IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 25th February 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

Tuesday, 25 February 2025

(10.30 am)

THE CHAIRMAN: Mr Armitage, good morning.

MR ARMITAGE: Good morning. We are obviously dealing today with unfair pricing. Before I start, just to mention that literally this morning the Court of Justice has given judgment in the *Android Auto* case.

THE CHAIRMAN: Yes, we were going to -- we saw that and we were going to --

MR ARMITAGE: I am not going to make any submissions on it now.

THE CHAIRMAN: No, of course. I do not think there is an English language judgment available yet.

MR ARMITAGE: There is apparently. We will obviously make sure it is added to Opus, but just to let you know that is there.

THE CHAIRMAN: Thank you.

Closing submissions by MR ARMITAGE

MR ARMITAGE: Mr Ward gave you the roadmap yesterday. Just as a reminder, I am going to deal with some legal points on unfair pricing and then limb 1, Mr Ward is going to deal with limb 2, fairness issues, then back to me for comparators, then back to Mr Ward on incidence and then finally Ms Fitzpatrick on interest.

Starting with the law on unfair pricing, we

addressed this in some detail in our opening submissions, back on Days 2 and 3 of the trial, and you now have our ten propositions fleshed out in appendix D to our written closings. The core propositions we set out there are not, as far as we can ascertain, in dispute and I do not propose to go through them again. Instead, I propose to focus on two legal points that arise from Apple's written closings.

The first concerns the relevance of evidence on costs and profitability in cases involving intangible products and then the second is Apple's contention that the CR's case on unfair pricing is contrary to binding precedent in the form of the Court of Appeal's judgment in *Attheraces*.

Beginning with the point concerning intangibles -- there was some discussion of this point in opening submissions too -- could we go, please, to page 134 of Apple's written closings, {A1/9/136}, under the heading "Applicable legal principles"?

No particular issue with (a), but if we look at (b), we see that Apple says that:

"One way of determining whether a price is unfair is the Cost-Plus method."

But if you read the remainder of that subparagraph, you see that what Apple is describing here is the

orthodox two-limb approach from *United Brands*. That is what it is calling the "Cost-Plus method" and that is, of course, the approach that Mr Holt has taken to the assessment of unfair pricing in this case.

Then, at (c), we see it is said that this sort of methodology is inadequate in cases involving intangible products. Apple cites a remark from Lord Justice Green in *Flynn Pharma* to the effect that, "in cases involving intangible property, such as copyright, it is recognised that such an analysis might be artificial", and an observation from the Advocate General in Latvian Copyright that, {A1/9/137}, "a cost-price comparison makes little sense with regard to certain intangible goods such as ... copyrighted musical works".

Now, even on their face those remarks do not purport to lay down any general rule for all intangible goods, but, in any event, Apple's argument here appears to be that the *United Brands* framework is inadequate simply because the case involves intangible products. Now, this was a point that was considered at the CPO stage. I would just like to remind you what you said in rejecting Apple's strike-out application in relation to these matters. If we could call up {I/11/29}, paragraph 77, the Tribunal held that:

"It is clear that cost plus is a conventional

starting point for the *United Brands* analysis and, where it can be performed, there is no basis to criticise that."

Then, at paragraph 79, over the page {I/11/30}, the Tribunal did not accept that "there is any established rule for assessing demand side factors in relation to intangible products or services or as a result of innovation. Neither *ATR* [which we are going to come to] nor *Latvian Copyright* decide that and both cases turn on their particular facts".

Now, when we suggested in opening submissions that Apple were seeking to relitigate a point that had already been decided against it, we were assured that Apple was really only making a point about the inadequacy of Mr Holt's methodology on the facts of the case. It seemed to us that the proposition at paragraph 417(c) of Apple's written closings is stated in much more general terms than that and seems to amount to a submission that you simply do not look at costs at all in a case involving intangible assets; that they are simply uninformative in such a case.

Be that as it may, we say the Tribunal was right to reject this argument for the reasons it gave at certification. There is no special rule that applies to cases merely because they involve intangible products.

Now, it is true that the case law has recognised there may be difficulties in identifying costs for certain intangible products; copyrighted musical works being the example the Advocate General gives in *Latvian Copyright*.

To build on an example Apple relied on at certification, one might well struggle to meaningfully identify the costs that were incurred by Paul McCartney coming up with the melody for Hey Jude. We say, though, on the facts, there is a world of difference between that situation and the App Store. The evidence at trial -- and we are going to come to some of it on limb 1 -- has shown that the App Store is operated as a discrete business unit, preparing regular profit and loss accounts and profitability estimates for presentation to Apple's most senior executives.

The App Store is not The Beatles. It is more like Apple Records, the record label that distributed The Beatles' music. As I say, we will come back to Apple's profitability under limb 1.

I would like to show you, though, just one authority that bears directly on this point about intangibles and costs. It is the Tribunal's judgment in *Hydrocortisone*. If we could pick that up at {AB3/57/164}, under the heading "Evidence", paragraph 331, the Tribunal says:

"Any appropriate method is likely to be informed by that which is being valued: identifying costs and linking them to a particular product is a problem in almost every case, but particularly so where intangible property is concerned or (as here) products commanding a high price at a low marginal cost."

That is a quotation that Apple relied on in its skeleton argument for trial in relation to the difficulty of identifying costs in cases involving intangible products. But the Tribunal does not say that one should not look at costs in those circumstances. If one looks at subparagraph (2), not referred to in Apple's skeleton on this point, we see the Tribunal says:

"The inter-relationship between price and cost is obviously significant. Bearing in mind always that cost can be extraordinarily difficult to relate to a product's price, if (nevertheless) cost can reliably be derived, a price well in excess of cost will be an indicator of unfairness. That being said, simply taking a cost-plus approach may mean wrongly appropriating a producer's surplus to the consumer."

So that in a nutshell is the CR's case. Costs can reliably be assessed, and that is the limb 1 debate. The limb 1 assessment reveals very high profits and

those are an indicator of unfairness, although of course not decisive in their own right. So we say Apple is wrong to suggest looking at costs is ipso facto uninformative in cases involving intangible products and certainly on the facts of this particular case.

That brings me to the second legal point concerning *Attheraces* and the argument that the Class Representative's whole approach to unfair pricing is precluded by the 2000 decision -- 2007 decision of the Court of Appeal in that case. We addressed Apple's reliance on this case at paragraph 200 of our written closings, but, given the emphasis on the case in Apple's written closings, I would like to say a bit more about it now.

Our submission in a nutshell is that *Attheraces*, as interpreted in subsequent more recent case law, is fully consistent with the Class Representative's approach to unfair pricing. It does not establish any additional or different test for unfair pricing and it bears emphasis that, having considered this authority, you refused Apple's strike-out application and certified the case.

But starting with the legal proposition that Apple purports to derive from the case, we have this at 417(f) of Apple's written closings, page 135, {A1/9/137}. We see there that *Attheraces* is said to establish that

there is nothing unfair about "a supplier which provides an input to a product sharing in the profits that arise ... Rather, Article 102 will only require intervention where the price charged puts competition in the downstream market at risk by rendering the purchaser's activities unprofitable".

So Apple appears there to be reading *Attheraces* as authority for the proposition that some kind of margin squeeze analysis is required before a price can be unfair. Now, I am going to show you, that is not how the case has been interpreted by either the Court of Appeal or this Tribunal in much more recent case law. But just on its face, it is obvious that the proposition has no basis in *United Brands*. It conflates the well-known distinction between exclusionary and exploitative abuse.

Now, a price may indeed be abusive because of distortive effects on competition. Where there is an obvious effect on competition, this could be relevant to the enquiry on fairness. In the present case, although it is independent of our case on unfair pricing, we have the exclusionary abuse case. If we are right about exclusionary abuse, we also rely on that as a factor pointing in favour of a finding of unfair pricing, just as in *Albion Water*, for example, there was

a related margin squeeze abuse. One sees that at paragraph 4 of the judgment in that case. No need to turn it up, but the reference is {AB3/10/6}.

We also emphasise that in our case we do have a clear downstream effect, should it be necessary to establish one in relation to unfair pricing, in the form of our case on incidence. But we say, as a matter of law, downstream effects of this kind are not a prerequisite for establishing an unfair price. In that regard, in your certification judgment, respectfully, you rightly said that the law in this area is as set out in *United Brands* and explained by Lord Justice Green in *Flynn*. That is paragraphs 70 and 72 of our certification judgment, {I/11/28}.

The basic legal test is whether prices exceed those that would have been attained in conditions of workable competition, and we summarise that case law at paragraphs 2 to 5 of appendix C to our written closings. Charging a price that exceeds the price attainable in workable competition is a direct and well-established form of abuse. It is a departure from competition on the merits. The case law shows there is no need for any additional analysis of whether competition between firms is distorted as an essential element of the legal test.

If we could go to the Advocate General in

Latvian Copyright, on whose opinion Apple relies. If we turn up {AB4/21.1/1}, if we look, please, at paragraph 6 at the bottom of the page, we see the Advocate General says that:

"The case at hand offers the Court an opportunity to clarify the conditions under which the imposition of high prices by a dominant undertaking might infringe point (a) of the second paragraph of Article 102 TFEU. In other words, the present case concerns prices set by dominant undertakings that may be abusive because, being excessively high, they exploit customers. Conversely, it does not concern prices which may be abusive because of their exclusionary effects on competitors."

That is the distinction I referred to between exclusionary and exploitative and it would make no sense on Apple's approach. Now, there are of course unfair pricing cases at the retail level where consumers are charged prices that are alleged to be unfair -- *Le Patourel* was an example of such a case -- but of course one could also have unfair pricing at the wholesale level. *United Brands* was about the wholesale supply of bananas; *Latvian Copyright* and *Tournier* were about the royalties charged by collecting societies to, for example, discotheques; *Flynn Pharma* and the other pharmaceutical cases were about the wholesale supply of

medicines to pharmacies. In none of the judgments does the court suggest that an effect on downstream competition is an essential prerequisite for establishing unfair pricing. But, despite all this, Apple suggests that Dr Kent is wrong to seek to apply *United Brands* to its pricing because of certain observations made in *Attheraces*.

If we could look at paragraph 429 of Apple's written closings, internal page 139 and {A1/9/141}, you will see in the first sentence the argument is made that:

"Ultimately, Dr Kent's framework of looking to a price set in a 'workably competitive market' as [establishing] demand-side economic value is flatly inconsistent with the binding decision of the Court of Appeal in [*Attheraces*]."

But of course Dr Kent's framework of looking at prices set in workably competitive markets is the law as stated by Lord Justice Green in *Flynn*, 15 years after *Attheraces*. Could we just look briefly at that authority and what it says about *Attheraces*? It is {AB3/37/30}. You see on this page that Lord Justice Green is specifically considering *Attheraces* as part of his extensive tort of the relevant jurisprudence in this area. He cites paragraph 6 of the judgment of Lord Justice Mummery as identifying the imponderables

that arise in unfair pricing cases. Then, at 96, Lord Justice Green says that:

"The parties [in *Attheraces*] disagreed about the approach to be adopted. The claimants argued that the test was Cost-Plus. The defendant (BHB, who owned the data) argued that the test was, upon the basis of United Brands, the economic value of the product."

Then Lord Justice Green cites paragraphs 213 and 218 of the judgment, if you would not mind just reading those to yourself. (Pause)

So there we have, in my submission, the key finding in *Attheraces* identified by Lord Justice Green. The judge's error at first instance in *Attheraces* was to equate economic value and cost-plus. There is no reference here to any of the Court of Appeal's remarks in that case concerning what the evidence showed about downstream competition.

If we go over the page to page 31 of the judgment in *Flynn*, {AB3/37/31}, paragraph 97(i) -- you have obviously seen this before -- we have Lord Justice Green describing the basic test for abuse:

"... a price will be unfair when the dominant firm has reaped trading benefits which it could not have obtained in ... 'workable competition'."

Again, there is no reference in that formulation of

the test to the need to establish an effect on downstream competition, let alone a requirement that the customer's business must be rendered unprofitable before a price can be unfair. We say that is very significant because Lord Justice Green is deliberately setting out here to state the legal test. We do not need to turn it up, but actually paragraph 1 of the same judgment makes clear that this is of application to all goods and services across the economy. There is no reference to any special rule for intangibles nor for pricing by monopoly wholesalers.

If I could show you one other authority -- in fact, I would like to take you back to *Hydrocortisone* because the Tribunal also considered *Attheraces* in that case. {AB3/57/161}, please, and it is paragraph 327 of the judgment. The Tribunal here describes the Court of Appeal having posed two questions for the purposes of determining whether the price constituted an infringement of the Chapter II prohibition. The first condition is "whether the difference between the costs actually incurred and the price actually charged is excessive". That is just *United Brands*, limb 1. Just pausing there, that shows that the suggestion that that framework is not applicable in a case involving intangible products is just wrong. Even *Attheraces*

makes clear that it is a necessary part of the analysis.

Then the second step, the second condition -- if we could have the full page -- that is whether the price has been imposed which is unfair in itself or when compared with competing products. So, again, that is just *United Brands*, limb 2. Then:

"Mummery LJ identified the central concept ... as not the course of producing the product [this is at the limb 2 stage] ... but the 'economic value of the product supplied'."

But then, if we go over the page, {AB3/57/162}, some further passages from the case are set out. Then we see the Tribunal's analysis:

"These passages make clear that:

"(i) The object of competition law is to protect competition, and not seek to impose an outcome that is inconsistent with properly operating market forces.

"(ii) Sellers of Product are entitled to the maximum price they could command in 'normal and sufficient competitive' conditions. In other words, where a competitive market would result in Prices which are significantly above Cost, then Sellers ought to be entitled to hold on to the profits that they would thereby obtain.

"(iii) The approach of the Court of Appeal in

Attheraces is [held to be] consistent both with the approach in *Flynn Pharma* (which we have described) and with the approach described by the Tribunal in *Napp*."

This is another case we relied on in opening and indeed referred to in our written closings. If we could look at the final line on the page, this is the quotation from that:

"... to show that prices are excessive it must be demonstrated (i) that 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."

We say that is exactly the factual position in this case. But what we see here is on the law that the Tribunal is interpreting *Attheraces* as fully consistent with the approach in both *Flynn* and indeed *Napp;* that is to say, as consistent with and indeed authority for the proposition that sellers may command the maximum price that they could obtain in workable competition but not the proposition that they can charge as much as they like provided only that their customers' activities are not rendered unprofitable. We say that that is a proposition that forms no part of the law in this area and the CR's case is fully consistent with the law as interpreted both by the Court of Appeal and the Tribunal

in much more recent cases. To be clear, though, insofar as some impact on downstream competition is required, we say that we have that anyway in the form of our case on incidence.

Now, just returning to paragraph 429 of Apple's written closings, {A1/9/141} -- so this is the proposition that our case is inconsistent with *Attheraces*, which I have dealt with by reference to the law. Then Apple says:

"In that case, BHB was contributing nothing more than pre-existing data that BHB needed to gather for its own purposes anyway. All of the commercial risk of using this data was going to be borne by *ATR*. Yet the Court of Appeal endorsed an offer that provided for an extraordinary ... 50% share of net revenues to be paid to BHB."

Now, it is not right that the Court of Appeal endorsed that. It was an appeal. What the Court of Appeal found was that the judge's approach at first instance was erroneous in law and the error was to equate economic value with cost-plus, as I have said, and that is made very clear in paragraph 281 of *Attheraces*, {A3/9/52}.

Then Apple suggest that, had there been other firms competing with BHB to provide the same data, then the

price charged under conditions of workable competition would undoubtedly have been much lower, and this is said to show that the CR's case is irreconcilable with *Attheraces*. We say that is just an assertion about what might have happened on the facts of a different case. The relevant question is not "Would prices have been lower if there had been other suppliers?" but "Was BHB's price above workably competitive prices?".

It is also important finally to emphasise that the facts of *Attheraces* were unusual, to pick up a word used by this Tribunal at paragraph 53 of the certification judgment. BHB was the governing body of British horseracing. It was seeking to fund horseracing via a secondary commercial activity of selling the pre-race data. In our submission, at the end of the day, nothing can really be gleaned from the facts of that case. They are very far removed from those of the present case and in terms of the facts, *Attheraces* is ultimately not of much assistance to the Tribunal, just as you found at the CPO stage when similar points were raised.

Unless you have any other questions, I propose to turn directly to limb 1 and the question of the App Store's profitability.

THE CHAIRMAN: Yes.

MR ARMITAGE: So this was an issue which Apple considered

sufficiently important to call its chief financial officer, Mr Parekh, to take time out of his doubtless relentless schedule to give evidence live from Cupertino. It was an issue on which the two expert accountants, Mr Dudney and Dr Barnes, filed detailed reports and it occupied significant court time in terms of cross-examination.

But if we can turn up paragraph 423 of Apple's written closings, {A1/9/139}, we see at paragraph 423 that this is now described as an issue of "limited relevance", so much so that the submissions on the point are relegated, in Apple's words, to appendix 6 of their written closings.

Now, we take a different view on relevance, you may not be surprised to hear. First, establishing that Apple's prices are excessive by reference to costs is a key first step in the orthodox *United Brands* analysis, and I mentioned this earlier, but Apple's own favourite case, *Attheraces*, makes that clear, and that is paragraphs 209 and 213 of *Attheraces*, {AB3/9/35-36}.

And secondly, the scale and persistence of Apple's profits is a relevant although certainly not determinative factor in the limb 2 analysis, and we make that point at paragraph 291 of our written closings by reference to the case law.

But focusing now on limb 1, can we just start by looking at Apple's Re-Amended Defence, paragraph 135? That is at {A1/2.1/38}. (Pause)

Can you see in the final sentence:

"It is denied that Apple's profit margin is extraordinary ..."

Now, that is not actually right in terms of the legal test for excessiveness. We deal with that in our written closings. The test is significant and persistent excess. But, in any event, we see that Apple denies that its pricing satisfies the excessive limb. That is a position on the pleadings. Yet it now suggests in closings that the profitability evidence is only of limited relevance. We say that the reality is that the evidence is not only relevant but clearly shows that Apple's profits are excessive and do satisfy limb 1, and reading Apple's written closings, it is not clear to us the extent to which that is even now in dispute.

If we could go back to Apple's written closings at paragraph 421, {A1/9/138}, we see on the third line:

"... Apple has never suggested that the App Store was unprofitable."

Well, it may not have done so in terms. We have seen that it did deny that limb 1 was satisfied in the

pleadings, but what it certainly did suggest, emphatically, is that the App Store's profitability could not even be meaningfully estimated. That was the express position of Dr Barnes throughout his report and it was echoed at paragraph 184 of Apple's skeleton for the trial, {A1/5/62}.

That the App Store's profitability could not even be meaningfully estimated was not put to Mr Dudney in terms in cross-examination, and we see here from Apple's written closings that Apple now embraces Mr Schiller's concession that the App Store has been extremely profitable for Apple and indeed says that this was always obvious.

So, in the circumstances, I propose to take limb 1 fairly briskly. We deal with the evidence fully at paragraphs 203 to 281 of our written closings and I certainly do not propose to go through all of it.

Can we, though, turn up page 65 of our written closings, where we have reproduced table 2 of Mr Dudney's report, {A1/8/68}. Sorry, this is the Class Representative's written closings. If we can perhaps just zoom in a little bit. Could we zoom in? Thank you.

So we have Mr Dudney's table 2, the App Store's profitability in the Relevant Period. You will recall

that Mr Dudney presents three profitability metrics, operating margin, return on assets and return on capital employed. We rely on all of them for limb 1, together with Mr Holt's ROCE/WACC comparison. We say individually or in combination they establish significant and persistent excessive profits and thereby satisfy limb 1.

Starting with operating margin, we see from Mr Dudney's table 2 the figures. They are non-confidential in the earlier years and confidential in later periods, but you can see from the page the scale. We say these are excessive profits in their own rights, that is apparent just from the absolute levels, but lest you require some comparative evidence here -- we do not need to turn it up at this stage and there are confidentiality issues -- but we know that Apple has done internal profitability assessments. It may be that I cannot say anything about the particular comparisons that are made, but I will give you the references. {D1/757/14} and {D1/752} are both documents that were discussed with Mr Parekh.

In terms of another comparison, in *Le Patourel* the Tribunal held that a persistent 20% excess of price above cost-plus would be excessive for limb 1 purposes. That is paragraph 926 of *Le Patourel*, {AB3/62/214}.

That was a different kind of cost-plus analysis which looked at the monthly costs for the fixed voice services that were at issue and added a reasonable margin. On the facts of the case, 13.5% was allowed. We do not rely on the precise comparison. We just say it is instructive as to the sorts of margins that are regarded in the case law as excessive.

Then turning on to page 68 of our written closings, we have reproduced table 1 of Mr Dudney's report. Again, if we could zoom in, please, {A1/8/71}. Table 1 sets out the various components of the operating margin estimate and only one of the rows in this table is actually in dispute. That is "OPEX -- App Store ...". Pausing there, we see that that is a small proportion of the revenue and gross profit figures, and you may recall Mr Holt's evidence was that it is unlikely that reasonable changes in the allocation of OPEX would significantly affect these findings. We do not need to turn it up, but that is paragraph 192 of Holt 3, {C2/10/77}.

Apple's position in cross-examination and in its written closing appears to be, "Well, that just shows that we have small OPEX compared to our large revenues", as if it is somehow irrelevant to the question of profitability that Apple has large revenues and

relatively low costs. The App Store is unquestionably an important part of the company's overall profitability. Documentary evidence the Tribunal has seen makes that clear.

The document I am going to show you is confidential, so I am just going to bring it up on the screen if I may, {D1/757/9}. I will just ask you to read the light-blue text at the top of that page, underneath the heading, which engages with this point, and of course this was discussed with Mr Parekh. (Pause)

Now, on the disputed issue concerning the allocation of OPEX, we are of course talking about the overall OPEX of the Apple business, including R&D costs and general administrative costs. Now, on Apple's case, these are common costs; see, for example, the cross-examination of Dr Barnes, {Day13/17:4-7}. It is inherent in the concept of a common cost that it is not incurred by or causally connected to any single part of the business, so, where you have common costs but you are seeking to work out the profitability of a given product or service, it is necessary to use some appropriate method for allocating them. Indeed, Mr Piccinin put that to Mr Dudney in terms at {Day13/113:6-10}. Of course, this is not some bespoke Apple issue. It is an inevitable feature of any unfair pricing case involving

a multi-product firm with substantial -- potentially substantial common costs. It was a major part of the argument in *Le Patourel*, just for example.

Now, as the Tribunal knows, Mr Dudney has used a revenue-based methodology as his primary method. We summarise the key steps in that approach at paragraph 228 of our written closings. Then Mr Dudney cross-checks his approach against an internal Apple exercise which uses a direct cost approach. Now, Mr Dudney did not pluck those methodologies out of the air. Could I just show you Mr Parekh's first witness statement, paragraph 18, at {B2/4/5}? Mr Parekh there says that:

"For the purpose of preparing trend analyses [I will come back to that], Apple generally allocates operating expenses using two methods. The first is allocation on a revenue basis, whereby operating expenses are allocated proportionately according to revenue earned by each product or service. The second is allocation on a direct cost basis ..."

Now, the reference in the first sentence to "trend analyses" is something that was addressed in the evidence and we pick up the references in our written closings. We showed a number of profitability documents to Mr Parekh which he accepted were not trend analyses;

they were estimates of absolute profitability. We say the significant point here is that this is Mr Parekh, Apple's CFO, identifying the revenue and direct cost methods as the methods that Apple itself generally uses for these purposes.

This is important, we say, because, reading Apple's appendix on profitability, one would be forgiven for getting the impression that Mr Dudney's methodologies and the internal documents he has relied on are somehow anomalous and that other allocation methodologies are available, but that is wrong. They are the two methodologies to which Mr Parekh specifically draws attention. It was perfectly appropriate and correct, in those circumstances, for Mr Dudney to apply those methods. The fact that they arrive at the same result, we say, ought to give the Tribunal confidence that the results are sufficiently robust to be adopted as profitability estimates for the purposes of limb 1.

It bears emphasis here that Apple has not presented any rival profitability estimates, suggesting that App Store operating margins were in fact much lower than estimated. Dr Barnes was not even instructed to attempt that exercise.

We address some of the other methodologies that have been discussed in the course of the trial in our

appendix E and I do not propose to go through those in detail. Apple of course says that they are equally meaningless and arbitrary.

But if we could go to Apple's appendix 6, page 187 of Apple's closings, paragraph 551, {A1/9/189}, you see that the suggestion is made that there is a fundamental problem with trying to analyse the profitability of the App Store in isolation from at least the devices business. That is the point about whether it is meaningful to even do this exercise at all.

The Tribunal, I hope, has our point from our written closings that this is really just a counsel of despair. Neither the CMA nor the US court took such a pessimistic view and both of them expressed robust views about the App Store's profitability, including its operating margins. We do not need to go to those, but we give the references to the relevant observations and findings by those bodies at paragraph 176 of our written closings. We say it is very significant that the CMA considered and rejected essentially the same arguments that Apple is advancing in this litigation; namely, that it is not possible to meaningfully assess the App Store's profitability on a stand-alone basis.

Just to give you the reference to the CMA's consideration of that point, it is addressed very

clearly in appendix C to the Mobile Ecosystems Market Study, paragraphs 28 to 40, beginning at {AB6/28/9}. You may recall from the cross-examination that Dr Barnes was driven repeatedly to accept that his view was that the regulator's opinion on these matters was just completely wrong.

As I have said, we see now that Apple positively embraces Mr Schiller's acceptance that the App Store is extremely profitable. We say that is perhaps unsurprising given the clear documentary evidence we have seen concerning the profitability estimates that Apple itself produces using the very methodologies on which Mr Dudney has relied, as discussed in Mr Parekh's oral evidence. Most of the relevant oral evidence was given in closed session, so I would perhaps just refer you, to avoid going into closed session, to paragraphs 236 to 244 of our written closings, which deal in detail with the internal documents discussed with Mr Parekh.

You also have our submissions at paragraphs 231 to 233 of our written closings in relation to the so-called line of business reports which Mr Dudney utilises in relation to his primary revenue-based methodology. Those between them cover the two methodologies that, as we saw, Mr Parekh himself refers to as being generally

used within Apple.

Just to tie that to Mr Dudney's reports, if we could go, please, to {C2/7/44}, if we could zoom in, you can see "Table 25: The App Store's ROR"; that is "return on revenue", another term for "operating margin". The row entitled "Per my analysis", that is the estimates that he derives from his primary revenue-based methodology; then "Per Apple's analysis", if you were to follow through the footnote reference, those are taken from the internal profitability documents that we discussed with Mr Parekh and you will see just how closely aligned those estimates, utilising different methodologies, are.

Now, in its appendix 6 Apple refers to a different methodology that was used in a price committee presentation document. That was disclosed late and discussed in Mr Parekh's second witness statement. I do not think I can say anything about this document in open court and I may not need to.

In its appendix 6, paragraph 550, the most that Apple says about the methodology used in that presentation is that it is no more or less arbitrary than Mr Dudney's methods or, rather, Apple's methods. But we have explained in detail why this is not an appropriate methodology on the facts of this case at paragraphs 23 to 30 of our appendix E. As I say, I do

not think I can go through that in open court and I hope I could just refer you to those paragraphs.

I would also remind you, in case it had slipped your mind, of the existence of Dudney 3, which comments on the price committee estimates and shows that, if you adjust them in the way we say is appropriate, you still obtain high operating margin estimates and indeed very high ROCE/WACC comparisons, and Dudney 3 is at {C2/18/1}.

The other more general point that Apple makes in appendix 6 is that Mr Dudney's revenue-based approach simply bakes in high profitability because the App Store has a high gross margin, and you will recall the cross-examination on the "Equations for Mr Dudney" document. That is a point that is made at paragraph 536 of Apple's written closings.

Now, it is of course correct that a high gross margin is an important contributory factor to a high operating margin but it does not follow that operating margin estimates are somehow not meaningful. Without wishing to repeat myself, the revenue-based methodology is Apple's own methodology, one of the two that are said to be generally used by Mr Parekh. In any event, we have seen from Mr Dudney's table 25 that it produces results that are very similar to those produced via

Apple's other preferred internal method.

There is one point of detail on appendix 6 which it is necessary to say something about. If we look at paragraph 540 of appendix 6, {A1/9/186}, again, this is the -- the relevant part is confidential but I hope I can deal with this without mentioning anything confidential. You see that:

"... the main ... documents cited by Dr Kent that deploy revenue allocations are the 'Line of Business' documents, Mr Parekh explained that these are ..."

Then if you could just read the confidential material through to the end of that sentence on the next page. So you see there is a description of what Mr Parekh explained. Sorry, could we have the next page, {A1/9/187}?

The point is just this: the final part of that sentence, beginning with the word -- the underlined word "not", is not an accurate reflection of Mr Parekh's oral evidence. No doubt that is not deliberate, but I would just invite the Tribunal to read the relevant part of the transcript, which is footnoted there, where in fact Mr Parekh made a more limited point about these documents. As I say, we have addressed these matters in much more detail in our written closings.

So that is operating margin. Turning to the

ROA/ROCE estimates and the balance sheet issues, Mr Dudney's ROCE and ROA metrics require Mr Dudney to construct an App Store-specific balance sheet, and then the ROCE figures he derives are an input into Mr Holt's comparison between ROCE and WACC, as the Tribunal knows. It was a striking feature of Apple's cross-examination of Mr Dudney that no issue was taken with his approach to the construction of the App Store balance sheet beyond the general point about the use of a revenue-based allocation method being arbitrary and Apple's written closings, including appendix 6, say next to nothing about specific balance sheet issues. In the circumstances I will just give you the references to paragraphs 247 to 257 of our written closings, where we summarise the evidence, including some of the expert evidence, on the balance-sheet-specific points.

Lastly on limb 1, we have Mr Holt's comparison between Mr Dudney's ROCE estimates and the WACC. Could we look, please, at paragraph 208 of our written closings where the evidence is summarised? Sorry, I do not have the Opus reference to hand. It should be -- thanks {A1/8/69}. Thanks, Mr Ward. (Pause)

Yes. So we see "ROCE vs WACC", and I am afraid the figures are confidential, but you see:

"Mr Holt finds that the App Store's excess of ROCE

... above WACC is between [X% and Y%] over the Relevant Period ..."

Then figures are also given for "the annual profits that Apple has earned in excess of the returns required to cover its cost of capital" from circa 5 billion in 2016 to circa another number by 2023.

We say those figures are obviously high and excessive and satisfy limb 1. Can I just show you for comparison what the CMA said about ROCE/WACC issues? Mr Ward may have showed you this yesterday but I will turn it back up. It is at {AB6/28/14} and it is paragraph 6 to the CMA report.

You will recall the CMA did a ROCE/WACC analysis in this appendix of Apple's overall business and also its device business, so that is the context for these remarks. You can see in the second sentence:

"As a reference point, we would normally expect investors to have an expectation of earning returns of the order of 10% per year for investing in shares of large firms with significant assets and exposure to the wider economy."

That is a reference to the WACC findings in relation to Google and Facebook in an earlier market study.

"In other words, a ROCE above 10% is indicative of Apple making higher returns on its invested capital than

normally required by investors in the shares of comparable companies."

Now, it was put to Mr Holt and perhaps I think also Mr Dudney in cross-examination that the excessive ROCE/WACC figures that are identified would still be there at lower counterfactual commission rates. That is a point that is reiterated at paragraph 419 of Apple's written closings.

We say at the very most, focusing on limb 1, all that shows is that Apple's Commission may have satisfied limb 1 even in the counterfactual. It does not undermine the reliability of the estimates for the purposes of limb 1. On the contrary, it shows that they are conservative -- and this is Mr Holt's point -- and sensitive to reasonable alternative allocations.

Now, we deal with the detail of Mr Holt's ROCE/WACC analysis at paragraphs 259 to 280 of our written closings. No complaint has been made about Mr Holt's approach to the WACC except a minor point that has been corrected in relation to the need to present pre-tax figures for both ROCE and WACC, and that has been corrected and agreed and we give the references in our written closings.

In relation to the ROCE, Mr Holt followed the well-established standard approach of the CMA, which is

to start with accounting-based metrics and then consider whether to make any adjustments, for example, to reflect costs associated with intangible assets that do not appear on the balance sheet. That is the exact approach the CMA used when assessing Apple's profitability, including the profitability of its devices business, and, in fact, making no adjustments to the basic accounting values when it did so. The reference for that is at appendix C to the Mobile Ecosystems report, paragraphs 41 and following, {AB6/28/11}.

And while Apple presents a detailed critique of the CMA's Market Study in appendix 1 to its written closings, it is striking, we say, that it says nothing about the CMA's ROCE/WACC analysis.

In the cross-examination of Mr Holt, there are complaints that had been made by Dr Barnes in his report about Mr Holt's approach to these matters were simply not pursued. Now, instead, Apple's challenge in its written closings is to the relevance of the resulting profitability estimates to the analysis of whether Apple's prices are unfair, including, in particular, the allegation that the ROCE estimates do not factor in valuable intangible assets. We say that is a limb 2 point, not a limb 1 point, and the evidence shows unequivocally that the App Store's profits are

significant and persistent and satisfy limb 1 of *United Brands*.

But before handing back to Mr Ward on the issue of unfairness, let us look at what Apple does say about the relevance of the profitability estimates to the question of unfairness. Could we have Apple's written closings, paragraph 422, {A1/8/150}?

THE CHAIRMAN: Just before you do that, could I just ask you about something you said? I want to make sure I understand it. You said that the allegation that the ROCE estimates do not factor in the intangibles is a limb -- is a limb 2 point, yes. Yes, I see. Sorry. Yes, I see.

MR ARMITAGE: Yes, what is -- (overspeaking)

THE CHAIRMAN: Exactly.

MR ARMITAGE: They have the well-established --

THE CHAIRMAN: Yes, I understand. Sorry, I was just reading it back. So your position is that you do not have to take account of possible variations in the approach to look at intangible assets until you get to limb 2 and that is where you do it --

MR ARMITAGE: Subject to the point that it may be necessary to take account of costs associated with intangible assets in accordance with the CMA criteria --

THE CHAIRMAN: Yes.

MR ARMITAGE: -- which Mr Holt considers. That is the limb 1 aspect.

THE CHAIRMAN: You would do that in limb 1. But then, in limb 2, you then embark on a thought experiment as to whether or not you need to do anything else.

MR ARMITAGE: Limb 2 is obviously a broader enquiry looking at fairness. This is the crossover point between limb 1 and limb 2. I was just going to deal briefly with what Apple says in the profitability section of its written closings in terms of how relevant the profitability estimates are to the question of fairness before handing over to Mr Ward to deal with fairness more generally.

Yes -- sorry -- we need paragraph 422 of the Apple written -- thank you. That is it, {A1/9/138}. We see here that Apple puts its case really extraordinarily high. They say:

"... this is not a case in which the degree or persistence of 'excess profits' established at the Limb 1 stage, even if calculated meaningfully [we say they are], can shed any light on the fairness of Apple's pricing."

Now, insofar as it is suggested that profitability is only relevant to limb 1, that is simply wrong in law, and in fairness I am not sure that that is suggested, but, in case it is necessary, the relevant law is cited

at paragraph 15 of appendix D to our written closings, making it clear that profitability is a relevant factor at the limb 2 stage as well.

But as to the relevance of profitability on the facts of this case, Apple makes three points. The first point is that the CR's ROCE numbers give Apple no credit for its intangible assets beyond what it costs to create them. You have my point that, in relation to limb 1, focusing on costs is the correct and orthodox approach, a point we have just discussed. Mr Holt applies the well-established approach of the CMA to the assessment of profitability.

Now, in relation to limb 2 -- and, as I say, Mr Ward is going to pick these points up also -- but Apple points to some generalised points from the evidence about Apple's IP and its brand, and then, over the page, {A1/9/139}, we have Professor Hitt's memorable reference to the "big blob of intangible assets" sitting underneath everything.

Just to preview some of the points -- and we have obviously dealt with this in closings, written closings -- we say that Apple has made no attempt to identify or value the relevant intangible -- the allegedly relevant intangible products despite Professor Hitt professing to have expertise in that

area. We say that -- we deal with this at paragraph 316(e) of our written closings. Dr Barnes conceded in cross-examination that he had no positive case about either the value of the ROCE or the value of the App Store's assets. The reference for that is {Day13/122:19} to {Day13/123:3}. Yet Apple invites you to find that the source, indeed apparently the sole driver of Apple's excess profitability, is the "blob" and not Apple's monopoly.

We say, in relation to these matters, this is a point on which Apple bears the evidential burden. I just want to show you one authority on this point which we do not, in fairness, cite in our written closings so I will just show you it. It is {AB3/7/21}. This is actually the first instance judgment from *Attheraces*, the judgment of Mr Justice Etherton, as he then was. He is dealing with burden of proof issues. Paragraph 126:

"It is not in dispute that, since the legal burden of proof lies on *ATR* to establish abuse ... the burden also lies on *ATR* to establish each of the analytical steps which are prerequisites ..."

In this case, that is limb 1 and limb 2.

Then we see at paragraph 127:

"It is equally clear that an evidential burden may

lie upon BHB, either initially or generally (depending upon the particular assertion and the manner and circumstances in which it is raised) in relation to any positive assertion by BHB in rebuttal of *ATR*'s case ..."

We say obviously a precise incidence of an evidential burden depends upon the facts, but we say arguments about intangible assets fall into this category. As I say, this is a limb 2 point and Mr Ward is going to be addressing you on fairness generally.

But going back to Apple's written closings when they give the three reasons why profitability is said to be irrelevant, paragraph 422(b), {A1/9/139}, the second reason is that:

"... iOS Devices are integrated products that give rise to two sided markets not only at the level of the App Store but also at the level of the wider platform."

Then just towards the end of the paragraph, fifth line from the end:

"The reality is that iOS Devices are integrated products and Apple's profitability in making them needs to be assessed holistically."

Also that Mr Holt has somehow wrongly considered the App Store in isolation from the wider business.

Now, we say that is misconceived. Mr Dudney allocates the App Store a substantial proportion of

Apple's overall R&D and SG&A expenses, and that includes expenditure that will have nothing to do with the App Store at all. In that regard, Dr Barnes accepted in cross-examination that it was reasonable to conclude that some of Apple's R&D expenditure will not be attributable to the App Store at all, and that was {Day13/17:16-20}.

It goes further because Mr Dudney's profitability analysis, while it takes account of the overall costs of the ecosystem, it takes no account of the substantial revenues that Apple earns in other parts of the business, even though Apple's own evidence is that these revenues are at least partly driven by the App Store. That is the quotation from Mr Schiller that we cite at paragraphs 212 to 213 of our written closings. Perhaps we could just look at that, internal page 67 of the CR's written closings, {A1/8/70}. It is at paragraph 212. In fact, this is the same quotation that Apple refers to in its written closings on profitability. Mr Schiller is asked:

"... Would you agree it has been extremely profitable, the App Store?

"Answer: Yes.

"Question: That is even without taking into account the sales for devices and other services that it [has]

helped to push, would you agree?

"Answer: Yes."

So this particular complaint about the alleged absence of a holistic assessment of profitability is not understood and it bears repeating that Apple has not put forward any alternative estimate of the App Store's profitability. The contention that profitability needs to be assessed holistically is pure assertion without any analysis of how Apple says this should be done.

The third and final point, at paragraph 422(c) of Apple's written closings, page 137 internal, {A1/9/139}, is that Mr Holt accepted that innovative intangible products like Apple's App Store or the apps that are sold on it can produce tremendous value that far exceeds the costs of creating or running them.

It is true, Mr Holt accepted and the CR accepted -- and the CR accepts -- innovative and intangible products can produce value in excess of costs. But of course that does not mean that profitability is irrelevant to the assessment of fairness. All it means is that one cannot equate value with the costs of supply. That was the legal error that the judge at first instance committed in *Attheraces* but it is not an error committed by Mr Holt or the Class Representative.

With that, I will hand over to Mr Ward to address

you further on limb 2 and fairness, unless you have any questions.

THE CHAIRMAN: Yes, thank you.

Closing submissions by MR WARD

MR WARD: Thank you, sir.

Fairness. I am going to start with an obvious point. The unfair pricing case is, of course, premised on Apple being dominant. If not, no question of unfair pricing arises. It does not matter whether you find there to be one market or two. Provided Apple is dominant in the relevant market, the threshold condition for unfair pricing is met. This matters because Apple has persistently tried to answer this case on the basis that it operates in competitive markets.

Can we turn up its closing, please, at {A1/9/4}, paragraph 7? Thank you. If you can just zoom in a little bit. Thank you very much. In the last five lines it says:

"What the evidence before the Tribunal in fact demonstrated was that Apple's Commission is competitive ... precisely because commissions are constrained by competition in the device markets and by alternative transaction channels. In other words, Apple is not dominant in any relevant markets."

But of course, if that is right, we do not get to

unfair pricing. This is exactly the trap that Professor Hitt fell into. Could we please turn up {C4/4/6}? This is his joint expert statement with Mr Holt. Thank you so much. Zoom in a little bit on 6 and 7. In 6 the question -- the proposition is:

"Comparing ROCE to WACC can provide relevant insights into whether a price is excessive and/or unfair."

Professor Hitt starts with a qualified acceptance, and then he said:

"However, a ROCE versus WACC comparison will not shed light on whether the App Store Commission rates are excessive/unfair. In fact, high and persistent profitability is common for innovative and competitively constrained firm like Apple."

Then similarly in the next row, which asks the question whether the market conditions allow Apple to set unfair prices, he says:

"Disagree. The App Store faces significant competitive constraints in the multiple ... markets it competes in."

So it is something of a challenge to disentangle Apple's case from its assertion that it is not dominant at all, but we have to try and get past that step if we are going to consider unfair pricing. On the limited

occasions where Professor Hitt tried to do that, he was forced into absurdity, in our respectful submission.

Could we go to {C3/4/221}? This is Professor Hitt's second report. You might recall I took him to this in cross-examination. It is paragraph 398, where he says:

"For completeness [as if this were a really second order consideration], I note that the CMA in its Final Report on its Mobile Ecosystems Market Study has said that Apple's App Store and also its devices business are highly profitable. It states that Apple charges 'above a competitive rate for its devices' and similarly that it charges 'above a competitive rate of commission to app developers'. I also note that in Epic v Apple, Judge Gonzalez Rogers described the App Store as earning 'supracompetitive operating margins'."

That is, in a sense, the issue. He says:

"As I understand them, such findings ... do not in any way undermine my analysis ... Profitability is not a measure of value for an innovative, differentiated product like the App Store ..."

That is the point obviously Mr Armitage has just addressed you to. Then he carries on:

"Likewise, were different prices to hypothetically arise in what Mr Holt may describe as a 'competitive' market in which, for the sake of argument, Apple were

forced to allow developers to distribute iOS Apps to consumers outside of the App Store, such prices would not reflect the value that developers and consumers derive from the App Store."

Well, in our respectful submission, this amounts to saying that Apple is entitled to monopoly rents on the App Store, even if prices would be lower in competition, and that, with respect, is certainly not the law.

Now, I would like to start looking at Mr Holt's analysis by looking at his summary of his case on fairness, and that is at {C2/10/97}. This is Mr Holt's second -- I am sorry, third report. Thank you. Just at the very bottom of the page, paragraph 6.13 begins:

"I consider that the Commission was unfair in itself in relation to each of the iOS App Distribution Market and the iOS In-App Aftermarket. for the following reasons."

If we please turn the page, {C2/10/98}, there is a long list. I am not going to read it all out, but obviously we invite you to consider the whole thing. You will see that the short point I am making here is that there is much more than merely the comparator analysis, whereas certainly at times the flavour of Apple's closing was that you might be forgiven for thinking that that was the whole analysis.

Just to look at the first few bullets:

"The App Store has earned very high levels of profit under a variety of profitability metrics which far surpass levels that may be required to encourage investment.

"The App Store's profits have persisted (at least) over the duration of the Relevant Period, and in spite of this there is no evidence of emerging competitive constraints on Apple.

"The Commission is not consistent with the provision of economic value reflecting demand-side benefits ... (although the App Store would likely have earned high profits and producers' surplus in the counterfactual with a fair commission ...).

"(d) Apple's Commission is much higher [than] I expect would have applied in conditions of workable competition ..."

That is in part a reference back to the comparators.

Then he talks about the market context at (e). Now:

"[It] operates in a market context, for each of the iOS ... Distribution Markets ... in which there is no rivalry; limited competitive constraints from outside the market; limited countervailing buyer power; and no evidence of entry. This all suggests that the Commission was sustained in markets which were not

contestable."

I will not read the rest, but there is more. These were points we have already discussed.

What we see, therefore, is the market power analysis is a key premise, and on that analysis, of course, as Mr Hoskins has been submitting to you, Apple is not just dominant, but it is a monopolist, and it is not just a monopolist, it is protected from competitive entry because it has foreclosed all competition on those markets. That is key to the analysis, but, with respect, it is a point that Apple has simply never grappled with.

Can we now turn up *Albion Water*, {AB3/10/88}. If we zoom towards -- I am so sorry. It must be the previous page, {AB3/10/87}. Yes, thank you. Can we zoom to the bottom? Thank you. It is paragraph 270 which we say, with respect, applies equally here:

"In our judgment, it follows that the relevant market was clearly not capable of functioning in a manner that produced, or was likely to produce, a reasonable relationship between the First Access Price and the economic value of the services ..."

Now, Apple's approach to this is really just to reassert its case that Apple is not dominant, but, as I said yesterday and I do want to reiterate, we do not

say that any price charged by a monopolist is per se unfair. If Apple had charged a commission of, say, 3%, we could have had no complaint, but in fact it stuck to a headline rate that was chosen in 2008 without regard to costs, without regard to economic value.

If we can now go back to Apple's closing, at {A1/9/146}, and zoom towards the bottom, please, you will see in the last five lines of 451, it says -- last five lines:

"It is ... wrong to say that the SBP [and other] programs represent situations where Apple is constrained or its customers have buyer power, in contrast with those who pay 30%."

So, even on Apple's case here, we can see that these programs were not, in a sense, a response to competition with Apple.

It is 11.42. I was about to move on to my next topic, if that is convenient.

THE CHAIRMAN: Yes, it is. We will take a ten-minute break. Thank you.

MR WARD: Thank you.

(11.43 am)

(A short break)

(11.53 am)

THE CHAIRMAN: Yes, Mr Ward.

MR WARD: So the question is: what explains the very high profits of the App Store? Mr Holt's view is that, if there were competition, these prices would have attracted entry; the profits would have been competed down. That, of course, is consistent with the view of the CMA which we have already seen, but maybe we can just get it back on the screen, {AB6/28/12}. This is paragraph 44 which I took you to yesterday, the fourth line:

"In a market characterised by effective competition, any excess of returns above the WACC would then be expected to be eroded over time, as competitors would see an opportunity to enter and earn high returns on capital."

Now of course, as I also said yesterday, though, we do not go as far as the CMA. Mr Holt's analysis envisages Apple earning much more than the WACC in the competitive counterfactual. But one of the points emerging from the comparators that Mr Armitage is going to go to is that how prices have, in fact, fallen in a market which does have workable competition.

Now, Apple's view is that this monopoly price reflects the economic value of its services, even though it was no part of the consideration that went into its price setting in 2008 and even though it has made no

attempt to quantify that value. Just for the transcript, paragraph 287 of our closing on page 95 sets out the relevant evidence about how the 30% price was set.

Now, Apple's point has been put in various different ways throughout the trial but at the heart of it is the idea that developers generate a lot of value out of the App Store and so the price Apple charges is a fair one. A good example of that, again for the transcript only, is Apple's closing, page 138, paragraph 424.

But all of the variants of this argument suffer from the willingness to pay fallacy. Many developers clearly are willing to pay the price that Apple asks, they undoubtedly do perceive economic value in being able to market iOS Apps which they are otherwise prevented from doing, but it does not follow that the actual price is the price Apple would have been able to obtain in conditions of workable competition.

I just want to remind you of the law on this. Can we go to *Flynn Pharma*, {AB3/37/50}, paragraph 155, please:

"The simple fact that a consumer will or must pay the price that a dominant undertaking demands is not therefore an indication it reflects a reasonable relationship with economic value. But a proxy might be

what consumers are prepared to pay for the good or service in an effectively competitive market ..."

Then if we go, please, to *Le Patourel*, {AB3/62/219}, paragraph 960, picking it up in the second line at the end:

"... the fact that a product may have some additional economic value cannot itself be a defence to a claim based on unfair pricing if the customers are in a truly captive market in all respects and have nowhere else to go. This is the essence of the Willingness to Pay fallacy. In such a case the excessive price will not bear a reasonable relation to its economic value. On the other hand, if the customers are not captive, then it would be easier to ascribe a reasonable relation to the underlying economic value."

Then finally, just for the transcript, Advocate General Jacobs said something very similar in *Tournier*, and it is {AB4/3.2/22}, paragraph 65.

Now, it is worth looking at how Apple addresses this argument, and this is its closing at {A1/9/140}, please. It is paragraph 425. They say:

"Mr Holt's and Dr Kent's response to this point [about the value they create] is to say that it falls foul of the 'willingness to pay fallacy' [true]. But nobody is suggesting that Apple is extracting anything

like developers' maximum willingness to pay."

Well, that is not the test. The fact that Apple could charge even more tells us nothing at all about whether or not this price is above the price payable in workable competition.

Then Apple goes on to talk about the share that is captured by developers, but this is not a joint venture between Apple and a developer or where there is a negotiation about the split of proceeds. Apple is a monopolist that unilaterally imposes its terms of trade. If a developer wants to sell an iOS app, the developer must accept them. Of course it is true that some apps, like, say, a game, might generate large revenues for developers -- they do -- but it does not follow that the developer revenue represents the economic value of the App Store.

This is what -- the car battery fallacy that we discussed with Professor Hitt. Imagine an electric car that might sell for 50,000. There might be an innovative battery that is forming part of the car, using a patented technology, although, pausing there, car manufacturers at least have a choice of batteries. But the economic value of the battery is not the economic value of the car. That latter value reflects the car manufacturer's own inputs.

In the same way, the success of an app is also down to the developer's activities, their innovation, their IP, their marketing, so the revenues that developers earn, as a result, simply do not justify Apple's monopoly price.

Now, a new argument came to light during cross-examination that the prices could be justified because they were competitive when they were set in 2008. Apple rely heavily on a single slide with the title "Checkpoints" that mentioned the commission rates charged by some other businesses; and again, for the transcript, that is {D1/28/19}.

But thinking back to this "Checkpoints" slide deck, there has not been any evidence about who considered it, when they considered it or for what purpose. It is not a point that has been advanced by Apple's experts in response to the unfair pricing case that it is fair by reference to 2008 and indeed there is no analysis by Apple's experts of the competitive conditions for the App Store at that time.

But even if 30% was a competitive price when the App Store first launched, a point on which we have no detailed analysis, it is just a non-sequitur to say, "This means it was competitive during the Claim Period", which of course started many, many years later.

You will recall yesterday Mr Hoskins explained anyway why it is our case that Apple imposed the restrictions that excluded App Store competition from the outset and was therefore dominant from the outset, and I simply refer back to Mr Hoskins for that.

Now, part of Apple's argument is of course that its innovation and its IP somehow serves to justify the monopoly price. If we go back again to the joint expert statement, {C4/4/6}, please, proposition 6 -- I showed you this before the break, but again we can see that -- in Professor Hitt's answer in line 5:

"... high and persistent profitability is common for innovative and competitively constrained [companies] like Apple."

So, again, what we see is that the idea that the price can be justified by innovation is bound up with Professor Hitt's view that the price -- that the market is competitive. But if you go beyond that and look at it in our world, which is to say, "It is not merely a dominant but a monopolist", then it just becomes assertion that somehow this monopoly price is, in a sense, nevertheless equivalent to the price, the value of the intangible assets in workable competition.

Now, the focus of this argument has been the so-called tools and technology, and I am going to make

three points about this. The first is that Apple's own agreement makes clear that the charge for access to these tools and technology is the annual developer program fee. Mr Hoskins took you to that yesterday. I want to emphasise, this is not just a matter of contractual formalism. This is the charge that Apple makes to all developers, whether free apps, physical goods or the kind of apps that trigger payments of the commission. The charge is the same no matter how many apps a developer launches each year. It is just an annual charge. The charge is the same whether or not the commission paid is 30% or 15%.

You have seen the evidence that Apple does this, of course, because the App Store helps drive device sales or, rather, strictly, the apps on the App Store do, and that is all confirmed by Mr Schiller and set out in our closing. So it is simply wrong to suggest that the economic value that should be attributed to the commission is the value of the tools and technology.

Secondly, even if it is to be taken into account, the argument remains entirely circular. Could we go to the judgment in *Epic v Apple* in California, {AB5/7/35}? If we could zoom in so we can see the third paragraph. It starts with the judge noting Apple's intellectual property and its patents. Then it says in the fourth

line:

"Other than these patents, Apple does not identify specifically how the rest of its intellectual property portfolio impacts the technology at issue in this case ..."

Then it is the next bit:

"... nor does it specifically justify its 30% commission based on the value of the intellectual property. It only assumes [that this] justifies the rate."

That, in our respectful submission, is precisely the position here.

Then there is a third point which I am going to make that overlaps with Mr Armitage's points from a moment ago. Can we go to Apple's closing now, please, at {A1/9/138}? It is 422(a). I am going to look at this through the fairness part of the telescope rather than the excessive -- sorry, not telescope -- limb.

At 422(a), this is saying why the profits do not shed any light on the fairness of pricing:

"First, Mr Holt accepted that his ROCE numbers 'give no credit at all for its intangible assets beyond what it costs to create them'."

That is right, and it is right because, as Mr Armitage said, Mr Holt and Mr Dudney's approach

follows that of the CMA about whether to put intangible assets on the balance sheet.

Just for the transcript, we can see that in the Competition Commission Guidance at {D2/348/89}, paragraph 14, and in the CMA Mobile Ecosystems Report at {AB6/19/31}, which -- and then also applied to Apple, {AB6/28/22}, paragraphs 83 and 86. Of course, Dr Barnes accepted that none of Apple's intangible assets met the criteria for inclusion on the balance sheet.

Then we go over the page, {A1/9/139}, and again, as Mr Armitage has already showed you -- the top of the next page, please -- we get the "big blob of intangible assets". Of course, as Mr Armitage said, neither Professor Hitt nor any other Apple witness has actually valued these assets or attempted to explain which are attributable to the App Store itself because, of course, it is Apple's case that it is all indivisible.

But the really important point, though, from a fairness point of view is that Mr Holt's ROCE analysis is not determinative of his approach to economic value. He allows Apple a generous return of an aggregate commission of 15%. So what that means is that Apple would still make huge returns on the App Store and whatever intangible assets it is said to represent.

THE CHAIRMAN: Mr Ward, can I just interrupt you for

a moment, just to make sure I understand that? So I think you are saying that -- so wherever we see this argument that is put in lots of different ways; it might be summarised as "tools and tech", and sometimes it is put as "innovation" and other sorts of things. But I think you are saying that you read it, as indeed I do, as being something which goes, at least in this context, into the question of economic value.

MR WARD: I think it does. I think it is fair to say that Professor Hitt was not clear which limb of the test he was addressing at any one time.

THE CHAIRMAN: Yes.

MR WARD: So the way we have approached it is to try to be systematic and say, "The ROCE/WACC analysis measures profitability. It does so under the orthodox framework, including the orthodox framework for analysing intangible assets".

THE CHAIRMAN: Yes.

MR WARD: That is not, we would respectfully suggest, seriously challenged.

Mr Holt analyses the question of economic value under limb 2, and you will recall from our case law bullet points that it can be analysed under limb 1 or limb 2, but the case law suggests economic value is better done under limb 2. It is not compulsory, but

that is indeed the way Mr Holt has done it.

So limb 2, he has looked at the question of what is the economic value of the App Store, including, of course, all of these arguments around intangible assets. I showed you that he has a kind of multifactorial approach to economic fairness, but I also showed you that the litmus test is: what would the price be in workable competition? So these tools and technology might be marvellous or they might not, but the real question is: what would people pay by way of a workably competitive price, not a monopoly price? Of course, on our case, it is a monopoly price.

THE CHAIRMAN: Yes. I do not want to drift into the benchmarks analysis, which is a danger --

MR WARD: It is coming soon.

THE CHAIRMAN: It is coming soon, but just -- maybe just to step back a little bit. So I think you are saying -- and I -- just to check that I have got this right -- that you could look at economic value in lots of different places and you have chosen to put it in at limb 2. Equally, you could, in relation to some of the aspects of it, perhaps, take a view that it could amount to some sort of accounting valuation treatment that went into your calculation for limb 1 or indeed limb 2 if you are comparing ROCE and WACC, so there is a way in which,

sticking with --

MR WARD: (overspeaking).

THE CHAIRMAN: Yes.

MR WARD: So under the ROCE analysis, the costs are accounted for.

THE CHAIRMAN: Yes, exactly. Yes.

MR WARD: The question is: is there also an asset that has to be accounted for?

THE CHAIRMAN: Yes, and the question of capitalisation of that, yes.

MR WARD: We accepted -- and we went through all of this -- that in principle one can capitalise on assets such as an intangible assets and put it on the balance sheet, but there are criteria for doing so which were not challenged by Dr Barnes, they were not challenged in cross-examination. In fact, Dr Barnes just ignored them when Mr Holt raised them in the joint expert process, which you can see in the joint expert statement.

THE CHAIRMAN: Yes.

MR WARD: But when I cross-examined Dr Barnes, he accepted that they did not meet these criteria. He did not suggest the criteria were wrong. So the ROCE/WACC analysis addresses the intangible assets in an appropriate, orthodox way.

THE CHAIRMAN: Yes, although somebody -- was it

Mr Dudney? -- did conduct an exercise on capitalisation, did he not, as a sense check?

MR WARD: He did, sir. He carried out a sensitivity and he looked at -- he carried out a sensitivity where he did test the capitalisation of the assets and the results were not sensitive to it --

THE CHAIRMAN: Yes.

MR WARD: -- for a number of reasons, including the fact that, when you capitalise the assets, you lose something from the balance sheet, so it is not a complete- -- sorry, from the P&L -- so it is not a completely one-way street.

THE CHAIRMAN: Of course, but he may (overspeaking) --

MR WARD: He carried out a sensitivity, and he was not cross-examined on this sensitivity either --

THE CHAIRMAN: No.

MR WARD: -- but the end result of that was that Mr Dudney's approach was just like the CMA in the Mobile Ecosystems Report, namely it used the book value of assets, it looked at a sensitivity for whether to capitalise some of the assets, but it essentially, in the end, remained with the book value.

THE CHAIRMAN: Yes.

MR WARD: Now, of course, Apple could have run some much more developed case, a positive case, about

capitalisation of these assets. It could have produced evidence about the valuation of the assets and so on and so forth. It did not do any of that. What we had instead was a wholly negative critique from Dr Barnes, who basically said, "Everything is impossible, everything is meaningless".

THE CHAIRMAN: There was also a theory, was there not, that somehow the market capitalisation might provide you with some guidance about the economic value as well, and I do not need to go down -- just to make that --

MR WARD: (Overspeaking) We dealt with that at cross-examination.

THE CHAIRMAN: Yes, that was put on the table as well.

MR WARD: From recollection, but I will be corrected, I do not think that point arises or is given life in Apple's closing. I may be wrong.

THE CHAIRMAN: We will see if it comes back, but that sort of completes the picture.

MR WARD: It is a different point. So where we are, then -- our case is that the ROCE/WACC analysis deals with these intangibles in the appropriate orthodox way, which was, in my respectful submission, not seriously challenged. Economic value is dealt with by Mr Holt under limb 2, which itself is entirely orthodox. That economic value takes into account the value of the services, including

the intangible -- including their intangible nature and the benefits that they accrue to developers.

THE CHAIRMAN: He does that in a qualitative way --

MR WARD: He does.

THE CHAIRMAN: -- because he is considering the market conditions and the competition and so on.

MR WARD: Indeed, and he starts with the, in my respectful submission, very strong point that, where you have not just this monopoly but this restrictive monopoly that precludes entry, that then it precludes what one would ordinarily expect, that such high profits would attract entry and drive the prices down. That is why, at the risk of labouring it, I have shown you that passage from the CMA again. Mr Holt's analysis is entirely consistent with the CMA's approach.

But, of course, that is not the whole of it, which is --

THE CHAIRMAN: No. If I may, just before you -- because I want to just come to the last bit of this chain -- sorry, I have taken up a lot of time -- but the last bit in the chain is the point about the benchmarks. As I say, I do not want to get into the individual benchmarks, I know Mr Armitage is going to do that, but just conceptually, what then is said, I think, is that you -- there is a break in the logic there because when

you go to the benchmarks you are not going to anybody who is putting the same sort of intangible assets on the table for the developer.

MR WARD: Yes, that is the point Mr Armitage is going to deal with.

THE CHAIRMAN: He is going to deal with that, yes.

MR WARD: But we do make the point, though, about why -- the point I made a moment ago is that the commission is not itself a charge for these tools and technology.

THE CHAIRMAN: Well, that is part -- in a way, that is -- I mean, it sort of answers the questions of does and does not because Apple says that is how it is charging for it.

MR WARD: Of course, and that is one of the issues you are going to have to decide.

THE CHAIRMAN: Yes.

MR WARD: I have explained our case on that. Then there is, of course, the other exciting world of alternative charges, which Mr Hoskins addressed you on --

THE CHAIRMAN: Yes.

MR WARD: -- on Monday and I -- in our closing on excessive pricing, there is also a little bit about that at the end as well, if you like, looking at that through the lens of the excessive and unfair pricing case.

THE CHAIRMAN: Yes. Just on that -- just on that point --

and I do not want you to steal any thunder from Mr Armitage -- but just the conceptual point that if you are -- so you have got this -- in a way, you have almost got a sort of pollution of the condition of the identification of the commission -- if you are viewing it as you say the contract sets it up, you have got this pollution of it because it is not just about distribution and payment services; it is about something else, and that is the way that Apple says that it has to be thinking about it. Whether that is right or wrong, that is what they say. So if you -- so -- and I suppose the sharp point of this question is that I think you are saying that you -- it is testing the consistency between the idea that you can have a commission set at 15% and then still have very significant profits, you say, under a ROCE analysis, and I think you accept also that that reflects some premium because of what Apple is bringing to the party, and -- well, you see where I am going with this. I am testing, in a way, that point with whether -- whether you are or are not taking a fairly bright line on what this commission actually is and you are saying, "I do not care about the tools and tech, they belong somewhere else". That is the point I am interested in, the conceptual point.

MR WARD: Yes, yes. I understand the point. Mr Armitage is

going to go into this as well. But in a sense the first line of argument here is the tools and tech are separately charged for.

THE CHAIRMAN: Yes.

MR WARD: The second round of -- line of argument is that the 15% commission represents a kind of in-the-round assessment by Mr Holt as well. He does not say any one of these comparators is perfect.

THE CHAIRMAN: Yes.

MR WARD: Beyond that the questions that you are asking are entirely granular, which mean -- raise granular issues, I mean, that Mr Armitage is going to --

THE CHAIRMAN: Yes, I understand that. I do not want to get into that.

MR WARD: I do want to clarify. Our case does not stand or fall on the question of whether the tools and technology are separately charged for. That is, in a sense, a first line observation. Even if you are against us on that, we say the comparators are still compelling, recognising the role of the comparators is not to be precise or exact in the comparison that is being drawn but also recognising that part of our case on the comparators is that they show what happens when there is competitive entry. So not just, "Oh, look, the Microsoft Store is exactly the same as Apple in every

one of these 14 respects". It is the dynamic of competition which is revealed in a market which has been open to workable competition that is entirely foreclosed from a market that we are talking about, so that is why it operates on different layers. But the tools and technology point, in particular, I know Mr Armitage is going to address you on.

THE CHAIRMAN: Yes. No, I understand. I think -- I just -- it is partly a consistency point as well because obviously Mr Hoskins has been encouraging us in relation to exclusionary abuses to get to a certain point and determine that there is a particular outcome --

MR WARD: Yes.

THE CHAIRMAN: -- which I think is -- as I understand it, the argument is based really, once you get through to the end of that, on saying that the charges for the tools and the tech do not come into that, you push them to one side, and I suppose I am wondering whether, in fact, your argument really amounts to the same thing when we get through to the end point of this.

MR WARD: I think it does.

THE CHAIRMAN: Yes. Well, I am sure it does.

MR WARD: (Overspeaking) Consistency is always good in our case. As I said, we have a parallel section on tools and technology which looks a lot like Mr Hoskins' as

well and where we say, "Look, when you envisage what would Apple do in the counterfactual ...", which is in a sense the counterfactual of workable competition, we give a range of reasons why the tools and technology argument does not get off the ground. One is the lack of factual evidence point that Mr Hoskins made.

THE CHAIRMAN: Yes.

MR WARD: The second is incentives. There are plenty of incentives to carry on providing these for nothing. The third is a sort of pricing point, which is: we do not even know which bit of tools and technology would be needed in the counterfactual, still less what the charge of it would be, because Apple has chosen to pursue all this argument at a very high level of abstraction, not descending into any detail in the way that might have been of more assistance to the court.

THE CHAIRMAN: No, I understand all of that. I am sure that is all coming. I suppose -- I think the concern that I am hearing is more one about, if we are faced with this task, trying to do it in a way that -- to address it in a way that has some internal consistency of its own, and we do have this complicating factor that sits in the middle of it and it appears in every bit of this case, and untangling it and trying to work out what the right answer is and how one -- where one takes it into

account is quite complicated. It is a little bit of a -- forgive me for putting this way because it is not in any sense a criticism. I think it probably is necessary. There is almost a little bit of a fudge that one gets to when you get to this question of comparators and so on and the number because you -- I think you acknowledge that -- and I do not think there is any problem with this in terms of the framework for unfair pricing -- but you acknowledge that it is not necessarily the price, it is just the best we can do as an indicator of where workable competition might come out.

MR WARD: Yes, and obviously I would prefer not to call it a "fudge" and go with something like "multifactorial assessment of all the evidence".

THE CHAIRMAN: Yes. Well, do not take the "fudge" as a slur on you.

MR WARD: Joking aside, that is the reality, that Mr Holt's analysis is looking at a broad range of evidence and reaching a judgment, and of course the Tribunal's job is to consider that judgment as well. If you decide that in your judgment the 30% is indeed workably competitive by reference to the counterfactuals, well, then, obviously the unfair pricing case is going to fail, but --

THE CHAIRMAN: Yes. Implicit in that is the 30% for what? You know, what is the service that has been provided? That is the problem --

MR WARD: Indeed, but that is also in the granularity --

THE CHAIRMAN: Yes, it is.

MR WARD: -- in other words, in the sense of how germane are these counterfactuals and, insofar as they do not provide tools and technology, what difference does that make. That is partly our alternative charges argument, which says that it is just essentially assertion by Apple that this is a material difference between the two, because you are being asked, in a sense, to defeat the proposed comparators on the basis of assertions about what difference the tools and technology really make here.

THE CHAIRMAN: Yes, that is helpful -- very helpful indeed. Thank you.

MR WARD: Thank you. I just have one more point to deal with, before I hand over to Mr Armitage, but it is very brief actually, and it relates to the ecosystem argument; in other words, the -- Apple's ecosystem.

Again, this is an area where Apple puts its case astonishingly high, and if we can please turn up Professor Hitt's second statement, {C3/4/212}. Thank you. Zooming in on the bottom of the page, 377 -- and

this is just one of many places where he put the formulation in a similar way. He says:

"The commission Apple charges is Apple's compensation for providing all the products and services that contribute to the value [consumers] and developers derive from the iOS ecosystem."

"All -- "all the products and services". Obviously we discussed this with Professor Hitt.

This analysis is, of course, all one way by Apple. Apple says we have to take into account all the value of the ecosystem but not all the other benefits that Apple enjoys in exchange, so the revenue -- the obvious point -- the revenue from the devices, the other charges from its services and even for the App Store itself, the way in which the apps on the App Store boost the sales of Apple's devices and services. But this also is another -- so we say it is just wrong, it is wrong. It is wrong in principle as well because, of course, what we are concerned with is the goods on the -- services on the target market.

But it is also another aspect of Apple's exceptionalism, we would respectfully submit. It says it sells integrated products but they cannot -- so they cannot be looked at separately. We can see why that is attractive to Apple, but it has not stopped the CMA or

the US court from looking at its profitability. Indeed, in particular, they had no difficult in disentangling the costs, as you know. Indeed, it has not stopped Apple from looking at the profitability of the App Store.

Now, Apple has made certain choices about how to monetise its ecosystem; charges on some things, not on others. Part of that structure is to charge commission on the App Store transactions. But the question is whether those charges, for those specific services, are above the prices Apple would obtain in workable competition. You have seen why we say that they are. Certainly an important part of that is the comparator exercise. That is where I hand back to Mr Armitage, unless you have further questions.

THE CHAIRMAN: Thank you very much.

MR WARD: Thank you.

Submissions by MR ARMITAGE

MR ARMITAGE: Yes. So on the comparators, I think I have four headings, if you like. I have some preliminary points about the role of comparators in relation to the unfair pricing cost and how Mr Holt's approach is consistent with the relevant case law; I will then say something about the evidence and arguments in relation to the specific comparators that Mr Holt relies on;

I will then say something about the comparators Apple relies on, which it says that Mr Holt has wrongly disregarded; finally, I will say something about the counterfactual to the unfair pricing case, where comparators obviously also play a role.

While I am focusing on the unfair pricing case, there is of course read-across with the exclusionary case, as Mr Hoskins mentioned yesterday. But in terms of the role of comparators in relation to the unfair pricing case, they are relevant to questions of both infringement and quantum. On infringement, as Mr Ward has said, they are part of the evidential picture in relation to the general question of whether the commission is unfair in itself. We say, if necessary, they also demonstrate unfairness in comparison, so the alternative formulation in limb 2 of *United Brands*, although, in terms of the Tribunal's overall assessment, one can see that it may be right to consider these matters together.

In relation to quantum, they inform Mr Holt's estimate of the likely effective rate of commission in the counterfactual, absent the unfair pricing abuse. Quantum is, of course, a matter for the broad axe, not the balance of probabilities, but it is important to note at the outset that, in order to establish unfair

pricing, to establish an infringement in this regard, it is not necessary to show what the fair price would have been, the price that would have been payable in workable competition. That is a point made by Mr Justice Roth in the *Gutmann* case. Can I just show you that? It is at {AB3/45/29}, paragraph 68. This was a judgment on certification, but Mr Justice Roth was dealing with a point of law which arose about whether establishing abuse requires the identification of a counterfactual in specific detail. We see in the fourth line:

"More generally, to establish that conduct is an abuse does not require the identification of a counterfactual in specific detail."

The first example given is exclusive dealing, but then we see:

"Similarly, in an unfair pricing case, an excessive price can be shown to constitute an abuse without specifying precisely what would be the non-excessive price."

So on that basis we say that, in order to establish that Apple has committed the abuse of unfair pricing, we need to satisfy you that the commission is above a price that would be charged in workable competition, but we do not need to establish for those purposes what the price would be in conditions of workable competition.

There is no need to turn it up but a very similar point is made in the *Napp* case, paragraph 405 of that judgment, {AB3/2/111}. We say that is an important point when it comes to considering the PC comparators that Mr Holt relies on.

You have seen there is a variety of prices in the PC comparators market. There is, of course, the question about the tools and technology, which I will come back to. But in order to establish an infringement, we do not need to show that any particular one of these comparators represents the fair price for Apple, and I will show you that surely this is not the nature of the reliance that Mr Holt places upon them.

We say what is important about the comparators is that they show the impacts of competitive entry on a monolithic 30% commission rate that had been charged for well over a decade by the incumbent provider. No need to turn it up, but that is the US court's characterisation of the position in the PC market in the *Epic v Apple* case, {AB5/7/98}.

So the comparators are one part -- certainly an important part, but one part of the evidence base that supports Mr Holt's opinion and the Class Representative's case that Apple's Commission in respect of the App Store would be significantly lower in

conditions of workable competition such that the Tribunal can be satisfied that they are now above and indeed have always been above such levels and therefore unfair.

Of course, when it comes to the counterfactual, that is a different analytical enquiry which does require you to think about what the commission would have been in the absence of unfair pricing, and I will come back to that at the end, but they are separate analytical stages, in our submission.

Now, I would just like to show you two authorities on the proper legal approach to comparators in the context of unfair pricing. The first is going back, I think, for the third time to *Hydrocortisone*, {AB3/57/164}, paragraph 331(1):

"Comparators are of particular importance, even where they may not be clear or compelling. Comparators can include: (i) [among other things] comparators on different markets ..."

Then:

"In all cases, the critical question for the court is whether anything probative can be derived from the comparator in question."

That makes clear that it is necessary to take a measured and realistic view in relation to the

evidential value of comparators, recognising, as Mr Holt does, that no comparator will ever be perfect.

Now, if we could look at *Le Patourel*, {AB3/60/26}, we see that the Tribunal has -- {AB3/62/26} -- thank you -- the heading, "Unfairness by Comparison", paragraph 92 summarises some of the points and indeed cites *Hydrocortisone*, paragraph 331(1), in relation to the general approach, but then at 93 we see the Tribunal recognises a limit on the relevance of comparators:

"... if the comparator prices are themselves distorted because they were not set in conditions of effective competition and were affected by the exercise of market power, they are not reliable."

That is an important point in this case when it comes to some of the comparators that Apple invokes.

Now, we say that Mr Holt's approach to the comparators was fully aligned with this case law and, in fact, he explained this cogently during cross-examination. We quote the relevant passage at paragraph 322 of our written closings, but it is worth turning up the transcript, if we may. Could we have on the screen, please, {Day19/28:1}? You can see at line 9, {Day19/28:9}, Mr Holt is challenged about not having conducted, according to Apple's counsel, "a comparative analysis of these various quality

parameters as between the App Store and these comparators, these benchmarks that you rely on?".

Now, pausing there, we say this is an unfair criticism of Mr Holt in circumstances where Apple's own experts have not conducted any such analysis either. Indeed, there was much reference to quality-adjusted pricing and the need to take account of such matters. But Professor Sweeting, who I think was the source of the point on quality-adjusted pricing, has accepted in cross-examination that it would be impossible to do the kind of quality-adjusted pricing analysis that Apple suggest is needed in this context. We give the relevant transcript references at paragraph 326 of our written closings.

Of course, Professor Hitt is the one who says that quality differences between the App Store and the PC comparators is so great that they are not probative. We say that lacks reality and we will look at some of the evidence in a moment.

But the more fundamental point is that it is not the right way of thinking about comparators in an unfair pricing case, and we see Mr Holt makes that point, as I say, very cogently in response. He says, {Day19/28:14}:

"I think it is fair to say I have not tried to look

at all the dimensions of what an app store might offer."

Then at line 20, {Day19/28:20}:

"My approach is essentially an entirely different one. Given that we do not have a within market comparator, at least that I think is viable, i.e. you cannot compare a previous time and say, with other things having been controlled for, that is a good benchmark ... you necessarily have to look at other markets. In my view, the PC app distribution market it is the best, albeit imperfect. As a set of cases, it is I think reasonable because it is digital distribution, it is a broadly similar business structure, and there is at least evidence of what happens when there is entry and competition. I am not saying it is perfect. Obviously it is not even in the same market, so of course there might be different considerations that might be relevant to some extent, but as a, in my view, probative piece of evidence, I think it is quite persuasive."

Then he refers to the "in the round" assessment, partly based on comparator, partly based on iOS aspects.

Now, we say that is a measured and realistic view of the relevance of comparators in a case in which, due to Apple's conduct, there are no other providers of app distribution services or indeed in-app payment services

in relation to iOS markets, and it is entirely in accordance, we say, with the case law that I showed you.

Just reading on a little further, page 29 -- I am sorry, on the same page, line 18, {Day19/29:18}, Mr Holt is asked:

"But you cannot say, can you, how low or high Apple should be in the counterfactual, so how high or low Apple should be ..."

But of course, as I have shown you in *Gutmann*, the law does not require a claimant to identify with precision what the fair price would be in order to establish an unfair pricing abuse. In relation to what the price would be in the counterfactual for the purposes of quantum, it is a different matter, but it is a matter for the broad axe. Mr Holt does give a view on that too and we will come to that.

Now, in terms of the points that are debated with Mr Ward, if we could just go to paragraph 434 of Apple's written closings. That is {A1/9/142}. This is the point that you discussed with Mr Ward and I am not sure that that is stealing my thunder, but I do think in a sense Mr Ward has addressed the point.

THE CHAIRMAN: Yes. Just to be clear, I mean -- and I think you should come on and deal with this -- but the point I was trying to make with Mr Ward was more how it fitted

into the right picture rather than necessarily whether it was right or wrong, so I was not anticipating Mr Ward answering this question and you should go ahead and say what you want to.

MR ARMITAGE: No, of course. What we say here is that Apple makes a general argument about Mr Holt's approach to the comparators analysis. The argument is that Mr Holt's approach of looking to the PC comparators is fundamentally flawed because Apple's Commission is not just charged for distribution and in-app payment services; rather, it is said to be a price for all the value Apple provides to developers, including Apple's proprietary tools and technology.

We respond to this at paragraph 325 of our written closings or at least address the point, which has of course come up in a number of places in the litigation. That is {A1/8/116}. Mr Ward has already explained why the argument is not a good one in relation to fairness generally. In relation to the application of this point in the context of the comparators, we have got a number of responses.

We do say that commission is not correctly understood as payment for the tools and technology. That is the point Mr Ward and indeed Mr Hoskins have addressed you on. So in relation to the comparators

exercise, as well as unfairness generally, we say that the proper focus is on the services provided on the relevant markets. We say there that there is a close resemblance between the services provided by the App Store and by the PC comparators, and I am going to come back to that.

But the other point is that there is no detailed identification or evaluation here of the value of the tools and technology that are said to be involved and it is assertion that it is the value of these tools and technology that justifies the large difference one sees between Apple's Commission and some of the commissions one observes in the comparator markets. There is no evidence, for example, as to the extent to which developers value particular tools and technology that are provided.

I showed you, deliberately showed you earlier, what is said in the *Attheraces* case at first instance about evidential burden, and, again, to give you another reference, a point is made in the *Napp* authority, paragraphs 406 to 407, {AB3/2/111-112}, concerning the importance -- where a defendant in an unfair pricing case raises this sort of matter -- in that case, it was about the size of initial investments in intellectual property -- evidencing that proposition, if it is going

to be relied on, as an explanation for high prices.

Now, in relation to Mr Holt's PC comparators generally, the Tribunal knows that he relies on four particular comparators. That is Microsoft Store, Epic Games Store, itch.io and Steam. Dr Singer, of course, also relies I think in particular on the first two of those in his analysis of overcharge issues on the exclusionary case.

Just to remind you, could we just turn up {C2/10/124}, paragraph 339 of Mr Holt's third report? You see there that Mr Holt sets out a range, between 10% and 20%. That is his opinion of the range of prices that may have been payable under conditions of workable competition, drawing on evidence from the PC app stores.

"The 10% ... range is consistent with the default rate offered by itch.io and would allow app stores to cover the expected cost of providing [the] distribution and ... payment services."

Then:

"The 20% upper end ... corresponds to the most competitive headline rate that Steam offers to developers."

Apple's 30% headline commission rates and indeed its effective commission rates throughout the relevant period are of course considerably above these levels.

We say that supports a finding of unfair pricing in conjunction with the other evidence relied on by Mr Holt.

There is an intuitively obvious basis, we respectfully submit, for using these platforms as comparators. To state the obvious, they are all platforms for distributing apps, including apps made by third party developers to end users; they all allow in-app purchases; like the App Store, they all charge a commission on paid downloads. So there is an obvious basic comparability with the App Store and the services Apple provides on the relevant markets.

Professor Hitt agreed, unsurprisingly, in cross-examination that the PC comparators on which Mr Holt relies are, in substance, app stores, but unlike the App Store and indeed other possible comparators, like games consoles, which we are going to come to later, there are now rival platforms in this market.

As we know, at paragraph 323 of our written closings, competitive entry in this market by Epic, in particular, prompted the incumbent, Steam, to reduce its commission rates for larger developers in particular. The CMA took this to be evidence of a competitive reaction and indeed referred to evidence that, as well as price reductions, it had also spurred more

competition on quality, such as storefront improvements and offers for users. We do not need to turn it up, but the reference for that is paragraph 4.205 of the CMA Ecosystem Study, {AB6/25/138}. We know that Microsoft, having already been charging 15% for non-gaming apps, later followed suit and matched Epic's commission rate of 12% on gaming apps. It is, in fact, common ground that these changes are at least partially the result of competition. That was Professor Hitt's evidence at {Day22/19:22}.

We say that is really the key reason why PC comparators are both probative and valuable and it is why Apple's death by a thousand cuts approach of highlighting specific press articles criticising particular features of the PC comparators is respectfully hopeless. The approach ignores the obvious significance as a comparator of a market where an incumbent has, in fact, been driven to reduce its prices as a result of competitive entry.

To be clear, the CR's case does not depend on this PC market being fully workably competitive and the CR's case does not involve the commissions charged in this market simply being transplanted on to the App Store in a competitive counterfactual. Mr Holt made clear in cross-examination, {Day19/34:11-23}, that his approach

was not literally translating Steam's rates, for example, on to the App Store.

Now, the CMA makes the point in its market study that Steam is the largest PC distribution store, with market shares that are consistent with market power. That is paragraph 4.205 of the CMA report. The Tribunal may be aware that there are currently collective proceedings in this Tribunal alleging abuse of dominance by Steam in relation to the use of most-favoured nation clauses, a point Mr Holt referred to in evidence. That is {Day19/61:14-16}.

As I will show you in a moment, Mr Holt does not rely on Steam's rates generally but, rather, on its most competitive rate of 20%. We saw that in the range. That is the rate it offers to the largest developers. But we are certainly not suggesting that the Tribunal needs to reach a firm view on matters such as whether Steam holds a dominant position. It is not a point the experts on either side have addressed in detail. The point is simply this: this is a market in which some competitive entry, at least, has been possible and has actually worked to drive down prices. This, of course, has not been possible in the relevant markets on which the App Store operates, but it supports a finding that, in conditions of workable competition, where competitive

entry was possible, Apple's prices would be considerably lower, and establishing that, we say, having regard to *Gutmann*, would be sufficient to establish an unfair pricing infringement.

In relation to the detailed evidence and arguments concerning Mr Holt's comparators and particularly the sorts of quality issues that were discussed in cross-examination, we have addressed this, I hope fully, beginning at paragraph 328 of our written closings, {A1/8/117}. We go through the four PC comparators in turn. I do not propose to take you through the points orally in detail because I think that would simply involve me reading out our written closings. I am going to say something more about Steam in light of Apple's written closings in a moment.

The general point we make, the overall submission we make, is that Professor Hitt's qualitative critique of Mr Holt's comparators was essentially anecdotal and one-sided, being based ultimately on a handful of press articles. Professor Hitt accepted in cross-examination, realistically, we say, that you will find a variety of opinions in articles of that kind. That was {Day22/199:20}. He was shown in cross-examination articles expressing different views on quality issues from the articles his own team had identified. He was

also taken to evidence in cross-examination showing that the App Store has been criticised in a number of the same respects for which he had identified criticisms in relation to the PC platforms. Professor Hitt conceded on several occasions that he had not done a comparative analysis in respect of a number of the quality issues that he identified; see paragraphs 334 and 339 of our closings.

In short, we say Apple has not shown any convincing basis for concluding that Mr Holt's in-the-round assessment of this evidence is materially wrong by reference to quality issues, but that is without prejudice to the more general point that the key value of the comparators is the evidence they provide of the impacts of competition on price.

There is another important general point made in Mr Holt's reply report. Can we look, please, at {C2/11/24}, paragraph 63? So Mr Holt is responding here to Professor Hitt's contention that the lower commission rates charged by Microsoft and Epic, in particular, reflect the lower value offered by these platforms and Professor Hitt's reliance in particular on differences in services offered and overall quality. Then, "Putting aside the lack of evidentiary basis for [this]" -- those are the points we addressed in the paragraphs of our

written closings that I mentioned -- he says this, "he fails to take into account two important considerations".

The first is the point I have already made, that the comparators are informative as to the rates that would have prevailed for the App Store under conditions of workable competition precisely because they illustrate the likely effect of competitive entry. But then the second point -- and this overlaps with the submission Mr Ward made -- at (b) is that:

"... Professor Hitt does not address the extent to which the Commission rate is a reflection of its quality and the extent to which the Commission rate was the result of its [over the page] position as the only app distribution platform on iOS and the only In-App Aftermarket Services provider for iOS Apps. Professor Hitt presents no evidence that, if faced with effective competition, Apple would have been able to sustain the Commission at the present levels without losing significant transaction volumes to alternative app stores and/or alternative In-App Aftermarket Services providers."

As I say, it is a version of the point that Mr Ward made and indeed explored with Professor Hitt in cross-examination, that Professor Hitt does not approach

the unfair pricing analysis generally or the comparators element of that analysis on the correct footing; namely that Apple is dominant, as alleged.

Turning to some discrete points about Steam, if I may.

THE CHAIRMAN: Yes.

MR ARMITAGE: Could we go, please, to Apple's closings, paragraphs 436 to 437, at {A1/9/143}? There is a reference at 436 to Mr Holt's reliance on Steam's 20% tier of pricing and then there is -- the argument is that this is the wrong comparison and that, on a like-for-like comparison, Apple's Commission is the same or lower than various points in relation to Steam, which I am going to cover.

Now at 437 it is said that:

"The comparison with [Steam's commission rates] is ... dispositive of the case. It matters not whether there are other comparators who charge less. Dr Kent is seeking to establish the maximum price that can lawfully be charged by any business of this type. It is therefore the highest price charged in a competitive market, not the lowest or the average, that is relevant."

Now, just to be -- just to mention at this stage, we explain in our closings why this approach of seeking to

establish the maximum lawful price is not correct in law in relation to the unfair pricing counterfactual. That is paragraph 355 of our written closings and I may come back to that.

THE CHAIRMAN: Do you mean the quantum? The quantum assessment?

MR ARMITAGE: Exactly.

THE CHAIRMAN: Yes.

MR ARMITAGE: Yes, yes, I am sorry. The quantum --

THE CHAIRMAN: (overspeaking) the counterfactual.

MR ARMITAGE: I am sorry, you are right. The quantum assessment, exactly.

But the suggestion here, on the evidence, appears to be that Apple's Commissions are in reality no greater than Steam's. Now, Apple relies on a comparison firstly between Steam's headline rates, which we know have a tiered structure since the competitive entry by Epic caused a change of approach, so 30 going down -- 30, 25, 20 for Steam, and then he compares that with Apple's headline charges of 30 and 15, but we saw that Mr Holt relies on Steam's 20% rate for the largest developers as the upper end of his range for a fair rate.

If we could look at Mr Holt's third report, at paragraph 339(b), we see the rationale for this. That is {C2/10/124}. I showed you this earlier, but if we

look at 339(b). So Mr Holt is specifically identifying, as the upper end of his range, the most competitive headline rate that Steam offers to developers, ie the 20%.

"Steam only offers a 20% commission rate on games with revenue over USD 50 million on Steam. These are the titles for which Steam faces the most competitive pressure on commission rates, as they are the most valuable to Steam and other app stores who are seeking to attract them. They are also the games for which developers have the most to gain from distributing directly if doing so increases their sales margin ..."

So that is Mr Holt's rationale. He is not relying on Steam's rates generally. He is relying on the 20% rate that, on Mr Holt's analysis, reflects the focus of competition in this market.

THE CHAIRMAN: So that is said to be the response to the Epic entry, that reduction -- their reduction for that -- for that category as a response to --

MR ARMITAGE: (overspeaking), yes, yes. So the adoption of the charging structure generally was prompted by entry, so that is when you see the 30, 25, 20, exactly. It is the 20% we say is the focus of that --

THE CHAIRMAN: So Mr Holt's logic is that the response to the Epic entry has been to revise the charging structure

so that the most valuable set of its developers has a better rate and that is said to be an indication of what happens in workable competition?

MR ARMITAGE: Precisely.

THE CHAIRMAN: That is the argument in this context.

MR ARMITAGE: Precisely, yes.

THE CHAIRMAN: Yes.

MR ARMITAGE: Now, Mr Holt explained also in his third report that Steam's effective commission rate is likely to be lower than 20% -- indeed, lower than its headline rates generally -- due to so-called Steam Keys, whereby Steam allows developers to sell games through other channels which can then be downloaded through Steam, without payment of commission.

Mr Holt referred to this in various places, including -- perhaps we could look at paragraph 318 of Mr Holt's third report.

Sorry, I have lost the reference. Yes, thank you. 318. {C2/10/116}:

"The Effective Commission that Steam earned, even before it altered its commission rate structure in 2018, is likely to have been below its headline rate. The availability of Steam Keys means that developers were able to distribute via Steam while taking payment elsewhere and avoiding Steam's commission rate. Paid

apps that are sold through the use of Steam Keys effectively pay zero commission to Steam."

Now, as I have already showed you, it is the 20% headline rate that forms the conservative upper bound of Mr Holt's range. In relation to Steam Keys, this was a further consideration that Mr Holt identified in relation to what can be gleaned from what happens in conditions of greater work -- that are closer to the ideal of workable competition.

Now, Professor Hitt said, I believe, literally nothing about the Steam Keys point in his reports or in the joint expert statement. During cross-examination, first with Mr Singer and then Mr Holt, you will recall that Apple's counsel relied on pre-certification reports filed by experts in an US class action against Steam, in which neither of the parties to the present litigation are involved. So it was a 313-page report by Dr Chiou, *Valve*'s expert, *Valve* being the parent company of Steam or the provider of the Steam platform, and also a 286-page report by Dr Schwartz, the plaintiff's expert in those foreign proceedings.

Returning to paragraph 436 of Apple's written closings, {A1/9/143}, you see at points (iii) and (iv), where it says:

"... Apple's average of 25% is lower than Steam's

average of 27% ..."

Then at (iv):

"... counting the zeroes results in [circa] 20% for Steam and (as best as Apple can estimate) significantly lower for Apple."

Those figures, first, of 27% for Steam and then circa 20% for Steam, they are listed from the expert reports in the foreign proceedings.

Somewhat confusingly, Apple seeks to have it both ways. It relies on the foreign Class Representative's estimate of Steam's effective commission rate as being 27%, saying: well, this is lower than Apple's effective rate throughout the claim period. But we have already seen that it is Steam's most competitive headline rates that Mr Holt relies on as being the relevant evidence and providing the upper bound for his range of workably competitive prices.

Then Apple also relies on Steam's estimate of its effective commission rates from the foreign litigation of circa 20%. In fact, the report suggests less than 20%. That estimate factors in Steam Keys consistently with Mr Holt's evidence on this point.

In fact, in those reports, Steam's expert gave a range of approximation for Steam's effective rates, the lowest of which, for particular developers, are

1 something like 7%. You can see that at {D1/1804.1/85}.
2 Now, Apple says that an equivalent approach to --
3 THE CHAIRMAN: I am sorry, Mr Armitage. I am not sure if we
4 are going to be shown that, but what is that document?
5 MR ARMITAGE: That is Dr Chiou's report from the foreign
6 litigation.
7 THE CHAIRMAN: (Overspeaking) That is Dr Chiou. It is
8 page 85, is it?
9 MR ARMITAGE: Page 85.
10 THE CHAIRMAN: Just while I have interrupted you. Just in
11 terms of locating this. Are you -- I mean, you are
12 obviously addressing this in a convenient way and I am
13 not pushing back on that, but are you -- is it your
14 case, or Dr Kent's case, that this is all part of the
15 picture in relation to unfair pricing as well? I mean,
16 I think it is. But I am just trying to tease out from
17 you, given there is quite a big dispute about this, and
18 no doubt we will hear lots about it from Apple, and
19 given the point you make about the difficulty of
20 understanding what is really happening here because of
21 the nature of the proceedings, I --
22 MR ARMITAGE: Well --
23 THE CHAIRMAN: Well, if I am jumping ahead, say so, but I am
24 just wondering whether you are dealing with this because
25 it does come up again in the quantum discussion or

whether you are dealing with it because it matters terribly to your case on unfair pricing.

MR ARMITAGE: No, no. Not the latter. In fact, we are bound to make the submission that really no weight should be afforded to the evidence from the foreign proceedings. I am only --

THE CHAIRMAN: For the purposes of anything or for the purposes of the unfair pricing?

MR ARMITAGE: For the purposes of unfair pricing --

THE CHAIRMAN: Rather than the quantum, rather than the quantum --

MR ARMITAGE: In relation to quantum, things are a little different. But again -- I mean, may I just make the submission on --

THE CHAIRMAN: Yes, of course. Sorry, I interrupted you.

MR ARMITAGE: No need to apologise at all. I have made, I think, already the primary point, that what Mr Holt relies on is the headline 20% rate. That is his range and that is also relevant to the counterfactual --

THE CHAIRMAN: Yes, exactly. Yes.

MR ARMITAGE: -- where further considerations --

THE CHAIRMAN: That is understood.

MR ARMITAGE: -- come into play and that is not affected by this debate.

Having, I hope, explained the context and the way in

which the "counting the zero" points arise, Apple's argument appears to be that: well, you have this evidence from foreign litigation of what Steam's effective commission rate, factoring in Steam Keys, is.

Then if one is going to rely on that, if one is going to rely on an analysis of Steam's effective commission rates, one has to take an equivalent approach to Apple and that is what they describe as "counting the zeros". One sees that in the whole illustrative appendix, appendix 4 of Apple's written closings.

The short point on that is: we say it is not supported by any expert analysis in these proceedings. We make this point in our written closings. To state some obvious points, none of the factual material relied on by the foreign experts is even available. None of the foreign experts have been available for cross-examination. The experts in our proceedings on both sides have not analysed the lengthy reports in the foreign litigation. As for counting the zeros, Professor Hitt has never suggested, at least in this litigation, that Apple's Commission should be assessed in this way.

We say at the end of the day, this was an attempt to introduce substantive new expert analysis for the first time during cross-examination, and it should be given no

weight.

Just for your note, Mr Holt did give an answer to the "counting the zeros" point which we cite at paragraph 325(c), footnote 579 of our written closings. But as I say, the primary point is that Mr Holt's analysis does not depend on an analysis of Steam's effective commission rate at all. He relies on the headline rate in respect of those developers where competitive pressure is at its greatest.

I see the time.

THE CHAIRMAN: Yes.

MR ARMITAGE: I understand Mr Kennedy may have a short point to make, which I think he needs about -- yes, which we can either do now or at --

THE CHAIRMAN: We have got you back after lunch, have we not?

MR ARMITAGE: Yes, yes.

THE CHAIRMAN: Are we on track for everything today? In that case, let us rise and we will come back at 2 o'clock. Thank you.

(1.02 pm)

(The short adjournment)

(2.00 pm)

THE CHAIRMAN: Mr Kennedy?

MR KENNEDY: You may not be glad to see me, sir.

THE CHAIRMAN: Well, what we were speculating was as to why you were back and we are about to find out, I expect.

Submissions by MR KENNEDY

MR KENNEDY: Just to cover off a point that arose yesterday. You will recall that in consideration of Mr Federighi's evidence a minor dispute arose between me and Mr Kennelly as to whether I could show you the two documents. I am not going to try and show you the two documents in question.

THE CHAIRMAN: Well, that is an interesting question, yes.

MR KENNEDY: I just want to give you three references to the evidence and make a short submission and one of clarification to the transcript.

You will recall that Mr Federighi's evidence was that the absence of certain marketing materials in connection with the notarisation version of App Review might allow certain types of app to slip through the net, and the example he gave was of a fake Adobe and a banking trojan.

THE CHAIRMAN: Yes.

MR KENNEDY: I made the submission yesterday that that risk was not identified in his witness statement, and just to give you some references to the other evidence, the issue is canvassed by Mr Kosmynka at paragraph 102, which is {B2/6/28}. That is confidential so I will not

read it out but no mention is made there of any banking trojan.

Then for Professor Rubin's evidence, the references are, 1st Rubin, paragraph 302, which is {C3/2/156}, and 2nd Rubin, paragraph 138, which is {C3/6/61}. Again, no reference in either of those passages to the possibility of a banking trojan slipping through the net in the counterfactual.

The submission is simply that, if there was a material risk that App Review would miss a banking trojan in the counterfactual, then one would have expected this to have been addressed in the written evidence and not for the first time by Mr Federighi in cross-examination. So that is simply to set out what our position is so that Mr Kennelly can take that into account if he wishes in his submissions.

As to the transcript, at {Day24/155:21-24} I made reference to the Court of Appeal's decision in *Sainsbury's* and I should have referred both to the Court of Appeal's decision as to the requirement for causal connection but also to the Supreme Court's decision as to the quality of evidence required to make good the case on objective justification. So just to make clear that I rely on both the Court of Appeal and the Supreme Court in relation to what I said about the

failure to prove the case on app distribution, so simply by way of clarification. That is it, sir, you will be glad to hear.

THE CHAIRMAN: Good, thank you.

MR KENNEDY: I will hand back over to Mr Armitage.

THE CHAIRMAN: Yes. Thank you very much.

Yes, Mr Armitage.

Submissions by MR ARMITAGE

MR ARMITAGE: Just a final point, which is somewhat related to Steam and also touches on Mr Holt's reliance on developer surveys as lending some support to the proposition that Apple's 30% commission rate is unfair. We summarise the evidence at paragraph 309 of our written closings. This was the point that Professor Hitt again memorably described as the "nails down the chalkboard moment". Could I just show you one point of detail? It is paragraph 448 of Apple's written closings, which is -- yes -- internal page 144, {A/19/146}.

Just the final point in the final sentence:

"Moreover, as Mr Holt accepted, other surveys that he had failed to consider make similar comments about commissions that Mr Holt does accept are reasonable, like Steam's 20%."

I do not need to turn it up, just to give you the

reference. That is a reference to a survey that is in the bundle at {D1/8/18}. I would invite the Tribunal at a convenient moment just to look at that. It is clear from the document that the focus of the survey is Steam's 30% commission rate. Developers are asked to give their view on what commission rate would be justifiable, and you have that, as I say, at {D1/8/18}.

There is no need to turn it up, but also I took Professor Hitt in cross-examination to a similar survey from 2021 which covered 30% commissions generally, including the app stores, and that returned very similar results. You have that in the bundle at {D2/879.1/1}.

With all due sympathy and concern for the state of Professor Hitt's nails, we do say these surveys have some probative value. They cover large numbers of developers. On their face, developers are not simply asked would they prefer to pay a lower price, but for their view on what split is justifiable. The answers are in line with Mr Holt's estimates as to the likely range of counterfactual rates. We do not put it any higher than that. It is one piece of the relevant evidence base.

I am going to look in a moment at the comparators that Apple relies on to argue that 30% is a competitive and fair rate, but I just want to make sure firstly that

the Tribunal does not lose sight of the fact that Mr Holt also provides a separate analysis of comparators in relation to the after-market. It is section 7.6 of Mr Holt's third report. For the transcript, that begins at {C2/10/134}. He relies on the rates offered by Paddle for payment services and also the commissions charged by his PC comparators on in-app purchases using their own payment systems.

If I recall correctly, Mr Holt was not asked about this part of his report in cross-examination. I do not therefore propose to say anything more about it now, save to direct you to or give you the references to, rather, paragraphs 154 to 155 of our closings in relation to the relevance of Paddle as a comparator and also paragraph 351 of our written closings in relation to Mr Holt's after-market analysis.

If we could then turn to paragraph 441 of Apple's written closings, which is page 142, internal, {A1/9/144}, can you see the bold text at the beginning of 441, "Other comparators disregarded [said to be disregarded] by Mr Holt"? Apple says:

"Mr Holt excludes from his analysis: (i) the Google Play Store and 30% headline commissions of a series of other *Android* app marketplaces; (ii) the 30% commission charged by transaction platforms ... (iii)

the 30% and higher commissions charged by Roblox, and (iv) the 30% commission set by Apple in 2008."

I would like to deal with those, if I may, in reverse order. (iv), the 2008 commission rates, Mr Holt has already addressed you on that. As with the point on the foreign expert reports in the *Valve* litigation, this was a feature of Apple's cross-examination at the trial but was not a significant feature of Apple's own expert economic evidence. For the reasons already given by Mr Ward, the fact that Apple chose a 30% rate in 2008 is, we say, not informative in relation to the fairness of the commission during the relevant period, whether as a comparator or more generally.

As for (iii), Roblox, this was a completely new point at trial. It is ironic in the extreme that Mr Holt is criticised for excluding it from his analysis. It is such a compelling comparator that Professor Hitt did not see fit to mention it in this context in his reports or in the joint statement and it appears to be innovation by Apple's counsel. The first we heard of it as a potential comparator was when Mr Holt was asked about it in cross-examination on Day 19 of the trial. Unsurprisingly, Mr Holt said that he had not considered Roblox as a comparator when asked about it. We invite you simply to disregard Roblox as

a comparator. If Apple had raised it as part of an orderly expert process, Mr Holt would have been able to consider it and give a view.

Then, at points (i) and (ii), so the *Android* app stores and the games consoles, those are at least referred to by Professor Hitt in his report, albeit that all Professor Hitt actually does is to point at the headline rates charged by these platforms and note that a number of the headline rates are 30%. The reference for that is paragraph 73 of Hitt 2 and the tables which follow it, beginning at {C3/4/45}.

Two preliminary points. The first is that the CMA raise specific issues with each of these potential benchmarks in its Mobile Ecosystems Report and consider that they were not good benchmarks for assessing whether Apple's Commission was set at competitive levels. Professor Hitt did not engage with these points. We make that point and give the relevant references at paragraph 28 of our written closings.

The second point is that by his own admission Professor Hitt did not consider the conditions of competition in these other markets; see paragraph 143 of our written closings, where we give the relevant references to the transcripts, {A1/8/48}.

In the circumstances, Professor Hitt's bare reliance

on the fact that certain other platforms also charged 30% as a headline rate was simply uninformative. But it is also completely wrong for Apple to say, as it does here, that Mr Holt disregarded these comparators or that he excluded them from his analysis. He specifically considered them.

Starting with *Android* marketplaces, could we turn up Mr Holt's third report at {C2/10/125}? Can you see at the bottom of the page, the heading "*Android* app stores". This is within the comparator section of his third report, I should say. So at paragraph 342, third sentence, he makes the point that:

"In contrast to iOS, it is technically possible to access multiple app distribution channels on *Android* including the Play Store, and (to an extent) access to alternative app stores, including the Amazon Appstore ..."

Then over the page at paragraph 343, {C2/10/126}, he refers to evidence that:

"... the effective commission [rates] that *Android* app stores charge is lower than suggested by the advertised headline rates in at least two instances."

He gives the example of the Samsung Galaxy Store and then also the Amazon Appstore, and he refers to a finding by the US court that headline rates are

frequently negotiated down and then there is a reference to the effective commission for the Amazon Appstore. Professor Hitt did not engage with this and Mr Holt was not asked about it in cross-examination.

Paragraph 344 refers to further evidence concerning something called the "One Store".

Then if we could have the rest of the page. At 345 -- yes. At 345:

"The above evidence suggests that a competitive commission rate for *Android* app stores would be lower than the headline rates of 30% that Professor Hitt refers to in his report ... [and] support the proposition that a competitive commission rate for the distribution of paid apps, including the charge for payment services, might be between 10% and 20%."

That is the range we saw earlier.

So we see that, far from disregarding this market, Mr Holt actually finds some support in the *Android* app stores examples for his view that a competitive rate is between 10% and 20%. As I say, none of this was addressed with Mr Holt in cross-examination.

Paragraph 346, Mr Holt turns to the Play Store, {C2/10/127}. As he says at the top:

"There are indications that the market for *Android* app distribution may not be characterised by workable

competition."

Then he sets out some evidence in relation to the Play Store, including its share of downloads and findings that Google --

"... allegations and/or findings that Google imposed anticompetitive restrictions ... and [enjoyed] a significant level of market power in the market for app distribution on *Android* mobile devices."

Now -- sorry. Then if we see his conclusion at 347:

"As a result, it is my opinion that while *Android* app stores can be informative in determining a counterfactual commission rate ... they likely provide a less reliable benchmark than PC app stores for the purposes of identifying a competitive market outcome."

So, again, he does not ignore the Play Store. He takes a considered view that it is a much less reliable benchmark than the PC comparators that he relies on.

His view on these matters is in line with that of the CMA, which found that the Play Store was not an appropriate benchmark for assessing the -- whether the commission charged by Apple was at a competitive level or indeed vice versa precisely because Google has market power within its own ecosystem. That is CMA report, paragraph 4.201, {AB6/25/137}. At 4.202 on the same page, the CMA found that other *Android* app stores

1 are not good benchmarks either because they do not have
2 strong incentives to compete with the Play Store. As
3 I am sure the Tribunal also knows, in the *Android*
4 decision, the European Commission found that Google has
5 held a dominant position in the worldwide market for
6 *Android* stores since 2011, and you have that at
7 {AB6/16/129}, recital 590 and following of *Android*.
8 THE CHAIRMAN: Does Mr Holt carry out any analysis himself
9 about competitive conditions on the Google Play Store?
10 MR ARMITAGE: He does not carry out a detailed competitive
11 analysis. You see his analysis at 346.
12 THE CHAIRMAN: Yes, that is it -- (overspeaking) the
13 reference to the other decisions.
14 MR ARMITAGE: Yes, exactly. Our submission is simply that,
15 in light of the existence of the CMA and the
16 European Commission findings, Mr Holt's approach was
17 entirely reasonable. You see that he is making
18 a comparison there between these markets and the PC app
19 distribution market.
20 THE CHAIRMAN: Did Dr Singer get into it as well? I seem to
21 recall he said something about the -- Dr Singer said
22 something about the competitive conditions, did he not,
23 or am I making that up?
24 MR ARMITAGE: Dr Singer, yes. I am not the resident expert
25 on Dr Singer --

THE CHAIRMAN: Well, the difficulty is that it pops up everywhere, does it not?

MR ARMITAGE: It does, it does.

THE CHAIRMAN: I seem to recall -- this is an issue that has been in play very plainly between the parties, has it not, about the competitiveness of the Play Store?

MR ARMITAGE: Yes, yes, yes.

THE CHAIRMAN: Mr Hoskins is lurking.

MR HOSKINS: Dr Singer, as well as Mr Holt (?) is not a proper comparator because of the documents (inaudible - not on the microphone). It is in the express statement as well, so it is a --

THE CHAIRMAN: He does not -- I think the point was made earlier that Professor Hitt had not done any analysis. No one has done a detailed analysis of it, other than what we see here at a relatively high level. Is that right? Has Dr Singer done anything more?

MR HOSKINS: Nobody on either side has attempted a detailed analysis of the Google market, and that is probably the case against the -- (overspeaking).

THE CHAIRMAN: Yes.

MR HOSKINS: Not for this purpose.

THE CHAIRMAN: But you say you have the regulatory decisions and that is good enough?

MR HOSKINS: Well, certainly --

THE CHAIRMAN: Good enough to cast doubt?
MR HOSKINS: We had this sort of issue at the start, when I was addressing you on admissibility of various sources.
THE CHAIRMAN: Yes. Well, that is why I am asking the --
MR HOSKINS: That is right. I made the point then that it is commonplace in expert reports for experts to refer to reports, decisions, et cetera, because it would become an impossibility if an expert had to prove everything from scratch. Obviously there is then a matter for the Tribunal as to how much weight to give to the extraneous sources, et cetera, but the expert process would ground to a halt if that sort of material could not be referred to by experts and was not then capable of being taken account of by the Tribunal. So that is the ...
THE CHAIRMAN: Yes, good.
MR ARMITAGE: In relation to the unfair pricing analysis of Mr Holt, I obviously echo that. We say, in light of the existence in particular of the CMA's analysis and indeed the European Commission's findings on dominance in the very market that is said by Apple to provide a comparator, Mr Holt's approach in respect of the Play Store was entirely reasonable. It is hard to think of a worse comparator for assessing whether Apple's Commission is at a workably competitive price than the

prices charged by an undertaking that has been found to hold market power in the alleged comparator market by both the CMA and the European Commission.

Mr Holt's approach is also fully consistent with the case law, in particular *Le Patourel*, which I showed you earlier, in which the Tribunal said that comparators which are themselves affected by market power will not be reliable. Just to give you the reference again, it is paragraph 93 of *Le Patourel*, {AB3/62/26}.

Turning to games consoles, Professor Hitt refers to the 30% rates charged by each of the PlayStation Store, Nintendo and the Microsoft Store. Before looking at what Mr Holt says -- I mean, the picture is similar here because, if we could turn up paragraph 4.203 of the CMA report, {AB6/25/1} -- that is almost certainly the wrong reference. I can perhaps just tell you what the CMA have said and then I will provide the reference later.

Essentially the CMA identified two factors which, in its expert view, meant that the regulator did not consider games console commissions -- {AB6/25/137}. Yes, it has magically been found. I am very grateful. Paragraph 4.203:

"Second, Apple and Google pointed to the fact that console games stores charge 30% commission rates, but we consider that these stores are not good comparators ..."

First because of differences in business model, at least for Microsoft and the PlayStation Store.

"... where consoles are priced at low, no or negative margin, while profits are subsequently generated through the sale of games and subscriptions ... unlike Apple and Google that are profitable without the App Store revenue."

Of course in appendix C the CMA gives detailed consideration to the latter point in relation to Apple's profitability.

Now, if we could look next at Mr Holt's third report, paragraph 348, {C2/10/127}, we see Mr Holt again does not disregard the games console market. He comes to the view that they do not provide an appropriate comparator, and in paragraph 348 he makes one of the two points made by the CMA, that they each operate the only digital app store on their respective consoles. In these circumstances, he doubts whether they provide a measure of what the commission rate would be in a market characterised by workable competition.

Just to give you a reference, at paragraph 369 of Holt 3 he makes the other point made by the CMA in relation to the different business models. But there is then a further point at paragraph 349 on the same page. Mr Holt makes the point that Microsoft's 30% -- charges

a 30% rate for Xbox games where there is only a single option for digital distribution of such games and yet charges 12% for PC games in a market where it does face competition and there are multiple platforms. We say that is particularly compelling evidence and reinforces the point that in workable competition Apple similarly would not be able to sustain the 30% rate.

We say on the evidence, including the views of the regulators, Mr Holt was right to regard the PC app distribution market as significantly more informative and probative than these other markets.

Turning briefly, before handing back to Mr Ward, to the question of quantum and the role of the comparators there, they are relevant in relation to quantum also for the unfair pricing claim in that they provide an indication of the price that would have been charged in conditions of workable competition.

Here, of course, you do need to form a view as to what Apple's effective commission would be in the absence of unfair pricing, but as a matter of quantum and the exercise of the broad axe and separately from the earlier analytical stage of deciding whether there is an abuse in the first place.

Just to show you a couple of points from the materials, if we could start at the Singer/Holt/Hitt

joint expert statement, {C4/3/6}, proposition 5. (Pause)

It is dealing with a question about the range of commission rates applying in the counterfactual, and just to show you, you see that Mr Holt is considering -- the way he looks at this issue you see in the second paragraph:

"However, my approach to assessing the counterfactual commission applies at the level of the effective average commission across Relevant Purchases."

Just to show you what he says in the supporting reasoning, if we go to Holt 3, paragraph 340, {C2/10/125}, you see the reliance he places on the evidence from the PC app stores as supporting his view that the most likely rate that iOS App Developers would have in the counterfactual scenario is 15%.

Now, he gives four factors. There is obviously and unsurprisingly a degree of overlap with the factors relied on in relation to fairness and abuse. One factor we have not discussed, at (d), is the reliance he places on the 15% commission rate that Apple already charges for certain transactions. Mr Ward mentioned this in a different context. It is a significant factor here because there is no suggestion that 15% is unprofitable for Apple and we also know that it provides exactly the same services to developers already paying that rate.

I mentioned earlier that there is potentially a legal point as to the correct approach to thinking about pricing in the unfair pricing counterfactual. It was put to Mr Holt in cross-examination that the exercise involves establishing the maximum lawful price that Apple could have charged in the counterfactual. Insofar as that was a point about quantum and the counterfactual for these purposes, it is wrong in law and we have explained that at paragraph 355 of our written closings by reference to *Le Patourel* and the authorities cited there.

That was all I was going to say about comparators. Unless you have any questions, I will hand to Mr Ward on incidence.

THE CHAIRMAN: Just a point that you were making, I did slightly lose the thread when we were looking at the joint statement, proposition 5. I do not know whether you were just -- were you just using that to set up the discussion that --

MR ARMITAGE: Yes, I was. It was just a -- to make the point about Mr Holt's approach involves looking at the effective average commission rate in the -- it is obviously a class claim --

THE CHAIRMAN: Yes.

MR ARMITAGE: -- when you look at paragraph 340, but you

read the references to 15% in that regard. He is effectively comparing the effective rate paid in the real world, which we know is -- having factored in some of the limited programs in which the commission came -- it is lower than 30% obviously when you factor those in.

THE CHAIRMAN: Yes.

MR ARMITAGE: I think it is 27% or thereabouts or perhaps a bit lower. This is the comparator. In the counterfactual, the effective average rate, we say, would be 15% most likely.

THE CHAIRMAN: Yes. Just remind me -- I know I am going to disclose that I have got something muddled up -- but at some stage there is this whole question of the rate for the distribution service -- the rate for the payments, so the after-market. Is that -- maybe that is -- Mr Ward is going to come on to that or maybe he is not -- but does that occur here? Does that come up in the excessive pricing quantum?

MR ARMITAGE: Yes. As I said earlier, Mr Holt addresses that in section 7.6.3 of his third report. It is a point that, as I say, was not addressed in cross-examination. Part of the reason for that may be that he relies for his effective counterfactual rate for that part of the case on the PC comparators because they of course charge a commission on in-app purchases as

well and it is at the same rate.

THE CHAIRMAN: Yes. Well, that is the thing because he ends up -- as I recall, he ends up effectively with the same rate for both markets, does he not?

MR ARMITAGE: By a slightly different route because he also relies on Paddle as a comparator with I think a rate of about 10.7%. He also considers payment processors who charge much lower amounts but he does not rely on those.

THE CHAIRMAN: Because it is a different service.

MR ARMITAGE: So it ends up with the same range and indeed the same estimate of the most likely counterfactual rate, so it is 15% for both. It is a different analysis, though. That is the --

THE CHAIRMAN: Yes, it is a different analysis. That is the point, is it not?

MR ARMITAGE: (overspeaking) -- the recital.

THE CHAIRMAN: Right, okay. That is helpful. Thank you.

MR FRAZER: Just one question. On the quantum comparators, rather than on the unfair pricing, as I understand Apple's argument, it is that Google looks a bit like Apple would look like post-entry because it would have a large market share with some fringe entry and in that respect Google might be a good comparator for quantum even if it is not in unfair pricing. Is there anything that we should take account of in that ...?

MR ARMITAGE: So from the perspective of unfair pricing, the answer is quite straightforward because our counterfactual for that -- so assuming we only had an unfair pricing claim, the counterfactual is just workably competitive price. It does not depend on arguments about entry. In relation to the exclusionary case, well, I think -- I mean, I do not want to speak for Mr Hoskins and I will not speak for Mr Hoskins, but it comes up in that context as well.

THE CHAIRMAN: Okay.

MR HOSKINS: I mean, our position is the same. When you are choosing a counterfactual, whether it be for infringement purposes or quantum purposes, you are looking for a counterfactual to apply in a competitive market and therefore looking to Google, which has been held to be dominant, is not going to be helpful.

Now, there is the issue about 50% market share and 90% market share which we address by saying that Professor Sweeting has Steam at 50%. He actually calculates the market share, I think, as being about 39%, but tops it up a bit for Apple. Then he has 90% for Google, and we say the Google one is not right because of dominance.

Dr Singer's position is 50%, which he gets at by a different route. He does not actually rely on Steam

as such. He gets to it by a different one.

So what you have is you have two experts, one saying 50, one saying 50 to 90. The 50 is common ground, at least. Then the question is: how much more market share would Apple have? That is based solely on Google Play, which we say is not an appropriate comparator in the counterfactual because it is not competitive.

I took you yesterday -- I gave you a reference. I cannot remember it off the top of my head -- when I said that Professor Singer, in cross-examination, had said that Apple would charge a competitive price, and actually in the extract that I showed you yesterday, he said it would be a competitive price whether it is 50 or 90. So that shows the importance of the comparator being in a competitive market and the attempt to sort of bring in Google Play through the back door by saying that Apple would have 90, it really does not work if your own expert, Professor Singer, is saying it would be a competitive price in that market for Apple because that is so important to the damages counterfactual.

THE CHAIRMAN: Because there is competition and therefore the prices will be reduced --

MR HOSKINS: That's right.

THE CHAIRMAN: -- to maintain market share, if not to --

MR HOSKINS: That is right, and Professor Singer's [sic]

approach -- Professor Sweeting's approach was that Apple would price competitively, whether it was a 50% market share or a 90% market share.

THE CHAIRMAN: Yes, thank you. That is helpful.

Yes, Mr Ward.

Submissions by MR WARD

MR WARD: I am going to talk about incidence. Here the parties are a long way apart, as you know. Our true contention is the true figure lies between 50% and 90.8%; Apple's case is that it is zero.

Now, to state the obvious, it is important that this is a class claim and the class is disparate. There are many millions of consumers making many millions of purchases over a nine-year period.

So, of course, like most if not all class claims, we have approached this on a top-down basis. That does not involve looking at individual losses or individual apps and, of course, it does involve an element of approximation and indeed generalisation. Your task, of course, is to look at the totality of the evidence across the class as a whole and, for reasons I will come on to, apply the broad axe when doing so.

I am going to deal with the issues in the order they are in, in our written closing. Our starting point is *Spotify*. Apple's closing still does not grapple

seriously with it.

Could we please turn up page 156 of Apple's closing, which is {A1/9/158}, I think, on the Opus. I am sorry, I have just seen that I may have a wrong reference so just give me a moment. Yes, 158. Thank you very much. We just start with paragraph 482, which says -- thank you -- talking about the information that we do not have, it says in the sixth line:

"The truth is that there is virtually nothing in it of relevance, beyond the pricing data of music streamers ..."

Well, you may well say so, but how can we know? But, more importantly, the point I wanted to go to was in the next paragraph, 483, where it says:

"... *Spotify* ... was not a rich source of evidence on the issues in this case. Pass-on was at most a side issue in *Spotify*."

That is not right, actually, and I would like to show you that by going to the *Spotify* decision, which is {AB6/45/252}. This is the operative part. If we could zoom in on the top, please. Article 1:

"Apple ... have committed a single and continuous infringement of Article 102 ... by imposing the Anti-Steering Provisions on music streaming service providers to the detriment of consumers."

So it was a critical element in the Commission's analysis. To see why, I would like you to now go back, please, to page 166, {AB6/45/166}, where we will just see the scheme of the decision. Yes, thank you.

At the top of the page you can see the heading in bold, 9.3:

"Analysis of the unfair character of the Anti-Steering Provisions ..."

On the next page, please, {AB6/45/167}, 9.3.2 in the middle of the page:

"The Anti-Steering Provisions are detrimental to the interests of iOS music streaming users (consumers)."

Then going to page {AB6/45/170}, so going through the subparagraphs -- thank you -- we have the heading towards the bottom of the page, "Monetary harm to consumers". That is the bit that we have been discussing and relying on. But I am making the point now that it is just that the incidence issue here, consumer incidence, is not a side issue here. It is actually fundamental to the infringement that the Commission found.

Apple attempts to minimise the significance of the findings in here. I am not going to go through them again. I pointed you to them in the course of both the cross-examination and in our written closing, but what

you see is a thorough investigation of the issue, grounded in the evidence.

Now, Apple has no choice but to try and minimise it, given its case is diametrically opposed to the Commission. It does not disagree by some matter of degree. It just says -- its logic is, "This is all completely wrong". But it has not sought to distinguish *Spotify* or even engage in a debate about its findings.

For better or worse, Apple served an annex to its written closings dealing with the CMA decision or at least not the aspects of it that I was concerned with but some of the aspects that Mr Hoskins was concerned with, but there is no attempt to explain why any of this is wrong. Indeed, in our respectful submission, that is not surprising because it is unassailable.

Now, of course, Professor Hitt ignored the *Spotify* decision altogether until he was asked eventually to look at it as part of the exercise that led to Hitt 4, served memorably on the Saturday before trial. We will -- we do respectfully submit that this is one of several reasons why Professor Hitt failed to comply with his duty as an independent expert.

Could we please turn up {AB2/3/119}? Thank you. If we could zoom in on 7.67 -- thank you -- it is the last half of this that we say is relevant here:

"Expert evidence presented to the Tribunal should be, and should be seen to be, the independent product of the expert uninfluenced by the pressures of the proceedings. An expert witness should never assume the role of an advocate and should not omit to consider material facts which could detract from the expert's concluded opinion."

Now, the *Spotify* decision was a plain and obvious case of failure to comply with this and, as you will recall, Dr Singer pointed to the *Spotify* decision in his second report, even if it was perhaps not necessary, given that Professor Hitt was working so closely with Apple.

There is other evidence that Professor Hitt ignored, which we will come to, and again we will come later to the fact that there is a significant breach of this principle here in regard to his evidence on marginal costs. All of that to come later.

But just to be clear what we are saying about this, this breach obviously bites specifically on the aspects of Professor Hitt's evidence that deal with incidence and his insistence that the rate is zero, but it also bears more generally on the weight of his evidence in our submission. Professor Hitt has given evidence for Apple now for many years in many different cases and we

do submit his evidence cannot be given the weight that you would attach to truly independent expert evidence.

Just for the transcript, there is an example of a very different expert issue leading to that conclusion in the *Royal Mail v DAF* case, which is {AB3/52/108}, paragraph 255. The issue is very different, but the consequence is the same.

Now, one of the things that Professor Hitt ignored was statements by developers, both inside the *Spotify* decision and beyond. The real significance of those decisions is what they tell us about what Apple knew about incidence. It is clear from those matters that Apple did have some understanding and experience of developer attitudes to this commission and the implications for incidence. We gave the details in our written closing.

As you will recall, this is a matter which Professor Hitt failed to make any enquiry about. Instead, of course, he based his whole case on the natural experiments, which, if relevant at all, are relevant to the primary counterfactual -- sorry, not relevant at all to the primary counterfactual, so he had no answer in his own analysis to what we would say is the primary case.

Now, there is an issue of some contention in the

closings about the cross-examination of Professor Hitt on the basis Apple had made a concession in the *Spotify* proceedings. You will recall, if we get the *Spotify* decision up again, we based our cross-examination on what it said. That is {AB6/45/174}, where it is said at 614:

"In its Response to the Letter of Facts, Apple also concedes that music streaming service providers 'pass on "Apple's Commission"' ..."

That was the basis of the cross-examination, but it is said now that it is unfair. In my respectful submission, it is not unfair to cross-examine on the basis of a finding of the Commission based on, in fact, a quotation from Apple's own submission.

But as a point has been taken on this, I do not know if you will think it matters at all, but I would like to just go through some of the context for that and see why we would certainly submit that it was fair and there is no reason to think the Commission was wrong in its interpretation of what Apple did.

I think, in part, this is a complaint about the Commission rather than a cross-examination, but given that issue has been joined, I would like to take you to it. I am afraid it means we will have to go very briefly into closed session when we get to the letter of

facts, but firstly we can look at the decision, the *Spotify* decision.

If we go to page 179, please, {AB6/45/179}, we will see in Apple's closing it relies on something said in 648. If we could zoom in a little, please, it says here:

"Apple contends that the payment of higher prices by iOS users cannot be attributed to its commission fee and that as of year two of a subscription when the commission fee paid to Apple decreases from 30% to 15%, no music streaming service provider decreased its subscription prices."

That is, of course, a similar argument to Professor Hitt's natural experiment. Then over the page, {AB6/45/180}, that this confirms Apple's view -- So sorry, my mistake. Bottom of {AB6/45/179}:

"This would confirm, in Apple's view, that subscription pricing is an independent business decision by music streaming service providers and that those providers maintain increased prices to maximise their profits."

That argument is rejected by the Commission, and it says, {AB6/45/180}:

"However, Apple's arguments disregard that even a 15% fee is problematic for developers operating in

markets with thin margins and high fixed and variable costs such as music streaming ..."

Then just picking up in the middle of the paragraph, it says:

"The fact that music streaming service providers do not lower the price after the first year of the subscription, when Apple's Commission fee is lowered to 15%, is not surprising, given that, in general, discounts for digital products are more likely ... [during the initial period than later]."

But I just want to draw your attention, while we are here, to footnote 905 because that is the footnote attached to Apple's submission that my friends are relying on. It footnotes this point to Apple's response to the statement of objections, and that is not a document that we have but we do not need it for this purpose. So the passage my friends rely on comes from the response to the statement of objections.

Can we now go to page 14, please, of *Spotify*, and remind ourselves of the process, {AB6/45/14}? What we will see is at paragraph 24 there was a statement of objections on 28 February -- sorry, there was an initial statement of objections, then replaced on 28 February 2023. Recital 25, Apple replied in May, and that is presumably the document that we have just seen

the footnote reference to.

Then, at recital 26, there was an oral hearing; at recital 27, an RFI; next page, please, {AB6/45/15}, recitals 28 and 29, more RFIs; then, at 30, the letter of facts; then recital 31, access to the file; then recital 34, just down the page a little more, please, in January Apple submitted its response to the letter of facts.

So there was a lot of fresh material after the statement of objections and, of course, as you know, a letter of facts can be used after serving a statement of objections where the Commission has fresh evidence.

If we look at page {AB6/45/17}, please, at the bottom of that page, recital 46, it explains:

"... the Letter of Facts set out, for each item of evidence, how it relates to the harm to consumers ..."

So the whole purpose of the letter of facts and how the Commission intended to use it in the decision. So what happened then, the statement of objections, a whole series of further phases, access to the file, letter of facts dealing specifically with the issue of incidence.

Then if we go to -- back to recital 614 on page {AB6/45/174}, we see the concession that the Commission considers Apple made was in its response to the letter of facts, so it obviously appeared or it appears, in our

respectful submission, that Apple's position had shifted, in light of the additional material and the further process, away from whatever position it took in its response to the statement of objections.

Now, in my respectful submission, that is more than ample to dispose of this point, but mindful of Ms Demetriou's strictures about the limits on our reply, they do point to various paragraphs in the response to the letter of facts and I would be happy to show them to you and say why, in our submission, the view the Commission has taken and the cross-examination on the basis of this view of the Commission was a fair one. I think it will take five minutes, but I am afraid it does have to be done in closed, if you have any appetite for it.

THE CHAIRMAN: Well, I think probably -- I think, as you say, you probably do need to do it. What is practically the best thing to do, I wonder.

MR WARD: Wait until the break and then come back to it?

THE CHAIRMAN: We can turn the livestream off. I do not know about the transcript, how difficult it is to move from one transcript to another. I wonder if what we might do is we might park it and ... Okay, I think we can just go into closed and come back out again, so I am told, so why do we not do it now? Shall we turn off the

livestream and the transcript?

(2.48 pm)

(The court sat in closed session - separately transcribed)

(3.13 pm)

MR WARD: Right, we are ready to go. Good.

Spotify is consistent with the broader point that we made about developer evidence. That evidence shows that developers do take the commission into account when they set prices, and, of course, it is not just *Spotify*, but Mr Howell, the expert, and indeed the various other developer complaints and concerns. This is in accordance with a point of obvious common sense, in our respectful submission. This is a large and inescapable charge. It is not a small secret cartel overcharge, as we are well familiar with in this jurisdiction.

What Mr Howell said, if I can quote, is:

"... for most of us, the cost of running the business is about equal to the revenues."

That was Day 9, page 38, lines 16 to 18, {Day9/38:16-18}. But, on Apple's case, this 30% charge is simply irrelevant to price setting. One of the important reasons why they say it is irrelevant to price setting is because it was an ad valorum charge. That is a point that was not put to Mr Howell when he was cross-examined, that that would make in any way

a difference to his evidence.

Now, that takes me to the increase in Apple's pricing tiers arising from the increase in VAT because that, too, of course, is an ad valorum charge. We absolutely accept that it was Apple that decided to increase the price tiers. Just to remind you, that is {D1/296/3}. Can we just get that back? You saw this before and this is just to join the dots.

What this shows, in our submission, is that Apple itself thought that the consequence of the increase of ad valorum charge was that generally developers would want to pass it on because, if generally developers would absorb it, there was no reason to increase the prices of the tiers.

You will recall we also showed you a slide deck, which is {D1/242/1}, which appeared to set out the reasons for this decision. If we could go to that, please. Thank you. At {D1/242/3} it says "Decisions", "EU VAT 2015", "Pricing for ... [inter alia] GBP ...". Then we went to slide 13, {D1/242/13}, which explained -- thank you. If we zoom in a little -- the last bullet, that:

"The following analysis assumes demand for apps is inelastic when making small price changes. This is historically evidenced by prior app store price

changes."

By "small", here of course they are talking about 5%.

So, in our respectful submission, this was an important document about Apple's thinking and Apple's understanding in this area.

While we were preparing our written closing, Ms Fitzpatrick spotted that Professor Hitt had even referred to this document in a footnote to his third report, which I for one had not appreciated. Can we go to that? It is {C3/8/124}. Could we zoom in on footnote 459? Thank you. It says:

"Apple increased the price for 82 of the 87 tiers. See Apple, 'Tax and Foreign Exchange Update' ..."

Which is in fact this slide deck. We can trace that through the Kent number.

But unfortunately Professor Hitt had simply ignored what this document said about Apple's experience of demand inelasticity. We also produced other evidence of ad valorum charges being passed on. Dr Singer pointed to the statements by a range of big tech companies that they would pass on taxes. Professor Hitt simply ignored that.

Then, of course, we had the reductions in merchant interchange fee that were set out in the Commission's

study, and that just really, for your note -- we do not need to go there -- for the transcript, it is {D1/931.1/175}. Professor Hitt quite fairly said, "Well, that was in a different industry", but it is still informative.

Now, in the hot tub, Dr Singer said he had found that -- sorry, back to the VAT increase now. Back to the VAT increase. Dr Singer said in the hot tub that he had found, in practice, "70% of developers "rode up with the price [tier changes]"; in other words, I think he meant stuck with the tier even as it increased. That is {Day15/43:7-12}. It is right -- it is right to say that that is not mentioned in any of Dr Singer's reports and to that extent a fair point is taken by Apple in its closing.

But what they also say in their footnote at footnote 712 is that the Class Representative's legal team must have known about this at the time objections were taken to Hitt 4; in other words, we were there sitting on some new analysis while objecting to their new analysis.

Well, I am instructed that that, in fact, is not right and that the first Hausfeld knew about this analysis, this riding up with the price tiers analysis, was in fact later during the course of the trial. But,

in any event, all Dr Singer's figures do is confirm that Apple's expectation, as expressed in the slide deck, was actually realistic.

Now, that takes me to the related topic of marginal cost. On Professor Hitt's view of the world, it is of critical importance whether the commission is per unit or ad valorum. This difference, in particular, is said to fatally undermine the formal models. According to Professor Hitt, it entails that there would only be pass-through to the extent there were other marginal costs. That is the maths in Appendix 5 to Hitt 3. Again, just for the transcript, that is {C3/8/229}. The maths is not in dispute.

But the first point is that there is no evidence that any developer actually thinks like this, that it looks at this and says, "Well, that is a 30% charge, not a 300,000 charge". Indeed, on the contrary, Mr Howell's evidence is that the commission is just another cost element, albeit a particularly large one. So it is actually only on Apple's analysis that it matters what other marginal costs there are.

Here, unfortunately, Professor Hitt's evidence was fundamentally different to that that he gave for Apple in the US Proceedings. We set that out in our closing. I will just quickly turn that up. It is page 139 of our

closing, which is {A1/8/142}. Oh dear. Is this the right reference? No, sorry, {A1/8/143}. Thank you. You will recall, at the top of the page -- in fact, we need to go to the previous page where there is the bit that is open, {A1/8/142}. At the bottom of the page, this is dealing with Professor Hitt's witness statement in the US Proceedings, "... a 'flawed assumption' ... that 'every developer has low marginal costs ...' ... some apps may face meaningful marginal costs, including music streaming apps ...", which of course, as we observe, he entirely ignored post-*Spotify* in these proceedings.

Then there is a part that is, of course, confidential, which I will just remind you of, if you read in 402, {A1/8/143}. (Pause).

Then also, very importantly, the point that is also marked as "confidential" in the first four lines of 403. (Pause)

Now, in our respectful submission, this is another significant breach of his duty as an independent expert, but what is important is the totality of this evidence shows that there would be significant marginal costs for apps with a range of types of content: licence content, media apps, games, books. Mr Howell said there would be marginal cost for social media, storage apps and more.

If we go now to what Apple says about this in its closing, which is {A1/9/152}, we see, firstly, at lines 3 and 4, "He fairly acknowledged that there are other types of ..." -- sorry, thank you very much -- lines 3 and 4, "He fairly acknowledged that there are other types of transactions that can potentially have significant marginal costs ...". Well, yes, he did, but only under cross-examination. Then eight lines down it says:

"Dr Kent has no meaningful evidence of prevalence of high marginal cost ..."

Well, we do, actually. We have Professor Hitt's own evidence, we have Mr Howell's evidence and we have Dr Singer's, which was not, in fact, challenged.

Turning to another topic, price differentials between the App Store and developers. Now, the starting point here again is *Spotify*, where this was part of the tapestry of evidence that the Commission relied on. We do not need to go back to the decision. It is {AB6/45/177}, paragraph 634. It is just an example.

We also have Professor Hitt's evidence, and I am just going to make sure this is open. I am pretty sure it is. Yes, {H1/2.1/177}. This is Professor Hitt's expert report and this part of the report deals with a developer claim, and just to remind you, if you

read 361 and 362.

THE CHAIRMAN: Is this -- this is the US Proceedings, is it?

MR WARD: Yes, it is. It is, yes. Oh, yes, very importantly it is. Just read those two paragraphs. I put all of this to Professor Hitt. (Pause)

Now, we agree with this. Can I just ask you to cast your mind back to the relevant evidence in and around the passage of the letter of facts that we considered? As I say, no more than that -- I do not want to go back into closed session -- and the approach that Apple was taking at that time.

But in this proceeding he took a different tack. Can we go to {C3/4/274}? This is his second report. At the top of the page, 511:

"When app developers prefer setting a common price ... they will likely not change the single cross-platform consumer price ... in response to changes in commission ..."

Well, in fairness, again, under cross-examination, he accepted that developers might in fact choose to set a profit-maximising price that covered distribution costs across all platforms, and that is {Day23/151:6-9}, but we do not need to go that. But if we go to the next page, {C3/4/275}, you will recall -- thank you -- exhibit 45, which was the top 50 subscription products,

and then on two pages, exhibit 46, {C3/4/77}, VPP and NPP.

We made the point, and what his own analysis shows is that only around half had uniform pricing between the App Store and their website, but -- and we made the point in our closing that this selection of these particular types of apps were all apps with reduced commissions so that, of course, made it less likely that one would see a difference in price between the website -- own website and the App Store.

But, also, you will recall we made the point to Professor Hitt that, although he did not say anything about the scale of the disparity, in fact there were indeed, in some cases, really quite significant differences.

Now, in closing what Apple says is that all this shows is simple economic theories performed poorly; in other words, it is all a bit mixed. Of course they are mixed, these results, but this is a class claim, and our submission is that all of this is more support for consumer incidence.

Next, natural experiments -- Professor Hitt's natural experiments. You appreciate that it is our contention that this offers support for consumer incidence but greatly understates it. The support comes

from Professor Hitt's exhibit 35, which is {C2/4/233} -- sorry, {C3/4/233}. Just zoom in on the bottom half, please. This is -- I am sure this has now become overfamiliar. This is where Professor Hitt said:

"App developers did not reduce prices for the vast majority of [programs] in response to lower commission rates ..."

Our answer was, "Well, but 6% to 32% did reduce their prices", in his words, "in response to lower commission rates". Now, we have obviously had a lot of discussion about this. Professor Hitt's answer was, "Well, I did a difference in difference analysis for the first two, the small business and the Auto-Renewing Subscriptions". But of course, he did not do a difference in difference analysis for the second two, where the disparity is 6.5% to 32%.

But even the difference in difference analysis showed at least significant reduction of prices in the lifestyle genre, you will recall. I will just show you that again. That is {C3/4/680}, where, in the middle of the page, rows 7, 8 and 9 are lifestyle, and you see a negative coefficient, minus 185, which -- statistically significant -- showed that there was a difference in that category.

Now, putting that aside, talking about the natural

experiments generally, we gave reasons why each of these experiments would not be representative of pass-on more generally. Some were high level and some were specific. But let us deal with the high-level ones first. The first one is direction. All of these experiments deal with price reductions, and that is not the Class Representative's primary counterfactual. You have got Mr Hoskins' submissions about that and indeed you have got the CMA's submissions on that.

But the second issue is steering, and steering has caused quite a large controversy. But the point is really a very simple one, which is: there is an obvious incentive for developers to steer their customers towards suppliers charging lower commission, whether it means alternative app stores or just alternative payment processes, which is a much simpler task. Even now, it is not really clear whether that general intuition is in doubt.

But what Apple says in its closing is that Dr Singer gave no reason as to why prices on the app store would be lower as a result of steering, and that is page 153, paragraph 474.

But that is actually not right. What Dr Singer said is that the App Store commission would fall as a result of what he called "competitive forces ... unleashed" and

a "wonderful competitive interaction", and those pithy phrases are at {Day18/96:7-9} and {Day18/94:10}. The point is that Apple itself would be driven to reduce prices by the magic of competition.

But it is also important that, as Mr Hoskins was saying actually at some point earlier, Apple -- it is still the evidence that Apple would still be able to command a premium -- and that is {Day18/21:3-6} -- even though it would be charging a competitive price. So it would be competitive, but at a premium.

That is -- the competitive price, that is Dr Sweeting -- was it? -- or Professor Sweeting, {Day20/64:20-25} and {Day21/87:16}.

There is a further high-level point about the natural experiments. Natural experiments are isolated types of apps where things changed at different times. What we are talking about here, even if we entertain the world of the natural experiments, is an industry-wide change in the price, not by individual genres, and of course industry-wide changes are likely to be -- more likely to be passed on. We know from Mr Howell that the industry contains price-setters who have sophisticated methodology. In our respectful submission, they would take into account the fact that commission was 15 and act differently to how they would if it was 30.

Now, there is a related point of which a lot is made in Apple's closing about the Google Play Store. You will recall that Apple -- Dr Singer was cross-examined on a hypothetical, which was a reduction in commission on the Google Play Store, which involved treating it as a monopoly, and he said that pass-through would be low. This was supposed to show that incidence would be low on the excessive pricing case. The reference in Apple's closing is page 146, paragraph 456.

But this argument proceeds in at least three unwarranted steps: first, it assumes the case on exclusionary abuse fails. It does not, for the reasons Mr Hoskins has given; secondly, it assumes the primary counterfactual fails, and I should say that that even makes a difference to the unfair pricing claim, a point I am going to come to later; thirdly, the basis of the argument is supposed to be a read-across from Professor Hitt's natural experiments, but, as I am going to come on to and as Apple appreciates, there are a range of specific reasons why we say those experiments are not representative.

Now, it is true that Professor Singer, Dr Singer did not bring those to mind when he was being cross-examined on the Google Play Store in the course of his five days in the witness box. He did not. When he gave his

answer, he did not think about those things. But Apple is, of course, in no doubt that it is our case that we do rely on them. Now I am going to look at them differently -- individually, I mean. So sorry.

Also, before we do, I just want to remind you that each of these programs was introduced partway through the claim periods and there are all sorts of different metrics in the evidence about how significant they are. But they do account for a minority of the transactions at issue in this case, and one source of numbers for this is Dr Singer's second report -- so sorry, third report, {C2/8/137}, but the numbers are confidential.

I am just going to talk briefly about these programs individually. Firstly, the Small Business Program. This was launched in December 2020. We deal with it at page 137 of our closing. In December 2020, the Covid-19 pandemic had begun in the spring and inflation was rocketing up so it is hardly surprising, in our submission, that small developers did not fancy reducing their prices.

Now, Apple's answer to this is Dr Hitt's difference in difference analysis. Let us go to that, please. It is at {C3/4/665}. You see:

"Regression Analyses of the Small Business Program."

He explains at the bottom of the page how it works.

Last four lines:

"These regressions compare changes in prices for app developers that enrolled in the SBP to changes in prices for app developers that did not ... For example, if app developers that enrolled in the SBP hold prices constant, while app developers in the control groups raise prices, the regressions would yield a negative coefficient ..."

So it deals with differences between price movements, of course, and not just raise it -- it would be in both directions. I am not making a silly point like that. But what we are interested in, of course, here is not price rises. We are asking whether the prices in the treatment group fell by more than the prices in the control group or relative movement terms.

Of course, Covid and inflation affect both, and Dr Singer's point is that, in those circumstances, small developers are likely to be highly risk-averse about a price-cut arising from the commission reduction, so it is unsurprising that there was no difference for the difference in difference analysis to pick up.

Then, while we are on this topic and for completeness, I will just remind you of two other reasons why the Small Business Program underestimates the rate of incidence. First, the way the program is

structured. If developers cut prices because of the commission reduction and then they become successful, they may have to put the prices back up again. We saw that from Apple's press release. I will show you again. It is {D1/1003/3}. Can we zoom in at the bottom, the bullet points at the bottom which explain how the program actually works? It is the second bullet point:

"If a participating developer surpasses the US$1 million threshold, the standard commission rate will apply for the remainder of the year."

So there is obviously a disincentive to cut your prices if, in fact, you succeed -- you are starting to be successful and they have got to go back up. Then, secondly, Mr Howell explained that small developers are price followers, and that is {C2/442} at paragraph 88.2. So again, that makes it less likely on the face of it that a small developer cut would affect pricing. So we do say there are many reasons why this small developer program is not informative.

Then, as for the automatically renewing subscriptions, ARS, the essential problem is the discount only applies in the second year but developers were only able to offer a single price, so they had to be confident enough of recouping through renewals to offset the reduced revenue in the first year. We set

this out in our closing, page 138, paragraph 398.

So that, too, is not informative of the general position. It is another reason why you may see a reduced rate of pass-through.

Then finally under this head, as for the video and news programmes, the VPP and the NPP, both involve a complex tradeoff. Developers have to make certain content available in Apple's own TV and news products that comply with various standards of Apple, if they get admitted, and it raises an obvious risk of cannibalisation from other sources. So, again, the calculation that goes into whether to change the price is not illustrative of any wider point.

Now, yesterday, sir, you asked me about the relevance of the delayed counterfactual for incidence, and of course we have a primary counterfactual and a delayed counterfactual, and the argument for the primary counterfactual is based on legal issues that Mr Hoskins has ventilated. That is outside my remit. But I will talk about incidence.

Now, in the exclusionary case, it is obviously -- in the delayed counterfactual, what we have is a change in the conditions of competition leading to new competitive equilibrium on the delayed counterfactual. So we can see -- and we do not shy from saying -- it might take

some time for consumers, particularly, to gravitate to new app stores, but obviously, once the tie is broken and developers are able to offer new payment services providers to consumers, that is much, much quicker and simpler to do. As you have seen, it can be done by just a button. If it is not prevented by the anti-steering provisions, it can just be done. So we do accept that there is an element there of delay arising from the delayed counterfactual.

But the unfair pricing case is different. That does not involve some kind of change to the conditions of competition. It does not involve reducing the commission in that way. It is about applying a benchmark of workable competition. So it does not concern a competitive dynamic bringing commission down. On Mr Holt's analysis, assuming you accept it, the commission should be 15%, but it is not about a change. So in either primary or delayed counterfactual, we say Apple should not get the benefit of some kind of run-in period, a bit like a run-off period in a cartel.

So, in our submission, in fact, it has -- the delayed counterfactual has very little implication here for the excessive case.

Now, I am going to turn to --

THE CHAIRMAN: I am just wondering whether -- does that mean

that you do not actually -- is that a submission that there really is no need for a delayed counterfactual at all?

MR WARD: Well, if we need it, we rely on it --

THE CHAIRMAN: No, I understand.

MR WARD: -- but we say -- we have been obviously giving this some thought in light of your question and wanting to be as helpful as we can, and if you decide -- if you decide against me on the points I have just made, then obviously the delayed counterfactual would entail some sort of stickiness. But what I am saying is that that is not the right way to look at it because it is just a question of what the commission should be. Answer: 15% by workable competition. It does not require some competitive dynamic to play out.

THE CHAIRMAN: Yes. So even if I -- even if we disagree with Mr Hoskins, if we get to that stage, then you are saying we do not necessarily have to be consistent when it comes to this because it is a different approach? That is the point?

MR WARD: I do say that, but of course my ultimate fallback is that I would rather have stickiness than nothing, if I can put it that way.

THE CHAIRMAN: Yes, that is understood. That is understood.

MR WARD: Okay.

DR BISHOP: Just one question here. You are making an assumption or you do need some assumption, do you not, that at some point Apple should have realised that it was becoming dominant and making huge amounts of money and it was --

MR WARD: Yes.

DR BISHOP: But that realisation ought to have come some time before the opening of this -- of the period and indeed enough to -- for the market to adjust to these lower rates so that there is no hysteria; there is no effect of the 30% rate going into the claim period.

You have not actually presented us with any -- I am not saying you necessarily have to -- with anything about the date on which Apple should have realised that, "Gosh, we are making so much money. Maybe we are dominant. Maybe we should bring the price down" -- I do not know -- "the commission".

MR WARD: That is fair. Our answer to that lies in the submissions that Mr Hoskins made about the primary counterfactual more generally, which is to say that within the period of the claim, if I can -- forgive me for not having the correct language of the case law at my fingertips, but essentially the consequences of illegality ought to be purged from that period. Please do not allow my poor formulation to replace Mr Hoskins'

expert formulation in your mind. That is effectively the consequence. Even in the delayed counterfactual, what I am saying is that Apple should not get the benefit of what I am calling "run-in" to say, "Well, there might be a period of adjustment", where there is no competitive process which is part of our case which would warrant that.

DR BISHOP: But just one final point. Surely you are not saying that we should give damages against Apple that might partly be for a period when they were not doing -- they were not abusing their dominance?

MR WARD: Of course not.

DR BISHOP: Okay.

MR WARD: Now, I was going to turn to the broad axe. We have a substantial range of evidence, practical, commercial, empirical, pointing to incidence. If you could turn to our closing on page 143, please, so {A1/8/146}. Sorry, it is just the difference between my hard copy and the Opus copy.

You will see, at 413, we set out five reasons why we say at the minimum -- at the minimum -- the evidence establishes there has been some incidence sufficient to perfect the tort. This is all setting aside various other debates, including the economic realities, Dr Singer's formal models and so forth. We have the

Spotify decision; Apple's own understanding and its admission. Obviously we have debated the admission; the unchallenged evidence of Mr Howell, drawing on his wide experience in app development that the commission was taken into account in price-setting and that smaller developers simply follow; then (d), we rely on Professor Hitt's evidence in the US that there was pass-through, which we observe at (d) was strikingly consistent with the European Commission's findings and reasoning in the *Spotify* decision, albeit inconsistent with what he put forward in this case; then, finally, his own natural experiments.

Now, when I rely on these for perfecting the tort, that is the absolute minimum of my case. Obviously I say they go much further. But, as you appreciate, this is an important threshold for us to cross in order to engage the broad axe. We would say any of those would do.

Now, in its closing, Apple called it "the fabled broad axe", and that is paragraph 480 on page 155. Of course, it is not really a fable; it is a fact. It is a fact of the jurisprudence of the Supreme Court. What I would like to do is take you to the judgment of the Court of Appeal in *BT* and *Royal Mail v DAF* at {AB3/59/44}. Now, I am doing this -- sorry. I just

need to check the files. (Pause)

Good, thank you. This is -- I do this slightly apologetically as I am going to take you through my submission --

THE CHAIRMAN: I had noticed that already!

MR WARD: You might say, "Here is one I made earlier".

THE CHAIRMAN: Yes, quite.

MR WARD: But I am going to avoid quoting myself and just invite you to consider the statements of their Lordships, which are summarised -- although I say it myself, it does summarise the relevant passages. We can see that at 104, in the last half of the paragraph, it refers to:

"... the Supreme Court stated that: 'Once that hurdle [of showing a triable issue that more than nominal loss has been suffered] is passed, the claimant is entitled to have the court quantify their loss, almost ex debito justitiae. There are cases where the court has to do the best it can upon the basis of exiguous evidence.'

"The Court continued ... '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' ... 'This principle

of entitlement to quantification notwithstanding forensic difficulty has stood the test of time and outlasted the involvement of civil juries in the assessment of damages' ... 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."

Then there is a quote from the Supreme Court in *ASDA v MasterCard*, {AB3/59/45}:

"'The "broad axe" metaphor appears to originate in Scotland in the 19th century. The more creative painting metaphor of a 'broad brush' is sometimes used. In either event the sense is clear. The court will not allow an unreasonable insistence on precision to defeat the justice of compensating a claimant for infringement of his rights.'"

Then we have *Gutmann*:

"'... It is not so much a substantive principle of law as a description of a well-established judicial practice whereby judges eschew artificial demands for precision and the production of comprehensive evidence on all issues and instead use their forensic skills to do the best they can with limited material to achieve practical justice.'"

Then finally, *One Step*, which is in the third to fourth line:

"... 'the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss'."

So I hope I can be forgiven the indulgence because of the economy. You might remember that, in that case, *BT* and *Royal Mail*, the Tribunal was actually quite critical of the economic models and still drew upon it -- drew upon them. So this is the framework with which you must approach all of the evidence, but I also say this as a precursor to talking about the formal models, given how sustained the attack on them has been.

It is important to keep in mind what those models seek to achieve. They are not a direct measure of incidence. Dr Singer explained this was not possible given the lack of variation in the headline rates, and that is {C2/8/136}, paragraph 280. He was not challenged on that. Professor Hitt has not attempted to do it, of course.

Dr Singer's view is that both models were a reasonable, but not perfect, approximation of the demand curve. The issue for the Tribunal is not whether they are perfect but whether they are informative. The linear model provides a form of lower bound of

pass-through of 50% for a monopolist. We saw from the Hausman paper that, if there is competition or a convex demand curve, the predicted rate of pass-through is even greater. The paper is at {C5/42/1} and we quote the key passage at page 145 of our closing, paragraph 417. Of course, that higher pass-through is exactly what we see in the *Spotify* decision.

Then we have the logit model which predicts higher pass-through at 90.8% on the basis of market shares. Of course there has been a sustained attack on the assumptions behind it and we address those in our written closing from page 146 onwards. But, to reiterate, Dr Singer is clear that the logit model is not a perfect representation of reality. It is an informative approximation. For both models, the models become informative when you have regard to the totality of the variables they contain rather than by excising some of those variables.

Now, I do not intend to go into the granular criticisms, but I do want to make three points about the closing in addition to what we say in writing. Firstly, if we go to Apple's closing, please, at {A1/9/191}, we see, at paragraph 561, please -- I am so sorry. It must be the previous page. No, there you are. 561. I am so sorry. Just give me a moment. Oh yes. This is right.

This is where it was said that Professor Hitt -- let me try again -- Dr Singer had committed a howler. The word "howler" was used in cross-examination and there it is, at the bottom of 561. It is to do with how the IV regression was calculated by reference to the VAT rate rather than the -- the VAT multiplied by price is the instrument rather than the VAT itself. We were -- you will recall that this was a point that was taken by Mr Piccinin in cross-examination but neither adopted nor foreshadowed in any way by Professor Hitt or his 1,000 pages of evidence. So, as a result, Dr Singer was completely unprepared for this. He did not accept the point. But we were going to leave it there, but as it is revived in Apple's closing, I am going to make two more points about it.

Firstly, it of course only affects the IV regression, the instrumental variable. It is of no relevance to the OLS regression. The results of the two are, in fact, strikingly similar. Secondly, I have a point on instructions on the substance, which is that, even carrying out the IV regression in the manner that Mr Piccinin prefers -- in other words, using the tax rate rather than the tax level -- the results obtained are similar.

Now, of course, that is just on instructions, and if

this had been raised in Professor -- by Professor Hitt at all, it could have been dealt with by Dr Singer.

The next point I make is going on to page 119, paragraph 555. There is some reliance -- I am so sorry. Have I got the page wrong? There we are, {A1/9/190} -- some reliance on the district judge's views in the *Epic v Google* case about the logit regression, which is set out over a couple of pages by Apple. Well, Dr Singer made clear he rejected this criticism and he explained why, and I will just give you the transcript reference rather than attempt to summarise it. It is {Day19/139:1} to page 141, line 13, {Day19/141:13}.

Then there is a blog post from Professor Allison, criticising the Hausman test. Again, just for the transcript, that was {D1/205.1/1}. We are accused of selective quotation. We do not think so. It is two and a half pages long. It is not very technical. We invite you to read it.

But, again, stepping back from all of this -- and despite what I said, we have descended a bit into granularity -- it is necessary again to bear in mind the nature of this claim. It is a class claim. This is a top-down methodology. It is neither realistic nor necessary to identify the precise level of pass-through of numerous developers and apps over a nearly ten-year

period. There is ample material before you to wield the broad axe in support of a finding of high level of incidence across the class as a whole.

Now, that was all I was going to say on incidence, leaving a little time for Ms Fitzpatrick, unless of course you have any further questions.

THE CHAIRMAN: Thank you. No, that is very helpful. Thank you.

Closing submissions by MS FITZPATRICK

MS FITZPATRICK: Sir, Members of the Tribunal, we have now reached the grand finale that Mr Ward promised yesterday. I will be addressing you on the Class Representative's simple interest claim.

I will begin with the basic legal principles, which I do not think are controversial. The Tribunal has a broad discretion to award simple interest on damages up to a rate of 8%, and that is Rule 105 of the Tribunal's Rules, which -- I do not think we need to turn up.

As for how that discretion should be exercised, the principles are set out in the judgment of the Court of Appeal in *Carrasco v Johnson*, which is the most recent Court of Appeal case on the subject of statutory interest. Please can we look at *Carrasco*? It is at {AB3/28/1}. Thank you. This was an appeal against the

rate at which statutory interest had been awarded on the facts of that case. Please can we go to {AB3/28/4}? The Tribunal will see the heading, "The relevant principles" -- thank you -- halfway down the page.

Please could I ask the Tribunal to read paragraph 17, which goes on to the next page, so perhaps if we could have {AB3/28/4-5} alongside each other. Thank you. (Pause).

THE CHAIRMAN: Yes, thank you.

MS FITZPATRICK: There are two points I would like to highlight here. First, subparagraph (2) indicates the lack of a need for evidence on the particular attributes of the claimant. It is said that the court will not have regard to those matters; that is to say, it is sufficient to consider the position of persons with the claimants' general attributes when deciding on the rate at which to compensate them for being kept out of their money. We say that that is a principle that applies a fortiori in a collective claim, where the Tribunal's entire approach to assessing loss and damage will take place on an aggregate level.

Second, subparagraph (5) mentions certain categories and claimants which may fall between those categories. The reason I highlight this is because a little later I am going to show you another case which has more to

say about the approach to be taken when the claimant is a private individual or a consumer.

Now, just pausing briefly on that proposed characterisation of Dr Kent's class as a consumer class, there does not appear to be any fundamental issue between Dr Kent and Apple as to the basic character of the class. Apple itself describes the present claim as "a consumer claim" at paragraph 489 of its closings, and please can we turn that up? It is at {A1/9/160}. Thank you. The reference to the claim being "a consumer claim" is on the third line.

To develop this point a little bit further, the Relevant Purchases in Dr Kent's claim are not of phones, but of apps and in-app purchases. Now, it is at least possible, of course, that some of the apps or in-app purchases relevant to the claim may have been made by businesses, but when you look at the types of purchase or the genres of purchase that are the most prevalent in the claim, those are in-app purchases in gaming, entertainment, dating and lifestyle genres, and it seems unlikely that many of those purchases will have been paid for by corporates or small businesses as opposed to consumers.

Turning then to the specifics of Dr Kent's simple interest claim, she is seeking an award at the maximum

rate of 8%. There is no need to turn it up, but for the Tribunal's note that is at paragraph 145 of the claim form and the reference is {A1/1/49}.

Apple contends that the award should be limited to 2% above base rate, and that is at paragraph 489 of its closings, which we already have on the screen, {A1/9/160}. We see there, in the second and third lines, that Apple relies on *Le Patourel* and, in particular, on paragraph 1427.

So please can we turn next to the relevant section of *Le Patourel*? It is at {AB3/62/300}. I would like to start near the top of the page with paragraph 1424. So the Tribunal says:

"*BT* proposes that simple interest should be awarded at the rate of 2% above base rate for the relevant periods. This conventional approach, where the claimant is an individual, has been accepted by the Tribunal in other competition cases."

Then, at paragraphs 1425 and 1426, there is a discussion of specific attempts at a more granular approach to simple interest. Then, finally, 1427, which Apple relies on, again refers to a conventional approach of awarding interest at 2% above base rate.

Now, there is an oddity here, which is this: the other competition cases referred to by *Le Patourel* are

all cases where the claimant was not simply an individual but more specifically a commercial entity; in other words, those cases are not consumer cases. For the Tribunal's note, the commercial cases that are being referred to in which the CAT has awarded 2% above the base rate are, first, *2 Travel Group*. There is no need to turn it up, but the relevant paragraph is paragraph 415 and the reference is {AB3/14/155}; next, *Albion Water*. Again, no need to turn it up, but the relevant paragraph is paragraph 225, {AB3/7/77}; finally, *Royal Mail v DAF*, and it is worth briefly turning up paragraph 830 of that judgment, so please can we go to that? It is at {AB3/52/292}. The Tribunal will see a specific statement in the first sentence of paragraph 830, which says:

"... the conventional approach of the CAT is to award base rate plus 2% to commercial claimants and we will do so in this case."

That was in respect of *BT*, I think, but not *Royal Mail*.

Now, the reason for underlining the point that 2% is associated with commercial cases is that there is a separate line of case law which the Tribunal in *Le Patourel* did not refer to and which sets out a different approach in circumstances like the present,

where the claimant is not a commercial entity. We have referred to that case law at paragraph 266 of our trial skeleton. It is not necessary to turn it up, but the reference for the Tribunal's note is {A1/4/78}.

I should make it clear at this point that Apple has not suggested that this case law is inapplicable. It just has not commented on it.

Now, in a nutshell, what this case law indicates is that, for private individuals or consumers, they should be treated differently from commercial entities and, in particular, for -- in cases involving private individuals, simple interest should be awarded at a higher rate than in commercial cases. That is because of the obvious commercial reality that the real cost of borrowing is higher for private individuals than it is for commercial entities.

To make those points good, I would like briefly to show you two of the relevant cases. So can we go first, please, to the Court of Appeal in *Jones*? That is at {AB3/19/1}. The facts of the case are not important. The issue on appeal related to the rates of an award of a pre-judgment interest on disbursements. Please can we go to paragraph 17, which is on {AB3/19/5}. So at the top of the paragraph we can see that -- this is Lady Justice Sharp -- she begins by discussing the power

to order interest on costs, but four lines down, towards the end of the line, her Ladyship goes on to explain that:

"The purpose of such an award is to compensate a party who has been deprived of the use of his money, or has had to borrow hundred to pay for his legal costs."

She says:

"The relevant principles do not materially differ from those applicable to the award of interest on damages under section 35A of the Senior Courts Act 1981."

Then, beginning in the following sentence, the relevant principles are set out. So we see halfway down the paragraph that the court's discretion is described as "not fettered" and "at large". Then, in the next sentence, beginning "Ultimately", we see that the court will conduct "a general appraisal of the position having regard to what is reasonable ...", and so on. Then, in the following sentence, we see that that appraisal will involve an assessment of what is reasonable, "having regard to the class of litigant to which the relevant party belongs, rather than a minute assessment which it would be inconvenient and disproportionate to undertake".

This is essentially the same point we saw earlier in the *Carrasco* judgment, namely it is the position of persons with the general attributes of the claimant or claimants which matter when it comes to simple interest.

Could we turn to the next page, please, paragraph 18 --

DR BISHOP: Ms Fitzpatrick, just a query. This is new to me, I am afraid, this area of the law, so forgive me if I turn out to be asking Dick and Jane questions about it. When you read out the section or invited us to read the section on paragraph 17 of *Carrasco v Johnson*, was it, or was it --

MS FITZPATRICK: *Carrasco*, yes.

DR BISHOP: Well, the precedent you took us to, the contrast was drawn between those litigants who would get the deposit rate and those who would get the borrowing rate, and I had supposed that the borrowing rate would be appropriate to businesses because most businesses effectively borrow, there would be a commercial borrowing rate, and that the litigants got only the deposit rate -- who got the deposit rate, generally lower than the borrowing rate, would be ordinary savers, ordinary individuals, who are considered, on the whole, to be saving and working out lifetimes and not borrowing.

Now, here, we are dealing with consumers, but you are now saying that these consumers are borrowers, not depositors, not -- is that what you are saying?

MS FITZPATRICK: I am not giving evidence on that, sir, but what I am saying is that I am about to show you the case law which suggests that it is the borrowing rate that is appropriate for consumers.

DR BISHOP: For consumers?

MS FITZPATRICK: Yes.

DR BISHOP: Oh. So what is left of that contrast between deposit rates and borrowing rates? Who -- if all businessmen are borrowers and all consumers are borrowers, why do you need to draw the -- why does the law ever need to draw the distinction?

MS FITZPATRICK: Let us go to *Carrasco*, actually, because it might help. Can we go back to {AB3/28/4}?

DR BISHOP: Can I just ask my colleagues, if all of you -- if all of this is perfectly obvious to you and --

THE CHAIRMAN: No, I think you are going in the right direction.

DR BISHOP: (Laughs)

MS FITZPATRICK: Sorry. Can we go to {AB3/28/5}, which is the relevant page, actually, that Dr Bishop was asking about. So this is an area of some discretion rather than the legal rules. If you look at paragraph 18,

there are two cases referred to there which we have not put in the bundle because we are not relying on them, but we can get them into the bundle. Those are examples of cases of individuals who fell into the middle category between borrowing and deposit, if you like. In those cases, the claimants were taken to be sophisticated investors, so they are not ordinary consumers. They were, for reasons specific to the facts of those cases, understood to be people with particular investment concerns. I think one of them actually -- now I am regretting not putting them in the bundle -- but one of them related to claimants who are involved in some sort of complicated geared investment scheme.

So what I am about to show you is that what the case law tells us is, when we are looking at simple private individuals, if you like, bearing in mind that this is an area of discretion, we look at borrowing for consumers rather than a mix.

THE CHAIRMAN: Just while we are on that -- while you are here and maybe just to help a little bit, so subparagraph (4) in *Carrasco* is where it talks about -- that is the only place it talks about deposits, is it not, effectively or it talks about the investment rate, does it not?

MS FITZPATRICK: Yes.

THE CHAIRMAN: I know (5) refers to deposit, but it is talking about -- effectively (3) and (4) are setting the parameters, are they not, for this discussion between the commercial claimants and personal injury claimants, are they?

MS FITZPATRICK: They are, in the way that the principles are arranged here, sir.

THE CHAIRMAN: Yes.

MS FITZPATRICK: I think (4), what is being referred to there is the fact that, if you have a PI claimant, it is not that they are being kept -- they have been kept out of money they otherwise would have had and they have therefore had to borrow. It is that they have been given a windfall or -- exactly.

THE CHAIRMAN: Yes.

MS FITZPATRICK: But that is perhaps just one example of a claimant you might have who might have investment concerns which might mean that it was appropriate to consider the depressed rate as well.

THE CHAIRMAN: Who had a general characteristic that might lead to an assumption about how they should be compensated?

MS FITZPATRICK: Exactly. That is exactly right, yes, yes.

THE CHAIRMAN: Yes. So this does not tell us anything about what you are going to come and talk about in a minute,

which is that -- I think you are saying that this does not tell us anything about the position of private individuals in the situation of a consumer claim. That is the --

MS FITZPATRICK: No, that is --

THE CHAIRMAN: That is your submission (overspeaking) -- yes.

MS FITZPATRICK: Thank you, sir. So we were on *Jones*, I think, and we were looking at paragraph 18, so the reference for that is {AB3/19/6}. Thank you.

So this is the critical point for our purposes. The first sentence -- and this paragraph is indeed about borrowing -- the first sentence explains that the interest rate may differ depending on the type of borrower or, in other words the type of claimant. Then, four lines from the bottom, it is explained that private individuals have tended to recover at a higher rate to reflect their real cost of borrowing and SMEs are also referred to here, but next, as I have foreshadowed, we are going to see how the courts have applied this principle of recovery at a higher rate in cases only involving private individuals.

So can we look now at the case that Dr Kent relies upon, which is the *Attrill* case. That is -- you can see it referred to here in paragraph 18 of *Jones*. In our

bundles, it is {AB3/16/1}. So we just saw this referred to in *Jones*. It was also referred to in *Carrasco*, which we flicked back to a moment ago. The claimants in this case were former bank employees who had sued their employer for damages for breach of contract in respect of outstanding bonus payments. The court was considering the appropriate rate of interest on those damages.

Please can we go to {AB3/16/2}? Please can the -- can we go back to paragraph 3? Please could the Tribunal read paragraph 3, which again goes over the page, {AB3/16/2-3}. (Pause)

In summary, the claimants were seeking an award of interest at a rate of 5% above the Barclays Bank base rate. That was to reflect the cost to them, as private individuals, of unsecured borrowing. A contrast was drawn between the trajectory of the base rate and the cost of -- and the trajectory of the cost of unsecured borrowing, so while the base rate had fallen at the end of -- significantly at the end of 2008, we see that, at the end of the fourth line, the cost of unsecured borrowing had not followed suit.

The court was referred by the claimants' counsel to, amongst other things, published Bank of England materials on unsecured lending rates. That is the

penultimate line on the page on the left side of our screens.

Then, looking at the final sentence of the paragraph, {AB3/16/2}, those materials substantiated counsel's contention that "a rate of 5% over base is a fair and reasonable rate to reflect the cost of unsecured borrowing to an individual".

Now, it is worth looking also at paragraph 4 to see the counter-argument, {AB3/16/3}. So, looking at the first two lines, the banks argued that the claimants should instead be awarded base rate plus 1%, being the normal rate of interest in a commercial case. Then, halfway down the paragraph, Mr Justice Owen says that that argument is "based on a false premise, namely that this case is to be treated as a commercial case, or akin to a commercial case", whereas, in fact, looking now at the penultimate sentence, "The claims are brought by the claimants as individuals against their former employer". Then the final sentence:

"There is [or was] no sound basis upon which to assume that they could borrow at the rates available to commercial concerns."

Then looking finally at paragraph 5, the result was that the court ordered interest on damages at 5% above the Barclays Bank base rate. The reason for that,

looking at the first two lines of paragraph 5, was that the cost of unsecured borrowing was the appropriate rate at which to compensate the claimants for being kept out of their money.

Now, there is no need to turn it up, but a similar approach was taken by the Court of Appeal in the case of *West v Finlay*. For the Tribunal's note, that is {AB3/20/1} and the relevant passage is paragraphs 81 and 82 at {AB3/20/20} of that judgment. That case again refers to *Attrill* and the Court of Appeal in that case considered again the Bank of England's published rates for unsecured personal loans to be a legitimate reference point for determining the appropriate rate of simple interest, which in that case was considered to be 4.5% above base rate.

So, to summarise, what these cases consistently show, in my submission, is that, where the claimant is a private individual, the award should certainly be higher than the 2% above base rate that is conventional in commercial cases. They also show that, in determining the appropriate rate at which the award should be made, the courts have referred themselves to published Bank of England rates for unsecured personal loans relevant to -- for the relevant period of the claim at hand. Dr Kent's position is simply that the

same approach can also be taken in a collective claim such as this one, again, a fortiori because assessment is in the aggregate.

So what we have done, therefore, is to locate the Bank of England's published data for small unsecured personal loans for the relevant period; that is 2015 to 2024. We have got those in the bundle at {D1/1868.2/1}. (Pause)

We have done our best here and we understand that this dataset is equivalent to the dataset relied upon by the High Court in *Attrill*. We referred to it in our opening submissions and Apple did not comment on it. You can see from the heading of the second column that it shows interest rates for small unsecured personal loans of 5,000 and the third column shows equivalent data for loans of 3,000.

Please could the operator just, to get an impression, scroll through this document one page at a time so that the Tribunal can see the range of rates, {D1/1868.2/2-6}. (Pause).

So I think that is nearly there.

{D1/1868.2/7-8}. Thank you.

Can we go back to the top, please, {D1/1868.2/1}? So looking just at the second column relating to loans of 5,000, what we see is that interest rates have been

high. On my reading of the document, they have ranged across the relevant period between 7.69%, I think, or 0.67% and 12.09%. The available data for loans of 3,000, which does not go back quite as far, shows rates ranging from -- so they are even higher. They range from 16.92% to 20.19%.

So, to conclude, where this leaves the Tribunal, in our respectful submission, is as follows: in this case a simple interest award should compensate the consumer class for being kept out of their money at a rate which is higher than the conventional commercial rate of 2% above base rate. This approach would simply be a faithful application of the approach that the courts have taken in cases involving private individuals. I have shown you *Attrill* and *Jones* and I have referred also to *West v Finlay*.

According to that line of case law, there is no real legal basis for an award confined to the commercial rate or an award of only 2% above base rate. Indeed, considering the relevant Bank of England data and proceeding on an aggregate level, 2% above base rate would come nowhere near to compensating the class for the actual cost of borrowing facing private individuals generally over the duration of the relevant period.

Now of course, if you took a base rate plus

approach, you would -- an annualised year-on-year approach, you would end up with different rates for different years. But we are not asking the Tribunal to undertake an annualised approach or to make any other complicated calculation. What we are saying is that, looking at the position in the round, on the basis of the Bank of England data and following the approach taken in *Attrill*, an award of 8% is about right.

Finally, while 8% happens to be the maximum rate that the Tribunal can order, we are not seeking it because it is the maximum. We are seeking it because it is well supported by the Bank of England figures, which suggest that an 8% award may even be slightly conservative. Those are the reasons why we say an award of 8% is the just and appropriate award in this case.

So, unless I can assist further, those are our submissions on simple interest.

THE CHAIRMAN: Just two questions. Sorry, do you want to go? Two questions.

One is, going back to *Le Patourel*, is your submission, respectful submission no doubt, that that second sentence in 1424 is simply wrong, the conventional approach where the claims of the individual has been accepted by the Tribunal in other competition cases? Obviously --

MS FITZPATRICK: Yes. Well, it has been accepted by the Tribunal in other competition cases. It is just that it ought to have been qualified as referring to competition cases involving commercial entities.

THE CHAIRMAN: Not individuals?

MS FITZPATRICK: That is exactly right. Of course, there has never been a claim like this in which simple interest has been awarded so it is no surprise that the cases that the Tribunal had in mind there were commercial ones.

THE CHAIRMAN: Yes. Then the second question: can you tell us who the claimant was in *West v Finlay*? What is the general nature of the claimant?

MS FITZPATRICK: It was a negligence claim and some faulty construction works had been done on the claimant's property.

THE CHAIRMAN: So it was an individual suing in relation to their personal property?

MS FITZPATRICK: Yes, I believe it was a couple that -- yes, they were suing the architect or the contractor or whoever it was that had failed to solve the damp problem or something like that.

THE CHAIRMAN: Okay, thank you. That is very helpful. Thank you very much.

MR FRAZER: This is a class action and distribution of

damages is rather more complex, is it not, than where a claim goes wholly to the people who are damaged? In other words, do we need to take into account that not all of the money recovered is going to go to the class but some will go to the funders and the professionals involved?

MS FITZPATRICK: I do not think so, sir, because this issue that we are talking about is about the calculation of part of the quantum of the claim. It is interest on damages. I think that what you are referring to comes a stage later, at the distribution stage. But this is simply aggregating up what might happen in an individual claim, where the question of distribution does not even arise, so I do not respectfully think that we need to take distribution into account here.

MR FRAZER: It is not a fiction, though, is it? I mean, it is going to occur -- we have to at least take into account that that will occur and that the interest will affix to money which is not intended for the class eventually. I take the point entirely that the compensation is intended for the class, but not all the money is going to go there, which distinguishes these kinds of actions from maybe previous ones. I have to admit, I just -- only have just thought of this so there may not be an answer.

MS FITZPATRICK: Well, I think I will, if I may, stick to my previous answer, sir. I do think this relates to a different part of the process of determining the claim. Of course, this is within the Tribunal's discretion to make allowance for that.

MR FRAZER: Of course.

MS FITZPATRICK: I cannot for my part see a principle basis for doing so.

MR FRAZER: Thanks.

DR BISHOP: Ms Fitzpatrick, this is a claim for about 40% of the adults in the UK or something like that, maybe more. I mean, 80-something -- 87% of adults own a smartphone today and Apple is, in the UK, a little bit bigger than the *Android* system so there are just tens of millions of people that we are concerned with.

Now, it is true that some of those will be borrowers of small amounts of money. Most people are -- they do borrow small amounts of money. Occasionally, some, they borrow large amounts of money and pay lower interest for secured loans on their mortgage or they run over the credit card sometimes and there it is 22%, I suppose you could do it on that basis.

But what basis have you for thinking that borrowing at unsecured rates small amounts of money is a more important characteristic of the 20 million-odd or

30 million-odd people that may be involved than, say, putting a little bit more into an ISA, saving a bit more in the pension plan, borrower type -- sorry, saver type things rather than borrower type things?

MS FITZPATRICK: I do not know, sir, what people at large do with their money. What I do know is that what the cases tell us is that it is relevant to look at borrowing and it is relevant to have reference to the rates attaching to unsecured personal loans. I mean, there might be ways of making the allowances that you are talking about. This is obviously not easy. I am not suggesting it is easy. But what I have done, though, is presented you with a way through that the courts have found, albeit in individual cases.

DR BISHOP: Thank you.

THE CHAIRMAN: Well, who knew interest was going to be so exciting? Thank you. That is very helpful. We have no further questions. Thank you.

Housekeeping

THE CHAIRMAN: Just in terms of where we are, are you going to say anything else about *Android Auto*? Are you planning to address us?

MR HOSKINS: I am, but not now.

THE CHAIRMAN: Not now, no. So you are finished, are you, then?

MR HOSKINS: I think that completes our closing submissions, yes.

THE CHAIRMAN: Yes. So we will start with Apple in the morning. Good. 10.30 is fine. I suppose you are not already thinking you need extra time?

MS DEMETRIOU: If it is on offer, we would gratefully take a slightly earlier start, just because, as you will recall, we were given 11 hours as against the Class Representative's 12, but you did, maybe in a slightly foolhardy way, suggest that we might be able to make some of that deficit up if the Tribunal were willing to sit --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- earlier.

THE CHAIRMAN: I think we are happy to find the extra time if you think you need it. I do not want to give you time that you do not need, but, of course --

MS DEMETRIOU: I think we may --

THE CHAIRMAN: -- any time that is given is always taken.

MS DEMETRIOU: I think we may need it. So if we were able to find a little bit more time, then we would be grateful. We do not mind terribly much when that is.

THE CHAIRMAN: No, I will ...

Shall we start at 10 tomorrow morning, and we will see how we go and hopefully that will give you a bit --

MS DEMETRIOU: Thank you very much.

THE CHAIRMAN: -- and if you need more, then we will find it, but obviously there is a limit to how much extra you can get.

MS DEMETRIOU: Of course. We are very grateful.

THE CHAIRMAN: Let us do that. We will start at 10 am tomorrow morning. Thank you.

(4.32 pm)

(The hearing adjourned until 10.00 am on Wednesday, 26 February 2025)

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