letter to recognise that we're making a concession. A concession doesn't necessarily

mean going halfway through his case; a concession is it's not the highest of what we can get and we clearly didn't get the highest that we could have got, so we are making a concession, as to -- you know, if we'd offered the top end of this, the maximum that we could possibly get, he may have a point that we haven't made a concession. But the point of this letter is, it could be this; it could be that; we're going in the middle. Now, those are our figures, but that's a concession. The pure fact that we have -- on our case, and we thought that this was common ground -- beaten that offer suggests that there was a concession in the letter. It is clearly a concession, not at the maximum that we could have got.

THE CHAIR: Yes, I suppose another way of looking at it is, it's a concession within the range of your successful outcomes.

MR HUTTON: Yes, exactly.

THE CHAIR: But the point I think that's being made is that that's not quite the same -- if Apple is entitled to take the view that there might have been a different outcome, so without the benefit of hindsight --

MR HUTTON: Yes.

THE CHAIR: -- then it might well think that that's not much of a compromise, because it would expect a compromise to take account of some of the litigation risk of the difference between their position and your position. So, I think that's probably the spirit in which the compromise point's been made.

MR HUTTON: Yes. But their position, of course, is nil. So, you know --

THE CHAIR: Well, they didn't make an offer, did they? So, they clearly didn't want to engage, for whatever reason.

MR HUTTON: Yes, exactly. And my learned friend characterised the letter in November 2022 as simply being an offer to discuss the mechanics. But it's much more than the mechanics. It's an offer to sit around the table and talk about settlement,

which is why we make the point in that offer, which is at page 83, that if there's a settlement that they may get reversion of the damages, et cetera. We're talking about a without prejudice meeting to discuss settlement. We're not talking about it in the ether of, "Well, let's not talk about actually what this case might settle for, but let's talk about the mechanics of how it would happen if it did settle"; we're saying, "No, we need to talk about both, what this case may settle for and then what the mechanics are", to which there was no response at all; it was simply ignored.

And there is a failure to engage, we say, firstly as a result of this letter, and secondly as a result of the November 2024 offer. There was a total failure to engage at any point until this very half-hearted effort in the trial of saying, "Well, please make us a bid against yourselves and make us another offer without us ever having to make an offer". Which, in the context of the trial, my learned friend says, "Oh well their November 2024 letter was very late in the day, it was only two months before trial", the only approach they made to us was actually in the middle of the trial and it was an approach of, "Please make us another offer; we're not going to make you any offers at all".

So that is, we say, a repeated failure to engage and a failure, really, to see the way the wind was going. I mean, those emails in January 2025 are really inviting us to say, "You're going to lose; you need to make us an offer in that context", which is, in our submission, a failure to read the room effectively. At that stage, that's an unrealistic approach.

Can I just deal with a couple of points on the law? There isn't much between us, I entirely accept, on the law. In relation to the failure to engage dispute, alternative dispute resolution, if I can just remind the Tribunal, at tab 2 of the authorities bundle, CPR 44.2, one of the factors in 44.2(5), which is at page 5 and 6 of the bundle, (e): Conduct in this context, which the court can take into account, includes:

"... whether a party ... unreasonably failed to engage in alternative dispute resolution." So that is a specific relevant factor in the Rules, and we see no reason why that shouldn't be read across in effect, to the general discretion that there is in Rule 104 in this Tribunal.

THE CHAIR: How does that fit in with *Gore v Naheed*? Because that doesn't seem to be what Lord Justice Patten is saying in *Gore v Naheed*.

MR HUTTON: So, in *Gore*, I mean, what is being said is there is no automatic rule that if a claimant makes an offer which it then beats, that results in an indemnity costs order.

THE CHAIR: Well, yes, if you look at 49, it seems to be going a bit further than that. It's saying, "silence in the face" -- where are we? 49:

"Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct ... as here, those rights are ultimately vindicated."

Of course, their rights were not ultimately vindicated. But:

"A failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor ..."

I think that's the point, isn't it? It's simply a factor to be taken into account?

MR HUTTON: Yes, it's clearly relevant. So, I mean, just going halfway through 49:

"Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated."

Well, of course that's not the case here. This is a case where that party who had refused to engage in alternative dispute resolution had won at trial, and the other side was saying, "Well, I've lost, but they shouldn't get their costs from after they had failed

to engage". And so that was the context of this; it's not an indemnity costs order case. And that's ultimately what happened: they were deprived of their costs. Lord Justice Briggs made clear in his judgment:

"A failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account when exercising costs discretion."

So, it's clearly relevant, and it clearly has to be dependent on the facts of the individual case.

THE CHAIR: Yes.

MR HUTTON: Can I also then come back to *F&C*, just a quick point on *F&C* , which is at tab 10. And it's paragraph 68, which my learned friend took you to paragraph 69. But at 68, the point of this, Mr Justice Sales's award of indemnity costs, is clear at paragraph 68.

THE CHAIR: Which page is this?

MR HUTTON: Sorry, this is on page 132.

THE CHAIR: Thank you. Yes, I have it, yes.

MR HUTTON: Paragraph 68, second sentence, four lines down:

"The sole ground for the award of indemnity costs was, in reality, the rejected offers of settlement and, in particular, the 'strong analogy' the judge drew with Part 36."

So, there was no finding in *F&C* that the party had behaved unreasonably; it was solely the rejection of the offer and the analogy with Part 36. And of course, that's not our case. We accept that the analogy with Part 36 doesn't work for the reasons that are given in this judgment by Lord Justice Davis. But that was the point at the heart of this, that Mr Justice Sales had gone wrong by saying, "Well, it's not a Part 36 offer, but I can apply it as if it was a Part 36 offer".

And my learned friend also made a point about the *Noorani* case, in effect saying, "Oh, well, that was on very different facts". But if one goes to tab 9 in the bundle, starts at

page 102, and my learned friend quoted from paragraph 32, which is at page 109, where the judge is dealing with the whole underlying basis of the defamation proceedings being fundamentally unsound. But that, with the greatest respect, is a false point because, as can be seen from the judgment, there were two bases on which indemnity costs was applied for. First was the conduct in relation to offers and failing to engage, and then secondly was the nature of the claim. That can be seen from paragraph 5 at page 103. There were two elements of the dispute about indemnity costs: the parties pre-trial conduct and the nature of the claimant's claim itself. Paragraph 32 deals with the second element, but it's important to recognise that Mr Justice Coulson said he would have awarded indemnity costs on the first element alone. And we can see that, in paragraph ...

THE CHAIR: Yes. It does seem to me that there are some facts in *Noorani* in relation to the first limb --

MR HUTTON: Yes.

THE CHAIR: -- which are quite particular as well. And I certainly read it as suggesting that the judge was unimpressed with the way that the claimant behaved in relation to those particular allegations, which, I mean, at least reading through the lines, it was one of the situations where it should have been withdrawn and it was pretty obvious they should have been withdrawn, which I think is different from here.

MR HUTTON: Well, of course --

THE CHAIR: And I don't think you're saying that the Apple's case was so hopeless that it should have just pulled back from it.

MR HUTTON: No, no. There's no part of my case to say their case was hopeless. No, it isn't. But it is important to recognise that when he deals with the first issue of indemnity costs, at paragraph 12, he goes through their reaction to the offers, et cetera, and in the last sentence of paragraph 12, he says:

"This is an important part of the story and the parties' conduct which, so it seems, to me, would, on its own, justify an order in the defendant's favour for indemnity costs."

THE CHAIR: Yes, you're saying it shouldn't be tainted by what he later finds.

MR HUTTON: Exactly. He deals with that separately.

So, the suggestion from my learned friend that there has been no failure to engage does seem to defy common sense, because we've made two approaches and there was a total failure to engage with the first; they didn't even acknowledge it, let alone substantively respond to it. And in relation to the second, two months before trial, they said, you know, "We're going to reply to you next week, 14 days afterwards"; they never did. They went through to trial and then at the trial, they then make this approach which goes nowhere because they make no offer at all and the ball clearly was in their court at that stage. So, what were we supposed to do, bid against ourselves? That's wholly unrealistic. Unless, of course, the trial was going disastrously wrong for us, which it clearly wasn't in the circumstances.

And there were obvious benefits to them in settlement, you know, the most obvious being the reversion of the damages, which we had made clear repeatedly to them, but which obviously was a point that they were unimpressed by. And in those circumstances, given that history, we say that we do come within the principle that they have not only rejected offers, but they've unreasonably failed to engage in trying to settle these proceedings repeatedly. And that does justify an award of indemnity costs for that part of the proceedings we've identified.

DR BISHOP: Mr Hutton, you've put some emphasis on the calculation of expected damages based on Dr Singer's evidence.

MR HUTTON: Yes.

DR BISHOP: Dr Singer's various reports were in the hands of Apple before the trial at the date which these discussions took place.

MR HUTTON: Yes.

DR BISHOP: Now, you are aware, are you -- I assume you're aware -- that on both the points you mentioned, overcharge and pass on, this tribunal did not accept Dr Singer's evidence. The basis on which the decision was made used other evidence.

MR HUTTON: Yes.

DR BISHOP: And broad axe, let's call it that. I mean, whether that's technically meant by broad axe, I'm not sure, but that's intrinsically less easy to calculate. Are you saying that it was unreasonable for Apple to have gone -- having read this report and believed, as they clearly did, that it wasn't very sound, that it was unreasonable of them to go to trial and have and test that?

MR HUTTON: What I'm saying is that it was unreasonable to -- I mean, there are always risks in litigation about which expert will be accepted, to what extent, et cetera. No one can necessarily foretell that, particularly where there are experts on both sides and the Tribunal might prefer the other side's expert on that point or whatever. There are always risks of it. But the offer that was made was a reasonable one. Clearly, we say, as a result of the Tribunal's judgment, it was reasonable.

But beyond that, and this is the task that I've got to do in indemnity costs, was a total failure to engage with that offer. They could have come back and they said, "Well, we think Dr Singer is wrong for the reasons that you've just said, sir". But they didn't do that; they totally failed to engage with us. They totally failed not only to make a counter-offer, but also to sit down with us.

DR BISHOP: I understand.

MR HUTTON: Yes.

THE CHAIR: Good, okay. Thank you. That's very helpful. Thank you very much, Mr Hutton.

Housekeeping

THE CHAIR: The poor, long suffering transcriber needs a break, so we will do that. When we come back -- I'm just a bit concerned about the time -- we do need to deal with confidentiality. We'll take a ten-minute break, or rather we'll break at 4.00 pm, which is just a little bit less than ten minutes. When we come back, I think I'll be in a position to give you a ruling on the costs point, which I'll try and do as quick as I can, and then we do need to get on with confidentiality. I'm not sure we need such a room full of people; we will go into private for that.

There are just two things that we wanted to plant with you, which we will do just before we rise. The first is, it wasn't clear to us why nothing was being done about distribution at the moment. I appreciate that people don't want to spend money unnecessarily, but it did seem to us that it would be unhelpful to find that appeal rights were exhausted, and if Apple is unsuccessful, we would find that we then have to wait two months before anything happened. It wasn't clear to us why all of that was being competed about. It may be that there's nothing that can sensibly be done that doesn't involve a lot of money, in which case I would understand that. But really, that's just -- maybe I might leave it for --

MR HOSKINS: I think that the suggestion wasn't in the sense that absolutely nothing will be done, but you're right, there's a reluctance to spend a lot of money on it. So, it's not necessarily everyone's sitting on their hands and there'll be no thinking done about it. But certainly, there is a wish to have that period, which is not a particularly long period, if there is serious money to spend, I fear there probably will be on coming up the distribution plan, because we're going to consult the people who are experts in that.

So, I think, if I put it like this, if you think that period is too long, it's more a question of

how quickly do you think you need to move after the appeal has been exhausted? I hear what you say about work being done, et cetera, but that period was intended to be a reasonable one for us to come back and not to reflect, just sitting on hands, et cetera.

THE CHAIR: What I'm concerned about is that we might find that we get to that point, and if you suddenly turn up with a whole lot of things that require Apple's involvement, then quite fairly and reasonably, we'd have to give Apple a significant amount of time to look at it and the whole thing just drifts. I just wonder if part of this ought to involve some more engagement with Apple about what you think. And that's really --

MR HOSKINS: I think, the intention was that the order would allow for that.

THE CHAIR: Yes. Well, in that case I can leave it and the marker's put down.

MR HOSKINS: I mean, I'll take instructions in case I'm wrong.

THE CHAIR: Well, maybe over the break.

MR HOSKINS: My understanding was we would come to you after two months with a proposal and that would include, if necessary, consultation.

THE CHAIR: Well, that would be helpful, if that is something that's possible.

The other thing is, in relation to the order, I was a little bit surprised at the form of the order. And you, I expect, all have more experience in doing this than me, because we are only really starting to engage in this --

MR HOSKINS: Doing orders.

THE CHAIR: -- as we've been told. But I thought the order didn't reflect, as I expected, some aspects of the disposition. And I thought that the whole point of *Bittylicious* was that the Court of Appeal wanted to have a clear statement of what we had actually decided, for example, market definition, for example, the reference.

MR HOSKINS: No, that wouldn't normally to an order.

THE CHAIR: No.

MR HOSKINS: If this was a High Court proceeding, you'd find the appeal allowed, insofar as declarations were sought, that's a sort of extra over what you'd normally find. But as far as you go into detail about findings about market difference, that is something you would expect to find in the Judgment rather than being reflected --

THE CHAIR: You don't think that -- yes, okay. Well, I'm just raising it only that I don't want to disappoint the Court of Appeal.

MR HOSKINS: I honestly don't think you would.

THE CHAIR: If you're confident that's the position, then I'm happy to accept that.

MR HOSKINS: You have my word that if this was a High Court trial, that's the order I'd be putting to you.

THE CHAIR: If anything happens, I can blame you.

MR HOSKINS: Exactly. And I'm happy to take that.

THE CHAIR: Okay, well, we'll rise and we'll come back at 4.05 pm.

(3.56 pm)

(A short break)

(4.06 pm)

THE CHAIR: Mr Piccinin.

MR PICCININ: Yes, can I just check, are we in private?

THE CHAIR: Yes, but before you do that, I'm going to give you a ruling on the costs.

MR PICCININ: Oh, yes. Of course.

THE CHAIR: Yes, so I think we're probably still in public session.

(4.06 pm)

Ruling on costs

THE CHAIR: This is an application by the Class Representative for an order that Apple pays her costs of these proceedings on an indemnity basis.

It is accepted by Apple that it should pay the Class Representative's costs, so the question before us is whether the costs should be assessed on a standard or an indemnity basis. The Class Representative accepts that the regime in Rule 45 of the Competition Appeal Tribunal Rules 2015 does not apply by virtue of Rule 74(3)(c), which excludes the Rule 45 offer regime from application to collective proceedings.

The Class Representative also accepts that there is a high hurdle for the award of indemnity costs, expressed in the case law as there being something out of the norm or exceptional, or there being unreasonable conduct to a high degree.

The Class Representative rightly also accepts by reference to the *F&C Alternative Investments* case that it is not sufficient simply to show that she has beaten any offer made in a Calderbank letter sent as an alternative to a Rule 45 letter, although she notes that she has no option to send a Rule 45 letter as already described, which is a factor that should be taken into account. There must therefore be other unreasonable conduct which is out of the norm or exceptional.

The Class Representative relies on two letters from her solicitors to Apple's solicitors. Firstly, a letter of 9 November 2022 following a grant of the CPR application which invited Apple to meet to discuss settlement. This letter was ignored. Secondly, a letter of 21 November 2024 which made a detailed settlement offer in the form of a Rule 45 letter which specified a proposed settlement sum which the Class Representative says is lower than the damages she has obtained in these proceedings.

This letter was also ignored until a discussion and email exchange during the trial in January 2025 in which the Class Representative says that Apple took an unrealistic position in expecting the Class Representative to make a further substantive offer.

The Class Representative says that this amounts to unreasonable conduct which justifies an award of costs on an indemnity basis. She refers to *Noorani v Calver*, in which the behaviour of the claimant in rejecting offers justified an award of indemnity

costs.

Apple says that the conduct does not amount to unreasonable conduct which is out of the norm or exceptional.

We agree with Apple. In our view, while it was unhelpful for Apple to fail to engage at all in settlement dialogue, even if simply to reject the offer of a meeting or the later settlement offer, that was not conduct which was unreasonable to such a high level as to be out of the norm. The November 2022 letter was not a settlement offer, but instead an invitation to meet to discuss options under the collective proceedings regime to settle claims.

We note the cases Apple has cited to us to the effect that a preference to have a claim determined through the courts rather than mediation is not itself unreasonable conduct, and failure to engage does not automatically result in a costs penalty but is simply a factor to take into account, see for example *Gore v Naheed and Ahmed* at paragraph 49 per Lord Justice Patten. It seems to us that the November 2022 letter falls into that category and is not a factor of sufficient weight to justify a costs penalty..

In relation to the November 2024 letter, it is plain from the *F&C Alternative Investments* case at paragraph 69 that we should avoid the benefit of hindsight in relation to the assessment of reasonableness of any reaction to an offer or settlement. We accept Apple's submission that it could reasonably have considered the November 2024 offer to be unattractive and as not involving any real compromise by the Class Representative.

Apple also questioned whether it could fairly be said that the Class Representative has achieved a better outcome in the judgment than the offer conveyed in the November 2024 letter, as assessed on the numbers at the time. The Class Representative makes the point that this is a new argument in respect of which she was not on notice. In our view, that argument is not something we need to resolve for

the purposes of this application. It may be that Apple's view as to the merits was wrong, but that does not make it unreasonable for it to decide that it was not interested in the Class Representative's settlement offer.

It is also clear that the judge's decision to award indemnity costs in *Noorani* is very much a consequence of the facts of that case and the particular unreasonable conduct of the claimant. We think that is different for the present case, even if one accepts the argument that Apple "failed to read the room", as Mr Hutton KC put it.

In those circumstances, we decline to award indemnity costs and order that Apple should pay the Class Representative's costs of and incidental to the claim, subject to orders for costs already made, on the standard basis.

(4.11 pm)

(Hearing in Private)

(4.32 pm)

MR PICCININ: Very good, sir. I think that takes us to the end.

THE CHAIR: I think that's it. Mr Kennedy, anything else from you? Good. Okay. Well, thank you very much, everybody. I'm sorry we had to do that in such a hurry. I do need to be somewhere else. Thank you very much for all of the efforts. I think there's probably going to be a revised draft order that will come back as a result, presumably, because there are quite a few things that seem to have changed. You'll hear from us about amendment and there are one or two things that others have got to do for us, which I don't think I'm going to list now, but you know what they are.

MR PICCININ: Yes. With the draft order, since one of the biggest points in it was --

THE CHAIR: The amendment point. You don't need to wait for that.

MR PICCININ: We'll just wait for that and send it back to you after.

THE CHAIR: That's right. Perhaps if you can work out everything else, but you're quite right, that makes perfect sense.

Good. Thank you very much.

(4.33 pm)

(The court 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?