IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 13th January 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, Michael Armitage, Matthew Kennedy, Antonia Fitzpatrick (Instructed by Hausfeld & Co. LLP) On behalf of Dr. Rachael Kent

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

Monday 13 January 2025

(10.35 am)

THE CLERK: Case 1403, Dr Rachael Kent v Apple.

THE CHAIRMAN: Good morning. I should read the livestream warning. Some of you are joining us on livestream on our website so I will start with the customary warning. An official recording is being made, 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. Breach of that provision is punishable as a contempt of court.

Mr Hoskins?

MR HOSKINS: Good morning I will just do the representations first for Dr Kent. You have got myself, Mr Ward KC, Mr Armitage, Mr Kennedy and Ms Fitzpatrick. For Apple you have Ms Demetriou KC, Mr Kennelly KC, Mr Piccinin KC, Mr Leith and Ms Higgins and for the CMA you have Mr Gregory.

In terms of speaking parts on our side of the room, the broad division of labour will be as follows. I am going to deal with market definition and dominance. The foreclosure and tying allegations, and I will be saying a bit on objective justification but Mr Kennedy is going to be doing

most of the work on objective justification. Mr Ward and Mr Armitage are going to be dealing with excessive pricing and incidents or pass-on to the class.

There was a timetable issue you asked us to deal with, and as far as I understand, that is fine for both sides of the room.

THE CHAIRMAN: I did feel slightly guilty because we told you we did not want to sit on the Friday, but actually it is another matter in the Tribunal where there is an urgent matter for court space. You will appreciate that the Tribunal is quite congested at the moment, so that is the reason for that. We are very grateful for that. Thank you very much.

MR HOSKINS: We will give you an updated timetable reflecting that difference, and also we should populate it with which economists are turning up, which has not been in there so far, but that is all agreed. We will make sure you have one that is fully populated.

THE CHAIRMAN: It does now have very little space for expansion. I think we canvassed the idea we might sit slightly longer days to fit in some of the witnesses, and maybe it might be worth trying to flesh that out a little bit as well although I

appreciate that may well depend on how things go once those cross-examinations start.

MR HOSKINS: Certainly.

I cannot see the clock so you are going to have to keep me on time. I am sure you will anyway. So if I am running on even longer than usual, it's because I have no concept of time.

THE CHAIRMAN: We will let you know.

Submissions by MR HOSKINS

MR HOSKINS: Thank you very much.

Let me begin with, this is real Mickey Mouse stuff, but some of the main dates, just so we have them all in our heads. The App Store was launched by Apple in 2007. The ability to make in-app purchases was introduced in 2008. The ability to offer subscriptions in native iOS apps was introduced in 2011. What's referred to as the reader rule was also introduced in 2011. What is referred to as the multiplatform rule was introduced in 2018, and as you know, Dr Kent is bringing claims on behalf of all iOS Device users who, between 1 October 2015 to 15 November 2024, used the UK version of the App Store and made one or more relevant purchases. Those are the main dates. As you will be aware, some of the Apple rules change

over time so that is up to us to flag up to you when there have been material changes. I think we are all referring to the most recent version of the rules, but they are not necessarily the rules that were in play throughout the period although the main rules have remained constant, but we made tabs of that for you.

Somewhat surprisingly, there is absolutely no dispute about the fundamental facts in this case. It is common ground, or the following things are common ground. Apple requires that all native iOS apps must be distributed through the App Store, that is number one. An iOS App cannot be an alternative App Store. Number three, for digital goods and services payments for initial app purchases, subsequent in-app purchases and subscriptions can only be made using Apple's -- the phrase used by Apple is "commerce engine". You will also see reference to the IAP, you see reference to what we have called the ASPS. I think they are all the same thing. They are a bundle of services. But it is agreed you have to use Apple's version of those services for those types of purchases. We have often used the shorthand "relevant purchases" for three classes of purchases, the initial app

purchase, the subsequent in-app purchase and the subscription purchase.

Then the fourth key fact that is not in dispute is that Apple charges a commission on all relevant purchases. The headline rate of commission has remained the same at 30 per cent since the launch of the App Store.

Those are the fundamental facts and none of them in dispute.

At the PTR you asked us to provide you with a reading list rather than a narrative of the relevant Apple terms and conditions. I hope you did not regret that when you got the reading list in the skeleton, but I will just trot through some of the main points just so -- it is appropriate that I do so in opening. If you look at our skeleton argument paragraphs 17-19, that is {A1/4/4}. At paragraphs 17-19 you will be aware that we have sought to identify the most relevant provisions. The references we have given to you there are to the current version of the various Apple -- sorry there might be a technical issue.

The references we have given are to the current version of the various Apple documents, and as I have said, those have changed over time. You do

have the different versions in bundle E electronically, so they are before the Tribunal if you need them. There is also a helpful abbreviated summary of some of the relevant provisions at footnote 31 of Apple's skeleton, which is worth looking at. As I say, I am not going to go through that list, it would not be a good use of the time, but I am going to take you to some of the main provisions.

In order to register what is known as an "Apple developer", a developer has first of all to sign up to the Apple developer agreement. That sets up some basic terms, for example in relation to confidentiality, but it is not particularly relevant for these claims. We are not going to spend much, if any, time on the developer agreement.

Of more importance is what is referred to as the DPLA, which is the Apple developer program licence agreement. If we can look at that, at bundle {E/18/1}. First of all, the section or the introductory part which is the heading "Purpose". This is addressed to a developer:

"You would like to use the Apple software (as defined below) to develop one or more Applications (as defined below) for Apple-branded products.

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

Then it says:

"Applications developed under this Agreement for iOS, iPadOS" -- and those are the two we are concerned with, can be distributed through the App Store selected by Apple, and then there are various other methods of distribution but they are more limited, they deal with specific categories and we are not really concerned with them in this case. It is number 1 and the App Store we are concerned with.

Then the third paragraph of the purpose, about six lines up from the bottom, begins in the middle of the line:

"If You would like to distribute Applications for which You will charge a fee or would like to use the In-App purchase API for the delivery of fee-based content, you must enter into a separate agreement with Apple", which is called "Schedule 2".

That gives you a good description of the purpose of the DPLA. Then if we could go to page 18, please, clause 3.3.1 A. (A for Apple if you will

excuse the pun) it says:

"Applications may only use Documented APIs in a manner prescribed by Apple and must not use or call any private APIs."

As confirmed in footnote 1 of Apple's skeleton, one of the things that clause does is it includes the requirement that in-app purchases must be made using Apple's in-app purchase API. We have the confusion that is sometimes referred to as the IAP, so you have the IAP, API. I will trip up on that more than once during the next seven weeks no doubt.

Page 43, clause 7.2. Again, this is the schedule 2 requirement:

"If Your Application qualifies as a Licensed Application and You intend to charge end-users a fee of any kind for Your Licensed Application or within Your Licensed Application through the use of the In-App Purchase API, You must enter into a separate agreement (Schedule 2) with Apple ... via the App Store or before any such commercial distribution of Your Licensed Application may take place via the App Store or before any such commercial delivery of additional content, functionality or services for which You charge end-users a fee."

That is the schedule 2 we saw in the purpose.

Page 45, clause 7.6, you see the heading:

"No Other Distribution Authorized Under This Agreement.

Except for the distribution of freely available Licensed Applications through the App Store or" -- and then we have the limited other methods -- "no other distribution of programs or applications developed using the Apple software is authorized or permitted hereunder".

So again the distribution requirement, as it is referred to by shorthand sometimes.

Page 45 still but this time clause 8, "Program Fees":

"As consideration for the rights and licences granted to You under this Agreement and Your participation in the Program, You agree to pay Apple the annual Program fee set forth on the Program website, unless You have received a valid fee waiver from Apple."

This is obviously not the commission, this is the program fee, it is £79 in the UK. "Program" is defined in clause 1.2 at page 8. You see it towards the bottom of the page:

"'Program' means the overall Apple development, testing, digital signing, and distribution program

contemplated in this Agreement."

Finally in the DPLA at page 47, clause 11.1 is the term and basically the developer's adherence to the DPLA renews automatically for one-year terms. It rolls over annually.

Then if we can go next to schedule 2, so that is at bundle {E/22/1}. Clause 1.1, you will see the heading, "Appointment of Agent and Commissionaire":

"You hereby appoint Apple and Apple Subsidiaries (collectively 'Apple')" -- and we are concerned with (ii) for the United Kingdom -- "as your Commissionaire for marketing and delivery of the Licensed Applications to End-Users located in those regions listed on Exhibit A, Section 2 to this Schedule 2", and that includes the UK, and the commissionaire is basically the civil law equivalent of an agent and principal relationship.

Then at page 3, clause 3.1, delivery of the licensed applications to end users.

One of the reasons I am showing you this is it starts to show the distinction of between the initial download of an app that takes place through the app store and subsequent in-app purchases, including subscriptions, that take place through the app and you already see that in the terms and

conditions here in 3.1:

"You acknowledge and agree that Apple, in the course of acting as agent and/or commissionaire for You, is hosting ... may enable authorized third parties to host, the Licensed Applications" -- i.e. the apps -- "and is allowing the download of those Licensed Applications (apps) by End Users, on Your behalf. However, You" -- the developer -- "are responsible for delivering content and services sold by You using the In-App Purchase API, except for content that is included within the Licensed Application itself ... All of the Licensed Applications shall be marketed by Apple, on Your behalf, to End-Users at prices identified in the price tier and designated by You", et cetera. Then the final sentence:

"As Your agent and/or commissionaire, Apple shall be solely responsible for the collection of all prices payable by End-Users for Licensed Applications acquired by those End-Users under schedule 2."

Then page 4, clause 3.4:

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

2."

The relevant is (a):

"For sales of Licensed Applications to End-Users Apple shall be entitled to a commission equal to thirty percent (30%) of all prices payable by each End-User", so that is the headline rate which has remained constant throughout the claim period. Then the next sentence deals with what are called auto renewable subscriptions:

"Solely for auto-renewing subscription purchases made by customers who have accrued greater than one year of paid subscription service with a Subscription Group ... and notwithstanding any Retention Grace Periods or Renewal Extension Periods, Apple shall be entitled to a commission equal to fifteen percent (15%) of all prices payable by each End-User for each subsequent renewal."

There is a wealth of detail on how that operates. Basically, if you have been subscribing for a year Apple's commission drops to fifteen per cent from thirty. It is more complicated than that but that is the core of it. That provision was introduced in 2016.

Then clause 3.4(b) is what is referred to as the small business program. Again, that has a

reduced commission of 15 per cent for small businesses as defined. I will not go into the detail now. That was introduced in 2021.

Then finally in schedule 2, if we could go to page 7, you will have seen references in the evidence to what are called anti-steering provisions visions and this is an example of what attracts that epithet. 3.11:

"Subscription services purchased within Licensed Applications must use In-App Purchase. In addition to using the In-App Purchase API, a Licensed Application may read or play content ... that is offered outside of the Licensed Application (such as, by way of example, through Your website)" -- and this is the anti-steering provision -- "provided that you do not link to or market external offers for such content within the Licensed Application."

There are other examples, but I just wanted to show you an example of an anti-steering provision.

The final document, which is of particular importance for these claims and the way in which the Apple standard terms and provisions operate are the app review guidelines.

THE CHAIRMAN: Before you move off this document, I

suppose you might find an app developer puts forward an app for download that is free and then at some later stage changes their business model and decides to charge for in-app purchases. I do not know whether that happens a lot or whether it does not happen much, but it seems that is a possibility. Do these terms deal expressly with that in schedule 2 or is it just implied from the payment provision that you have to go back and sign up to schedule 2. If you have just issued it as a free app, a free download, then you would be under schedule 1, would you not?

MR HOSKINS: That's right off the top of my read, I cannot remember what it specifically says if you change over, but you will have to pay the commission because of the provision that says if you want to charge for in-app purchases or for apps you must sign schedule 2.

THE CHAIRMAN: 7.2?

MR HOSKINS: Exactly, so if you are a developer and you are currently free and you want to move to a paid system, you are only contractually entitled to do so under the licence if you enter into Schedule 2. So whether there is a more specific provision, I must confess I cannot think off the top of my head, but

certainly you would have to have a schedule 2 if you want to charge.

THE CHAIRMAN: Thank you.

MR HOSKINS: The app review guidelines, bundle {E/8/1}. Developers must comply with these guidelines if they wish to have an iOS App approved for distribution if you can look first of all at page 10. Just let me get myself in the right document. It is paragraph 3.1.1 in-app purchase. And it is the first bullet we are interested in you see the heading in-app purchase:

"If you want to unlock features or functionality within your app, (by way of example: subscriptions, in-game currencies, game levels access to premium content or unlocking a full version), you must use in-app purchase. Apps may not use their own mechanisms to unlock content or functionality, such as licence keys, augmented reality markers, QR codes, cryptocurrencies and cryptocurrency wallets, etc."

This is shorthand the payment restriction, you will see that referred to in the submissions you have had.

Then at page 12 there are some exceptions to the requirement to use in-app purchase. You see at

paragraph 3.1.3 and the reference to "Other Purchase Methods":

"The following apps may use purchase methods other than in-app purchase. Apps in this section cannot, within the app, encourage users to use a purchasing method other than in-app purchase, except as set forth in 3.1.3(a)", so again a type of anti-steering provision. Then:

"Developers can send communications outside of the app to their user base about purchasing methods other than in-app purchase."

I should say that third sentence, that permissive sentence, was added in June 2021. That is an example of where this has changed over time.

Then you have examples of the exceptions to the payment requirement. The first one 3.1.3(a) "'Reader' Apps":

"Apps may allow a user to access previously purchased content or content subscriptions (specifically: magazines, newspapers, books, audio, music and video)."

The important thing to note is that the reader rule does not alter the fact that original iOS app necessary to access the content on your phone or iPad must still be downloaded through the App Store.

It does not change that distribution rule.

In similar vein, one has the multiplatform rule in 3.1.3 (b):

"Apps that operate across multiple platforms may allow users to access content, subscriptions, or features they have acquired in your app on other platforms or your website, including consumable items in multiplatform games provided those items are also available as in-app purchases within the app."

Again the multiplatform rule does not alter the fact that the iOS App necessary to access the content on an iOS Device (i.e. an iPhone or iPad) must be downloaded through Apple's App Store. You should also note at this stage that a developer can only benefit from the multiplatform rule if the relevant items are also available as in-app purchases within the app. Those in-app purchases of course have to be made using Apple's IAP.

3.1.3(e), on the next page, provides that payments for goods and services cannot use in-app purchases, the sort of opposite, if you like, it is not that you must use in-app purchase, you must not use in-app purchase for physical goods and services.

Then finally at page 14, paragraph 3.2.2(i) you

will see the heading in bold "Unacceptable" and:

"It is unacceptable to create an interface for displaying third-party apps."

So in other words, it is unacceptable to create an iOS App Store. The only app store you can have on iOS is Apple's App Store.

That is all I wanted to do in terms of setting the scene. Those are the main provisions. As I said, there is not a dispute about the main requirements or restrictions. I am sure we will end up in the detail at some stage, but for opening that is all we need.

I will turn to market definition. In our skeleton argument, so {A1/4/16}, you will see that we have identified the legal principles that we say are relevant to market definition. Apple's skeleton does not seek to challenge any of the principles identified by us. So I do not know if there is going to be any sort of point of conflict, but it looks like we are on fairly solid ground in terms of what we have suggested the principles are. Those relevant principles are well-known. I am not going to trot through them now. What I will do is limit myself to making a few initial submissions to frame the debate. I should stress I am not going to try

and anticipate the results of cross-examination. That would be, as any trial advocate knows, a foolish thing to do, but I will try and frame the debate for you.

The first point is that market definition, as we all know, is not an end in itself. It is not something that requires mathematical precision. What it is intended to do is to provide a helpful means to identify the competitive constraints acting on an undertaking and to provide a framework for competition analysis, so that is very much the ethos, what is helpful as a way of understanding/analysing the issues in this case. It is not an abstract exercise where we all try and tick boxes and come up with the right answer.

In our expert's opinion, Dr Singer's opinion, there are three particularly relevant markets. The first one is the device market in which smartphones and tablets are sold, and that includes Apple smartphones and tablets, and obviously competitors using the Android system, et cetera. That is the first relevant market we have to be aware of.

The second relevant market is what we have referred to as the iOS App distribution market. We have described that as the market for the provision

of iOS App distribution services, which facilitate the purchase of iOS apps by iOS Device users. There is an awful lot of words there. It is quite hard to hold in your head what we are talking about. What we are talking about is this is the stage after which you have purchased your iPhone or iPad, and you have excitedly unboxed it and set the thing up, you decide to purchase an app or apps. It is that initial stage when you go and you download the app for the first time, that is what we are talking about when we talk about iOS App distribution services. It is the means by which you download the app for the first time. As we know, as we have just seen that may only be done via the App Store. That is the distribution requirement.

At this stage note that there is a distinction between the apps themselves, whether you want to play Candy Crush or you want to download a city map or to find your way around, the actual substantive app. But that is not what we are talking about, that is not what our case is about. Our case is about the means by which apps are distributed and our attack is on the fact they can only be distributed by virtue of Apple's own App Store. So it is not about the apps themselves. It is about

how they are distributed.

Again I am not sure there is really much between us on this. If we can go to Apple's defence {A1/2/17}, paragraph 56. This is Apple's defence and Apple says:

"The App Store is a two-sided transaction platform that facilitates transactions between consumers and developers. The relevant product that Apple supplies through the App Store is the facilitation of digital transactions, for which Apple charges a commission when a developer imposes a positive purchase price on the purchase of digital content."

So Apple talks about it in terms of facilitating transactions between consumers and developers. Their evidence is in similar terms. Mr Schiller's witness statement, that's bundle {B2/5/18}, paragraph 64. Mr Schiller says:

"On 10 July 2008, Apple launched the App Store. Among other things, the App Store is a transaction platform which provides a convenient place for consumers to discover and obtain iOS apps and for developers to offer and market their iOS apps."

So you have seen a reference to match making, for example, in Dr Singer's analysis and this is the

notion of the match-making. Developers can make an offering and users can search and see if there is an offering they like and that is what he describes as a match making purpose.

That is the second market that we say is relevant at the distribution level, and that means distribution of the initial app.

The third relevant market is once the users has downloaded the iOS App through the App Store, through the Apple App Store, then they might want to make further in-app purchases, or enter into a subscription. That is what Dr Singer describes as a further iOS in-app aftermarket. Again you will see the chronology of the excitement of unboxing, the downloading the app and then you realise you have got to pay money to get further in candy crush so there are three stages to it.

Those in-app purchases can only be made once the initial app has been downloaded. Those in-app purchases do not take place via the App Store. They take place via the app itself, not the App Store, but they must use Apple's IAP. Let me just show you probably far more coherently than I have just done. If we can go to the correspondence bundle {CB2/11/1}, you will see this is a letter from

Gibson Dunn to Hausfeld dated 7 September. There is a very pithy summary of the point I am trying to make at page 2 of that letter. If you go halfway down the page you will see the paragraph that begins "Firstly". Apple's solicitors explain the following:

"Firstly, there are differences in the initiation of the transaction. In the case of Relevant App Purchases, initiation takes place inside an Apple app -- the App Store. For Relevant Subscription Purchases/Relevant In-App Purchases, initiation takes place inside a third-party developed native iOS app. That changes the way on which the transaction request is communicated to the commerce engine. For Relevant App Purchases, the communication is made from the App Store to the commerce engine directly. For Relevant Subscription Purchases and Relevant In-App Purchases, the communication is made through Apple's secure public APIs, which are part of StoreKit."

You will see the distinction between the initial download of the app and subsequent in-app purchased which includes subscriptions.

If we can go to our skeleton, bundle {A1/4/23}. At paragraph 64 we identified a number of factors

which we say render the iOS In-App aftermarket distinct from the iOS Distribution Market. You have seen those, you have read our skeleton, they will be no doubt investigated in cross-examination. That is our opening case on the difference.

Apple argues that also that competition on the device market, so that is the first market that I identified as being relevant for us to be aware of. According to Apple, competition on the device market constrains competition in relation to both app distribution and facilitating in-app purchases. I would like to show you what the Commission said about that in the *Spotify* decision, that is authorities bundle {AB6/45/1}. At page 1 you will see this is a decision of the European Commission, in March 2024. As you are aware it was in relation to the Apple Store and it was following a complaint by *Spotify*. If we can go to page 100 please, and could I ask you to read recital 337.

What I want to do here is I am showing you the legal framework for Apple's argument. There, one of their arguments says competition in the device market constrains Apple in the distribution and in-app purchase market. In the *Spotify* decision you have a summary of what the case law is in relation

to that. You will note, in particular, the first two bullets there, those are going to be matters we will look at in cross-examination.

MR BISHOP: Mr Hoskins, the footnote 519, or the sentence in which footnote 519 occurs is in the passive. It does not say who developed these things and I have no access to footnote 519. Can you tell me what the document is or who developed these criteria?

MR HOSKINS: 519 is a reference to another Commission decision, which I think is in the bundle. I will get you the reference for it. But *EFIM* was a Commission decision. These are both Commission decisions. Then you will see footnote 520 is a reference to the *European Federation of Ink and Ink Cartridge Manufacturers* -- actually, sorry, there we are, *EFIM*, so it was a Commission decision, footnote 519 appealed to the General Court, appealed to the Court of Justice in 520.

MR BISHOP: So the Commission developed certain criteria, stated them. In its rejection of the complaint by *EFIM* this went on appeal and the court rejected the appeal. Is that the sequence that we are talking about?

MR HOSKINS: Yes, so the criteria are set up. I cannot remember the detail of it now.

MR BISHOP: It does not matter at the moment.

MR HOSKINS: It went on appeal and the appeal did not disrupt the legal principles.

MR BISHOP: That is probably enough on it now, I did not mean to interrupt you. It is something I had not run into before.

MR HOSKINS: No, no, happy to be interrupted.

So that is an outline of our case an what the relevant markets are. Just briefly looking at Apple's case. Can we go to Apple's skeleton bundle {A/5/20}, paragraph 44 Apple says:

"The relevant product is the facilitation of transactions for digital goods and services between developers and consumers. This product is not confined to transactions in respect of iOS Apps only. It encompasses alternative iOS and non-iOS channels by which developers and consumers can transact for digital goods and services. Those alternative channels may be other two-sided digital transaction platforms or one-sided channels such as direct distribution from a developer's website."

This is obviously the fundamental point probably in market definition between us, because we say the markets are iOS, Apple operating system specific, and Apple says no they are not.

If you look at paragraph 47 of Apple's skeleton, they say there are three fundamental flaws with our proposed markets, which are Apple specific. First of all, they say it fails to take account for "different sources of competitive constraints", i.e. "competition for the supply of devices and competition from alternative transaction channels." Secondly, our markets are also too broad because they:

"Combine the facilitation of transactions for all types of digital goods and services."

So they say there are separate, if you look separately, for example, at games and video streaming.

Thirdly, they say:

"The division of Dr Kent's 'iOS App-only' markets into two product matters, divided according to whether Apple is facilitating a purchase of an iOS App itself or a purchase made within the iOS App, fails to reflect the reality of how the relevant product is bought and sold."

That is a second order argument, which is even if they are iOS only markets, the distribution and In-App Aftermarket are not distinct. So you have (a) and (b) not iOS specific and three, if iOS

specific not distinct markets.

Again, I am not going to try and anticipate the cross-examination on these issues but I will just briefly comment on each of those three points just to set a framework.

First of all, Apple suggests that it is constrained by competition for the supply of devices and competition for alternative transaction channels and Apple made similar arguments to the CMA in the context of its mobile ecosystems market study. It also made similar arguments to the European Commission in the context of its *Spotify* investigation and those arguments were not accepted by the CMA or the Commission.

We made absolutely clear we do not say you are bound in any way by those decisions. It will be a matter for you, having heard all the evidence before you, to decide whether Apple has produced sufficient evidence in this case to cause you to come to a different conclusion than the CMA and the Commission did.

The second argument, Apple suggests that our proposed markets have failed to account for the difference in competitive conditions in respect of, for example, video and gaming transactions. Our

position is that the fact there are or may be different competitive conditions in relation to video and gaming apps is not relevant. We say what matters is the manner in which such apps are distributed and that is the same regardless of whether it is a gaming app or a video streaming app. It has to be done through Apple's App Store initially. All iOS Apps, as I said, I am labouring the point now, must be distributed by Apple's App Store regardless of the type of app and all In-App purchases and subscriptions for digital goods and services must be made using Apple's IAP. That does not change depending upon the nature of the app concerned.

The third point is the fact that Apple says even if it is iOS only markets, you should not split distribution and the in-app purchase after market. We will obviously challenge that argument when we cross-examine but at the end of the day, it may not actually matter that much given that we have an alternative pleaded case in relation to this.

If I could ask you to look at our reply, which is at bundle {A1/3/13}. It is paragraph 28(a)(ii), and that says:

As to the second sentence, the CR relies on

Dr Singer's evidence as to the iOS In-App aftermarket."

Here is the alternative case:

"Insofar as Professor Hitt suggests that separate relevant markets for iOS App Distribution Services and iOS In-App aftermarket services do not exist, that is denied, alternatively there would be in any event be a single relevant product market for both iOS App Distribution Services and iOS In-App Aftermarket Services in which Apple would be dominant."

So that is the alternative so you are aware it is there if needed.

One more point on market definition. I would like to say a word about the cellophane fallacy, if you go to our skeleton argument, bundle {A1/4/18}, it is paragraphs 46 and 47. You will no doubt have read these but can I ask you just to refresh your memory of what we say in paragraphs 46 and 47. It should not be anything too controversial in there.

Both the CMA in its market investigation and the EU in its *Spotify* decision but also by the designation of the App Store or Apple through the App Store, as a gatekeeper under the DMA, have come to the conclusion that Apple has significant market

power as a result of its App Store. Our submission is it would therefore be appropriate to take account of the cellophane fallacy in this case.

If you could look at the Commission's 2024 notice on the definition of the relevant market. That is authorities bundle {AB6/44/1}. You will see the heading, "Communication from the Commission, Commission Notice on the definition of the relevant market." The date is 2024. If we can go to page 13, footnote 55. If I could ask you to read footnote 55, please. I particularly want to draw your attention to the final sentence, because you have this problem of the cellophane fallacy, how do you carry out a hypothetical monopolist test, how do you carry out a SSNIP test. In the final sentence, the Commission explains:

"In such cases, the Commission may apply the SSNIP test starting from a counterfactual price that would prevail under (more) effective competition."

That is one of the ways in which you can try and address the cellophane fallacy. Dr Singer has sought to carry out such an analysis because what he has done is he has identified appropriate comparators for a competitive commission rate and conducted the SSNIP test on that basis. I am not

going to go into the detail but I will show you where he has done that in his reports. If we can go to bundle {C2/8/48}. This is the second report of Dr Singer and it is paragraph 81 where he performs the exercise that I have just described. Then so you have it, at page 55, that was the exercise for app distribution and at page 55 you have an equivalent exercise for the in-app aftermarket. He identifies comparators and conducts a SSNIP test on that basis. Apple suggest that that approach is circular. We say it is in keeping with the Commission's guidance and again I am not going to preempt the evidence but I frame the issue for you because obviously it is an important one in the case.

Professor Hitt for Apple has not attempted to carry out any form of hypothetical monopolist test or SSNIP test, so that is the battleground, if you like, between the experts at that very high level.

That is what I wanted to say on market definition. Moving on to dominance. Again if you look at our skeleton argument, bundle {A1/4/26}, we have identified the legal principles relevant to dominance at paragraphs 72 onwards of our skeleton argument. Again, from reading Apple's own skeleton,

there does not appear to be any material dispute between the parties over those principles, just as to their application in this case.

Our submission is, our position is if the Tribunal prefers our iOS only market definitions to the market definitions proposed by Apple, then we say Apple's dominance is absolutely clear cut, if we are in an Apple only world. First of all on market shares, Apple has had 100 per cent of the relevant iOS only markets, from the launch of the App Store in 2007 and the introduction of in-app purchases from 2008 to the present day. I know market shares are not determinative but they are significant and when they are at 100 per cent, they are particularly significant.

Barriers to entry. By virtue of its own standard terms and provisions, Apple has excluded all competition in those iOS only markets over the same period. Countervailing buyer power, these are the big three in market definition, if you like, market share, barriers to entry, countervailing buyer power. Neither developers or users have been able to exert pressure on Apple to change the challenge restrictions. It has been necessary to distribute iOS Apps via Apple's App Store since its

launch until the present day. Nobody has been able to change that. It has been necessary to use Apple's IAP for iOS in-app purchases and subscriptions from the introduction of iOS in-app purchases to the present day. Nobody has been able to change that.

Given those three facts or factors, market share, barriers to entry, countervailing buyer power, our submission is -- I will undersell it -- it is difficult to see how Apple could not be dominant in light of those facts.

There is a further problem to this which is the excessing pricing case, because we say if our case on excessive pricing is accepted, then that is also very strong evidence of Apple's dominance, because Apple's ability to charge prices above the competitive level throughout the claim period would itself be a further strong indicator of dominance.

So we say if we win on market definition dominance -- I will be proved wrong in seven weeks time or longer when you have actually written the judgment -- we say dominance is pretty much clear cut, it is open and shut if it is an Apple only market.

What does Apple say in response to this? How

does it deal with those overwhelming facts? If we go to Apple's skeleton {A1/5/32}, paragraph 85, Apple says:

"The argument as to Apple's market share is an oversimplistic analysis which fails to account for all of the countervailing evidence that (i) there are numerous sources of competitive constraints acting on Apple; and (ii) Apple has in fact been reacting to that competitive pressure."

So Apple has two arguments in response. The first one is the suggestion that there are numerous sources of competitive constraints acting on Apple, but you see paragraph 86, Apple says:

"The competitive constraints are discussed above in the context of market definition."

So this is just a rehash of the arguments you have seen in relation to market definition. It is certainly the case that just because a particular constraint is found to fall outside the market as defined at the initial market definition stage, it does not mean you ignore it when you come to dominance. No dispute between us on that.

However, while it is appropriate to take account of all competitive constraints when assessing dominance, those outside the relevant

market are necessarily more remote. I am sorry if that is stating the obvious but that is the position.

If we go back to the European Commission's reference on market definition, that is authorities bundle {6/44/7}. It is paragraph 17. If I could ask you to read that. So there is nothing between us on the appropriate approach. You do look at out of market constraints but they are by definition more remote. Just for your note if you need it, the notion of the competitive assessment you see there is defined in footnote 13 in this document and it includes dominance. Again there is no dispute between us on that.

The second point that Apple makes in its skeleton argument is Apple says, "Well, we have been reacting to competitive pressure in a number of ways." If you go back to their skeleton {A1/5/32} paragraph 88, Apple says:

"Apple has decreased the commission: The weighting average commission rate paid by developers to Apple has fallen over time (and this conclusion does not depend upon whether one ought to account for free transactions by assigning them a 'zero' price). This pattern is also reflected in the

commission rates charged by Apples competitors."

Then a reference to Professor Hitt:

"Apple introduced reduced commission rates of 15% for certain segments through its NPP, VPP, SBP and ARS policy; as well as facilitating cross-wallet and cross-platform consumption through its Reader Rule and Multiplatform Rule. This is inconsistent with dominance: it would make no sense for a dominant undertaking to cut prices in the face of substantial increases in demand and quality."

That is all very well but the headline rate of 30 per cent in the DPLA has not changed since the launch of the App Store in 2007. Again, not in dispute. Furthermore, price reductions by an undertaking with a very large market share are not necessarily indicative of competitive pressures. You need more than simply saying, "We have reduced certain prices." It is not enough on its own. Again that should be obvious, but if one needs an authoritative statement for it, one finds it in the *Hoffmann-La Roche* judgment, {AB4/2/1}. Obviously a very well-known case. It is the European Court of Justice, a judgment of 1979. If you could turn to page 70, paragraphs 73-75 and if I could ask you to read those paragraphs. You will see the Court of

Justice makes the point that I have just made. I am sorry, sir, we are on page 70. It has not come up. It is {AB4/2/70}.

THE CHAIRMAN: We have got it now, and you want us to read 73 to 75?

MR HOSKINS: Paragraphs 73 to 75. So you see the point is made in the final sentence of paragraph 74 and the punchline is you have to look at the evidence. It is not enough just to say, "Here are some price reductions, therefore we are not dominant." You have to look at the evidence and that is what we will do later in this case.

Going back to Apple's skeleton argument, so {A1/5/33}, this time page 33. The third point that Apple makes on dominance at paragraph 89 it says:

"Apple has increased rather than restricted output: The total number of iOS App transactions has increased over time, in tandem with developer revenues. In fact, developer revenues" -- you see the point, there is a confidential point, but they say it is making more money.

But of course in the absence of any competition in this market, because at this stage of the case we have won on market definitions, we are in now iOS only market, iOS App developers and users have had

no choice throughout the period other than to use the App Store. Having excluded all competition from those markets, Apple of course has its own financial interest in encouraging, rather than restricting, use of the App Store. It is quite simple, the more transactions that take place the more money Apple earns. This is not the sort of situation where restricting output would enable Apple to put its prices up. It is not a scarce commodity. It is a two-sided market, the more transactions that are made, the more money Apple earns. So our submission is that this notion of, "Look we have not restricted output" is a straw man. Of course they have not restricted output. They would be cutting off their nose to spite their face.

At paragraph 90 Apple says:

"Apple has continually improved the quality and security of the App Store and iOS App transactions."

We say that is really of very little relevance to dominance. As I have said, it is in Apple's own interest to increase the use of the App Store, even if it does not face competition in iOS only markets. So the more attractive it can make it, the more transactions it can drive on the App Store, the more developers it can encourage to sign up, the more

money it makes. It is as simple as that. Of course the great imponderable, well the nature and quality of improvements may have been greater in a competitive market. The fact you do not stand still from 2007 to the present day does not mean you are not dominant, because who knows what you would actually have been forced to do in terms of quality and improvements if you had been competing.

You will be aware that Apple has been found to be dominant by multiple bodies. I am not going to go through, you have seen that in our skeleton argument, it is paragraph 84. They are not binding on you but it will be for you to decide if the evidence produced by Apple in this case is sufficient to reach a different conclusion from the CMA, the European Commission's DG comp and the EU in terms of the DMA regulation.

So we are two stages into the case. I will boldly say we have won on market definition. We say dominance follows if you adopt those iOS only markets and I am moving on now to exclusionary abuse and foreclosure.

THE CHAIRMAN: Just before you do, I think, as I understand it, if you have not got to where you have just said you got to, in other words you have lost

on effectively it would be market definition on your analysis, is that it? There is no alternative?

MR HOSKINS: We have not put forward an alternative case. Certainly in a regulatory case you could go on and make other findings, but we have not put an alternative case based on alternative markets.

THE CHAIRMAN: Thank you.

MR HOSKINS: So I am into exclusionary abuse, we have got foreclosure and time and I am going to deal with foreclosure. Do you want me to take the break?

THE CHAIRMAN: It is a little bit early, if it is more convenient for you to do it now, that is fine.

MR HOSKINS: Why not take it now and then start another topic refreshed.

THE CHAIRMAN: Yes.

(11.37 am)

(Break)

(11.52 am)

MR HOSKINS: The first of many corrections, a mistake I made this morning, in-app purchases were introduced in 2009. So the App Store was introduced in 2008 and in-app purchases were introduced in 2009.

I am going to move on to deal with exclusionary abuse, i.e. foreclosure and we have got two heads on that, the foreclosure of competitors on one hand and

tying on the others. Dealing, first of all, with foreclosure of competitors. If we go to our skeleton argument {A1/4/29}, we have summarised the relevant general legal principles on abuse, paragraphs 85 to 93 and then specific principles relating to foreclosure at paragraphs 94 and 99. Again, Apple has not pushed back on these in its skeleton argument, save to raise an argument based on its intellectual property rights which I will deal with separately a bit later. There does not appear to be too much between us based on the fundamental principles.

I would like to draw your attention to the following principles at this stage. If you look at page 31, paragraph 94 or our skeleton argument, we say that really it is a two-stage test that we have to satisfy:

"In order to establish that an exclusionary practice is abusive, it must be shown first of all that the practice was capable" -- the word "capable" is important -- "when implemented, of producing such an exclusionary effect, in that it was capable of making it more difficult for competitors to enter or remain on the market in question and, by so doing, that that practice was capable of having an impact

on the market structure."

That is the first limb. The second limb:

"That practice relied on the use of means other than those which come within the scope of competition on the merits."

In relation to the first limb, as I have described it, i.e. whether the act was capable of having an impact on market structure, we say the following principles apply if you could go back to page 30, paragraph 87, the case law establishes that:

"The concept of abuse covers not only practices likely to cause direct harm to consumers, but also those which cause them harm indirectly by undermining an effective structure of competition."

So the distinction between direct harm to consumers, harm to the structure of competition and the latter is sufficient. Obviously one of the examples of how the effective structure of competition can be harmed is by excluding competitors from the market.

Paragraph 96 of our skeleton, on page 31, you see the side heading, "Capable of producing exclusionary effects":

"In order to establish an abuse, it is not

necessary to demonstrate that the conduct complained of actually produced anti-competitive effects. It is sufficient that the conduct has the ability or capability to restrict competition."

Then the third point I want to emphasise, paragraph 97 over the page, on page 32:

"In general the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure."

The fourth point, paragraph 98:

"In general the higher the percentage of total sales in the relevant market affected by the conduct the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect."

The final principle to emphasise is the role of subjective intent. The fact that a dominant company has no interest in distorting competition is irrelevant because it is an objective concept. However, where there is evidence of a subjective intention to damage competition, that may be very relevant. You are aware of the principle. It is an asymmetrical approach to subjective intent.

Those are the five principles which we say are

particularly important. They do not seem to be in dispute in this case which is why I have not taken a long time over them.

The second limb is competition on the merits. If you go to page 30 of our skeleton, paragraph 91, again we have summarised the case law:

"Abuse of a dominant position may be established where the conduct complained of was based on the use of means other than those which come within the scope of 'normal' competition, i.e. competition on the merits. Competition on the merits means competition on price, quality, choice or innovation."

Given the lack of conflict again in the skeleton about legal principles, I will restrict myself to showing you three authorities on competition on the merits. First of all, if you could go to {AB4/28/1}. This is case C-377/20, *Servizio Elettrico Nazionale*. It is a judgment of the Court of Justice. It was delivered in 2022. If we can go to page 9 {AB4/28/9} and if I could ask you to read first paragraph 44, please. You will see towards the end, the final sentence, one of the principles I have already described about the effect on the structure of competition.

Then page 12 {AB4/28/12}, paragraphs 60-64, if I could ask you to read those, please. So you will see there paragraph 61 has what I have called the two limbs that is the test that we say should be applied, and paragraphs 62 to 63 describe the law on intent.

Next I would like to go to authorities bundle tab 6 page 1 {AB6/6/1}. These are the European Commission's enforcement priorities guidelines that were published in 2009. If we could go to page 4, paragraph 20 {AB6/6/4} the Commission explains:

"The Commission will normally intervene under Article 82 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. The Commission considers the following factors to be generally relevant to such an assessment:

- the position of the dominant undertaking: in general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure."

Then the next column on the same page you will see in the middle of that column:

"The extent of the allegedly abusive conduct: in general, the higher the percentage of total sales

in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect."

Again some of the basic principles that do not seem to be in dispute.

Then the final authority for this purpose is {AB3/42/1}. This is the judgment of the Court of Appeal in the *Royal Mail v Ofcom* proceedings. It was delivered in 2021. If we go to page 5 {AB3/42/5} of the report and I would ask you to read please paragraphs 17 to 20. I draw your attention obviously in particular to paragraph 18.

THE CHAIRMAN: Could we have a bit more time.

MR HOSKINS: Sorry, when you are ready, just let me know.

THE CHAIRMAN: And the next page, please.

MR HOSKINS: Obviously the first sentence of paragraph 18 in the Court of Appeal is probably the best definition we have found in case law on what normal competition or competition on the merits means. It is competition on price, quality, choice and innovation. Then paragraph 20 is helpful because it tells you the sorts of factors you should be looking at when you are applying the test.

That is the case law on foreclosure of

competitors. Turning to apply those principles to the facts of this case, we say again if we have got this far it is because you are with us on the markets. They are iOS only market definitions and we say if we are in that world, then our claim in relation to foreclosure of competition is, I will put it this way, it is clear cut. Because the relevant practices, i.e. requiring that iOS apps can only be distributed through the App Store, and requiring that in-app purchases must be made by means of Apple's own payment systems, have entirely precluded -- I could put it as low as or were capable of precluding, but they have precluded, any competitors from entering the relevant markets. It is a total shutout. That is not a technical term.

In relation to the shutting out of competitors, I would like to look at Apple's own expert's position on this. If we can go to Professor Sweeting's first report, bundle {C3/3/141}, he has a section you see at the bottom of page 141 and the title is, "Likely scenarios absent the distribution requirements." So he is effectively looking at a counterfactual, so assume the distribution requirements did not exist. If you go to page 142 {C3/3/142}, over the page, and I would ask you to

read please paragraphs 309 and 310. Remember, this is Apple's expert.

THE CHAIRMAN: Could we go over the page, please. Thank you.

MR HOSKINS: So Professor Singer's position is that, in the counterfactual, one reasonably plausible state of the world is one in which small number, potentially two or three of larger alternative iOS App transaction platforms exist, in addition to the App Store, along with a fringe of much smaller alternative iOS App transaction platforms. Our expert, Dr Singer, agrees. So there is clearly, as a result of the distribution requirement, an exclusion of competitors from that distribution market.

Then in relation to the in-app aftermarket if you go to page 126, you will see the heading, "Likely scenarios absent the payment requirements", so again a counterfactual analysis. If you read paragraph 277.

THE CHAIRMAN: Next page, please.

MR HOSKINS: So we say the fact that these restrictions preclude entry of competitors is clear cut, indeed it appears to be common ground between the experts. Apple has put forward arguments in its evidence, and

you will see in its skeleton argument to suggest that in the counterfactual, it (i.e. Apple) would have required developers to make total payments, so that the total sums paid by developers would have been the same. You will see that argument in the evidence in the skeleton. For example, it is at paragraph 118 of their skeleton argument. But while that counterfactual is relevant to the assessment of damages, it is not relevant to the question of infringement because as I have shown you, the legal principle is whether the restrictions are capable of affecting the structure of competition. You do not have to show an effect on consumers or practical effect on consumers. You have my submission on the effect on the structure of competition, Apple has prevented entry by any competitors into either of the markets. It is not necessary for to us establish an effect on prices in order to establish an infringement. Of course we have to do that in order to claim damages, but not to establish an infringement. Just going through the factors that the case law tells you that you should take account of when applying the test, the strength of the dominant position. In this scenario Apple has 100 per cent of the iOS App distribution market and of

the in-app aftermarket. The extent of the practice, well Apple's restriction have eliminated all competition in the relevant markets since 2008 for app distribution, since 2009 for in-app payments.

What about competition on the merits, what about the second limb? Apple has not excluded competitors in the relevant markets by means of competition on price, quality, choice or innovation. It has excluded competition by means of the standard terms and provisions which it imposes on the developers who wish to distribute iOS apps and that is not competition on the merits.

It is important to understand what Apple's argument is about competition on the merits. If we can go to their skeleton argument, bundle {A1/5/33}. Paragraph 92. You will see the heading at F:

"APPLE'S REQUIREMENTS CONSTITUTE COMPETITION ON THE MERITS, NOT ANTICOMPETITIVE EXCLUSIVE DEALING."

At paragraph 92 Apple says:

"First it is common ground that conduct is not abusive where it forms part of 'competition on the merits'. Dr Kent fails to engage with the fact that the requirements are a means by which Apple differentiates its iOS Devices to compete on the merits."

So Apple's argument about competition on the merits relates to the device market, but we are not concerned here with the devices market. It is relevant, it is in the background, but we are currently looking at foreclosure on the distribution market and the aftermarket. In the distribution market Apple does not compete with other device makers. It competes with undertakings who wish to distribute iOS apps. That is where we are if we have got this far in the case and that is the market, this is not about device competition at all. Apple does not compete on the merits with potential distributors of iOS apps. It simply locks them out of the market by virtue of the standard terms and provisions, which it requires developers to sign up to if they want to distribute iOS apps. That is not competition on the merits.

THE CHAIRMAN: If you, as I understood it, Apple was using a counterfactual analysis to argue that there would not be any effect and therefore if there was no effect, it was unlikely that you would find foreclosure. So you are saying that is not a permissible route to get back to effectively the analysis in *Royal Mail*?

MR HOSKINS: No. We know that the second limb is in

order to establish foreclosure, is that there was not competition on the merits. So you are then looking at the practice which, if you are satisfied limb 1 has excluded or has the capability to exclude. When you are looking at the relevant practice, then you ask yourself is that competition by way of price, quality, et cetera? Our case is that it has to be competition in the relevant market and what Apple quite clearly is relying on is not competition in the relevant markets, it is seeking to rely on competition in a different market -- a related market but a different market, which is competition in the devices market.

MR BISHOP: Mr Hoskins, are you saying one important part of Apple's case is that consumers are protected by system competition? Are you saying that even if there is brisk system competition, very effective system competition, it is still not legally relevant because there must be -- because it has excluded competition in the relevant market? Is that what you are say something.

MR HOSKINS: If we have got to this stage of the analysis, yes, because there is a prior question of market definition, you have to take account of device competition or system competition. But if

the conclusion is reached at that stage that there are separate markets for app distribution and the aftermarket services, then that is the framework by which you then ask is Apple dominant in those markets and has Apple excluded competition in those markets?

MR BISHOP: Even if there is compensation to the consumer, by way of a competitive price for a closely associated but somewhat different device, which has security features, and let me add another -- I am imagining an argument that is going to come from this side of the room later on -- and says that those things are essential, keeping people out of the system is essential to having system competition. Even if consumers are well compensated that is still not enough.

MR HOSKINS: That is a separate -- because, for example, systems competition, device competition, can remain relevant to each of the stages. So even after you have established the market, so iOS App only, as I said when you are looking at dominance, you can still look at competitive constraints from outside of the market. Apple's arguments about the benefits of the closed system remain relevant, but they come in again in the legal framework in the objective

justification part of the analysis. So if Apple can make it good on objective justification, absolutely they will walk away and I will come to the law on that in a minute.

MR BISHOP: That is clear now, thank you very much.

MR HOSKINS: We are looking at competition on the merits we say it has to be in the relevant markets, Apple relies on competition in the devices market not in the distribution market or the after market. So we say if you find for us on the market definition, dominance, we say, is clear cut, foreclosure, we say, is clear cut. That brings us to Apple's intellectual property argument.

If we look at their skeleton, page 38, paragraph 104 is probably where it is put at its clearest. Apple's case, Apple's argument, is that this case concerns a refusal by Apple to licence its intellectual property and it is therefore governed by the principles established in the *Magill* and *Bronner* judgments. That is Apple's case.

Just one point about the procedure I want to make, but I am not going to dwell on it so hopefully it never comes up. Which is prior to the service of its skeleton argument, Apple had not provided details of the IP rights, of the specific IP rights

upon which it relies. If I can just show you what we had. First of all if you go to bundle {A2/2/5}, this is Apple's response to a request for information from us. And if I could ask you to read request 9 at paragraphs 11 to 13. So you will see the level at which the response is pitched. The evidence that you have in this case is at a similar level. If you can go to the witness statements, first Harlow. That is bundle {B2/2/3}, and if you look at page 3. Ms Harlow provides a description under the heading, "Apple's proprietary developer technologies and underlying IP rights." The detail does not matter. It is the level of generality I want you to see in paragraphs 11 through to 16.

THE CHAIRMAN: Next page, please.

MR HOSKINS: You will remember at the PTR, we were a bit nervous because Apple was pushing us saying, "Do you need to cross-examine Ms Harlow or not?" We said "We do not know what you want her for." On that evidence we said we did not want to cross-examine her because it was in wholly general terms.

Mr Schiller is in even more abstract terms, first Schiller paragraph 40, at bundle {B2/5/10}, but you will not get any more detail from that.

You will have seen that as part of its skeleton

argument Apple provided an annex which is called, "App development guidance and technology made available by Apple." That is bundle {A1/6}, and it also provided something called a non-exhaustive list of Apple patents relating to its proprietary user interface and interaction technologies. That is bundle {A1/7}. You will have seen those so I am not going to go through them.

The point is simply this. We still do not know, we do not know what use Apple will seek to make of that new detailed information, by which I mean the material provided along with the skeleton argument. If Apple merely wishes to submit that iOS developers need a licence to use Apple's relevant IP rights, that will not be controversial that is why we did not want to cross-examine Ms Harlow. But if Apple wishes to make more detailed submissions based on its intellectual property, then that may raise procedural fairness issues because we have not had a chance to engage with the detail, or to put in any evidence to deal with it, et cetera.

So I am hoping this is a windmill I am tilting at, but I raise it now in case it becomes an issue. It is simply that.

So we are going back to Apple's intellectual

property argument which says the *Magill* and *Bronner* principles apply. Let us look at Apple's pleaded case on this issue. Can we go to the defence, bundle {A1/2/26}. I want to make two points in relation to the defence.

First of all, the *Magill* argument, if I use that shorthand, has only been pleaded in relation to the allegations of exclusionary abuse. It has not been pleaded in relation to the excessive pricing abuse. I will show you the paragraphs and tell you why I am going through this.

The second point is the *Magill* argument has only been pleaded in relation to the app distribution restrictions, not the payment systems restrictions.

If we go to page 26, you will see the heading on page 26 {A1/2/26} towards the bottom, "C. No exclusionary abuse", so we are in the exclusionary abuse section. Then if we go to page 28 {A1/2/28}, that is 101(d), so above the heading "Payment System Restrictions". That is the *Magill* case, if I can ask you to read that, you will see it is limited to the app distribution restrictions.

Then the next subsection you will see the heading "Payment System Restrictions", so that is

the aftermarket, there is no equivalent to paragraph 101(d) in that section of the defence.

Then page 35 {A1/2/35}, this is the section of the defence that deals with the excessive pricing abuse, you will see the heading, "No Excessive Pricing Abuse". Again, there is no equivalent to paragraph 101(d) in this section of the defence. So that is the pleaded case in relation to the *Magill* argument.

Our submission is that this is not a refusal to supply or a refusal to licence case and, therefore, the *Magill* and *Bronner* principles are not relevant. I will take you through the cases and explain why we make that submission.

Let us start with *Magill* itself, {AB4/9}. This is colloquially referred to as the *Magill* judgment, well-known in these parts. It is a judgment of the Court of Justice delivered in 1995. If you can go to page 65, paragraph 7 explains the background. Essentially each television station, BBC and RTE had copyright protection for its own weekly programme listings, and they each produced a television guide but they covered exclusively their own programmes. So there was a BBC guide, there was a RTE guide but not a comprehensive weekly guide. Paragraph 10,

Magill wants to come into the market with a comprehensive weekly guide, but it was prevented from doing so because the BBC and RTE obtained injunctions based on their copyright to prevent publication of such a comprehensive guide. So *Magill* therefore concerned a refusal by RTE and BBC to licence their copyright rights to a would be competitor. That is the basic background to it. I will come on to the test in a moment, it is summarised nicely in *IMS*, so I will come on to what the consequences are, but I am showing you what *Magill* was about.

What was *Bronner* about? That is {AB4/3}, again a judgment of the Court of Justice. It was delivered in 1998. In *Bronner* what effectively happened is that the principles established in *Magill* in relation to intellectual property rights were applied to property rights more generally. If you go to page 26, paragraph 5, media print published daily newspapers in Austria. Paragraph 7, media print had established a nationwide home delivery scheme. Paragraph 8, *Bronner* published a rival daily newspaper called Der Standard, and *Bronner* sought an order to require Mediaprint to include Der Standard in its home delivery scheme.

Again just in terms of the facts, this was a case in by the property owner, Mediaprint, refused to let a competitor use property which Mediaprint had created for its own use and was using for its own commercial ends.

The next case is *IMS Health*. That is bundle {AB4/21} -- sorry, {AB4/12}. Again a judgment of the Court of Justice, delivered in 2004. If we go to page 30, if you could please read paragraphs 3 and 4 and then 7 and 9, you will see the factual background to this.

THE CHAIRMAN: Next page, please.

MR HOSKINS: Then if you go to page 33, I would ask you to read paragraph 21.

THE CHAIRMAN: Next page, please.

MR HOSKINS: So in short, *IMS* had created what is referred to as a brick structure format for reporting pharmaceutical sales, that was protected by copyright. *IMS* refused to grant a licence to use that brick structure to a would be competitor. So again, just factually, this was a case in which property owner refused to licence its copyright to a would be competitor and *IMS* preferred to keep its intellectual property for its own use.

I said I would come to what the test is if you

follow within this category of cases. It is page 37, it is paragraph 37, {AB4/12/37}, if you could please read that. So you see the four conditions indispensable for carrying on the business in question:

"Prevented the emergence of a new product for which there was a potential consumer demand, was not justified by objective considerations and (the finding was) likely to exclude all competition in the secondary market."

That is what the debate is about, do those principles apply in our case or not?

I would like next to go please to {AB4/26.1}. This is case C-165/19P, *Slovak Telekom v European Commission*, again the Court of Justice, this was delivered in 2021. I should say there was another related judgment delivered the same day called *Deutsche Telekom*. It is one of those ones where the Court of Justice publishes essentially the same judgment twice because they are the same parties, but they are separate references. You will see reference to *Deutsche Telekom* when we come on but it is the same *Slovak Telekom*. Page 7, first of all. Could you read please paragraphs 11 to 16.

THE CHAIRMAN: Next page, please.

MR HOSKINS: So you will see that this case did not concern a refusal by a property owner to let a third party use its property. It concerned the terms upon which the property owner permitted use of its property. If you go to page 13, could you read paragraphs 43 to 45, please. So you see the Court of Justice says:

"The imposition of the conditions (in *Bronner*) was justified by the specific circumstances of that case, which consisted in a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for needs of its own business, to the exclusion of any other conduct."

Then over the page, page 14, paragraph 50, the Court of Justice held:

"By contrast, where a dominant undertaking gives access to its infrastructure but makes that access, provision of services or sale of products subject to unfair conditions, the conditions laid down by the Court of Justice in [41] of the judgment in *Bronner* do not apply."

So you see the distinction I am drawing because the Court of Justice has drawn it, and you will not be surprised to hear that I say we are in the

paragraph 50 type case rather than the refusal type case.

That is not the only authority on this matter. If you can go to {AB4/30/1}. For obvious reasons I am going to refer to this as the *Baltic Rail* case, case C-42/21 P, again it is the Court of Justice delivered in 2023. It is a pretty odd factual case because it concerns the removal of a section of railway track by the Lithuanian National *Railway* Company to prevent a competitor from entering the market. They really did not want them in so they pulled up the track.

If you go to page 41, and if I could ask you to read paragraph 42 for the factual background. Then on to page 46, please and I would like you to read paragraphs 78 to 82 and when you see the reference to *Deutsche Telekom*, that is the same one as *Slovak Telekom*. So you see the important point in paragraph 82 is that the *Bronner* provisions concern:

"A refusal of access to infrastructure, whereby, ultimately, the dominant undertaking reserves the infrastructure which it has developed for its own use."

That is made good or repeated at paragraph 86 if you want to see that for completeness on page 47,

but it is essentially the same point being made.

The next authority I would like to take you to is {AB4/34.1}. It is the opinion of Advocate General Medina in case C-233/23, *Alphabet Google* against the Italian Competition Authority, the judgment has not been handed down yet.

If you go to page 2, paragraph 8 explains that Google created a system called Android Auto that enabled users to access certain apps on their smartphones through the car's integrated display. If you want to read paragraph 8. Paragraphs 9 and 10 explain that a company called Enel X developed an app called JuicePass that offered a set of features for electric vehicles, for example, where you could find charging stations et cetera, and asked Google to enable JuicePass to be enabled on Android Auto and Google refused. If you go to page 5, paragraph 26, the Advocate General explains:

"In the following points of the present Opinion, I will examine, first and foremost, whether the conditions laid down by the Court in the judgment in *Bronner* should be deemed to be applicable to a case such as that concerned in the main proceedings."

Then the heading below:

"Applicability of the *Bronner* conditions. The first and second questions."

Then over the page on page 6, could I ask you please to read paragraphs 33 to 40 and then I will make some points in relation to them.

THE CHAIRMAN: Could we have the next page, please; and the next page, please. Yes.

MR HOSKINS: If we could just go back to page 6; please, you will see in paragraph 35 the Advocate General is summarising the law as I have showed it to you from *Slovak Telekom* and the *Baltic Rail* case. Then paragraph 38 is obviously significant for our purposes where the Advocate General explains:

"The platform to which access is requested in the present case ... cannot be considered to have been developed for the needs of a dominant undertaking's own business ... nor to have been reserved for its exclusive use. On the contrary, Android Auto is deliberately open and has been conceived to be shared freely and to remain at the disposal of third parties."

You will see immediately the analogy with the App Store in this case. Paragraph 40 makes it clear that the *Bronner* case does not apply to facts of the sort one has in *Alphabet*.

So what is the test that should be applied in this sort of case? You see that on page 9, paragraph 56, and if you could read that please. The test is essentially the foreclosure test.

THE CHAIRMAN: This comes up in *Google Shopping* too, does it not? That was a slightly different point, perhaps?

MR HOSKINS: I was not going to in relation to this. There are other elements of *Google Shopping*, I am going to go to your judgment next in which you refer to *Google Shopping*.

THE CHAIRMAN: And we have got the Court of Justice's decision since then.

MR HOSKINS: That is right. In my submission, the principles are clearly established by *Slovak Telekom*, the rail case, and that is all we need without getting into finer detail, but we will see where Apple go with this having heard this argument, but in my submission it is absolutely clear what the law is.

I was next going to go to *Alex Neill v Sony*, which was a Tribunal judgment. You chaired the panel, it is {AB3/54}.

MR FRAZER: Mr Hoskins, just before you go there, you are describing this as not being a case of refusal to

deal because this concerns the conditions under which app developers have access to the App Store, in effect. What about, though, the providers of alternative payment systems or the providers of alternative app stores who are, as it were, completely locked out, in your expression, from that platform? Would that not count as a refusal to permit access to infrastructure as you have described in the cases?

MR HOSKINS: Two points. The first is there is not a direct refusal in the sense that someone has come to Apple and said, "Let us do this."

MR FRAZER: But they know the answer.

MR HOSKINS: That is the second point I am going to make, the way in which the refusal comes about is by the application of the standard terms and provisions to developers who want to distribute iOS apps. Then what you have and you see it, this is something the Tribunal dealt with in Alex *Neill*, there obviously is a difficulty in what is "a refusal to deal" and what is just a situation where you do not allow people into the market. It is quite hard to draw a bright line, as you have just described, in terms of them. That is why I think it is important, and what one sees in *Slovak Telekom* and the *Baltic Railway*

case is, was the property, was the intellectual property, developed for the undertaking's own use, have they refused to allow it whilst keeping it for their own use? Obviously, that is a distinction which we have in our case because Apple has not kept the technology, because the intellectual property rights are the things that allow you to write, the apps et cetera allow you to make the payments work et cetera. We say there is a hard legal test at least in the sense of what you see in *Slovak Telekom* and the *Baltic Railway* case on one side and what we have in our case on the other, which is the same as the Italian case, which is the distinction between dominant undertaking keeps all the property of IP rights for itself for its own use, and the situation in which the dominant undertaking uses the IP rights to create a platform in which third parties are actively encouraged to come because that is the business model.

So you are absolutely right, there is a sort of ... semantic is downplaying it, that is the wrong word, but you know, you can have a debate about is this a refusal, is this not a refusal? There are harder edged concepts that come out of the law which allow us to say, it is on this side of the line or

it is on that side of the line. Those are the principles which we rely upon to put it on the other side of the *Magill* line.

MR FRAZER: Okay, thank you.

MR HOSKINS: If we go to {AB3/54}. This is a judgment of the Tribunal. It is 2023, it is the same Chair. Now, Ms Fitzpatrick, who is assisting me in this case, was in that case and I understand that neither *Slovak Telekom* nor *Baltic Rail* were cited to the Tribunal in the skeletons or oral submissions, though I understand that *Slovak Telekom* was in the authorities bundles. You will have a better sense than I do if this is new to you or not, what you are seeing. Obviously, the Advocate General's opinion in *Alphabet* had not yet been published so you, by definition, did not have the benefit of that. So it looks as if the Tribunal did not have the benefit of *Slovak Telekom* come or the *Baltic Railway*.

THE CHAIRMAN: I think, I think that is probably right, I think, I may be wrong about this but I think we probably were looking at it through a slightly different lens. So I think that *Neill* was all about whether the application of the General Court's decision in *Google Shopping* and about whether you could have effectively collateral abuses alongside

what might or might not have been a *Magill* type abuse, which I think is a slightly different point to the point you are making. I suspect that's the reason why. I think actually my reference earlier to the CJEU's decision does, I think, that they do bring the two together, I think, more on that decision, maybe we could come to that, perhaps it does not matter but --

MR HOSKINS: I guess what I am politely trying to say is *Slovak Telekom* and *Baltic Rail* are probably more use to us than your earlier decision.

THE CHAIRMAN: Yes. I think that probably, I think on the facts of this case, I think that is the way that the argument is being put, that you are probably right.

MR HOSKINS: I was trying to be as tactful as possible. Obviously it is important you are aware of this. It is clearly relevant and your fellow members of the Panel need to be aware of this as well. So I will show the Tribunal the relevant paragraphs of it.

THE CHAIRMAN: A lot more sensible than that.

MR HOSKINS: If you go to page 43 and if you read paragraphs 116 to 118, please.

THE CHAIRMAN: Next page, please.

MR HOSKINS: Then page 45, paragraphs 120 to 122. As I

say, I think there is probably more help in this case from *Slovak Telekom*, *Baltic Rail* and the Advocate General's opinion, that I have shown you did not have the benefit of those when you delivered this judgment.

THE CHAIRMAN: Yes.

MR HOSKINS: Where does that leave us if those are the legal principles? Our submission is that the *Magill/Bronner* principles do not apply in the present case for the following reasons.

First of all, the case does not concern intellectual property kept by Apple for its own use. It concerns the terms upon which Apple operates a platform which has been created specifically for use by third parties.

Secondly, this case does not concern a refusal to licence Apple's intellectual property. It concerns the terms upon which such a licence is offered and granted. If we go to the DPLA, bundle {E/18}, I showed you this morning the purpose provisions on page 1. The DPLA is a standard form agreement by which Apple offers developers a licence to use Apple's software and services. You see that in the very first paragraph under "Purpose". Then if you go to page 18, at the bottom of the page you

will see 3.3.1 "APIs, Functionality, and User Interface", and subheading "B. Executable Code". Then if we can go on to page 19:

"Except as set forth in the next paragraph, an Application may not download or install executable code. Interpreted code may be downloaded to an Application but only so long as such code ... (b) does not create a store or storefront for other code or applications ..."

So the licence is granted under the DPLA subject to various limitations and exceptions and one of the limitations is that you must not create rival iOS App Stores through the apps that you submit. I go back to Mr Frazer's question. In one way, you could say, well, this is a effectively a refusal because you cannot do this, but equally you could say, well, it is an exclusion because what we are looking at, the labels are refusal and exclusion. Not all refusals can be exclusions because that would drive a coach and horses through the application of competition law to dominant companies with IP rights. You are absolutely right about this linguistic difficulty and that is why I prefer to approach it through the legal principles that we have identified rather than trying to

grapple with is this in practice a refusal, is this in practice an exclusion? Because I doubt that is going to give us the answer.

The third point, slightly undercutting the point I have just made, but you will have seen it from the Tribunal's judgment is, this is not a case which concerns an express request and consent refusal by Apple. Again, I think the legal principles I have identified are more helpful than that but that is clearly there in the case law as a potential help in deciding which side of the line a particular case falls on. You have the point, we say this concerns Apple's general terms and conditions and the guidelines not a face-to-face refusal, if you like.

We do say that if Apple's contention were right it would create an extreme position because any undertaking such as Apple, and there are a number of them as we know, which has created a powerful, universal ecosystem and which holds some relevant IP rights could prevent the application of competition law to the manner and terms upon which it operates that ecosystem, if Apple is right with its submission. That would, we say, be an obviously undesirable legal situation just to take that

incredibly important sphere of commerce and indeed everyday life for us all now, and say competition law just cannot go in there, because there are IP rights somewhere underpinning this. As I have explained to you, I hope, it is not the law in any event because of the authorities I have shown you.

I have got two more minutes on *Magill* but I see the time, I am in your hands.

THE CHAIRMAN: Why do you not finish?

MR HOSKINS: Just very briefly. We say we are not in a *Magill* case for the reasons I have submitted. Even if we were, they would obviously be satisfied in this case. There are four conditions and I showed them to you in the *IMS* case, paragraph 37. First of all, the refusal in question must concern a product the supply of which is indispensable for carrying out the business in question. So do we fulfil that? Well that is Apple's own case. If you go to Apple's skeleton, bundle {A1/5/36}, paragraph 99, (a) to (d). So the (a) to (d) on that page is paragraph 99. If you just quickly read those. It is Apple's own case that these rights are indispensable for distribution and payment -- for distribution, sorry.

The second condition is that refusal must have prevented the emergence of a new product for which

there was a potential consumer demand. I have already shown you this morning Professor Sweeting's evidence on the counterfactual, what he thinks would happen. The general question of whether innovative new iOS App Stores would have entered the market, in the absence of the app distribution restrictions is already an issue in this case. I have already shown you some of the evidence, there is more and we will come to it, but it is entirely already in this case.

The third point, the refusal must not be justified by objective considerations, that is already an issue in the case, we are going to come to that. We say it is not justified.

Finally, the refusal must be likely to exclude all competition in the secondary market. If we have got to this stage, if the relevant market is iOS App distribution, then clearly all competition has been excluded because Apple does not permit any competing iOS App Stores to operate. So even if we are wrong on the law in the *Magill* case, it is not clear to us what that is going to add, in any event, to this case. That is all I wanted to say on the foreclosure part of the exclusionary abuse and then we can take another break.

THE CHAIRMAN: Good, so you are on time?

MR HOSKINS: I am absolutely on time.

THE CHAIRMAN: So we will resume again at 2 o'clock.

(1.00 pm)

(Break for lunch)

(2.06 pm)

MR HOSKINS: I am going to move on to the second head of exclusionary abuse that we rely upon, which is tying. Our allegation is that Apple has tied its own App Store payment system, which we call ASPS for short, to the App Store. Just to keep us all sort of centred, it is important to remember always which is the tied product and which is the tying product in our allegation. ASPS is the tied product and App Store is the tying product.

If we go to our skeleton {A1/4/34}, we have set out the relevant legal principles at paragraphs 108 to 119 of our skeleton argument. As you will be aware the leading authority is Case T-201/04, *Microsoft Corp v Commission* and we have given you the specific references for particular detail of *Microsoft v Commission* that we have summarised there. The most important are the four conditions which we have set out at paragraph 109:

"Tying will constitute an abuse where four conditions are satisfied:

(a) the tying and the tied products are separate products;

(b) the undertaking the dominant in the market for the tying product.

(c) the dominant undertaking does not give customers a choice to obtain the tying product without the tied product.

(d) the tying forecloses competition."

And if those conditions are met, if the four conditions are met, the dominant undertaking can avoid a finding of abuse on the basis of objective justification. Apple agrees with those four conditions, there is nothing controversial about them. If you look at bundle {A1/5/46}, this is Apple's skeleton. Paragraph 133:

"The four conditions which must be satisfied before tying will constitute an abuse are common ground."

And there is a reference to our skeleton paragraph 109.

So in relation to tying no real dispute in relation to the law, but Apple's case as you see at paragraph 134 is that none of the four conditions for unlawful tying are satisfied.

Just taking them in the order that Apple sets

them out there, first of all they say Apple is not dominant in a market for iOS App distribution services and I have already made my submissions this morning in opening as to why, if we are right on the market definition, we say dominance almost inevitably follows.

Separate products, so this is paragraph 136 of Apple's skeleton, Apple says:

"The set of services defined as "iOS In-App Aftermarket Services" are not a separate product to the "iOS App Distribution Services". There is no consumer demand for IAP or "iOS In-App Aftermarket Services" which is separate from the App Store or "iOS App Distribution Services".

I have already covered to a certain extent when I looked at the counterfactual for the aftermarket this morning, the fact there is demand, people want to come in and provide these specific services, but let me just add one point at this stage.

Can we go to Mr Owens' statement? That is {B1/1/1}. Mr Owen is one of the witnesses we will be calling. If you go to page 2, paragraph 3, Mr Owens explains that he founded a company called Paddle.com Market Limited in 2012 and he currently serves as a consultant and board observer and

previously he was the CEO and chairman of Paddle. If you go to page 6, Mr Owens explains that:

"Paddle has received many requests over the years from iOS App developers to use Paddle's solution. But, unfortunately, Apple restricts iOS App developers from using Paddle (or an alternative service) on the App Store."

So we say there is clear evidence of separate demand for iOS in-app aftermarket services, i.e. distinct from the distribution services. There is obviously a lot more evidence to cover and that will be dealt with when the witnesses and the experts come, but we do say the position in Apple's skeleton really is untenable in light of the evidence that there is not a separate demand. Their own expert, as we have seen, Professor Sweeting, suggests that absent the payment restrictions, companies would come in to perform that specific function.

The third criterion for tying is called, unfortunately, coercion, it sounds more dramatic than it actually is in the law. If we go back to the Apple skeleton, bundle {A1/5/47}, we are looking at paragraph 137 here. Apple says:

"Third, even if 'iOS In-App Aftermarket Services' were a separate product, they have not

been tied because there is no coercion. Developers are free to use the App Store and all of Apple's 'iOS App Distribution Services' without using Apple's 'iOS In-App Aftermarket Services'. They can monetise their digital content in ways which do not depend upon in-app purchases. Indeed, the vast majority choose to do so" -- and then the reference to the paragraph above.

Let us have a look at what the notion of coercion involves. Can we go to our claim form, bundle {A1/1/32}, paragraph 105. This is our claim form and we say at the bottom of the page:

"The third criterion, relating to coercion, is satisfied when a dominant undertaking deprives its customers of the choice of purchasing the tying product without the tied product. Coercion can take one or both of the following forms:

(a) Contractual coercion: the tying obligation is imposed by the terms of the agreement between the dominant undertaking and its customers; and/or

(b) Technical coercion: the tied product is physically integrated into the tying product, so it is impossible to take one product without the other."

Apple pleads this in its defence if we go to

{A1/2/33}. You will see the heading "Coercion", paragraph 122:

"Paragraph 105" -- which is the one we have just seen -- "is admitted and averred."

So again, a high degree of common ground between us on the law on this.

Let us go to *Microsoft* on this particular issue. That is {AB4/14/1}. This is a judgment of what is now the General Court. It was delivered in 2007. Can we please go to page 286 {AB4/14/286}. You will see the heading about a quarter of the way down the page:

"(c) consumers are unable to choose to obtain the tying product without the tied product", so this is coercion condition.

Paragraph 945 refers to the Commission decision and says:

"The Commission seeks to demonstrate that the third condition necessary for a finding of abusing bundling, namely the condition relating to coercion, is satisfied in the present case, in that *Microsoft* does not give consumers the option of obtaining the windows client PC" -- so that is the tying product -- operating system without windows media player", and that is the tied product.

Then page 290 {AB4/14/290} if I could ask you to read paragraphs 961 and 962 on page 290.

THE CHAIRMAN: Can we have the next bit, please.

MR HOSKINS: You see in paragraph 962 the court says:

"OEMs who wish to install a Windows operating system on the client PCs which they assemble must obtain a licence from *Microsoft* in order to do so. Under *Microsoft*'s licensing system, it is not possible to obtain a licence on the windows operating system" -- that is the tying product -- "without Windows Media Player" -- that is the tied product. So that is a form of contractual coercion to use the jargon.

Then over the page at page 292 {AB4/14/292}, paragraph 970 if I could ask you to read that, please. You will see that if the contractual obligation exists, the contractual coercion exists, it does not matter if in practice the consumers are not then obliged to use the tied product. It is sufficient for the abuse to be made out that there is the contractual coercion as described in *Microsoft*.

So in our submission, the third condition is satisfied because it is not contractually possible to acquire the tying product, i.e. the App Store,

without acquiring the tied product that is Apple's ASPS. All developers, whether they intend to charge for apps or not, have to enter into the DPLA and it is that agreement which contains the obligation to distribute iOS apps only via Apple's App Store. And the fact that developers are not then required to use Apple's ASPS, for example because they may choose to monetise in other ways, is not legally relevant.

Then the final condition is, again, foreclosure. If you go back to Apple's skeleton argument bundle {A1/5/47}. It is paragraph 138. Apple says:

"Apple's offering of an integrated digital transactions platform has not led, and is not reasonably likely to lead, to an anti-competitive foreclosure. There is no 'iOS In-App Aftermarket' for the reasons given in Section D above. Accordingly, there can be no extinction of competition on that market."

I have made submissions, opening submissions, about the markets:

"Even assuming Dr Kent's market definition to be correct, the payment system requirements have not led to anti-competitive foreclosure for the reasons

set out in Section F above."

Again, I have already made the opening submissions on that. Professor Sweeting, Apple's own expert, accepts that, absent the payment restrictions, it is likely that other parties would have come into the market and that is sufficient for foreclosure.

That is the second head of the alleged abuse relating to foreclosure. Unless you have any questions at this stage, I am going to move on to the question of justification. Again, a large degree of common ground, I think, between us on the legal principles that are applicable here. There are some differences in the detail, but it is common ground that a dominant undertaking can provide justification for conduct that would otherwise be abusive, if it can demonstrate one of two things. They are alternatives. One is that it is objectively necessary; or two, that the restriction of competition is outweighed by advantages in terms of efficiency, which also benefit the consumers. It is also common ground that Apple bears the burden proving that the app distribution restrictions and/or the payment restrictions are justified under either of those heads.

Again, we have summarised the legal principles that we say are applicable in our skeleton argument that is paragraphs 125 to 134. Before I look at some of those principles, let me make this preliminary point.

Both these heads of justification are supposed to be very difficult to fulfil. Where a dominant undertaking has committed a prima facie abuse, the law does not let it off lightly. It is sometimes easy to forget that when one is going through the case law and the principles, that these justifications are intended to be difficult. They are not intended to provide a way out. You really have to be satisfied that they are justifiable in this case. Let me deal with the efficiency principles first.

Can we go to the *European Superleague* judgment, that is {AB4/34/1}. So this is a judgment of the Court of Justice. It was delivered in December 2023. If we go to page 45 {AB4/34/45}, first of all, paragraph 202 identifies the two possible heads of justification, which I have just referred to, either objective necessity or efficiency which also benefits the consumer. I am going to look at the moment at the efficiency

justification. So if we pick that up at paragraph 204. That sets out the four conditions that must be satisfied by a dominant company if it wishes to justify conduct under the efficiency heading:

"First, it must establish that its conduct can allow efficiency gains to be achieved by establishing the existence and extent of those gains; second, it must establish that such efficiency gains counteract the likely harmful of that conduct and competition and consumer welfare on the market(s) concerned; third, that that conduct is necessary for the achievement of those gains and efficiency; and, fourth, that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition."

Paragraph 205. This is where the concept of efficiency under 102 is linked to the exemption conditions under Article 101(3) of the treaty. You will see that beginning in paragraph 205. The court says:

"In the same way as for the exemption provided no in Article 101(3) TFEU, that justification requires that the undertaking relying thereon shows, using convincing arguments and evidence" -- which is

the 101(3) test -- "that all of the conditions required for that exemption are satisfied."

Then again you will see the way the court draws an analogy between efficiency justification under 102 and exemption under 103 in paragraphs 208 and 209. That is the bottom of page 46:

"208. It should also be borne in mind that non-observance of one of the four cumulative conditions referred to in paragraphs 190" -- and I will show you in a minute 190 relates to 101(3) exemption -- "and 204" -- which is the one we just looked at, which is the efficiency justification for 102 -- "of the present judgment suffices to rule out the possibility that rules such as those at issue in the main proceedings may come within the exemption provided for in Article 101(3) or be held to be justified under Article 102 TFEU."

So you only have to fall foul of one them and you do not get justification as the dominant undertaking.

So you see the reference in paragraph 208 to paragraph 190 of the judgment. Let us go to that paragraph. That is at page 43. If you read that what the court does there is it sets out the exemption conditions under Article 101(3). It will

not take you long to see that they are essentially the same conditions as the case law has established for Article 102.

Then if you go to paragraph 192, the court deals with the first condition, i.e. the need to establish the existence of efficiencies. Can I ask you please to read paragraph 192. There are two points essentially being made there. The first one is that the efficiency gains must relate to appreciable objective advantages in the markets concerned. A mere commercial advantage to the dominant undertaking in our case, the 101(3), the 101 undertakings in this case, is not sufficient. So you are looking at objective efficiencies in the market, not benefits to the company or companies concerned. So for example, the fact that a practice allows a company to make more money would not be relevant under 101(3) or indeed 102.

The second point that is being made is that in order for the first condition to be satisfied, not only must the company establish the actual existence and extent of those types of efficiency gains, it also has to demonstrate that those gains are sufficient to demonstrate for the disadvantages caused in the field of competition. So that second

point has itself two limbs. First of all, what are the relevant efficiencies and what extent do they have and, secondly, do they actually, when weighed up with the disadvantages, counterbalance those disadvantages.

Over the page at page 44 {AB4/34/44}, paragraph 193 deals with the second condition. The court held:

"As regards the second condition ... it involves establishing that the efficiency gains made possible by the agreement ... in question have a positive impact on all users, be they traders, intermediate consumers or end consumers, in the different sectors or markets concerned."

So everyone must benefit. It is not enough that one category of user benefits, everyone must benefit.

Paragraph 197 deals with the indispensability criterion, which is well-known. I do not think I need to make any submission on it. You can see there what is said. There is nothing new or controversial.

Paragraph 198 deals with the fourth condition and if I can ask you to read that please.

THE CHAIRMAN: Next page, please.

MR HOSKINS: So you will see that under the fourth condition if the relevant practice or agreement gives the participating undertaking or undertakings the opportunity to eliminate all actual competition for a substantial part of the products or services concerned, then that alone suffices to rule out any competition.

Now, in terms of the type of evidence or the standard of evidence that an undertaking must produce in order to justify its conduct, I would like to show you two authorities. First of all, can we go to {AB4/25/1}. This is a judgment of the Court of Justice, delivered in 2020, case C-307/18, *Generics v Competition and Markets Authority*. At page 27 {AB4/25/27}, at the bottom of the page, paragraph 166, if you could read that, please.

The point is made that the undertaking has to do more than put forward vague general and theoretical arguments, which may sound quite anodyne, but is actually one of the reasons why it is so hard to obtain justification, because general vague, theoretical arguments will not do.

The second authority in relation to this, *Sainsbury's Supermarkets Ltd v Visa Europe Services* {AB3/38/1}, this is a judgment of the Supreme Court

that was handed down in June 2020. It is one of the interchange fee cases. This arises out of the retailer trials. If we go to page 37 {AB3/38/37} and if you could please read paragraph 116. So the Supreme Court made it clear that deciding whether 101(3) is relevant and:

"Cogent empirical evidence is necessary in order to carry out the required evaluation of the claimed efficiencies and benefits. To the extent that objective efficiencies caused by restriction cannot be established empirically they cannot be balanced with the restrictive effects."

It is an incredibly high standard, but it is intended to be an incredibly high standard.

The next point I would like to look is the nature of the efficiency gains which are relevant. We need to go to the Court of Appeal's judgment in *Sainsbury's v MasterCard*, which is authorities bundle {AB3/32/1}. This is Court of Appeal delivered in 2018, it was appealed to the Supreme Court, as we have just seen, but not on the point I am about to show you.

If we go to page 24 {AB3/32/24} if you could please read paragraph 84 at the top of the page. So the efficiencies have to come from the particular

conduct in question, in this case the so-called MIF. Just applying that to our case what that means is that if Apple wants to argue that the distribution restriction, for example, is justifiable, it has to show efficiencies, empirically show the extent of efficiencies that arise from that restriction. Apple cannot rely on general efficiencies arising from its ecosystem, for example, as a whole. It is simply not relevant as a matter of law.

You are going to hear a lot of evidence and argument about the efficiency justification in this hearing. You have, no doubt, started reading it with trepidation because there is a lot of it. There is a very short answer to this point, and it is this. Apple has eliminated all competition in the iOS App distribution market and iOS in-app aftermarket. It therefore cannot satisfy the fourth condition and if you cannot satisfy the fourth condition, you cannot rely on the efficiency justification.

Apple's only answer to this is at paragraph 153 of its skeleton argument, bundle {A1/5/54}:

"Dr Kent argues first that the Requirements could never be objectively justified because they have led to an elimination of all effective

competition in her alleged product markets. This argument fails to account for the fact that the evidence shows that Apple is still competitively constrained even in Dr Kent's alleged product markets (and even if those competitive constraints are insufficient to rebut her case on market definition, dominance and anticompetitive disclosure)."

In our submission the fact that Apple may be under some indirect competitive pressure is legally irrelevant in circumstances where Apple has eliminated all actual competition for the "products or services concerned", which is the language in the case law. For example, iOS App distribution services and iOS in-app aftermarket services. This is an incredibly important point. There is a huge amount of evidence in this case on justification but unless Apple can get over the fourth condition, and in our submission it clearly cannot that's the end of it. It does not matter if it can satisfy the other three conditions. We do not accept that it does.

So that is efficiency. On objective necessity, so this is the other head of justification, we have identified the relevant legal principles concerning

objective necessity at paragraphs 130-134 of our skeleton and I would just like to highlight two points now. The first point again relates to the elimination of competition. Conduct cannot be justified as being objectively necessary where it entails the risk of eliminating any and all competition from third party undertakings. It is a very similar point from the one we have just looked at for efficiency. We need to go back to the *European Superleague* case, {AB4/34/45}. I already showed you paragraph 202 and the first part of the possibility in 202, you will see, is the objective necessity defence or justification and then if you could read paragraph 203, which relates to that objective necessity justification. So you will see that the Court of Justice held that -- have you read over?

THE CHAIRMAN: Just doing that, thank you.

MR HOSKINS: The punchline was over the page. So the Court of Justice held that the discretionary powers of FIFA and UEFA to improve football competitions could not be objectively justified because they entailed, and here I am quoting:

> "The risk of eliminating any and all competition from third party undertakings."

So again there is a very short answer to Apple's objective necessity arguments and it is the same one I gave you for efficiency. They cannot succeed in those arguments because the restrictions in question have eliminated all competition from third-party undertakings in the iOS app distribution market and the iOS in-app market and that is an end to it.

In relation to this head of justification there is a further point, which is what the meaning of objective necessity is and whether Apple can fall within it. Here one starts on the basis that the law relating to objective necessity under Article 101 is relevant to the concept of objective necessity under Article 102, as you would expect. In relation to 101 it is sometimes called objective necessity, it is sometimes referred to as ancillary restraints, but it is the same notion of objective justification or objective necessity.

I would like now to go to the Advocate General's opinion in *European Superleague*, so that is {AB4/30/27} and I would like to pick it up at page 27. This was Advocate General Rantos and if you could read paragraphs 130 to 131, please. You will see the point he makes that the case law on

ancillary restraints or objective necessity in relation to 101 can be transposed when examining measures under Article 102.

The next authority I would like to show you on this is the European Commission *Spotify* decision. That is {AB6/45/211} at page 211. You saw that this morning, the Commission's *Spotify* decision and you will see the heading at the top of the page:

"The anti-steering provisions are not necessary for the attainment of a legitimate objective, and in any case they are disproportionate."

Then the subheading at 9.3.3.1:

"The anti-steering provisions are not necessary to achieve a legitimate objective."

Recital 776, please, if you could read that please. Then on to page 214 {AB6/45/214}, recital 794. If you would please read that. You will see that the Commission justifies its approach by reference to the case in footnote in 1039, which is a reference to the case C-382/12, *MasterCard v Commission* at paragraph 91 on the notion of necessity in the context of Article 101. I will come back to that in a minute, we will look at that specific paragraph. Before we do that, as we said in our skeleton argument, it is entirely logical

that the same approach to objective necessity should apply under both Article 101 and Article 102. Indeed, it would be very surprising if it were easier for a dominant undertaking to justify prima facie anticompetitive conduct than it were for parties to an anticompetitive agreement. Logically, it must be the case that the two are very, very similar, if not the same.

So let us go to the *Mastercard* judgment that the Commission relied upon to justify its approach in *Spotify*. That is {AB4/20}. This is the judgment in *Mastercard v Commission*, delivered in 2014. We have all looked at this judgment far too many times for our own health in various cases. We are interested in it now in relation to the notion of objective necessity. If you can turn to page 16, paragraph 91 of the judgment is the one the Commission relied upon in *Spotify*. If I could ask you to read that, please. So again, it is a very high hurdle because it's supposed to be. The Court of Justice held:

"It is necessary to enquire whether that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that

operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary."

This issue about what does objective necessity mean was explored in the domestic cases. If I can go back to the Court of Appeal's judgment in *Sainsbury's v Mastercard* that we looked at earlier. That is {AB3/32/18}, and pick it up at page 18, please. So this is the Court of Appeal and you see at paragraph 60, just before the citation, the Court of Appeal stated:

"The merchants and the Commission submitted that this was clearly established by the decision of the Court of First Instance in Metropole."

If I could ask you to read that quotation from Metropole, paragraphs 107-109. So you see objective necessity is not a weighing exercise, it is literally whether the activity would be impossible to carry on without the restriction.

If you go to paragraph 72 on page 21 {AB3/32/21}, I am going to pick it up six lines down you will see the words, "The principle established by Metropole", and the Court of Appeal held:

"The principle established by Metropole, as approved and modified by the General Court's decision in *Mastercard*, correctly states the law. It follows that the ancillary restriction must be essential to survival of the type of main operation" -- so it is not even to the specific company you are looking at, it is the type of the main operation -- "without regard to whether the particular operation in question needs restriction to compete with other such operations. All questions of the effect of the absence of the restriction on the competitive position of the specific main operation and its commercial success fall outside the ancillary restraint doctrine, as Metropole makes clear."

So we say that is the law. It applies just as much to objective necessity in 102 as 101. Logically, that must be the case and Apple cannot satisfy this condition. I could give you a number of examples but for example, it cannot satisfy it because in order to comply with the EU's Digital Markets Act, Apple now allows in the EU third-party app stores to operate as native apps on iOS, and it permits alternative ways to process payments on the app store. So it is therefore clear that Apple's own operation and that is not even the test. It is

operation of this kind. Apple's own operation would not be impossible to carry out in the absence of the relevant restrictions because it is carrying out its operation in the EU post DMA.

The only case that Apple cites in response to this point is at paragraph 155 of the skeleton argument. It is case T-712/14, *CEAHR v Commission*, which is a case about selective distribution. It does not address the specific principle upon which we rely. It does not refer to the judgment of the Court of Justice in *Mastercard*. I will leave Apple to develop that case, but when you see the principles that I have shown you and you look at whether *CEAHR* is about the same issue, it's really not, it's a selective description case and Apple puts far too much weight on it to try and contradict what is quite clear case law from the Court of Justice, our Court of Appeal, our Supreme Court.

So regardless of all the details that you are going to hear about security, privacy, et cetera, for the reasons I have given now in opening, we say Apple cannot rely on justification to rescue its prima facie abuse of conduct.

THE CHAIRMAN: Can I ask if that alignment, both in relation to the efficiency argument and also the

1 necessity argument, it is clear obviously from
2 Superleague, you have taken to us the passages. Is
3 that, if you like, a recent analysis drawing
4 together in Superleague?
5 MR HOSKINS: It is.
6 THE CHAIRMAN: So in a way you say it is logical, and
7 obviously we can see what the differences are and
8 form our own views as to any differences. There may
9 be some differences, it may be that some differences
10 are going to be pointed out, but is that really the
11 first time that the Court of Justice has
12 crystallised that point?
13 MR HOSKINS: I would not say it is necessarily the first
14 time, but it is clearly a trend in the case law that
15 this is becoming an issue because the court has had
16 to look at efficiency, it has had to look at
17 objective justification, it has to look at 101 and
18 102. What you find it is probably because of the
19 nature of the cases that are coming before the
20 court, they are starting to draw the threads
21 together in the way I have shown you.
22 THE CHAIRMAN: Yes, because those cases are, and you see
23 it going back to Generics, do you not, but in
24 Superleague you have both.
25 MR HOSKINS: That's right, because in Superleague it was

crying out for someone to say, "Are they different or are they the same" because it is a 101 and a 102 case. Absolutely it is something that has been recognised recently in the case law, it is a recent development, I accept that.

That is all I want to say on objective justification. There is a lot more to come, I am sure you will be delighted to hear, but I am going to move on now. If we have done okay so far, then we move to overcharge and quantum. Now, if you uphold either of our claims of exclusionary abuse, then obviously we move to the quantum of damages that the class should receive. Again, we have set out a summary of the relevant legal principles. That is at paragraphs 143-153 of our skeleton.

There is something I do not want to shy away from. There is absolutely no doubt that the assessment of damages in a case such as this is difficult. It would be foolish for me to suggest otherwise. It is a very difficult exercise, but what is really important for the Tribunal is that that difficulty does not mean that damages cannot or should not be awarded. What it means is that the Tribunal must do the best that it can on the evidence available. I will show you the case law to

that effect. It is very important to understand yes, this is difficult, yes the counterfactual is multifaceted, but that is not the exercise. I am sorry, Dr Bishop?

Can we go to {AB3/30/1}, *One Step (Support) Ltd v Morris-Garner* and another. This is a judgment of the Supreme Court delivered in 2018. Not a competition case, it is a damages, contract damages case. Please go to page 25. This is the judgment of Lord Reed at paragraph 37, and Lord Reed stated:

"The quantification of economic loss is often relatively straightforward. There are, however, cases in which its precise measurement is inherently impossible. As Toulson LJ observed in *Parabola Investments*" -- and then he quotes:

"'Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened or might not have happened but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require the

claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."

That is important, when we get to this stage of the case, if we get to that stage of the case, we are not in a balance of probability world.

So Apple cannot say, "Ah well, the Class Representative has not shown this to the balance of probabilities." That is simply the wrong legal framework.

Can we go next to *Mastercard v Merricks* in the Supreme Court. That is {AB3/39/1}. Soon you will all be very familiar with this judgment the Supreme Court handed down in 2020. If we can go to page 24, this is the judgment of Lord Briggs, which was the judgment of the majority. If I could ask you please to read paragraphs 46 to 52, I am afraid there is a bit of reading there and then I will draw your attention to some passages, 46 to 52 please.

THE CHAIRMAN: Next page, please.

MR HOSKINS: If you can go back to page 25 please just to highlight some of the points. In paragraph 47:

"Where in ordinary civil proceedings a claimant establishes an entitlement to trial in that sense, the court does not then deprive the claimant of a

trial merely because of forensic difficulties in quantifying damages, once there is a sufficient basis to demonstrate a triable issue whether some more than nominal loss has been suffered. Once that hurdle is passed, the claimant is entitled to have the court quantify their loss, almost ex debito justitae. There are cases where the court has to do the best it can upon the basis of exiguous evidence."

Perhaps even more striking paragraph 48:

"A resort to informed guesswork rather than (or in aid of) scientific calculation is of particular importance when (as here) the court has to proceed by reference to a hypothetical or counterfactual state of affairs."

It is quite surprising to see the Supreme Court use language like "informed guesswork", but that shows the importance of the principle. Then on page 27, paragraph 50, second sentence:

"There are occasions where the court has to quantify or value some right or species of property and does not allow itself to be put off by forensic difficulties, however severe."

Then the final sentence of that paragraph:

"In none of these cases does the court throw up

its hands and bring the proceedings to an end before trial because the necessary evidence is exiguous, difficult to interpret or of questionable reliability.

51. In relation to damages, it is a fundamental requirement of justice that the court must do its best on the evidence available is often labelled the 'broad axe' or 'broad brush' principle."

So you get a really strong sense there of the Supreme Court emphasising the importance of the court or Tribunal doing the best it can on the evidence that it has.

Finally on this, if I could go to the *Royal Mail Trucks* judgment in the Court of Appeal. That is {AB3/59/1}. So this is the Court of Appeal, handed down in 2024. As I said is it arises out of trucks cartel claims. Please go to page 53 and Mr Ward's ears will be burning as I read paragraph 145:

"As Mr Ward KC correctly submitted, once a Court has established loss on a balance of probabilities, the claimant is entitled to be compensated and the Court will do its best to quantify the compensation on the available evidence.

This principle is well-established and by way of authority, one need look no further than the passages in the majority judgment of the Supreme Court in Merricks cited ... above. As is clear from that judgment the judgment of Green LJ in Guttman and the judgment of Lord Reed JSC in One Step ... it is in the context of difficulties in the quantification of loss that the principle of the broad axe is deployed by the Courts."

So that is the approach to a case such as this where the hypothetical, that is the damages counterfactual, it is difficult, that is the approach to be adopted.

Can I just say a few words about the damages counterfactual. Damages, in this case, should put the class in the position they would have been in had the infringements of competition law not occurred. That will often involve the use of what is referred to as a damages counterfactual, but as we explain in paragraph 149 of our skeleton, counterfactuals can be used for a number of purposes. They might be used for establishing effect on competition or they might be used for assessing damages and it is important to remember and understand that different counterfactuals can be

used for different purposes. We have given the legal citation for that in our skeleton argument.

So let us look at the use of counterfactuals. How should the Tribunal use them? How can it use them? How can counterfactuals help the Tribunal? Can we go to the *National Grid* case, {AB3/12/1}. This is the judgment of the Court of Appeal delivered in 2010, *National Grid v Gas and Electricity Markets Authority*. Can we go to page 22 and can I ask you to read paragraph 57, please. This is in the judgment of Richards LJ, which was adopted by the other two members of the court.

You were faster than I thought.

THE CHAIRMAN: Just familiar. That is helpful.

MR HOSKINS: I should be absolutely clear, this is not a damages counterfactual case but the principle is of general interest.

THE CHAIRMAN: It does, I mean maybe this is where you are going with this, but it does give rise to this interesting question of the number of different ways you could employ a counterfactual in this case at different points.

MR HOSKINS: That is why I am taking you to it.

THE CHAIRMAN: Clearly -- I do not want to jump too far ahead but, clearly, there are some advantages and

disadvantages to thinking about it that way because you might -- put aside this case for a minute, you can see you might have different abuses that require a different counterfactual. I am not sure that is the case here, maybe it will be said but I am not sure it is.

MR HOSKINS: I am not suggesting it is, running a positive case that it is. I just wanted to alert you or remind you to the fact that if you thought it appropriate, you can have a different counterfactual.

THE CHAIRMAN: But there are some disadvantages to having difficult counterfactuals.

MR HOSKINS: For sure, it is certainly more work for everyone.

THE CHAIRMAN: Well I mean here we have yet to hear about excessive pricing, unfair pricing but clearly trying to go down a counterfactual which I think is probably difficult to avoid, if one can put it that way, it is pretty clear what the analysis would be that takes you down the counterfactual there, at least on your case, and do something different in relation to the exclusionary abuses would seem quite complicated.

MR HOSKINS: I am not encouraging you to adopt different

counterfactuals. I am just reminding you of the ability to do so should you consider it necessary.

THE CHAIRMAN: And to be thoughtful about them.

MR HOSKINS: That is right. As you flagged up, one of the issues of course on the counterfactual, the damages counterfactual, but it is more important to the damages counterfactual really is, what do you do about the period before 2015? Because the claim period starts in 2015 but the restrictions existed in relation to app distribution since 2008, in relation to the payment system since 2009. You have seen the experts refer to that as the primary counterfactual and the delayed counterfactual. We will have to go into the evidence on that, but what are the legal principles that apply in relation to the ability to have a counterfactual that looks at the period before the claims started? That is really what I am about to deal with.

If you go to what Apple says about this in its skeleton argument, bundle {A1/5/40}. It is at paragraphs 114 and 115. If I could ask you to remind yourself what Apple's case is on this. Our position is that Apple's argument is not correct as a matter of law, if I could show you the authorities we rely upon. First of all {AB3/51/1}. This is a

judgment of the Court of Appeal, 2023, yet another *Mastercard/Visa* judgment, this time in a claim brought by *Dune Group*. If we could go to page 17. You will see paragraph 39 begins at the bottom of the page. There is a list of the usual suspects. Over the page you will see a reference to Cartes Bancaires in italics and I would like to draw your attention to the next sentence in the judgment of Newey LJ where he held:

"Plainly, a counterfactual that would itself breach competition law could not be an appropriate one. Subject to that, however, a counterfactual should reflect what would be likely to have happened if the measures at issue had not existed."

So the counterfactual should not itself encompass or assume a breach of competition law.

The next authority I would like to go to is {AB3/11} this is a judgment of the Competition Appeal Tribunal in 2009, *Enron v English Welsh & Scottish Railway Limited*. Page 32 please and if you could read paragraph 90. So conduct which the court or Tribunal believes to be unlawful can be excluded from the counterfactual without the court or Tribunal having to make a formal finding of an infringement. That is the point from this sentence,

from this principle. That statement, that principle, has been followed in later cases and we have referred to them in our skeleton argument at paragraph 152. It is not an outlier. It has been applied on a number of occasions by the Tribunal.

Then if we could go back to *Sainsbury's v Mastercard* in the Court of Appeal that is {AB3/32/1}. So *Sainsbury's v Mastercard*. If we could pick it up this time at page 13 you will see the heading at the bottom of the page, "Popplewell J's judgment in *AAM v Mastercard*". I can tell you with some degree of confidence that that was a trial in which *Mastercard* but not *Visa* was a party. I can tell you that because I was acting for *Mastercard*.

Now, just to set the scene in this, *Mastercard* argued that its MIFs were objectively justified because if *Mastercard* had applied lower MIFs, Visa's MIFs would have stayed at a higher level, or the actual level they had, and that would have driven *Mastercard* out of the market because all the card issuers would have flocked to Visa because it would have had a far more attractive MIF rate, and that was referred to somewhat colourfully as the "death spiral argument". If we look at paragraph 46,

Popplewell J upheld the death spiral argument because he assumed that, even if *Mastercard* had been obliged to apply lower MIFs, the Visa MIFs would have stayed the same. So if I could ask you to read paragraph 46, that is what is being said there. That was rejected, or that approach was overturned, criticised by the Court of Appeal. If you go to page 48 and if you could read, please, paragraphs 201 to 203. So the reason the death spiral argument failed was because the Court of Appeal said, "If you are assuming that *Mastercard* is constrained by law to lower MIF rates, then it is appropriate to assume that Visa would be similarly constrained by law." And the significance is that Visa of course was not even a party to these proceedings, so it is quite an extreme example.

THE CHAIRMAN: This all goes to the pre-2015 hearing.

MR HOSKINS: That is right.

THE CHAIRMAN: So you are saying you cannot just work on the assumption that pre-2015 Apple would do whatever it liked.

MR HOSKINS: That is right.

THE CHAIRMAN: That is the argument. I think this is what you are saying, is it, where they are saying, "We have not been asked to make findings about

dominance", you are saying that does not really matter.

MR HOSKINS: I have to make good to you on the evidence that it is appropriate to assume that the counterfactual should take account of the conduct pre-2015. So I have certainly got an evidential burden, it is not just, "here is the law, I win." You are allowed to take account of the period prior to 2015, if you consider it appropriate, having heard all the evidence.

THE CHAIRMAN: So your primary case is your primary counterfactual?

MR HOSKINS: That's right. I can finish briefly on this and then I have been provided with a watch. You may want to take a break.

Let me make one final point in relation to the counterfactual and overcharge. It is just a word about Dr Singer's models. You will have seen that as part of Dr Singer's assessment of what Apple's commission rate would have been in the counterfactual, he has relied on two simulation models. One is based on a model produced by Rochet-Tirole and one is based on a model produced by Landes-Posner. If you had had a chance to consider those articles and Dr Singer's models, it

will have struck you immediately that they contain a lot of maths. Now I have to confess that if like me you do not speak a lot of maths, some of the points are quite hard to follow. Dr Bishop is smiling at me. I just want to make this point. Given my own mathematical limitations, if you leave it to the closing submissions to quiz me on those models you will probably be disappointed. So I think what we did for the hot tub was ask the experts to produce the list of main issues. I would encourage you, if you have detailed questions on the models, to ask them to Dr Singer and indeed Apple's experts in the hot tub because you will get a lot more sense out of them than you will out of me in the closing submissions.

MR BISHOP: Mr Hoskins, we would not dream of not asking some questions.

MR HOSKINS: I am sure, I am sure. It is more a confession of my own limitations rather than ... obviously, I will do anything I can to help and if you do have technical questions, we can speak to the experts. I am not saying that is the one shot chance.

If that suits that is probably a good time to take a break.

THE CHAIRMAN: Yes, let us take a break.

(3.19 pm)

(Break)

(3.32 pm)

MR HOSKINS: I am on to the last topic I am going to deal with before I hand over to Mr Ward and Mr Armitage, and it is this, in our skeleton argument we referred to another of other matters, if I can put it like that, which are highly relevant to the issues in these claims. I am thinking of Commission decisions in *Spotify*, Google Android, the CMA market study and the European Union's Digital Markets Act. We do not suggest, we do not say that they are binding in any way on the Tribunal, but we do submit that they are admissible and we do submit that they can be taken account by the Tribunal when evaluating the evidence in this case.

There is a sense in the Apple skeleton where they sort of say, if you are going to rely on these things or refer to these things you have to expressly state what weight you are going to put on them. We all see where that is going. There is a risk of if you refer to something, that is a ground of appeal. I think that it is important, having put these documents into play, if you like, because we

refer to them in our skeleton argument that we justify to you that you can refer to them and how you can refer to them. It is obviously a potentially important issue.

Now I start by saying that there's an air of unreality about Apple's suggestion that the specific documents that we refer to are inadmissible, i.e. they cannot even come into the evidence before the Tribunal. First of all, it is absolutely commonplace to refer to Commission decisions in competition proceedings, both before this Tribunal and elsewhere. It cannot realistically be suggested that European Commission's Google Android and *Spotify* decisions are inadmissible and therefore simply cannot be brought before the court. It is clearly more nuanced than that.

The European Union's Digital Markets Act is a piece of public legislation. Again the suggestion that it is inadmissible is untenable and of course Apple has also referred to the DMA in its evidence. In relation to the CMA's market study into mobile ecosystems, you may have seen that Professor Hitt for Apple relies materially on a document called the Accent Survey in his reports. Now the Accent Survey was commissioned by the CMA as part of its market

study into mobile ecosystems. It would be very odd indeed if the Tribunal were entitled to have regard to the Accent Survey, which is a report produced by a third party nothing to do with these proceedings, but not to the CMA's report when the Accent Survey was produced for the purposes of the CMA's report. Even at that sort of outset level, we say Apple's submissions in relation to this are surprising and it's not surprising that the law clearly does not support Apple's position in relation to these documents. That is where I am going to turn to now so that you have a firm bedrock for whatever you want to do.

Can we go to {AB3/55}. This is what's called the *FX* case, *Evans v Barclays Bank* in the Court of Appeal, judgment of November 2023. It was an appeal to the Court of Appeal from a decision of the Tribunal refusing certification in relation to the FX claims. You will see the composition is one that one often sees in competition cases now going to the Court of Appeal, the Chancellor, Green LJ and Snowden LJ, so they are well versed in competition matters.

At page 8 {AB3/55/8}, please, you will see the relevant decisions in that case. The claims before

the Tribunal were follow-on actions which were based on two commission decisions. They are explained in paragraph 6:

"The Commission rendered two decisions finding infringements of art 101(1) TFEU in relation to FX spot trading" --

In the "Three Way Banana Split" decision and the "Essex Express" decision, but those decisions were short form settlement decisions.

So those were the decisions that the claims were based upon. After the Tribunal had made its decision on certification the Commission adopted another decision and it was effectively in relation to the same type of conduct but it was a fuller decision and it was in relation to an undertaking which had not gone into the settlement procedure and that is why it was important. Paragraph 7:

"As it happens, on 5 July 2022, following the hearing and judgment of the CAT, and hence left out of account in the Judgment, the Commission published a fully reasoned decision addressed to Credit Suisse (which is not one of the defendant banks) finding an infringement of art 101(1) TFEU in Case" -- in the Sterling Lads case -- "This was not a settlement decision."

The would-be class representative said, "Well this is clearly relevant in front of the Court of Appeal, you should have regard to the full Sterling Lads decision to help flesh out the Essex Express and Three Way Banana Split decision." You will see opposite f in paragraph 7:

"An issue in this appeal concerns the admissibility and probative value in these proceedings of the decision in Sterling Lads. The respondent banks argue that it is wholly inadmissible, but if admissible bears strictly limited evidential weight. The appellants argue that it is admissible relevant and provides powerful support for their arguments on the appeal."

If we go to page 40 {AB3/40}, now it is absolutely right as Apple has pointed out in its skeleton, that the passages I am about to take you to were obiter in the Court of Appeal's judgment. You will see that in paragraph 94, it is not particularly easy to follow if you are not on top of the facts in the case, but you see at 95, the Court of Appeal said:

"However, since the matter was fully argued before us and raises some important points it is relevant to consider the main arguments advanced if

only because they could be relevant when the issue returns to the CAT."

The first paragraph of 96:

"The first issue was the subject of detailed oral argument."

So whilst strictly obiter, you have detailed oral argument by the parties and the Court of Appeal deliberately trying to adopt a principled judgment to provide guidance for the future. So yes obiter, but this is clearly intended to guide for the future.

Paragraph 97, if you go to e, or just across from e, at the end of that line:

"The respondent banks argue that the decision is inadmissible but alternatively of strictly limited, if any, probative value. It is contended that the rule in Hollington v Hewthorn applies to the findings in the decision, rendering it inadmissible. I do not agree. I address below first whether the decision is admissible and secondly if so the approach to be taken to an evaluation of its evidential weight."

Then Green LJ effectively describes what the rule in Hollington is because it sort of changed over time and it has been chipped away at over time

in certain respects. It has also been applied to different sorts of proceedings, it is fair to say. He says at the start of paragraph 98:

"I start with admissibility. The rule in Hollington is that absent the operation of estoppel factual findings in civil cases in England and Wales are inadmissible in subsequent proceedings."

Then over the page at paragraph 99: "There are however a growing number of exceptions to this rule." He refers to the exceptions but they are not relevant to us today. But then paragraph 100:

"Most importantly, it is well established that the rule does not apply to the CAT, which has its own rules of procedure and evidence" -- and refers to the Tribunal rules 55(1)(b) -- "and makes clear that the CAT has a wide discretion as to the evidence to be admitted. This has been recognised on many occasions and is, in my view, correct."

It refers to a number of cases, including finally *Consumers' Association v Qualcomm* at paragraph 18. In *Qualcomm* the Tribunal found that, and this predated this Court of Appeal judgment in *FX*, the Tribunal found that whilst the rule in *Hollington v Hewthorn* did not apply to the Tribunal, because the Tribunal had its own evidential rules,

the Tribunal in that case, none the less said that it would apply the same principle as *Hollington*, but it is clear from this judgment that the Court of Appeal does not agree with that approach, i.e. although *Hollington* does not formally apply to the Tribunal it should nonetheless be followed. The Court of Appeal does not agree with that approach in the judgment we are looking at. You will see that if you read paragraphs 101 and 102.

Now, one of the reasons that the Tribunal in Qualcomm had said it would apply the Hollington approach in any event was because of the last sentence of 102:

"The CAT will be conscious of the risk that being invited to perform a detailed inquiry into how prior findings came about draws it into disproportionate satellite litigation."

It is quite clear that the Court of Appeal was fully aware of what the Tribunal had decided in Qualcomm and why it decided it, but the Court of Appeal does not follow that approach. The approach to be adopted is one of weight rather than admissibility, and you will see the observations of the Court of Appeal on the weight to be given to a Commission decision at paragraph 104. We do not

need to read all of that paragraph. Green LJ said:

"This is not a Hollington type decision because it concerns Credit Suisse, not a defendant. It is however a decision of the Commission in relation to more or less identical facts to those arising in the instant case. The findings also import a relatively high degree of probative value given the quasi-criminal standard of proof the Commission had to overcome before the findings could be made."

So the Tribunal is not bound by the Hollington rule. The Tribunal should not, none the less, apply the Hollington rule as if it were bound. What it should do is look at the materials that are before it and decide how much weight to give them depending on all the circumstances relating to that document.

Those findings by the Court of Appeal, particularly in a competition case, are hardly surprising it is common, as everyone in this room knows in competition cases, for experts to rely on reports, surveys, decisions conducted by third parties to the litigation when they are providing their own opinions. You can immediately see the impracticality of a suggestion that cannot be done because it is inadmissible because it would not be possible to require all materials to be produced

from scratch by the experts in most of the cases that we see before us. It is a necessary part of the process that the experts can have regard to those sorts of materials and therefore the Tribunal can have regard to those materials. It is difficult to see how that would all function if that were not the case.

That is exemplified to a certain extent by the approach that Apple has adopted in its own skeleton argument. If we go to bundle {A1/5/45} if we look, first of all, at footnote 36 at the bottom of 44 {A1/5/44}. This is where we seek to rely upon a finding in the case in California between Epic and Apple. What Apple says in its skeleton is:

"Both Mr Holt and Dr Singer (i.e. our experts) seek to rely upon a finding made by a judge in California that Steam's effective commission is just 10.7%. That finding of fact is inadmissible and in any event should not be given any weight."

But if you go over the page to footnote 37, which relates to a related but separate issue, they say:

"Indeed, Epic's experience of the rates of switching is likely to overstate what would happen in the relevant counterfactual for two reasons.

First, in the relevant counterfactual it is unlikely that developers would avoid paying as much as 12 percentage points of commission given that they will need to pay Apple for the use of its technology."

And then, this is the important bit:

"Second, Epic gave evidence in US proceedings that one of the reasons why those 50 developers chose to switch was because Epic's own payment system was a 'difficult and tedious system for users to integrate with': see the relevant transcript excerpt in [Sweeting 1/229] {C3/3/106-107}; see also Mr Sweeney's evidence in Australia."

So you will see that footnote 36, where we seek to rely on the materials that are said to be inadmissible or of little weight. But in footnote 37, when Apple wants to rely on those sorts of materials, apparently it's fine. It simply makes the point we are not dealing with admissibility or inadmissibility here. We are dealing with the use and the weight the Tribunal can put to these sorts of materials.

Even if this Tribunal were bound by Hollington v Hewthorn, or even if it were to seek to apply the same principles as Hollington v Hewthorn in this case, that would still not render the

materials we refer to inadmissible. If I can briefly make that point good.

We need to go to {AB3/21/1}, this is a judgment of the Court of Appeal handed down in 2014. Could I ask you to read the headnote, so you can see what we are concerned with.

THE CHAIRMAN: Could you just go down a bit.

MR HOSKINS: You will see what we are dealing with here is the admissibility of a report which had been produced by the Department of Transport's Air Accident Investigation Branch into the accident which was actually the subject of this trial. The question was, was that admissible or not in the trial.

If we go to page 41, *Rogers v Hoyle* {AB3/21/41}, the judgment of Clark LJ, if you could read please paragraphs 38 to 40 you will see what is the current iteration if you like, of the Hollington principle. So you see Hollington applies to findings of fact made by another decision-maker, but then the Court of Appeal went on to explain more helpfully for our purposes what happens in relation to expert witnesses. If you go to paragraph 41, you will see the heading "Expert Evidence":

"As the *Hollington* case recognises in terms,

different considerations apply to scientific or expert witnesses."

Over the page, if you could go to page 43 {AB3/21/43} and if I could ask you to read paragraphs 49 to 55. I am not going to dwell on this because you have our primary submission which is Hollington is simply inapplicable in our case in any event. Even if it were, those are the principles to be applied and it obviously gets a bit more messy.

THE CHAIRMAN: It does get messy, does it not, because then one is trying to make this distinction of what is expertise, and what is a finding of fact and on what the decision is made and so on.

MR HOSKINS: That's right, but my submission is do not worry about that because you have rule 55(1)(b) and you are the master of the evidence that you wish to hear.

These relevant materials, we say, are important. They are important context for the arguments you are going to hear if nothing else. But the parties must rely on different aspects of them as well, so of course you have to understand what is in them. They are not the easiest read, some of them. They take quite a long time to

digest. We summarise the main points in paragraph 20 to 36 of our skeleton. So hopefully that at least provides some signposts as to the most material parts of those materials.

There are two points I would like to make in relation to the other materials before I hand over to Mr Ward. The first one is one of the documents that Apple refers to, as we saw in its skeleton argument. It referred to *Epic Games v Apple*, which was the judgment of the US District Court in the Northern District of California which was upheld by the US Court of Appeals for the Ninth Circuit. In that case Apple's view of the market was not entirely adopted, was not entirely dismissed. They did quite well in that case and obviously they want to bring that to your attention.

I just want to say, I will show you why, that judgment of the US District Court should be treated with kid gloves because, as I will show you, it depends on particularities of US law that are not applicable in these proceedings. We are all familiar in this Tribunal with US law being -- often it is a sort of false friend, you look and, "Ah there is the answer", and you look a bit more carefully and you are like, "Ah, maybe not."

So let me take you to that judgment that's {AB5/8}. I am going to take you to the appeals court judgment. It is a good way to see what was happening in that case. This is the United States Court of Appeals for the Ninth Circuit, *Epic Games v Apple*. I believe the judgment was handed down in 2022. Can we pick it up at page 25 {AB5/8/25}. You will see the heading "Market Definition". Can I ask you to read that paragraph under the heading "Market Definition", please. You will see that the Court of Appeal said there were some errors but the basic approach of the first instance judge was correct because he applied, as the US precedent required, particular rules of evidence and Epic, i.e. the claimant, had failed to produce any evidence that consumers are generally unaware of Apple's app distribution and IP restrictions when they purchase iOS Devices. So as a matter of US competition and evidence law, there was a burden on the claimant to prove a negative, i.e. that consumers did not know these things. If you go to page 33 {AB5/8/33}, in the middle of the page you will see a reference in the middle paragraph:

"Our knowledge-based distinction in Newcal flowed directly from the Supreme Court's emphasis in

Kodak on a defendant's ability to use not 'generally known' aftermarket restrictions to exploit unsophisticated consumers."

These are substantive US competition law decisions Newcal and Kodak. You will see the summary of the position in the paragraph at the bottom of the page. If you could read that and over the page and then the paragraph after the heading "Standard of Review", please.

Then at page 39 the Court of Appeals says towards the top of the page:

"Beginning with the first prong, Epic had the burden of showing a lack of consumer awareness - whether through a change in policy or otherwise."

Then the next paragraph:

"Nor did the District Court clearly err in finding that Epic otherwise failed to establish a lack of awareness. Indeed, the district court squarely found: 'There is no evidence in the record demonstrating that consumers are unaware", et cetera.

At the bottom of the page:

"Because of this failure of proof on the first prong of Epic's Kodak/Newcal we need not reach - and do not express any view regarding - the other

factual grounds."

We do not say this is inadmissible but we say it really does not deserve much attention because it is clearly premised on particularities of US substantive competition law and indeed the law of evidence.

This is I promise the last point I wish to make in opening. You will be aware that the CMA conducted a year-long market study into mobile ecosystems in the UK, and that study took place between June 2021 and June 2022. So it is still very current. Apple participated in that market study and Apple's expert, Professor Hitt, as I said earlier, relies on materials the CMA commissioned as part of that study. Can we go, please, to the CMA's report, {AB6/25/28}. So you will see *CMA, Mobile Ecosystems Market Study Final Report*, dated 10 June 2022. Can we go to page 28, please.

This chapter, chapter 3, was dealing with mobile device and operating system competition, so the market further upstream that I identified earlier. If I could just draw your attention to the second and third bullets of the key findings. So the second bullet:

"We have found that Apple and Google have

substantial and entrenched market power in mobile operating systems as there is limited effective competition between the two and rivals face significant barriers to entry and expansion."

Then the third bullet:

"Our findings of limited effective competition between Apple and Google are based on: - The supply of mobile devices and operating systems has segmented into broadly two groups - higher-priced and lower-priced`devices. Apple's iOS devices accounted for 77% of devices sold for over £300 in 2021 whereas Android devices account for 100 per cent of devices sold for £300 or less.

Users rarely switch between iOS and Android devices - with material perceived barriers to switching such as losing the ability to connect to other personal smart devices. These concerns are higher among Apple users and Apple has been able to earn a return on capital employed in its devices that is well above any normal benchmark over the last five years."

If you go to page 82 {AB5/8/82}, this is chapter 4, which deals with what we are more directly concerned with, which is competition in the distribution of native apps. Can I ask you to read

the key findings to yourself, please.

Then page 219 {AB5/8/219}, please. Can I ask you to read paragraph 6.134 to 6.136, which relates to the payment system rules.

Then you will be glad to hear finally, but hopefully this will give you some navigational pointers, I would like to take you to {AB6/33/1}, this is an appendix to the report, Appendix H: Apple and Google's appendix rules. Could you go to page 12 {AB6/33/1} and please read paragraphs 39 and 40. Let me repeat, so there is absolutely no doubt, the conclusions of the CMA in its market study report are not binding on the Tribunal. The Tribunal will reach its own conclusions on the relevant issues on the evidence that you hear. But one of the crucial issues will be whether Apple has adduced sufficient evidence before this Tribunal to cause you to come to a different view than the CMA did. If you excuse the dramatic flourish, we are going to submit that Apple has not even come close to doing so.

Unless you have any further questions for me, I am going to pass over to Mr Ward.

THE CHAIRMAN: Thank you very much.

Yes, Mr Ward?

Submissions by MR WARD

MR WARD: By way of a plan, I am going to give a brief introduction to our case on unfair pricing. Then Mr Armitage is going to address you on the law of unfair pricing. That will go into tomorrow. Then tomorrow I will turn to the application of the law to the facts and then say something about incidence in the time left.

Just starting with some introductory remarks, as you know Dr Kent's case is that the App Store commission is an unfair pricing. The headline figure was 30 per cent, was set in 2008 when the store was launched, and Apple's own evidence is that it was set without any consideration of the costs that Apple would incur. For your note that is Mr Schiller paragraph 191, {B2/5/53}.

As we will explain, the relationship between costs and prices is critical to an unfair pricing analysis. But in the sixteen years since, that headline rate has remained unchanged. There have been some limited exceptions that we are going to discuss.

The result has been profits that we would characterise as both extraordinary and, indeed, exorbitant. Could I ask you please to turn up our skeleton argument at {A1/4/50}. In here, in colour,

are some figures that Apple says are confidential, even though they are taken from our own expert reports, and they also say they are meaningless.

As I do not want to have an argument about confidentiality, I just invite you to consider those figures for return on capital employed. You will see there is a comparison there to WACC. For reasons I will come on to later -- as it says in parentheses that has now been adjusted up slightly because of a tax issue. I will come to that tomorrow.

So one can do the comparison immediately. It is worth bearing in mind that WACC, of course, is a figure that embodies a reasonable return on capital invested. It is not just cost. So what we see here is returns that are vastly in excess of the level of WACC. If we turn now please to page 60, there are some more figures that are said to be confidential. Again even though these are our experts' analysis that Apple repudiates. This is in paragraph 200. This shows the other two metrics that are relied on, "Return on Revenue" and "Return on Assets". These both are also, shall I say, strikingly high. Now Apple attacks these calculations, as you know, but it puts forward no positive case at all as to what

the true level of returns of the App Store are, none. What it says instead is that these figures are meaningless and arbitrary. It says it is impossible to measure the App Store's profitability because, it says, the App Store cannot be considered separately to the rest of what it calls the Apple ecosystem. Now one can see easily why this is an attractive submission for Apple; the App Store's profits are under scrutiny by regulators or in litigation in a number of jurisdictions around the world, and if it is right, it would of course immunise it from scrutiny on that basis. That would not be just the App Store but presumably the same logic would apply to other products and services in the Apple ecosystem. Indeed if it is right, then the same would presumably be said for other businesses with interrelated products and services. In fact as Mr Hoskins has already alluded to, both courts and regulators have considered the App Store's profitability and has made highly adverse findings to Apple. Most importantly for present purposes, the CMA had no difficulty in doing this in the mobile systems market study that Mr Hoskins has just taken you to.

I will be taking you back there tomorrow. What

we are going to see in the course of the next seven weeks is that there are a wide range of documents in which Apple itself allocates cost to the App Store, including the contested elements of OPEX and R&D. You are going to hear a lot more about that.

The consequence of that is the class representative's experts have been able to analyse the App Store's profitability on the basis of Apple's own data and its own cost allocation methodology. Now of course that involves elements of judgment. It is going to be our submission that the profitability is so vast that the analysis is not sensitive to any plausible changes in these judgments. There is another point that I want to make clear at the outset. It is not our case that any return above cost or even any return above WACC would be excessive or unfair. You will have seen Mr Holt's central case counterfactual is that Apple would have been able to charge 15 per cent commission in conditions of workable competition. If that is right, it would still have been able to make huge returns on the App Store.

Apple's case is that its profits on the App Store even though they cannot be calculated, are a reward for its innovation and it now says its

intellectual property. But the essential flaw in that argument is that as Mr Hoskins has already explained, Apple is a monopolist on the relevant markets. The monopoly is created and protected by the restrictions it imposes upon developers. So it is our case that as a result those profits are far in excess of any return that could have been obtained in workable competition.

Just to make one point clear at the outset, the excessive pricing case is premised on us making good our assertions about Apple's market power, but it is not premised on Mr Hoskins making good a case of exclusionary abuse, these are freestanding allegations, albeit premised on the same market analysis, and unless that gives rise to any immediate questions I am going to hand over to Mr Armitage to open the case on the law in the time that is left this afternoon.

THE CHAIRMAN: Mr Armitage?

MR ARMITAGE: I assume we sit until about 4.30?

THE CHAIRMAN: Yes, unless you feel you need extra time tomorrow but it sounds as if we are on track.

MR WARD: I think 4.30 should be fine.

THE CHAIRMAN: We need to fit the CMA in some time before.

MR WARD: If we negotiate for 10 am that might be very helpful, or just sit a little later this afternoon, just to create some wiggle room.

THE CHAIRMAN: I am not inviting extra time, I just want to make sure that somebody has got in mind that we need to find, I think, an hour for Mr Gregory at some stage. I do not know whether that has been factored.

MS DEMETRIOU: I think the CMA is coming out of our time already and so I am very loath to give Dr Kent any more time because there is already a lack of parity between us.

MR WARD: I thought the door might be open a crack so I thought I'd have a little push but we are quite content --

THE CHAIRMAN: If that is the position then I do not think you do get any extra time, Mr Ward. I am not entirely sure how we have ended up there, but that is how we have ended up and you are content with it, we will proceed.

Submissions by MR ARMITAGE

MR ARMITAGE: I will stop at 4.30. I suspect it will not have escaped your attention, members of the Tribunal, that there has been something of a raft of unfair pricing cases before this Tribunal in recent

years.

On the day of the deadline for the parties' written openings in the present case we were treated to a 300 page judgment on unfair pricing in the *Le Patourel* collective proceedings concerning BT's fixed voice services. That followed a trial which coincidentally took place in this very courtroom over a period of about seven weeks starting in January last year. Being on the losing side in that case, the judgment was something of an unwelcomed early Christmas present for me personally. *Le Patourel* was preceded by a series of judgments in the pharmaceutical sector, namely *Phenytoin*, *Hydrocortisone* and *Liothyronine*, in all of which the Tribunal either upheld or made its own findings of unfair pricing. The result is that the Tribunal now has the benefit, perhaps the dubious benefit, of literally thousands of pages of domestic and European authorities of unfair pricing.

With that in mind I would like to structure my submissions into two main topics. First, I will address you on what we say are some of the key relevant principles on the substantive law of unfair pricing and then secondly, and more briefly, I would like to make some legal points on the proper

approach to the evidence on unfair pricing in the present case.

Turning first to the substantive law, I am going to attempt to synthesise the now voluminous case law into, I think, ten key propositions and I will split those across three headings, if I may.

First, I will deal with the overall question of unfairness and the important concept in this context of economic value.

Secondly, I will identify some propositions concerning the proper approach to limb one of United Brands, the so-called excessive limb.

Thirdly, I will cover limb two of United Brands, the so-called unfair limb, including its two different aspects, so unfair in itself and unfair in comparison. Also the way in which the question of unfairness interrelates with the limb one question of excessiveness.

I should immediately say that many of the relevant principles in this area can be derived from the authoritative summary of the law on unfair pricing given by Green LJ in the Court of Appeal's decision in the *Phenytoin* litigation in 2020.

If I could begin with some propositions concerning the meaning of unfair in the present

context. Now the imposition of unfair selling prices is specifically identified in the statute as an example of an abuse of dominance. You have that at {AB/1} if needed. Of course the statute gives no indication as to the meaning of unfairness for these purposes. For those purposes, therefore, we have to turn to the case law. That case law has established, and here is my first proposition, that the essence of the unfair pricing abuse is that the dominant firm has charged prices and reaped trading benefits that it would not have been able to obtain in conditions of workable competition.

This is a point that was understood and emphasised at a very early stage in this Tribunal's existence. That is the *Napp* case, with Sir Christopher Bellamy presiding as president. We have that at {AB3/2}. So sorry, I cannot see the EPE.

This was a case about the prices charged for sustained release morphine by *Napp*, an associate of the now well-known Purdue Pharma group owned by the Sackler family. If we could pick the judgment up at paragraph 390 which is at page 107. Under the heading, "The abuse as found in the Decision ", and the Tribunal here quotes from the underlying decision of the Director General of fair trading,

the predecessor to the OFT and then the CMA:

"The Director states that, as a matter of principle a price is excessive for the purposes of the Chapter II prohibition:

'If it is above that which would exist in a competitive market and where it is clear that high profits will not stimulate successful new entry within a reasonable period. Therefore, to show that prices are excessive, it must be demonstrated that (i) prices are higher than would be expected in a competitive market, and (ii) there is no effective competitive pressure to bring them down to competitive levels, nor is there likely to be."

Then at 391, the Tribunal describes this approach as "soundly based in the circumstances of the present case", albeit recognises there may well be other ways of approaching the issue. Paragraph 392, the Tribunal identifies a range of methods that may reasonably be used for identifying whether a price is above a competitive level, noting it "is rarely an easy task".

The quotation from the Director General raises an immediate point of terminology, which is capable of causing confusion, at least for me, though I will not speak for anyone else. We will see there that

the reference is to whether a price is excessive for the purposes of the Chapter II prohibition and in some of the earlier case law, indeed in United Brands itself, the term "excessive" tends to be used to describe the overall abuse and that is the sense in which the word excessive is used in the *Napp* case itself. If we could turn on to paragraph 424, which is at 117 of the authority. We see four lines down:

"The abuse of excessive pricing consists of maintaining prices higher than would be expected in a competitive market", et cetera.

But the modern approach typified by the Tribunals's recent case law is to use the term "excessive" to describe the limb one inquiry, which as we will see involves comparing the prices charged with the defendant's costs of production. The question of whether a price identified as excessive under limb one is unfair, either in itself or in comparison to other products is then addressed at the limb two stage.

In its 2020 decision in *Phenytoin*, the Court of Appeal affirmed that pricing above competitive levels is at the very heart of the unfair pricing abuse. We have that judgment at {AB3/37}. It can be seen from paragraph 1, which is at page 4 of the

authority. At the very outset of the judgment Green LJ emphasises that the case raises important points of law, as he puts it, concerning the test for determining whether a dominant firm's prices amount to an abuse. As the Tribunal will know, Green LJ then provides a comprehensive analysis of the European and domestic jurisprudence on unfair pricing, as well as the economic literature. If we could pick up the judgment at paragraph 97, which is page 31 and it may be worth placing an actual or virtual bookmark at this point in the judgment because we see that his Lordship, having considered a range of case law on the topic, says that he draws the following general conclusions from the case law about the test to be applied. Then at subparagraph (i) his Lordship states that the basic test for abuse is whether the price is unfair, and he says that in broad terms this will be the case:

"When the dominant undertaking has reaped trading benefits which it could not have achieved in conditions of 'normal and sufficiently effective competition' i.e. 'workable' competition."

Now the notion of workable competition has been considered in some detail in some of the Tribunal's more recent case law, including the *Liothyronine*

case, where I believe Mr Frazer was on the Panel hearing the case. In short, the more recent authorities make clear that workable competition is to be distinguished from both perfect competition, but also from a situation of abnormal insufficiently effective competition in which an undertaking is able to exploit opportunities arising from its dominant position. I will not develop that further in opening but just to give you the reference to the helpful discussion in *Lyothyronine*, that is at {AB3/56}, paragraphs 126-129, which, as I say, elucidates this concept of workable competition a little further.

If we now look at Green's LJ subparagraph (ii), his Lordship says that a price which:

"... bears no 'reasonable' relation to the economic value of the good or service is an example of such an unfair price."

Now, reasonable relation to economic value is of course the language used to describe the example of unfair pricing given in the seminal United Brands judgment, but his Lordship's used of the words "such an unfair price" expressly link Green's LJ second general conclusion to his first. So the concepts of economic value and unfairness are thus directly

identified with the notion of a workably competitive price. That brings me to my second key proposition, which is that the economic value of a product is reflected by the price that customers would be prepared to pay for it in a workably competitive market. This is a point that is further elucidated later in the same judgment. The context for this argument in the case is that the pharmaceutical companies were contending that the CMA's cost plus analysis had failed to capture the economic value said to arise from the therapeutic benefits that epilepsy patients derived from the medication concerned.

If we could go please to page 50 of the authority. Perhaps could I just invite the Tribunal to read paragraphs 154 and 155 to themselves, please.

So we see here at paragraph 154, Green LJ is emphasising the important point that willingness to pay is not to be confused with economic value. Otherwise, the price charged by the dominant undertaking would be regarded as fair simply because some customers in fact pay it. Such an approach self-evidently would denude the prohibition on unfair pricing of any force. The Tribunal in the *Le*

Patourel case called this the "willingness to pay fallacy" that is, no need to turn it up but the reference for that is paragraph 960 of *Le Patourel*, {AB3/62/219}. The willingness to pay issue is an issue in all unfair pricing cases but particularly so where the dominant firm is a monopolist and so there are no alternative suppliers for the product in question. Then as we see at paragraph 155 Green LJ puts forward what he calls a proxy for economic value. Namely, as he says, the prices that consumers are prepared to pay for the relevant good or service in an effectively competitive market. So we see again an express link is drawn between the concepts of unfairness, economic value and the prices that would be payable in conditions of workable competition.

So in general terms, that is what it means to say that a price is unfair under the case law.

Turning now to the principles concerning how an unfair price is to be established. It is repeatedly emphasised in the authorities that there is no single method for doing this. That is a point we saw in the extract from *Napp* and if we go back to paragraph 97 of *Phenytoin*, page 31, we see that is a point that is made at subparagraph (iii) of Green's

LJ list of general principles.

My third proposition, however, and perhaps this is the last one I will do in the time available today, is that while there is indeed no single method, the two-limb United Brands framework remains the orthodox approach for assessing whether prices are unfair. As the Tribunal knows, the first limb under the United Brands framework involves considering whether the difference between the costs actually incurred and the price actually charged is excessive. As I will show you later, the precise test at limb one is whether prices materially or significantly and persistently exceed costs. The authorities make clear that that is a matter for the Tribunal's evaluative judgment. If limb one is satisfied, then the second limb involves considering whether the excessive price identified at limb one is unfair either in itself or in comparison to other products.

As I will also be coming to later, within that two-limb framework there is no fixed rule as to how and at what stage economic value is to be taken into account, although we will see that the Tribunal in *Le Patourel* considered economic value to be most helpfully addressed under limb two rather than limb

one, and that is the approach that the Class Representative's expert has approached matters in the present case.

In addition to *Le Patourel*, the two-limb *United Brands* framework was applied by the CMA and subsequently the Tribunal in its judgments in each of *Phenytoin*, *Hydrocortisone* and *Liothyronine*, and in its written intervention in the present case, which the Tribunal has at {A3/1/18} paragraph 55, the CMA refers to this as a tried and tested method for assessing unfair pricing. The same framework was applied by the European Commission when making provisional findings of unfair pricing in 2021 in the *Aspen* case, which you also have in the authorities at {AB6/19.1}.

Finally, in its second *Phenytoin* judgment from November last year, the Tribunal described United Brands as the starting point for any analysis of unfair pricing, that is paragraph 49, {AB3/61/38}. I emphasise those points because it is something of a surprise, we say, to find that Apple's skeleton argument appears to take issue with the application of the United Brands framework and in particular limb one of United Brands to the App Store.

Perhaps, on that note, I will leave matters for

today and pick that up as the first item of business in the morning.

THE CHAIRMAN: Thank you. We will start again at 10.30 tomorrow morning. Thank you very much.

(4.31 pm)

(Adjourned till 10.30 tomorrow morning)

I N D E X