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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 16th January 2025

Before:
Ben Tidswell
Dr William Bishop
Tim Frazer

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr. Rachael Kent

Class Representative

v

Apple Inc. and Apple Distribution International Ltd

Defendants

A P P E A R A N 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

Thursday 16 January 2025

(10.03 am)

THE CHAIRMAN: Good morning. Ms Demetriou?

Submissions by MS DEMETRIOU

MS DEMETRIOU: Good morning, Sir. I am going to address you on the amendment point. As the Tribunal is aware, Apple's case is that Dr Kent's allegations of exclusionary abuse should be rejected because the contractual conditions that she complains about are limits on the scope of the licence Apple grants to developers for its IP. You had my submissions yesterday so you understand the substance of the point. We say, save in exceptional circumstances, it is not anticompetitive for an undertaking to impose limits on the use of its IP.

Dr Kent accepts that we have pleaded this point as regards the distribution requirements, but says that we have not pleaded it in respect of the payment requirements. That is the issue that is before you.

THE CHAIRMAN: Yes.

MS DEMETRIOU: As I indicated yesterday, our primary position is that our pleading is not defective and we invite the Tribunal to so rule for the reasons I will develop. If the Tribunal is against us on

1 that, we seek permission to amend our defence and
2 the submissions are really quite overlapping, but I
3 will make that clear as I go along, it is not going
4 to take long to develop.

5 THE CHAIRMAN: I think it is inherent in seeking
6 permission you would have to explain why you need it
7 anyway, so I think we probably do need to deal with
8 what you think the position is. I am not sure that
9 it is particularly helpful to ask us to rule on
10 whether you need permission or not. I mean in a way
11 I think it goes to the question of whether, I think
12 either you are seeking it or you are not. I do not
13 think we can give you the assurance at this stage
14 that by the end of the trial we are going to treat
15 the pleading as being adequate for the purposes of
16 wherever we end up.

17 MS DEMETRIOU: Sir, I am not sure that that is
18 satisfactory, with respect, because the legal
19 submission was made that our pleading was defective.
20 As I say, I tried to answer that yesterday and Mr
21 Hoskins said, "No, no, this is not a fair way of
22 dealing with it, it is bound up with the point about
23 amendment." So I am going to make the amendment
24 application in the alternative, but obviously if you
25 think we are right on the first point then you

1 should indicate that and then we do not have any
2 issue about the amendment.

3 THE CHAIRMAN: I am afraid I do have to disagree with you
4 on that. I do not think that is our job here. I
5 think it is your risk. It is not for us to
6 underwrite at this stage. If you think you need
7 amendment that is your decision and you need to
8 apply for it. I do not think we can be giving a
9 ruling on the adequacy of your pleading in this way
10 at this time.

11 MS DEMETRIOU: Sir, can I just follow through on what
12 would happen if that is the way in which the
13 Tribunal proceeds. So I make my submissions on why
14 it is not defective and then the Tribunal hears my
15 submissions in the alternative on the amendment.

16 THE CHAIRMAN: Yes.

17 MS DEMETRIOU: Then if you accept that we should be
18 allowed to run the case, then I do think, with
19 respect, you need to explain why we should be
20 allowed to run it. Is it because it is not
21 defective or is it because -- and the reason for
22 that, sir, is if you say, "Well it was defective but
23 we are granting you permission to amend", then that
24 raises potential implications for whether or not
25 there should be a defence and so forth. So it is of

1 substantive importance. Anyway, can I make my
2 submissions and then we see where we get to?

3 THE CHAIRMAN: Of course that is fine, I have indicated,
4 I think, where I am on that and we will see what
5 Mr Hoskins has to say about it as well. Why do we
6 not get going?

7 MS DEMETRIOU: Sir, what needed to be pleaded, we say
8 what needed to be pleaded was the fact that the
9 payment requirements are a limitation on the licence
10 that Apple grants. That is the essential fact. The
11 proposition of law that competition law will only
12 require compulsory licensing of IP in limited
13 circumstances which are not made out here. So those
14 are the two propositions that would need to be
15 pleaded.

16 As the Tribunal knows, in High Court pleadings
17 you do not plead legal submissions anyway. That is
18 for the skeleton argument. So when it comes to the
19 High Court you are just pleading facts, but the CAT
20 rules are different, we accept, and they say the
21 propositions of law relied on should be concisely
22 stated.

23 If we go to our amended defence, {A1/2/28}, you
24 have seen already the allegation that we have made
25 here. The first sentence contains the facts we need

1 to establish the defence and the facts -- sorry, can
2 we scroll so we see 101(d):

3 "The App Distribution Restrictions only concern
4 the terms on which Apple permits developers to use
5 intellectual property that belongs to Apple."

6 So that is the fact that we need to advance the
7 argument in relation to the app distribution
8 restrictions. Then you see the last sentence of the
9 paragraph, the second sentence is an argument about
10 the implications of Dr Kent's exclusionary case and
11 it follows on from the first sentence. The last
12 sentence contains the proposition of law and the
13 proposition of law is stated generally, because it
14 is a general statement of law.

15 Now, in order to advance this legal contention,
16 the legal contention which is stated generally in
17 respect of payment requirements, we needed to have
18 pleaded that the payment requirements were a limit
19 on the licence granted by Apple. This point is
20 pleaded and indeed it is common ground. If you go
21 to page 2 of our pleading, you can see at paragraph
22 6, {A1/2/2}, that Apple pleads that it licences its
23 technology and intellectual property to third party
24 developers for specified use. Then we see at
25 paragraph 8, Apple pleaded that in 2008, if we can

1 go over the page, it began licensing third party
2 developers to use Apple's proprietary technology to
3 create iOS apps, and that Apple made the decision
4 to -- sorry, let us go on please to page 4. Page 4
5 addresses, at paragraph 15, addresses the DPLA in
6 detail. It describes it as:

7 "A portfolio licensing agreement that offers a
8 limited license to develop iOS apps 'using the Apple
9 software'."

10 Paragraph 15 lists a range of proprietary tools
11 and technology. So we have pleaded that Apple
12 licences, its IP to developers to create iOS apps.

13 Dr Kent's Re-Re-Re-Amended Claim Form similarly
14 alleges, if we pick that up at {A1/1/14}, paragraph
15 46, that to develop an iOS App a developer requires
16 access to Apple's advanced app development software.
17 They say that it must enter the DPLA to access the
18 software. Then just to note that Apple's amended
19 defence in the time, I do not think we need to go
20 back to it, but Apple's amended defence, paragraph
21 35, admits paragraphs 46 and 47 of this pleading, so
22 it admits these paragraphs.

23 Then if we go to page 18, please, you see
24 paragraph 62, first sentence, that Dr Kent alleges
25 that developers are required to use Apple's commerce

1 engine for purchases of paid apps and this
2 requirement is said to be imposed by the DPLA, so
3 62(a). Dr Kent refers to specific provisions of the
4 DPLA. If we go to page 20, 65(a)(i), Dr Kent there
5 alleges that through the DPLA, Apple requires
6 developers to use Apple's commerce engine for in-app
7 purchases and subscriptions and again refers back to
8 those provisions. Apple's amended defence, if we
9 can go back to that {A1/2/11}, admits, if you look
10 at the last sentence of paragraph 42A, admits that
11 there is a requirement to use Apple's commerce
12 engine, last sentence of paragraph 42A. So it is
13 common ground that through the DPLA there is a
14 requirement to use Apple's commerce engine and Apple
15 grants a limited licence. You saw, in the opening
16 submissions, that those factual points are common
17 ground and they are pleaded.

18 So it is pleaded and common ground that
19 developers require the ability to access and use
20 Apple's proprietary technology and software to
21 develop iOS apps, that permission to do so is
22 granted in the form of a limited licence under the
23 DPLA and the DPLA imposes requirements on developers
24 to use Apple's commerce engine for the purchase of
25 paid apps, in-app purchases and subscription

1 purposes. So the facts are pleaded.

2 The second point, the proposition of law, is
3 that save in limited circumstances, it is not
4 anticompetitive for a dominant undertaking, let
5 alone a non-dominant undertaking, to impose limits
6 on the use of its IP. That is the proposition of
7 law you saw in the final sentence of paragraph
8 101(d).

9 So the upshot is that Dr Kent's point is a very
10 narrow and formalistic one. It is that although all
11 of the elements of the point are pleaded, this
12 paragraph comes in the section on distribution
13 requirements and is not replicated in the section of
14 the defence addressing the payment requirements.

15 Now, the question as to the sufficiency of the
16 pleadings falls to be assessed by reference to
17 considerations of fairness rather than technicality.
18 We have put into the bundle at {AB3/46.1}, a recent
19 -- well, 2022 Court of Appeal judgment which, if we
20 can go to paragraph 25, please, page 7. Could I
21 just ask you to read paragraph 25 to yourselves.

22 THE CHAIRMAN: Next page, please. Yes, thank you.

23 MS DEMETRIOU: Now applying these points to the present
24 case, if we go to our skeleton argument, {A1/5/35},
25 it is crystal clear if you look, so this is the

1 section of our skeleton argument that concerns the
2 compulsory licensing point and it is crystal clear
3 that we argued it compendiously in the skeleton
4 argument. We did not distinguish between the two
5 different types of requirements.

6 CHAIRMAN: Which paragraph are you reading?

7 MS DEMETRIOU: Paragraph 99:

8 "The counterfactual in respect of each of these
9 alleged Requirements" -- so the requirements are the
10 distribution and the payment requirements.

11 If we go over the page to 99(e), you see in
12 terms we have referred there to the payment
13 requirement. So we have in the skeleton argument
14 compendiously argued the point, because it is the
15 same point of law arising on materially
16 indistinguishable facts. If you look at paragraph
17 100, you see the same point. We make the point in
18 relation to in-app purchases as well as the
19 distribution requirement, and you see that at (i)
20 and (ii).

21 So Dr Kent was fully on notice of how we
22 interpreted our pleading and if there were any doubt
23 about that, it is clear on the face of the skeleton
24 argument that we were pursuing the point in relation
25 to both types of restriction. I just note that

1 Dr Kent did not at that stage, when they received
2 the skeleton, say, "This is not open to you, you
3 have not pleaded the point in relation to the
4 payment requirements." So that was not pointed out
5 to us. So had there been a serious deficiency in
6 the pleading then no doubt they would have said,
7 "Well what are you doing arguing this in relation to
8 the payment restrictions because it is not open to
9 you on the pleading?"

10 Let me reiterate, the factual basis for the
11 argument is squarely on the pleading. What the
12 objection comes down to is that the legal
13 proposition which we have expressed in general terms
14 is not replicated again a few paragraphs further
15 down. In the High Court there would be no issue at
16 all, so any argument would not get off the ground,
17 because pleadings are not even supposed to contain
18 legal contentions. We say that to suggest our
19 pleading is deficient is to seek to read it as a
20 statute and really is to be deprecated as a
21 litigation tactic in proceedings like these. There
22 is no need to amend and we say that our pleading is
23 adequate for the reasons that I have given.

24 If I can take you to the proposed amendment in
25 case I am wrong on that.

1 THE CHAIRMAN: We have not seen that.

2 MS DEMETRIOU: It is at {CB2/22/29}. You can see it in
3 green and all we are doing is replicating 101(d) in
4 this paragraph.

5 THE CHAIRMAN: Yes.

6 MS DEMETRIOU: Then of course there is a cross reference
7 in 115, there is a cross reference in paragraph 115,
8 page 32.

9 THE CHAIRMAN: Yes.

10 MS DEMETRIOU: Now in terms of our alternative --

11 CHAIRMAN: Just to be clear, so this is limited to the
12 exclusionary abuses.

13 MS DEMETRIOU: It is.

14 THE CHAIRMAN: We had an exchange yesterday about the
15 pricing and you have decided that is not something
16 you want to go anywhere near.

17 MS DEMETRIOU: We do not think we need to because the
18 unfair pricing allegation relates to such licence
19 that has been granted what are the prices.

20 THE CHAIRMAN: That is helpful, thank you.

21 MS DEMETRIOU: The authority that is often cited, so
22 turning to our alternative application, which is
23 application to amend, the authority which is often
24 cited is *Quah v Goldman Sachs* which is at
25 {AB3/21.1}. In fact, to take things even more

1 swiftly, can I take it from the *Merricks v*
2 *Mastercard* judgment, so let us take it from
3 {AB3/51.1/12}, because this sets out the relevant
4 part of *Quah*. You can see at paragraph 32 that the
5 relevant paragraph, paragraph 38 of *Quah*, is set
6 out. The critical point, we say for our purposes,
7 is subparagraph (a). So that is the general
8 position:

9 "Whether to allow an amendment is a matter for
10 the discretion of the court. In exercising that
11 discretion, the overriding objective is of the
12 greatest importance. Applications always involve
13 the court striking a balance between injustice to
14 the applicant if the amendment is refused, and
15 injustice to the opposing party and other litigants
16 in general, if the amendment is permitted."

17 I would note now, if we go over the page, that
18 we are not in the category of a very late amendment,
19 at paragraph (c), because although it may seem late
20 on its face because it is in trial, what is meant by
21 very late amendment, you see from that paragraph, is
22 where permitting the amendments would cause the
23 trial date to be lost. So we are simply not in that
24 position.

25 Note (d) that:

1 "Lateness is not an absolute, but a relative
2 concept. It depends on a review of the nature of
3 the proposed amendment, the quality of the
4 explanation for its timing, and a fair appreciation
5 of the consequence in terms of work wasted and
6 consequential work to be done."

7 To make my submissions, we say first of all on
8 the governing principles and the comparison of the
9 prejudice caused to the parties, for the reasons I
10 have already given in relation to our primary
11 argument, this is no more -- if it is a deficiency,
12 it is no more than a slip, a very technical
13 deficiency on the pleading. There is no prejudice
14 to Dr Kent in allowing us to run the argument
15 because, first of all, the relevant facts are common
16 ground. It is really the contractual restriction,
17 it does not call for factual evidence.

18 The point of law is squarely identified in the
19 pleadings, as Dr Kent accepts in relation to the
20 distribution requirement. The third point is that
21 the point of law does not apply any differently in
22 respect of the payment requirements as compared with
23 the distribution requirements. Hence, us addressing
24 it compendiously in our skeleton argument.

25 The fourth point that this is really just legal

1 submission and it is hard to think of an amendment
2 that would cause less prejudice. It would not
3 require any factual evidence, will not require any
4 additional argument, will not lead to any greater
5 costs.

6 We say by contrast there would be enormous
7 prejudice to Apple if we were not permitted to run
8 the point as it relates to payment services, because
9 if it turns out that Apple has a good defence on the
10 point, it is a complete answer to the exclusionary
11 abuse. The prejudice goes further, because the
12 substantive submission, the substantive defence,
13 relates to the integrity of Apple's intellectual
14 property. So if Apple is right on the submission it
15 has made but not allowed to advance the argument, it
16 faces the upshot of the Tribunal ruling that Apple
17 was required compulsorily to licence the IP for its
18 payment activities and we say that that would
19 represent a serious incursion into Apple's property
20 rights.

21 We say also there is a wider point about the
22 interests of justice, it is important for the
23 Tribunal to reach a judgment in the proceedings that
24 is internally consistent and could be seen as such
25 and its ruling is going to rule on the point in

1 relation to the materially identical point in
2 relation to the distribution requirements.

3 Thirdly, we say as to explanation, the Tribunal
4 has my point that our view is that the relevant
5 points were already in issue, which is reflected in
6 the fact that we argued the point in the skeleton.
7 Now if we are wrong about that it would essentially
8 be, as I say, because we had not replicated the
9 proposition of law in paragraph 101(d), a bit
10 further down in the pleading, as we now seek to do
11 in this draft amendment, which is a small drafting
12 slip.

13 You can see that is the case by the order of
14 events here because, as I said, Dr Kent had our
15 skeleton argument on 19 December and had there been
16 a clear problem with our pleading, she would have
17 said, "Well gosh, this is a surprise", and would
18 have written to us saying, "Well this is not open to
19 you." This is because the parties are under a duty
20 to co-operate, including to raise deficiencies in
21 other's pleadings at an early stage.

22 Can I just show the Tribunal the *Merricks*
23 judgment on this at {AB3/51.1/16}. It is paragraphs
24 43 to 46. Essentially, in that case, the Class
25 Representative was seeking to amend and the

1 amendment there did cause the particular issue to be
2 pushed back. So it did require an adjournment of
3 the trial. The Class Representative submitted that
4 Mastercard should have raised the deficiency
5 earlier. You can see at paragraph 44 that
6 Ms Tolaney said, "This subverts the adversarial
7 principle, it is not for us to correct the other
8 side's errors." If you look at paragraphs 45 and
9 46, the Tribunal says, "No, that is not right,
10 because there is a duty of co-operation here to
11 ensure that the litigation runs smoothly and it is
12 something that Mastercard should have identified."

13 To be clear, let me be absolutely clear about
14 this, I am not suggesting that Dr Kent, having read
15 our skeleton argument, held back the point for
16 tactical reasons. I know that my learned friends
17 would not play tactical games of that sort. But our
18 skeleton was clear that we were running the point in
19 relation to both types of requirement and the fact
20 that Dr Kent did not look at it and say, "Well that
21 is not open to Apple to run", underlines the
22 footling nature of the pleading objection. It
23 suggests that everyone understood the principle in
24 substance.

25 So sir, those are my submissions. Just on the

1 question of prejudice, I have dealt with that so no
2 prejudice to Dr Kent. Can I just make one further
3 point which is, I took you yesterday, I do not have
4 to go back to it, to their response to our
5 allegation at 101(d).

6 THE CHAIRMAN: Yes.

7 MS DEMETRIOU: You saw that their response was a bare
8 denial, so they have not pleaded anything
9 substantive that requires factual evidence and there
10 is absolutely nothing to suggest that they would
11 have done in relation to the payment restrictions
12 had we put the sentence a few paragraphs down and
13 raised that in the way that Dr Kent would have
14 wished us to raise it.

15 So those are our submissions.

16 THE CHAIRMAN: Thank you. Mr Hoskins?

17 MR HOSKINS: Let me just return briefly to the legal
18 principles that apply to this application to amend.
19 If we can go back to the *CNM Estates* case
20 {AB3/53.01/17}, paragraph 67. This is the joint
21 judgment of Sir Geoffrey Vos and Newey LJ. You will
22 see the point because it is important when we look
23 at *Quah*, it is the start of paragraph 67:

24 "As can be seen from *Quah* ... the courts have
25 distinguished between 'late' and 'very late'

1 amendments, a 'very late' amendment being one which
2 would cause the trial date to be lost."

3 That is important in terms of the approach. If
4 you go to page 14, this is the judgment of Males LJ,
5 he was in the minority but not on the legal
6 principles, simply on the application of the
7 principles to this particular case. Paragraph 47:

8 "It was common ground before the judge that
9 this was a late amendment, albeit not a 'very late'
10 amendment which put a trial date at risk."

11 The applicable principles for a late amendment
12 were those conveniently summarised by Carr J in
13 *Quah*. If you go back to *Quah*, that is {AB3/21.1/1}.
14 Go back to page 10. Paragraph 38(a) is the general
15 approach for late and very late amendments, (b) and
16 (c) relate specifically on their face to very late
17 amendments, (d) and (g) appear to relate to both
18 very late and late amendments. I would ask you to
19 read, if you have not already, (d) to (g) because it
20 is very important to see the emphasis that is placed
21 on the approach the court should adopt.

22 THE CHAIRMAN: Yes.

23 MR HOSKINS: Apple and we agree on one thing, which is
24 the approach to this application should be based on
25 fairness, not technicality. Absolutely, could not

1 agree more.

2 So let us look at what fairness dictates. If
3 we go back to the original defence, please, that is
4 bundle {A1/2/28}. This is paragraph 101(d). Can we
5 go to the prior page, page 27. I showed you in
6 opening this applies only to app distribution
7 restrictions. There is no equivalent to this in the
8 payments restrictions section. The paragraph which
9 is relied upon is not front and centre in the
10 pleading. It is the fourth subparagraph in a number
11 of issues.

12 The defence, this defence was filed on 7 July
13 2022. With respect, the suggestion that on its
14 face, it applied this argument, the 101(d) argument,
15 to payment system restrictions, cannot hold any
16 water. There is a distinction in the way in which
17 the distribution is pleaded to and the payment
18 restrictions are pleaded to. It is not for us to
19 discern the inner mind of Apple. We are allowed to
20 take the pleading on its face. So we are dealing
21 with an amendment application.

22 The IP point, 101(d), was not front and centre,
23 it was in a subparagraph. It is in somewhat cryptic
24 terms and again it was common ground between
25 Ms Demetriou and I that a pleading in the Tribunal

1 is not like a pleading in the High Court. A
2 pleading in the Tribunal is not limited to facts.
3 It is fundamental that a pleading in the Tribunal
4 should make a party's case crystal clear.

5 So you see 101(d), you see the terms it is put
6 in. Can we look at our reply. That is bundle
7 {A1/3/16}. At paragraph 35(b), so you will see, "As
8 to sub-paragraph (d)", you will see the denial in
9 (i) and then if we can please go over the page, you
10 will see what we say in relation to (ii) and (iii).
11 We are saying, "Your case as pleaded is not
12 sufficiently clear for to us properly address it."

13 We did not just leave it there. We tried to
14 get Apple to clarify to us what the case was it was
15 actually running. We did it in correspondence. We
16 got nil return, but the best way I can show you what
17 Apple's approach to this was is to go to the RFI
18 response that I showed you briefly in opening. That
19 is bundle {A2/2/5}. This response was provided on
20 26 October 2022, so we are still in the early days
21 of these proceedings. If you look at request 9, I
22 showed you this in opening, we asked them to
23 identify with precision the alleged intellectual
24 property rights which they were relying upon and to
25 explain the precise basis for the allegation that

1 competition in relation to the distribution of iOS
2 apps -- and you will note just distribution -- would
3 involve a breach of the alleged intellectual
4 property rights so identified.

5 As I showed you in opening, we get a general
6 response, but nothing specific about the
7 intellectual property rights.

8 If we go over the page to request 10, request
9 10 was a request to clarify the legal case. The
10 third sentence, as Ms Demetriou put it, "Please
11 specify the limited circumstances in which Apple
12 contends", et cetera. So please specify your legal
13 case. The answer came back:

14 "This is a request for an answer to a
15 hypothetical legal question. The CR does not
16 require this answer in order to understand the
17 Defendants' case and prepare for trial."

18 At this stage why was it said to be
19 hypothetical? Because when Apple opened the case to
20 you this week, this was one of the main points in
21 their case and it is based on *Magill*. It may well
22 be Apple think we are stupid, they may think of
23 course you should have seen what this was all about.
24 But the chance was there, we were saying please just
25 clarify what your case is, it would have been the

1 simplest thing in the world to say, "It is *Magill*
2 stupid." But they did not do it. They gave us the
3 brush-off, they said it was a hypothetical legal
4 question.

5 So at this stage we are left with a degree of
6 doubt. We do not know what 101(d), precisely what
7 point it is going to be, and it is certainly not
8 clear to us it is going to be at the forefront of
9 their case, it is one subparagraph in a very long
10 pleading. I am not going to go through all the
11 chronology, do not worry.

12 Ms Harlow's statement was filed on 25 January
13 2024, that is {B2/2}, and again I showed you that in
14 my opening submissions, I showed you that it was
15 couched in very general terms in relation to Apple's
16 IP rights, and it does not contain any evidence
17 specifically identifying IP rights said to be
18 relevant to Apple's payment requirements. As
19 Ms Demetriou said in opening, "All they have done is
20 to say their IP rights but they have not tried to
21 say these ones apply to distribution and these ones
22 apply to payment." They have never attempted to do
23 that.

24 Apple filed an amended defence on 27 September
25 2024. If there had been a slip, as it is put in the

1 pleading, they could have pleaded the *Magill* point
2 then. They could have clarified their position in
3 that amended defence, but they did not do so. One
4 has to ask the question, given on the end of
5 September, they must have known the *Magill* point
6 was going to be front and centre in their opening in
7 the case. It would be extraordinary if they had not
8 decided that by then. They could have made it
9 clear, or clearer, in that amended defence and they
10 did not.

11 The PTR took place on 15 November 2024 and you
12 will remember Apple were pushing us in
13 correspondence, pushing and pushing to say, "Are you
14 going to cross-examine Ms Harlow?" I stood up to
15 and I said to the Tribunal, "The difficulty we had
16 at that time was we do not know what use Apple
17 wishes to make of Ms Harlow's evidence at trial."
18 Because remember, the IP issues are not just
19 relevant to the foreclosure case, they are also
20 reference relevant to the excessive pricing part of
21 Apple's case.

22 Apple could have told the Tribunal at the PTR,
23 and they could have told us, that Ms Harlow's
24 evidence was relevant to an argument based on *Magill*
25 they intended to run at trial. But they did not.

1 They kept you in the dark and kept us in the dark.
2 It would have been the easiest thing in the world to
3 explain what the significance of Ms Harlow was, but
4 they left us to guess at it.

5 We informed Apple we did not wish to
6 cross-examine Ms Harlow on 25 November 2024, on the
7 basis of the information we had had up to date. We
8 filed our skeleton argument on 4 December 2024, and
9 it has been said a couple of times as if it is a
10 criticism of us, we did not address paragraph 101(d)
11 in our skeleton. But you will anticipate why we did
12 not address it in our skeleton, because we were not
13 going to tilt at windmills. We had no idea that
14 101(d) was going to be the centre piece or one of
15 the centre pieces of Apple's case. We did not even
16 know for sure it was going to be a *Magill* case. It
17 would have been folly for us to try and anticipate
18 what was in Apple's mind, given what had happened up
19 to then, as I have shown you.

20 Apple filed its skeleton argument on 19
21 December, and that is the first time that the *Magill*
22 point was put up front in Apple's case. It is the
23 first time that it was said to be a *Magill* case.
24 As you know, the skeleton included two annexes
25 relating to intellectual property. They could have

1 provided that in response to our information request
2 way back when. They did not do it. They could have
3 put this evidence in with the witness statements.
4 They did not do it.

5 So there is an issue in the sense about whether
6 it is appropriate to have done that in any event.
7 But my point now, looking at fairness, is to give
8 that sort of evidence at the last minute in a
9 skeleton a couple of weeks before trial is not fair.

10 Even if one looks at what those annexes
11 contain, again, there are no specific points
12 concerning IP rights and Apple's payment
13 requirements. It is telling that in their skeleton
14 argument, if we go back to it, Apple's skeleton
15 argument paragraph 99, that is bundle {A1/5/36}.
16 You were shown this morning 99(e) which was said to
17 be the argument in relation to the payment
18 restrictions and Apple in its skeleton said:

19 "In order for a developer to integrate the
20 services of a third party payment services provider
21 within their iOS App, they would need (at the very
22 least) permission to use APIs provided by Apple for
23 the purpose of connecting to those services."

24 There is no reference to any evidence there
25 because there is not any specific evidence about IP

1 rights and payment. You will see that in
2 contradistinction to what comes above in relation to
3 distribution where they cross refer to Schiller and
4 Harlow.

5 So where does this leave us? Well, we say
6 Apple has failed to comply with the procedural
7 requirements of the Tribunal, and not just the
8 procedural requirements, but the spirit of
9 co-operation that this Tribunal requires.

10 The first point is this. No justification has
11 been given for the late amendment. If I can show
12 you the letter that was written to us when we were
13 asked to consent, it is at correspondence bundle, so
14 {CB2/21/1}. This is the letter that was sent to us
15 after I had opened the case on Monday. If you
16 quickly scan it, you will see there is no
17 justification whatsoever. These are not amendments
18 that result from late disclosure by us or new
19 evidence by us. It is late amendment entirely that
20 Apple wishes to make. The amendments are not
21 necessary for its existing pleaded case. We can
22 have the trial without them. It is just this
23 argument would be restricted to distribution, not
24 payment.

25 In relation to prejudice, there is prejudice to

1 us. First of all, we have not had the opportunity
2 to investigate or consider the IP position in
3 relation to the payment requirements. Neither the
4 defence nor the amended defence contained any
5 relevant details about IP at all, let alone in
6 relation to payment requirements. First Harlow is
7 at a very high level, there is nothing specific
8 about the application of IP to payment requirements.
9 We said we did not wish to cross-examine Ms Harlow
10 on the basis of the then pleaded case and the
11 evidence. But even the annexes to Apple's skeleton
12 do not specifically address the position of which IP
13 rights relate to the payment requirements.

14 The second point on prejudice is that if
15 permission is given to make this amendment, it will
16 compound and condone the unfairness concerning the
17 way in which the *Magill* point has been dealt with by
18 Apple throughout the trial procedure which I have
19 just shown you.

20 Remember that in opening, this is the third
21 point on prejudice, Apple submitted in opening that
22 we should not even be permitted to argue that we
23 fulfil the *Magill* conditions in relation to
24 distribution. So what they want is a situation in
25 which they have a pleading in relation to

1 distribution, they want to extend it to payment
2 requirements and they want to say that we cannot
3 argue that we fulfil the conditions.

4 Let me turn to practicalities, because it is
5 all very well, I am sure you are sitting there
6 thinking that, "Great, they have brought me another
7 problem, what are we going to do with it?" So let
8 us turn to that, what can we do with this? What
9 does fairness require, how can we resolve this? If
10 Apple is given permission to make the amendment it
11 seeks, obviously we would have to have permission to
12 respond to it by amending our reply, that is
13 absolutely fundamental, Apple cannot amend its case
14 and say that we cannot respond to it and make
15 arguments in the trial. That is glaringly obvious.

16 If permission is given and we are given
17 permission to respond, our amendment will say *Magill*
18 does not apply, which is the point I made in
19 opening, and if it does, we meet the requirements,
20 again a point I made in opening.

21 Now if we want to cauterize this whole issue of
22 fairness, not just in relation to payments, but also
23 in relation to distribution, as I have shown you
24 this morning, you could take the view that if we are
25 permitted to make the amendment in relation to the

1 payment restrictions, we should be allowed to make
2 the same amendment in relation to the distribution
3 restrictions. Ms Demetriou's argument --

4 MS DEMETRIOU: I am so sorry to interrupt this, but we
5 still have not been given any application to amend
6 in relation to the distribution requirements.

7 THE CHAIRMAN: Let Mr Hoskins finish and --

8 MS DEMETRIOU: It would be highly unfair to require me
9 to --

10 THE CHAIRMAN: You will get your bit in a moment,
11 Ms Demetriou.

12 MR HOSKINS: I cannot make an application to amend until
13 there is permission to respond to something, so I
14 cannot preempt what the Tribunal is going to do.

15 Sorry, I was trying to think of a broad way in
16 relation to fairness. I said if we are permitted to
17 make an amendment in relation to the payment
18 restrictions, then the Tribunal could say we should
19 also be allowed to make the same amendment in
20 relation to the distribution restrictions because it
21 will be the same amendment. It will be *Magill* does
22 not apply and if it does, we meet the requirements.
23 We will not be seeking to put in new evidence, as I
24 explained in opening, we think these issues are
25 already in the case and can be dealt with on the

1 basis of the evidence that is in the case. If we
2 are wrong, then we will fail on that argument.

3 THE CHAIRMAN: The trouble with that is that it does not
4 necessarily go both ways, does it? Because I
5 apprehend --

6 MR HOSKINS: I am going to come to that. That is my next
7 point, absolutely.

8 THE CHAIRMAN: Carry on.

9 MR HOSKINS: So if Apple -- so if at this stage Apple has
10 been allowed to amend, we have been allowed to
11 respond and then Apple is faced with a choice. It
12 can say that it wishes to submit evidence to respond
13 to our amendment. But I am afraid to say that if
14 that is its position, then one sees where this is
15 headed. It is going to have to be some sort of
16 adjournment to the trial to allow Apple to produce
17 that evidence and for us to respond to it. So we
18 become a very late amendment. But why do we become
19 a very late amendment? It is because of Apple
20 raising this point at the start of the trial. They
21 are the cause of this. They have unchained this and
22 that would lead us to that place.

23 Now, it may well be that when faced with that
24 hard choice, Apple's suggestion that of course we
25 would want to put in further evidence might well

1 disappear. Apple would have a choice at that stage.
2 If it wants to pursue this application for
3 amendment, we have to have a chance to respond and
4 Apple then has to make the choice of whether it
5 wishes to carry on with the trial or whether it
6 wishes to apply to amend the trial. But that is in
7 a sense fairness for all the parties and Apple just
8 has to make the choices. But I reiterate the point,
9 the reason why we are here now, the reason I am
10 making these submissions, is because of the way in
11 which Apple has dealt with the 101(d) point, and the
12 fact Apple failed to make the 101(d) point in
13 relation to payment restrictions.

14 So in our submission, you are probably more
15 creative than I am, but just looking at what the
16 Tribunal can do and it is up to you what you do,
17 obviously. You can simply refuse the amendment and
18 then we will have to deal with the issues that exist
19 around that or you can allow the amendment. But in
20 my submission if you do allow the amendment, we have
21 to be allowed to amend our reply, and then it is a
22 matter for Apple, once they have seen our reply,
23 whether they want to try to put in more evidence or
24 not. But it seems to us that those are the two
25 options that we have and the Tribunal will decide

1 which is fairest.

2 THE CHAIRMAN: So they are different, are they not,
3 though? Because in relation to -- you have made the
4 submission that you do not know anything about the
5 IP requirements in relation to the payment
6 restrictions and of course that, you put that as a
7 subset of the broader problem of not knowing, I
8 understand why you have shown me why you make that
9 observation and the history of the thing. But you
10 are stuck with that problem anyway in relation to
11 the distributions case.

12 MR HOSKINS: When we did not get clarity, we could have
13 applied for example to strike-out, but we would have
14 got nowhere with that. I appreciate, if you refuse
15 the amendment, are we stuck with, you know, the
16 evidence on IP in relation to distribution? Yes.
17 That is where we are.

18 I did make the point in opening that if Apple
19 tries to make specific points based on the annexes
20 to the skeleton, that I may well have to come back
21 to you and say actually no they are not allowed to
22 do that. We have not reached that point yet, but
23 that is still a possibility. It is still extant.

24 THE CHAIRMAN: Yes, but the position I think is that you
25 -- so you do not really know what they say about IP

1 in relation to the distribution restrictions and
2 equally you do not know about payment restrictions.

3 MR HOSKINS: It has not been distinguished which applies
4 to which.

5 THE CHAIRMAN: So you will be in the same position. Of
6 course the other way of looking at it is in relation
7 to the argument that *Magill* conditions have been
8 met. At the moment you have made a decision. I
9 think I would be very surprised if you had not made
10 a decision at some stage not to plead compliance
11 with the conditions because it must have been plain
12 to you, at least since the skeleton, I would have
13 thought well before that, that that is where they
14 were going with it. You may say not.

15 MR HOSKINS: I understand that point, "You should have
16 spotted it."

17 THE CHAIRMAN: It is not something you would have
18 spotted. I rather assumed you had and you made a
19 tactical decision that is the way you want to play
20 it but maybe that is not right.

21 MR HOSKINS: I cannot explain the legal mind of everyone
22 behind me. It was not clear that this was the focus
23 of Apple's case, or this was one of the centre
24 pieces of Apple's case. It was not clear because of
25 the way it was pleaded, it was not clear because we

1 had not had any response when we asked for
2 information. I appreciate we are going to take
3 potentially a hit in relation to this because people
4 say, "You should have spotted this, you should have
5 done this." I understand that, but it is a bit more
6 nuanced than that.

7 THE CHAIRMAN: I understand and I was not trying to put
8 you into that position really. I was just really
9 making the point that that is where we are. One of
10 the, the implicit message I think and Ms Demetriou
11 probably will not thank me for say this, but she did
12 use the word "slip" in her submissions. If this
13 does need to be pleaded it is more or less an
14 oversight. It has not been is the extent of the
15 explanation has been given, if one is in that world
16 and of course Ms Demetriou says she is not in that
17 world, fine. But if she has to be in that world,
18 then she is effectively acknowledging there has been
19 an oversight.

20 Suppose I am asking you if you were to be
21 applying for permission to amend in relation to the
22 distribution requirements and the conditions in
23 *Magill*, whether you would be saying the same. I do
24 not think you would be.

25 MR HOSKINS: Whether I would be saying what sorry?

1 THE CHAIRMAN: You would be saying it was an oversight
2 that you had not pleaded.

3 MR HOSKINS: No, I would be saying --

4 THE CHAIRMAN: You were taken by surprise.

5 MR HOSKINS: Yes, absolutely. I would be saying fairness
6 requires it. If the amendment on payment is
7 required, we have to be allowed to plead to that.
8 If we are pleading to that, it will say *Magill* does
9 not apply and if it does, we satisfy the four
10 conditions.

11 THE CHAIRMAN: In that situation you will have to make a
12 choice whether you want to do that because the
13 consequence may be that Apple says, "We cannot do
14 that without evidence" and you may be faced with an
15 adjournment.

16 MR HOSKINS: Which we may well oppose because you have
17 the history. We all have a crystal ball to certain
18 extent, but equally none of us knows exactly what
19 would happen. We can only try and pick through and
20 see the possibilities.

21 Let me make this absolutely clear, we do not
22 want an adjournment. We do not want an adjournment.

23 THE CHAIRMAN: I would not have thought you would. I
24 would work on the assumption that is not what you
25 want.

1 Are you saying that one of the reasons for not
2 granting the amendment is that you may feel
3 compelled to plead compliance with the conditions
4 and that does crystallise this problem. Is that a
5 relevant factor?

6 MR HOSKINS: Absolutely. It cannot, it simply cannot be
7 the case that Apple gets permission for its
8 amendment, and we are left with our hands tied and
9 we cannot plead back to that.

10 THE CHAIRMAN: In circumstances where you have not
11 pleaded that in relation to the same position in
12 relation to the distribution requirements?

13 MR HOSKINS: Absolutely. It would be extraordinary if
14 our hands were tied because what Apple would say is
15 "We are allowed to make our amendment and you cannot
16 argue to the full *Magill* conditions for either of
17 them." That is their case. They want to shut us
18 out. Given the history I have shown you, that would
19 be an extraordinarily unfair position. Now, you may
20 say it is felicitous because of Apple's slip, we get
21 to plead, but again the start of this is Apple's
22 slip.

23 THE CHAIRMAN: You have put yourself in the position
24 already where you have not pleaded it, but at least
25 recently and probably before that it has been pretty

1 plain that that was an option open to you. You
2 decided not to do that. It is a little bit
3 opportunistic on one view to now turn up and say
4 because they have made a slip you are going to take
5 advantage of that and you are going to put something
6 which you could not otherwise put into issue. I
7 think you know if you make an application now to
8 deal with the conditions, that is quite a different
9 order apart from the fact of whether they are
10 linked. But if we were simply looking at the
11 application made by Apple in order to deal with
12 effectively an oversight, then that is quite a
13 different order of magnitude from introducing the
14 whole question of the compliance with the
15 conditions.

16 MR HOSKINS: No, because as I have made absolutely clear,
17 if we are allowed to plead back to the amendment we
18 are not going to be seeking to put in new evidence.
19 As I put it in opening, we say these issues are
20 already in the case. The question of dominance,
21 necessity, et cetera, they are already in the case.
22 We may be right or we may be wrong but we are not
23 seeking to open up the evidence.

24 THE CHAIRMAN: I am not sure you can say that because I
25 think if you apply for permission, if you were

1 applying for permission in relation to the
2 distribution requirements, I think you would be
3 implicitly expecting, anticipating it to be opened
4 up because there is no way Apple are going to sit
5 there and say, "If you are now running that, we want
6 to address it in factual statements or reports", or
7 whatever it is. That is inevitable, is it not? It
8 is an extension of the case. It has to be, does it
9 not? You may say the evidence is good enough for
10 you, but it would not be at all surprising if Apple
11 would say not.

12 MR HOSKINS: I come back to the position that if you form
13 the view that Apple has not pleaded the *Magill* case
14 in relation to payment, regardless of the reason why
15 that happened, if you allow them to amend it would
16 be extraordinary not to allow us to respond.

17 THE CHAIRMAN: Yes, I have that.

18 MR HOSKINS: You may say "lucky you" because you may take
19 the view, "You should have pleaded to it earlier,
20 you did not and now you are getting another
21 opportunity." But the idea that a party is allowed
22 to make an amendment after the trial has started and
23 that the other party is not allowed to respond to
24 it, and is then precluded during the trial from
25 dealing with the point, I mean, I do not want to use

1 the hyperbole, you have my point. It would be
2 extraordinary.

3 THE CHAIRMAN: I have the submission. The only thing I
4 would say is you are going to try and make this
5 easier for me -- for us.

6 MR HOSKINS: At least I tried to identify some of the
7 options rather than simply saying, "Give me this,
8 give me this, give me this."

9 THE CHAIRMAN: I'm not sure that's what's emerged from
10 your submissions but I understand why you are making
11 them. Ms Demetriou?

12 MS DEMETRIOU: Let me take the points in order.

13 Mr Hoskins sought to say that our existing pleading
14 was in some way cryptic. We do not accept that at
15 all. Thinking about the structure of the argument,
16 we expected, it was really for Dr Kent to plead that
17 Apple should be required compulsorily to licence its
18 IP. That is the positive case that Dr Kent had to
19 plead. She did not plead that so in our defence we
20 said competition law does not require this.

21 The pleading itself is not cryptic, it really
22 is competition law 101 to say that as a general
23 matter IP owners, even dominant owners, do not need
24 compulsorily to licence their IP. Mr Hoskins took
25 you to the RFI and our response and he emphasised

1 the fact that we said it was a hypothetical
2 question. We were not trying to play games. It was
3 a hypothetical question because the Class
4 Representative had not pleaded a case that we needed
5 compulsorily to licence our IP. So in the
6 circumstances of them not pleading that case, it was
7 hypothetical. They had to show that the *Magill*
8 conditions, that it was a *Magill* case, unless they
9 took the view, which seemed to be the track they
10 were taking --

11 THE CHAIRMAN: I find it a very odd submission,
12 Ms Demetriou. I cannot understand why you suggest
13 they would need to plead that it was or was not a
14 *Magill* case. They have said that you should not be
15 entitled to rely on a set of contractual
16 restrictions, the obvious implication from that on
17 your case is that your IP is going to be used by
18 people without restriction. So I am afraid I just
19 do not follow that at all.

20 MS DEMETRIOU: Sir, let me make this point then.

21 Mr Hoskins took you to the RFI and our response. He
22 said that was unsatisfactory. Please take it from
23 me that we were not trying to be obstructive in any
24 way. It was obviously open to them to pursue the
25 RFI. So if they had any real lack of clarity about

1 what we meant when we said in the pleading,
2 "Competition law only exceptionally requires IP
3 owners to licence their intellectual property",
4 which is not a confusing statement, but if there was
5 any real lack of clarity about that, then when we
6 gave this response, which they now say they did not
7 like, they should have pursued that and sought
8 clarity.

9 But we come back to the point that the point
10 is, as Mr Hoskins accepts, properly pleaded in
11 relation to the distribution requirements. So all
12 of his complaints are really just attempts at
13 forensic prejudice.

14 He then moved on to the point about our IP and
15 he placed a lot of emphasis on the annex and said,
16 "Well that gave a lot more information about the
17 IP", and that Ms Harlow's statement is at a high
18 level of generality. This is an important point.
19 Our point is that that fundamentally misunderstands
20 what our argument is. Our argument is an argument
21 which is conducted at quite a high level of
22 generality as regards the content of the IP. Our
23 argument is that a licence to Apple's IP is needed
24 to create any iOS App at all. And Ms Harlow says
25 that in her evidence. That is all we need. We do

1 not need the annex for these purposes. We need that
2 simple proposition. It is in Ms Harlow's statement
3 and if my learned friend wants to challenge that,
4 then it is still open to him to seek permission to
5 cross-examine Ms Harlow. We are still at a
6 relatively early stage of the trial and there is
7 time.

8 So those points are all misconceived. This
9 argument does not turn on any detail about the
10 nature of precise intellectual property rights. It
11 is very simple. A licence is needed to create any
12 iOS App including a third party processor.

13 THE CHAIRMAN: So what about -- well, you kept it going.

14 MS DEMETRIOU: So that is the second point I wish to
15 make.

16 The third point is Mr Hoskins seeks to say, if
17 Apple is granted permission to correct this slip,
18 then we inevitably have permission to run fulfilment
19 of the *Magill* conditions and it would be very unfair
20 if we did not. So it is Apple's election. But that
21 is to put the point the wrong way around, because
22 the reply that Mr Hoskins is contemplating would
23 need permission and the reply is not a true reply,
24 it is a new positive case. It is a positive case
25 that Apple is required compulsorily to licence its

1 IP.

2 THE CHAIRMAN: So you say he does not, as of right, get
3 to plead the conditions?

4 MS DEMETRIOU: No, he would have to ask for permission.

5 Of course we would vigorously oppose, it is a
6 different abuse, sir, and that is the point I made
7 at the beginning that you were not sure about, but
8 can I just try and explain it. It is a different
9 abuse that they are alleging, so their pleaded case
10 at the moment is an alleged exclusive dealing abuse.
11 We say, we have said in our skeleton argument, "No
12 it is not, there is no exclusive dealing going on
13 here." This is all about, what you would need to
14 plead is that we are compulsorily required to
15 licence our IP.

16 THE CHAIRMAN: I see where you are coming from. What you
17 are saying, is, I think I did misunderstand you. So
18 you are saying, if they wanted to run a conditions
19 case knowing that your position was that a licence
20 would be required, and them being able to work that
21 out themselves, then they should have pleaded the
22 conditions to *Magill* up front, but I think that is
23 not how these cases generally work, is it?
24 Normally, you would expect them to have done what
25 they have done. You would have pleaded *Magill* and

1 you say you have, they say it was not so clear, but
2 ordinarily you would expect a reply then to contain,
3 if you are right then.

4 MS DEMETRIOU: Yes, or issue an amendment to the claim
5 form. I do not want to be pedantic about the form
6 it would take or the precise timing. As a matter of
7 substance, it is a different abuse. So the idea
8 that it inevitably follows, if you allow our
9 amendment application in relation to a slip -- it is
10 a slip, if it is a slip, we say it is not, but if it
11 is anything it is a slip -- the idea that it
12 inevitably follows that they should be allowed to
13 plead a new abuse, we say, is for the birds. They
14 would have to seek permission and obviously that
15 would be far too late because that would be a very
16 late amendment. I sought to foreshadow yesterday
17 the type of evidence that Apple says would be
18 required.

19 So the choice is not the choice that Mr Hoskins
20 posits, it is not a question of "Well Apple should
21 only be allowed permission to correct this slip."
22 It then inevitably follows that Dr Kent should have
23 permission to plead a whole new case and then we
24 would be put to an election as to whether to seek an
25 adjournment in order to meet that case. That is

1 just the wrong way around. That is the wrong way of
2 looking at it.

3 THE CHAIRMAN: I think he is saying that is something
4 that might happen but of course that rather depends
5 on whether you are right or he is right as to
6 whether he is entitled to do it.

7 MS DEMETRIOU: Yes exactly so the key point is whether he
8 is entitled to do it. My point is that it does not
9 simply follow from the fact we are allowed to do
10 it --

11 THE CHAIRMAN: You are saying there is another step in
12 there, and it is not right.

13 MS DEMETRIOU: Exactly, there is another step.

14 This takes me to my final point and it is the
15 one I started with which you were unattracted to at
16 the outset, where we are running the alternative
17 points. We do say we are right that it does not
18 need an amendment, that this really is an
19 opportunistic point made by Dr Kent and that the
20 pleading is there. It has been overcomplicated
21 wrongly by my learned friend. As I have made very
22 clear it does not depend on detail of the IP at all.
23 It really just depends on the simple proposition
24 which is there on the pleadings and in our evidence,
25 that IP is - a licence to Apple's IP is needed to

1 create any iOS App. No more detail than that is
2 required. That is there pleaded, it is common
3 ground, and then it is the proposition of law and
4 the proposition of law is there on the pleading. It
5 would be extremely formalistic, we would
6 respectfully suggest, to say that our pleading is
7 deficient because the proposition of law has not
8 been repeated under the next paragraph.

9 Sir, coming back to the point you put to me at
10 the outset which is why should the Tribunal rule on
11 that point, we say, with respect, that you should
12 rule on that point in order to allow the orderly
13 conduct of proceedings. Because if we are right on
14 that then it suits everybody to know that we are
15 right now, rather than in closing submissions at the
16 end, everybody knows what the position is.

17 THE CHAIRMAN: Yes. I have to say that having heard
18 everything, I do slightly regret having taken that
19 position at the start. I do not mean that
20 seriously, but I think the answer is that is the
21 right answer and we need to deal with this as an
22 amendment application which is what I think we will
23 do.

24 MS DEMETRIOU: Well, sir, can I just push back one more
25 time on that? If you deal with it as an amendment

1 application the option is binary, so either you
2 refuse it but that implicitly -- so then we are in a
3 position, so if you refuse the amendment
4 application, for example, because you are attracted
5 to this nightmare scenario posited by Mr Hoskins,
6 which as you say we say is wrong anyway. But if you
7 refuse the amendment application, then we are in a
8 position where we have got our current pleading and
9 we will proceed as though it is open to us to take
10 this case because that is our position. So the
11 parties will be unclear about it because we know
12 that that is not Mr Hoskins' position. That lack of
13 clarity will continue --

14 THE CHAIRMAN: I understand the point. I think the
15 difficulty, frankly, Ms Demetriou, is I do not think
16 the pleading is clear. It may not be clear as a
17 technicality, but it is not clear. So certainly as
18 far as I am concerned, I have not discussed that
19 with my fellow panel members, but I think that is
20 the problem I think you have got. It is a
21 technicality and that I think has quite a lot of --
22 a technicality in a sense, I do not mean to put it
23 quite as firmly as that, but that has some
24 consequences, I think, when one looks at the best
25 way of dealing with it. But I think the fundamental

1 problem is I do not think my view, at least before
2 consulting with the rest of the Panel, I do not see
3 how we can really reach the conclusion you have
4 dealt with it, because I think that there is an
5 omission there.

6 MS DEMETRIOU: Sir, you have got my submission already
7 that one has to look at the substance rather than
8 just formalistically and we say it is there in the
9 pleading and that there is no doubt about the case.

10 THE CHAIRMAN: We have all that.

11 MS DEMETRIOU: You have our submission on that. I think
12 those are my submissions in reply.

13 THE CHAIRMAN: Just as a practical matter, I am just
14 conscious we have probably got Mr Owens sitting
15 somewhere waiting to arrive. Do we need to deal
16 with this before he gets into the witness-box? Is
17 that necessary?

18 MR HOSKINS: No.

19 MS DEMETRIOU: No, I do not think so.

20 THE CHAIRMAN: We can give you a quick answer and we will
21 give you a quick answer. I just do not particularly
22 want to delay him any further.

23 MR HOSKINS: Absolutely, I do not think this impinges
24 on -- Mr Kennelly is probably best placed to tell
25 you but I do not think it is going to impinge on his

1 questions.

2 MR KENNELLY: I do not think it will have any bearing on
3 Mr Owens' evidence.

4 THE CHAIRMAN: Fine, well in that case, what we will try
5 and do is, I am not sure if we will give you an
6 answer and some reasons later, or give you an answer
7 and reasons, but whichever it is you will get the
8 answer quickly, so at least you can have a think
9 about what the implications are and we can discuss
10 that if there is anything else. So in that case, so
11 we will reserve our judgment on that point.

12 Shall we go straight into Mr Owens on that
13 basis?

14 MR HOSKINS: Certainly. I will call Mr Owens, please.

15 CHRISTIAN BAILEY OWENS sworn

16 THE CHAIRMAN: Please sit down, Mr Owens. Hopefully you
17 have got some water there.

18 THE WITNESS: I have, yes, thank you.

19 Examination-in-chief by MR HOSKINS

20 Q. Good morning, Mr Owens, I appear for Dr Kent. I
21 just have to do some formalities with you. You
22 should hopefully have a document in front of you
23 entitled first witness statement of Christian Bailey
24 Owens. Do you have that?

25 A. Yes, I believe so.

1 Q. If I could ask you just to flick through the pages
2 and to go to page 8.

3 A. Yes.

4 Q. Is that your signature?

5 A. It is, yes.

6 Q. Is this your statement?

7 A. It is, yes.

8 Q. Are the contents of that statement true?

9 A. Yes.

10 MR HOSKINS: Now counsel for Apple is going to ask you
11 some questions.

12 Cross-examination by Mr Kennelly.

13 Q. Good morning Mr Owens. For the Tribunal's benefit,
14 you established Paddle in 2012, when you were 18
15 years old?

16 A. Correct.

17 Q. You were previously the CEO of Paddle?

18 A. I was, yes.

19 Q. But in 2023 you stepped down as CEO and became
20 executive chairman of the board?

21 A. Yes.

22 Q. In April of this year you stepped down as executive
23 chairman of the board and you now serve as a
24 consultant and board observer?

25 A. That is correct.

1 Q. Just to go back to basics, Paddle provides a
2 platform which provides payments and billings
3 services to developers of digital goods and
4 services?

5 A. Yes.

6 Q. Those digital goods and services encompass things
7 like software or online courses?

8 A. Among other things, yes.

9 Q. For those platforms, for those developers who use
10 Paddle's platform, Paddle acts as a merchant of
11 record, does it not?

12 A. It does.

13 Q. Again in very simple terms this means that Paddle is
14 the legal entity responsible for selling a
15 developer's digital goods and services to the end
16 customer?

17 A. That is correct.

18 Q. So, among other things, it is Paddle who will be
19 liable for paying any taxes due on the transaction
20 in the relevant jurisdiction?

21 A. Yes.

22 Q. Could I take you to a document, please. You should
23 have a folder in front of you and it is behind tab
24 2. For the document presenter it is {D2/777.2}.
25 This is an article, is it not, from Paddle's

1 website?

2 A. Yes.

3 Q. Could you go please to page 2 and the heading, do
4 you see the heading, "Merchant of Record vs Payment
5 Facilitator: how are they different?"

6 A. Yes.

7 Q. Could you read to yourself please the text down from
8 the heading to the heading "Merchant of Record"?

9 A. Yes.

10 Q. This article reflects your understanding that one
11 can divide merchants of record from mere payment
12 facilitators which offer a smaller stack of
13 services?

14 A. Yes.

15 Q. Because one thing that payment facilitators do not
16 do is to take on liability for paying taxes?

17 A. Correct.

18 Q. So they are not taking as much of the risk, are
19 they, the payment facilitators?

20 A. No.

21 Q. So these payment facilitators will generally charge
22 developers less than companies like Paddle, which
23 offer a fuller stack of services?

24 A. Yes.

25 Q. And this article reflects your understanding that

1 examples of companies that act as mere payment
2 facilitators include, we see, Stripe, PayPal,
3 Shopify and Square?

4 A. Yes.

5 Q. In fact, Paddle contracts with companies like PayPal
6 and Stripe to act as the payment processor?

7 A. We do, yes.

8 Q. So you would accept, would you not, that what
9 companies like PayPal and Stripe offer is very
10 different from what Paddle offers?

11 A. There are component parts that I think are included
12 in both but the service as a whole is different.

13 Q. Very different? Completely different?

14 A. I think one could be sort of argued as a subset of
15 the other. The point of kind of taking transactions
16 and sort of dealing in commerce is sort of largely
17 the same.

18 Q. They are the subset of Paddle services?

19 A. In the nature that we contract with them to sort of
20 provide some of those services to us, yes.

21 Q. Could I take you please to D2 -- it is in tab 3 of
22 your hard copy bundle, just so there is no doubt,
23 and {D2/777.1} and again, this is from Paddle's
24 website. You can see the website address at the
25 bottom of the page. And again you are comparing

1 Stripe and Paddle, how are they different? Do you
2 see immediately below the heading, Paddle says,
3 "Stripe and Paddle offer two completely different
4 solutions for businesses looking to take payments
5 online." Do you see that?

6 A. Yes, I see that.

7 Q. And you explain why they are different, do you not,
8 from the bottom of that first page you draw a
9 contrast, do you not, between Paddle and Stripe?

10 A. Yes.

11 Q. That continues to page 3. Do you see that?

12 A. I do, yes.

13 Q. Where you have started with the benefits of Paddle
14 and then you go on to describe the costs of not
15 using Paddle, of using Stripe in combination with
16 other services?

17 A. Yes, we do.

18 Q. Just going back to a point you made in your
19 statement about the distinction between physical and
20 digital goods and services?

21 A. Yes.

22 Q. Looking at what Paddle offers, and starting with
23 what you do not provide, Paddle does not offer its
24 services to developers of physical goods and
25 services, does it?

1 A. No.

2 Q. May I suggest a couple of reasons why Paddle has
3 chosen to focus exclusively on payments for digital
4 goods and services. One reason is that Paddle can
5 verify the delivery of digital content more easily
6 than if it were responsible for the shipping of
7 physical goods?

8 A. Yes.

9 Q. Another reason is that as a merchant of record, as I
10 have said now a few times, Paddle is responsible for
11 paying local taxes on transactions and it would be
12 much more difficult to ensure that Paddle is in
13 compliance with local laws if it were responsible
14 for managing payments for all kinds of different
15 physical goods and services?

16 A. That is correct, yes.

17 Q. In fact, Paddle formed a commercial -- obviously a
18 commercial judgment about the sorts of services that
19 it was willing to provide under its brand?

20 A. Yes.

21 Q. Again focusing on the services that Paddle does and
22 does not provide, you would accept, would you not,
23 that Apple provides developers with a store front in
24 the form of the App Store?

25 A. Yes.

1 Q. And through the App Store, Apple connects developers
2 with users?

3 A. Yes.

4 Q. And Paddle does not provide a store front to
5 developers, does it?

6 A. Not at this time, no.

7 Q. Would you accept that Apple provides developers with
8 access to the iOS operating system?

9 A. Yes.

10 Q. And that Apple provides various tools and
11 technologies to developers to design and build their
12 iOS apps?

13 A. They do, yes.

14 Q. One example, and there are many you might be aware
15 of, is the augmented reality technology that Apple
16 provides that is used in games such as Pokemon Go?

17 A. Yes.

18 Q. Whereas Paddle's APIs and software are limited to
19 the payment-specific services that it provides?

20 A. We provide other services in addition to the payment
21 and merchant record specific services.

22 Q. But they are all linked to the payment services,
23 ultimately it is a payment service that Paddle is
24 providing?

25 A. We have other products as well as payment services

1 that Paddle offers to our customers as well.

2 Q. What services are they, Mr Owens?

3 A. We have a suite of business intelligence, sort of
4 tooling, reporting tooling, and products to enable
5 developers to understand more about the people who
6 are using their applications and their products.

7 Q. Going back to the tools that Apple is providing and
8 contrasting with Paddle's. Apple provides parental
9 controls so that end users can be sure that children
10 do not make purchases without their permission?

11 A. Yes.

12 Q. Paddle does not offer parental controls of that
13 kind, does it?

14 A. We do not, no.

15 Q. Apple provides users with the ability to save their
16 payment information for purchases from different
17 developers?

18 A. Yes.

19 Q. So by linking a payment method to their Apple ID or
20 Apple account they can do that?

21 A. Yes.

22 Q. Paddle does not offer that sort of functionality,
23 does it?

24 A. I believe at this point we do, yes.

25 Q. You do?

- 1 A. Yes.
- 2 Q. But presumably you can only do that in respect of
3 the developers which have opted to use your
4 services?
- 5 A. I do not understand the question, sorry.
- 6 Q. Apple provides users, all iOS users, with the
7 ability to save their payment information for
8 purchases from all the developers with which they
9 transact on the App Store?
- 10 A. Yes.
- 11 Q. Paddle cannot do that in respect of all developers
12 on the App Store unless Paddle has contracted with
13 every developer on the App Store. It is a
14 functionality that you offer to developers.
- 15 A. We cannot contract at all with any developers in the
16 context of the App Store today, so yes.
- 17 Q. Sure, but in order to do it, you would have to have
18 access to all of them, would you not?
- 19 A. We have access to all the developers who Paddle has
20 a contractual relationship with.
- 21 Q. Indeed, but -- yes. Similarly, family account
22 sharing. Apple can ensure that all family members
23 who are iOS users can share apps and in-app content
24 purchased by any of them?
- 25 A. Yes.

1 Q. And that would cover all their apps and in-app
2 content purchased on the App Store?

3 A. Yes.

4 Q. Paddle is not able to offer that sort of
5 functionality to app developers either, is it?

6 A. No.

7 Q. There are a number of things that you say you
8 believe Paddle could do better than Apple. Could I
9 take you back to your witness statement, please? It
10 is actually in that same hard copy bundle you have
11 behind tab 1. It is {B1/1/1}, just if you can see
12 the first page. I would ask you to go please to
13 page 7, {B1/1/7}. It is paragraph 20. You say:

14 "Based on my experience and feedback from
15 customers ... Paddle's solution would be an
16 attractive option for iOS App developers" -- you say
17 your solution -- "like Apple's existing one, could
18 be used to handle transactions, subscription
19 management, tax compliance, and pricing
20 localization."

21 Then this:

22 "Paddle also can offer iOS App developers
23 additional features not available with Apple's
24 solution, including increased pricing flexibility
25 (no tiers and more flexible discounts),

1 cross-platform support ... direct customer support,
2 advanced/more complex billing options (such as)
3 usage based pricing, and alternative refund
4 processing options, among others."

5 A. Yes.

6 Q. We will just take some of those in turn and look at
7 price tiers first. Could you turn up please in your
8 hard copy bundle, it is tab 5, {D1/1351/1}. At the
9 top of the page, Mr Owens, you can see this is a
10 press release issued by Apple on 6 December 2022.
11 Do you see that?

12 A. I do, yes.

13 Q. It is announcing additional price points. If you
14 just look at it and take it in stages, paragraph 1
15 says that Apple is:

16 "Providing developers with 700 additional price
17 points and new pricing tools that will make it
18 easier to set prices per App Store country or
19 region, manage foreign exchange rate changes, and
20 more."

21 I will take you down to the fourth paragraph,
22 if I may:

23 "Under the updated App Store pricing system,
24 all developers will have the ability to select from
25 900 price points, which is nearly 10 times the

1 number of price points previously available ... This
2 includes 600 new price points to choose from, with
3 an additional 100 higher price points available upon
4 request. To provide developers around the world
5 with even more flexibility, price points - which
6 will start as low as \$0.29 and, upon request, go up
7 to \$10,000 ... increasing incrementally", and how
8 that is done is described.

9 Do you see that, Mr Owens?

10 A. I do, yes.

11 Q. I assume you were aware of this development when you
12 drafted your statement?

13 A. Yes.

14 Q. So a developer need only pick a price point for a
15 country or region they are familiar with and Apple
16 will automatically generate prices for all of its
17 store fronts and currencies. That is how it works,
18 is it not?

19 A. That is my understanding based on the press release,
20 yes.

21 Q. Could I ask you to turn up, please, tab 6 in your
22 hard copy bundle. It is {D2/134/1}. Just to focus
23 on your evidence about the lack of flexibility with
24 price tiers. Looking on this page at the third
25 paragraph down that begins:

1 "You can set a price for the country or region
2 you are familiar with as the basis for automatically
3 generating prices across the other 174 store fronts
4 and 43 currencies. Automatically generated prices
5 account for foreign exchange rates and certain
6 taxes, and follow the most common pricing convention
7 for each country or region."

8 Do you see that?

9 A. I do, yes.

10 Q. Do you see:

11 "Periodically, Apple updates prices in certain
12 regions based on changes in taxes and foreign
13 exchange rates based on publicly available exchange
14 rate information ... These automatic price
15 adjustments help ensure that your app's price across
16 all store fronts stays equalised with your base
17 country or region."

18 Do you see that?

19 A. I do yes.

20 Q. One of the advantages that it provides is that
21 "automatic price updates help your global earnings
22 stay consistent and customers are not incentivised
23 to seek lower prices on certain store fronts and
24 pricing mistakes are reduced."

25 Do you see that?

- 1 A. I do.
- 2 Q. So for these reasons developers know that at the
- 3 click of a button Apple will ensure that their apps
- 4 are priced consistently on every one of potentially
- 5 174 store fronts and 43 currencies, should the
- 6 developer choose?
- 7 A. Yes.
- 8 Q. Paddle offers automatic currency conversion of a
- 9 developer's price, but it does it at the checkout?
- 10 A. Yes.
- 11 Q. And that just involves converting the base price
- 12 using a foreign exchange rate when the customer goes
- 13 to pay?
- 14 A. That is one option. There are several others as
- 15 well.
- 16 Q. And is the other option that if developers want to
- 17 provide a more attractive rate in other currencies
- 18 on Paddle, they can do so manually?
- 19 A. They can do so automatically as well.
- 20 Q. So you are saying that Paddle offers the same
- 21 functionality here that Apple is offering?
- 22 A. No. I think Paddle offers superior functionality in
- 23 this regard, in the ability to kind of price
- 24 according to, like willingness to pay in different
- 25 markets, purchasing power around the world, apply

1 sort of rather than simple currency conversions
2 across markets that may be fixed either at a point
3 in time or at the point of transaction, both of
4 which you can do on Paddle. You can also sort of
5 differentiate those prices in different markets
6 around the world as well.

7 Q. Can I show you {D2/775} please. Tab 7 in your hard
8 copy bundle, it is {D2/775.1}. This is from the
9 Paddle website. Do you see this?

10 A. Yes.

11 Q. If we look at the statement you have beside the
12 star, it says:

13 "Paddle automatically handles conversion into a
14 balanced currency for you, meaning you see the
15 amount you earned in your preferred currency."

16 Then skipping down to "Automatic currency
17 conversion" that is below "How it works", it is the
18 first tick after "How it works". It says:

19 "Let Paddle automatically convert your prices
20 into the local currency but for a customer at
21 checkout."

22 Do you see that?

23 A. Yes.

24 Q. You expand on that in the section under "Automatic
25 currency conversion". Over the page, when we look

1 at country specific pricing, do you see in the
2 second paragraph below "country specific pricing":

3 "Use country specific pricing in Paddle to
4 manually override base prices with custom prices for
5 countries that you choose. It lets you price
6 according to purchasing power and willingness to
7 pay." Is that point you were making a moment ago,
8 Mr Owens?

9 A. Yes, but manually is not the only way to provide
10 those price overrides, you can do them via our SDKs
11 our APIs and other methods as well, as well as a
12 handful of add-ons and tooling that allow you to
13 automate those price changes as well.

14 Q. They operate in exactly the same way as Apple's
15 price tiering automatic conversion, they provide
16 that functionality, do they?

17 A. I believe Apple's price tiering is fixed, so they
18 price in kind of in pounds relates to a price in
19 another currency that is fixed at a given moment in
20 time, and then lasts I think until -- as per the
21 document earlier is updated periodically. So I
22 think it differs in that way. That is an option
23 with Paddle. You can certainly fix the prices and
24 update them periodically if you wish to or you can
25 use more realtime currency information based on a

1 set of rules or automations as well.

2 Q. When you talk here in the Paddle website about the
3 ability to manually override the automatic
4 functionality -- or manually override the base
5 prices, you know, do you not, that with Apple it is
6 also possible to override its automatic price
7 tiering?

8 A. I did not know that, no.

9 Q. Could you go back, please, to {D2/134/1}. It is
10 behind tab 6 of your bundle. At the bottom of that
11 page, do you see where it begins "Alternatively",
12 Mr Owens? It is behind tab 6 of your bundle at the
13 very bottom of that page. The page should have,
14 "Set a price" at the top of it. Do you see that?

15 A. Yes, I do.

16 Q. At the bottom:

17 Apple allows developers "manually [to] manage
18 certain storefronts" if they choose to and "manually
19 manage them all."

20 Do you see that?

21 A. I did not know that.

22 Q. Were you aware that Apple allows developers to
23 charge different cohorts of subscribers different
24 prices?

25 A. Yes.

1 Q. So in terms of pricing tiers are concerned, Apple
2 does provide developers with considerable
3 flexibility, does not it?

4 A. The kind of the ability to override in different
5 regions is new to me. I do not entirely know how it
6 works. But I would not describe 700 pricing tiers
7 as a lot of flexibility.

8 Q. 900 tiers?

9 A. 900, sorry.

10 Q. You do not regard that as considerable flexibility?

11 A. No.

12 Q. Because it is true, is it not, in fact, that there
13 is no demand for app developers for the ability to
14 have more than 900 price tiers, is there?

15 A. I would not agree with that, no.

16 Q. Where is your evidence of the demand from developers
17 seeking more than 900 price tiers?

18 A. I think the nature of, kind of, customers that we
19 deal with on a regular basis is that there is an
20 evolution towards ever more kind of complicated to
21 implement and usage based pricing models, for
22 example, which require an incredible amount of
23 flexibility on the side of how a product is priced
24 in order for developers to be able to implement
25 those. That is the fastest growing segment of our

1 customer base in terms of complex billing
2 requirements is people switching to things like
3 metered usage based or consumption based pricing for
4 their products.

5 Q. We will come back to that, Mr Owens. But just
6 focusing on the 900 price tiers, where is the
7 evidence that your customers have told you that 900
8 price tiers is an insufficient number of price tiers
9 to the extent that price tiers offer them
10 flexibility?

11 A. Across the 5,000 customers that use Paddle, there
12 are substantially more than 900 different price
13 points that are used by those customers.

14 Q. In terms of their concern that 900 price tiers, the
15 alleged concern, is insufficient, have you any
16 document that shows that they do not regard 900
17 price tiers as sufficient?

18 A. No.

19 Q. Moving on to discounts and the availability -- the
20 ability of developers to offer flexible discounts?

21 THE CHAIRMAN: Mr Kennelly, sorry to interrupt, at some
22 stage we ought to have a break.

23 MR KENNELLY: This is probably a convenient moment.

24 CHAIRMAN: Whenever is convenient for you.

25 Mr Owens, you are not to discuss your evidence

1 with anybody during the break.

2 THE WITNESS: Understood.

3 THE CHAIRMAN: We will take ten minutes.

4 (11.32 am)

5 (Break)

6 (11.46 am)

7 MR KENNELLY: Mr Owens, turning to discounts and the

8 ability of developers to offer flexible discounts.

9 Could you turn up, please, in your hard copy bundle
10 it is tab 8. For the document presenter it is
11 {D2/166}. This is from the Apple website and it is
12 directed to developers. Do you see that at the top
13 of the page?

14 A. I do, yes.

15 Q. Could you go please to page 9, {D2/166/9}. We are
16 looking at subscriptions and the various types of
17 discounts that Apple allows developers to offer in
18 respect of subscription purchases. One sort of
19 discount that Apple allows developers to offer is a
20 free trial for a specific duration. Do you see the
21 first of the examples given?

22 A. I do, yes.

23 Q. The example is given of a one-month free offer for a
24 subscription with a standard renewal price per
25 month. And then the next that is mentioned is pay

1 as you go, where the subscriber pays a discounted
2 price each billing period for a specific duration,
3 1.99 per month for three months, with a standard
4 renewal price of 9.99 per month, do you see that?

5 A. I do, yes.

6 Q. Another sort of discount we see is called "Pay Up
7 Front" where the subscriber pays a one-time price
8 for a specific duration, 9.99 for the first six
9 months with a standard renewal price of 39.99 per
10 year after that, and then they go back to the
11 standard renewal price. Do you see that?

12 A. I do, yes.

13 Q. Over the page, page 10, you see offer types and
14 three types of subscription offers, introductory,
15 promotional and offer codes. Do you see that?

16 A. I do, yes.

17 Q. Introductory offers probably need no further
18 analysis at the bottom of page 10. Over the page,
19 page 11, do you see the reference to offer codes
20 below the picture of the phone?

21 A. I do, yes.

22 Q. These can help you, Apple tells us, acquire, retain
23 and win back subscribers by providing a subscription
24 at a discount or for free for a limited time, do you
25 see that?

- 1 A. I do, yes.
- 2 Q. These can be distributed, can they not, however the
3 developer likes, online and offline channels?
- 4 A. I believe so, yes.
- 5 Q. Moving away from subscription purchases to one-off
6 purchases of app or in-app content, Apple again
7 allows developers to offer promo codes -- allows
8 developers to offer promo codes for one-off
9 purchases of apps or in-app content?
- 10 A. Yes.
- 11 Q. Developers can schedule temporary price changes, can
12 they not, if they want to offer a lower price for a
13 particular purchase for a limited period?
- 14 A. Yes.
- 15 Q. So standing back, Apple does offer developers quite
16 a lot of flexibility when it comes to offering
17 discounts, does it not?
- 18 A. It offers flexibility, yes.
- 19 Q. In fact, what Apple is offering developers in
20 respect of what Apple is offering mobile app
21 developers, in respect of discounts is going to
22 satisfy the needs of virtually all mobile app
23 developers, is it not?
- 24 A. I do not know.
- 25 Q. And there is not really a gap in what Apple is

1 offering that will incentivise -- a gap in what
2 Apple is offering in relation to discounts that
3 would incentivise mobile app developers to switch to
4 Paddle, is there?

5 A. There may not be.

6 Q. Looking at direct customer support and refunds, one
7 of the features that you have mentioned in your
8 witness statement that you would be able to offer
9 better than Apple is providing developers with the
10 ability to offer direct support to their customers?

11 A. Yes.

12 Q. Without having Paddle act as middleman?

13 A. Yes.

14 Q. You said, let us go back and see it because it is
15 quite a strong statement. It is behind tab 1 of the
16 hard copy bundle, {B1/1/7}. It is paragraph 21,
17 Mr Owens, of your statement. About halfway down 21
18 you say:

19 "Paddle's solution [...] would allow [iOS] App
20 developers to continue to be in the driver's seat of
21 their own customer relationships. They would be
22 able to offer input regarding bespoke refund
23 policies [...] have greater access to their
24 customers, including fielding questions or concerns
25 from customers." By contrast you say "Apple requires

1 iOS App developers to essentially sever the link
2 with their customers."

3 Is that still your evidence?

4 A. Yes.

5 Q. Could you turn up, please, it is tab 11 in your hard
6 copy bundle, {E/7/1}. These are Apple's App Review
7 Guidelines. Are you familiar with this document?

8 A. Yes.

9 Q. Could you turn, please, to, it is page 5, {E/7/5}
10 and paragraph 1.5, developer information. It is
11 correct, is it not, Mr Owens, that these are the
12 guidelines that Apple -- these are effectively the
13 conditions that Apple imposes on its developers in
14 order for them to be approved to be published on the
15 App Store?

16 A. It is, yes.

17 Q. So looking at paragraph 1.5:

18 "Developer information". Apple requires that
19 "people need to know how to reach you" -- you being
20 the developer -- "with questions and support
21 issues."

22 Do you see that?

23 A. Yes.

24 Q. "Make sure your app that" -- that is the developer's
25 app -- "and its support URL include an easy way to

1 contact you."

2 You being the developer.

3 A. Yes.

4 Q. Skipping past next sentence:

5 "Failure to include accurate and up to date
6 contact information not only frustrates customers,
7 but may violate the law in some countries or
8 regions."

9 Do you see that?

10 A. I do, yes.

11 Q. The contact information is the developer's contact
12 information, is it not?

13 A. Yes.

14 Q. That is what Apple is requiring the developer to
15 provide in a clear and easily accessible way?

16 A. Yes.

17 Q. Just taking this part of the guidelines at face
18 value, it shows, does it not, that Apple is
19 proactively advising and requiring developers to
20 provide customers with an easy way to contact them
21 directly with questions and support issues?

22 A. Yes.

23 Q. Could you go please to tab 12. This again is as you
24 see at the top -- sorry, it is {D1/1761/1}. You can
25 see that at the top of the page, Mr Owens, this page

1 from the Apple website is directed to users. Do you
2 see that? It says, "How to contact an app
3 developer."

4 A. I see that, yes.

5 Q. So it is providing instructions to users how to
6 contact the developer of an iOS app, do you see
7 that?

8 A. I do.

9 Q. So let us see what Apple is telling users:

10 "How to contact an app developer. In the App
11 Store you can find contact information for app
12 developers, including for Apple Arcade Games."

13 And then:

14 "When to contact an app developer for help" --
15 and three examples are given -- "If an app is not
16 working but the issue does not affect other apps.
17 If you cannot use an in-app purchase, such as a
18 bonus game level or 'remove ads'. If you've
19 received a discounted subscription offer from the
20 app developer and have questions about eligibility."

21 Do you see that?

22 A. I do, yes.

23 Q. This is encouraging customers to contact developers
24 directly, is it not?

25 A. It is, yes.

1 Q. So again taking this document at face value, Apple
2 is helping maintain that connection between the user
3 and the developer, is it not?

4 A. For this set of circumstances, yes.

5 Q. If you go, please, to tab 13, your hard copy bundle,
6 {D1/1815}, this is another page from the Apple
7 website and if you go, please, to the top of the
8 page, you see this time we are looking at a document
9 intended for developers. Do you see that, at the
10 top of the page?

11 A. I do, yes.

12 Q. "Developer documentation", dealing in particular
13 with in-app purchase. If you go please to page 3,
14 {D1/1815/3}, do you see the heading, "Providing help
15 with in-app purchases"?

16 A. I do, yes.

17 Q. "Sometimes, people need help with a purchase or want
18 to request a refund. To help make this experience
19 convenient, you can present custom UI" -- what is
20 UI?

21 A. User interface.

22 Q. "Within your app that provides assistance, offers
23 alternative solutions, and helps people initiate the
24 system-provided refund flow."

25 Do you see that?

1 A. I do, yes.

2 Q. So again, looking at that paragraph and taking it at
3 face value, this is Apple allowing and encouraging
4 developers to enable users to request refunds
5 directly from within the app itself?

6 A. It is, yes.

7 Q. Then if you go to the next paragraph below it:

8 "Provide help that customers can view before
9 they request a refund. In addition to including a
10 link to the system-provided refund flow, your custom
11 purchase-help screen can provide assistance you
12 tailor to your app. For example, your custom screen
13 might help people resolve problems with missing
14 purchases, answer frequently asked questions about
15 the in-app purchases you offer, and give people ways
16 to submit feedback or contact you directly for
17 support", you the developer directly. And there is
18 an image below to show how clearly and easily that
19 can be presented. Do you see that?

20 A. I do, yes.

21 Q. On page 4 over the page, do you see the heading,
22 "Consider offering alternative solutions"?

23 A. I do, yes.

24 Q. "If the customer did not receive an item they
25 purchased you might offer immediate fulfilment or a

1 conciliatory item. Regardless of the alternatives
2 you offer, make it clear that people can still
3 request a refund."

4 So here, Mr Owens, we see Apple offering
5 developers the ability to manage their customer
6 relationship, here and in the previous page, by
7 offering a bespoke form of response to a problem
8 before the user asks for a refund.

9 A. I do not think it allows developers to manage their
10 relationship with customers. I think it more
11 accurately allows customers to manage their
12 relationship with developers.

13 Q. Well, here this is directed to a developer, is it
14 not? This document is designed to encourage
15 developers to allow customers to have this
16 interaction?

17 A. I think this is to allow developers to implement
18 certain user interfaces in their app to allow their
19 customers to interface with them.

20 Q. With the developers?

21 A. Yes, but not the other way around.

22 Q. Could you move on please to tab 14, it is
23 {D1/1408/1}. Again, this is from the Apple website
24 and do you see at the top, Mr Owens, it is intended
25 for Apple developers, do you see that?

1 A. I do, yes.

2 Q. Again focussing on in-app purchase. If we move
3 please to page 5, providing support, handling
4 refunds. In the second paragraph below, "Handling
5 refunds", Apple tells developers:

6 "If you've enabled App Store server
7 notifications, you'll receive a notification when
8 someone receives a refund. You (the developer) can
9 use this information to take action -- for example,
10 updating the account balance based on the refund or
11 restricting access to content unlocked by the
12 purchase. If you choose to take action, inform the
13 user of any changes and let them know if there's
14 anything they need to do. You can also identify
15 whether someone has previously received refunds for
16 any in-app purchases using the 'get refund history'
17 end point."

18 So in terms of facilitating the relationship
19 between developers and customers, where a customer
20 receives a refund from Apple, Apple does, you see
21 here, notify the developer immediately so that the
22 developer can then, if necessary, work on the
23 relationship with the customer?

24 A. There is still no way for a developer to manage that
25 refund process with a customer. It is entirely

1 invoked by the customer to the developer. There's
2 no way for a developer to be kind of in any way
3 proactive about that. They are able to be reactive
4 to it once a refund has occurred, for example, as
5 per the notification, yes.

6 Q. So it is true, is it not, Mr Owens, that Apple
7 facilitates the ability of the developer to
8 encourage and engage with the consumer before the
9 refund is sought. We saw that on the previous
10 pages.

11 A. Through a user interface, yes.

12 Q. Then once Apple handles the refund, if the customer
13 decides to do that, Apple through this notification
14 allows the developer to engage with the customer
15 post-refund to foster that relationship between the
16 developer and the customer?

17 A. It allows them to be notified, yes.

18 Q. In fact, the only time that Apple is coming in and
19 handling the refund, we saw this previously, is when
20 the customer has gone past all those other options
21 that Apple has allowed the developer to do; the
22 prerefund stages. That is when Apple steps in. It
23 is after the developer has had the opportunity to
24 make amendments or make alternative offers to the
25 customer?

1 A. In the exclusive way that a customer interacts with
2 a developer through that single piece of user
3 interface, yes.

4 Q. So standing back, developers are encouraged by
5 Apple, in fact, and required in the guidelines to
6 provide users with the ability to contact them for
7 help?

8 A. Yes.

9 Q. Developers can manage the customer relationship by
10 offering alternatives to a full refund through the
11 interface?

12 A. Yes.

13 Q. And even if the user has requested the full refund,
14 Apple's systems make sure the developer gets a
15 notification, which allows the developers then to
16 engage with the customer?

17 A. Yes.

18 Q. So it is just not case, Mr Owens, that Apple is
19 completely severing the link between the developer
20 and the user, is it?

21 A. They sever a link from -- there is still a link from
22 a customer initiated interaction to the developer,
23 but there is little to no link between a developer
24 initiated interaction and the consumer.

25 Q. Mr Owens, you said at paragraph 21:

1 "Apple requires iOS App developers to
2 essentially sever the link with their customers,
3 such that their customers have to rely on Apple to
4 manage the customer, end to end."

5 So it is just not true, is it, that from what
6 we have seen, Apple is completely severing the link
7 between the developer and the customer, completely
8 severing the link?

9 A. Completely no.

10 Q. In fact, the bit that Apple is doing is that refund.
11 That indeed is what Apple is doing?

12 A. And providing the user interface.

13 Q. The user interface is for the benefit of the
14 developer to engage with the user?

15 A. It is imposed on the developer and the user by
16 Apple.

17 Q. In terms of handling refunds, is not that what
18 merchants of record do? I mean, the merchant of
19 record's job is to handle refunds?

20 A. The administrative part of refunds, yes.

21 Q. And there is no sign, is there, Mr Owens, that
22 developers want significantly greater access to
23 their customers using Paddle rather than using
24 Apple's payment system, is there?

25 A. I would say it's the number one reason that

1 customers choose Paddle is for greater access to
2 their customers.

3 Q. Rather than using Apple's payment system?

4 A. In the instances where somebody has used Paddle's as
5 an alternative in some manner, to offer other
6 products that they offer on different platforms or
7 something like that, yes.

8 Q. Just focusing on the extent to which you are being
9 preferred, where you have evidence that someone has
10 preferred you over Apple, that is the distinction
11 that is being drawn, how many instances of that have
12 you seen?

13 A. I could not give a specific number.

14 Q. Have you any document that says that?

15 A. Yes, I believe there are quotes publicly available
16 on our website from developers who have contracted
17 with both Apple and Paddle and have preferred Paddle
18 because it gives them greater flexibility to their
19 customers and interacting with their customers.

20 Q. Of these customers, of these developer customers you
21 have, the 5,000 you mentioned, how many of them are
22 mobile app developers offering microtransactions?

23 A. I do not know a specific number.

24 Q. 5,000, it is not a huge number, a rough number of
25 those, how many of them are mobile app developers?

- 1 A. Hundreds of them have mobile apps.
- 2 Q. Hundreds of them?
- 3 A. Yes.
- 4 Q. Offering microtransactions?
- 5 A. I do not know the specific details of exactly what
- 6 products every single one of our customers sell.
- 7 Q. Moving on then to that metered price point you made
- 8 earlier, Mr Owens, in your evidence?
- 9 A. Yes.
- 10 Q. Usage based pricing, I think is another way you
- 11 described it. You say that one of the advantages
- 12 that Paddle has is you can offer complex billing
- 13 options such as usage based pricing.
- 14 A. Yes.
- 15 Q. That means, just forgive me for a moment, does that
- 16 mean that you sign up for a subscription and then
- 17 the price of the subscription changes depending upon
- 18 the consumer's consumption patterns?
- 19 A. Not necessarily just a subscription, it could be,
- 20 for example, crediting a balance and sort of the
- 21 consumption reduces the balance as well. So it can
- 22 be in either mechanism but, yes, the subscription
- 23 mechanism can also be true.
- 24 Q. So in simplistic terms, if for every 10 hours in a
- 25 game, if the deal is 10 hours in a game per week you

1 pay £20, but if you spend 50 hours on a game you pay
2 £90?

3 A. I think the specific implementation of that would
4 depend. So you could, for example, implement that
5 system with a tiered base pricing, as well as pure
6 consumption based pricing. I would say that
7 consumption based pricing is typically retroactive,
8 so it monitors usage over a period of time and then
9 bills them for that usage after the usage has
10 occurred. Whereas the instance that you gave, you
11 could, for example, pay £20 upfront for 10 hours of
12 usage and then kind of upgrade a subscription to a
13 different tier, which I would not necessarily
14 classify as kind of metered billing or usage based
15 price.

16 Q. So the tiers, as you describe it, when you sign up
17 you pay a price which is fixed at the time of
18 purchase and before you consume the content, and
19 with usage based pricing you are signing to pay a
20 price which is only fixed at some future date after
21 you have consumed the service?

22 A. There are nuances to the implementation but
23 essentially, yes.

24 Q. That kind of usage based or metered pricing is used
25 we know in certain business to business contexts

1 where users are using software as a service?

2 A. It is, yes.

3 Q. Those are normally fairly sophisticated users, are
4 they not?

5 A. The users of the software itself?

6 Q. Software as a service, yes. Metered pricing is used
7 a lot or commonly in these business to business
8 relationships, between the developers and their
9 customers?

10 A. Not exclusively, but yes.

11 Q. If we think about the App Store and its user base of
12 largely individual consumers, Apple might well have
13 legitimate concerns about the prospect of developers
14 binding customers into paying a price which is not
15 fixed at the checkout?

16 A. Apple may have those concerns, yes.

17 Q. Do you think those concerns are illegitimate?

18 A. I think if that information is presented clearly and
19 a customer kind of opts into that, I do not see any
20 issue with it.

21 Q. So they do not know -- the customer, the individual
22 consumer, does not know in advance how much they
23 will ultimately pay. It is going to depend on what
24 they end up consuming?

25 A. Potentially.

1 Q. They will be bound to pay that at the end of the
2 consumption?

3 A. Possibly, yes.

4 Q. It may not be very transparent for certain
5 consumers?

6 A. There would have to be a specific kind of example of
7 it not being transparent to a consumer for me to say
8 yes or no.

9 Q. Well consumers might not want to buy a device that
10 allows them, or more importantly their children, to
11 get sucked into that kind of pricing structure,
12 maybe inadvertently?

13 A. Potentially.

14 Q. It is highly unlikely, is it not, that we are going
15 to see significant numbers of mobile app developers
16 aiming at consumers, individual consumers,
17 implementing this kind of usage based pricing, is it
18 not?

19 A. I do not think that is necessarily the case.

20 Q. Have you any examples of mobile app developers
21 aiming at individual consumers who have expressed an
22 interest in usage based pricing?

23 A. I think that we have had enquiries over the years
24 from document storage or kind of file syncing based
25 applications and things like that who wish to

1 experiment with how they price to differentiate.

2 Q. You have not produced any examples of that in your
3 statement, have you?

4 A. No.

5 Q. You have not given us any exhibits, any documents to
6 back that up, have you?

7 A. No.

8 Q. So we have no idea what these documents say?

9 A. No.

10 Q. Even for Paddle to be able to offer this usage based
11 pricing within an iOS app, even if this were to be
12 used, it is still going to require flow of data from
13 the iOS app on usage. There is still going to be
14 some way in which the app is communicating the level
15 of usage to Paddle?

16 A. Yes.

17 Q. And that is going to require APIs to facilitate that
18 communication?

19 A. Most likely, yes.

20 Q. Apple APIs?

21 A. No. I highly doubt that.

22 Q. That is not going to require anything at all from
23 Apple to facilitate that transfer of usage
24 information?

25 A. It depends how we are defining API and sort of which

1 particular platforms and languages and things like
2 that, as to the nuances of the technical
3 implementation of how a developer would send data
4 over the internet to a third party service. Without
5 specifically looking at an example, I do not know
6 that I could make an assessment of whether it would
7 require the usage of an Apple API or not for the
8 usage.

9 Q. Fair enough, Mr Owens, but it is possible, is it
10 not, that Apple may need to do something to ensure
11 that that data is transmitted, that flow of use
12 information is transmitted from the user and the
13 developer to Paddle?

14 A. I do not believe Apple would have to do anything,
15 no.

16 Q. Turning then to your pricing structures and the
17 prices that Paddle charges to developers. I want to
18 look at your default pricing structure first and
19 then the different pricing structure of what you
20 call microtransactions?

21 A. Okay.

22 Q. Just taking those in turn, your default pricing
23 structure is 5 per cent of the transaction value
24 plus 50 cents?

25 A. That is correct, yes.

- 1 Q. US 50 cents?
- 2 A. That is correct.
- 3 Q. Then you say in your statement that Paddle enters
4 into bespoke pricing agreements with certain smaller
5 developers who sell digital transactions for low
6 prices, very low prices, which we have been calling
7 microtransactions?
- 8 A. Yes.
- 9 Q. Microtransactions are those which are under 10
10 dollars?
- 11 A. That is how we define them, yes.
- 12 Q. For those microtransactions you say that Paddle
13 offers a price typically expressed as 10 per cent of
14 the transaction value, with no flat fee 50 cent
15 component?
- 16 A. That is correct.
- 17 Q. That is a structure, you say, you would apply on iOS
18 if you were allowed to offer your services there?
- 19 A. I believe we would, yes.
- 20 Q. So you would charge 10 per cent for transactions
21 under \$10 and 5 per cent plus 50 cents for
22 transactions more than \$10?
- 23 A. We may consider lowering those prices, but as we
24 have evaluated thus far that is the pricing we would
25 intend to offer.

1 Q. You say that currently across your 5,000 customers
2 and their transactions, your average charge is in
3 the range of 6 to 7 per cent?

4 A. Roughly, yes.

5 Q. That is obviously, as I say, based on your current
6 customer and transaction base. If iOS App
7 transactions skew more heavily towards low value
8 transactions then your average commission for iOS
9 transactions would be closer to 10 per cent, would
10 it not?

11 A. Logically I think so, yes.

12 Q. Do you accept that the average value of transactions
13 on the App Store is under \$10?

14 A. I am not entirely sure but if I were to guess I
15 would say it most probably is.

16 Q. Can we look then at how you present your pricing on
17 your website. It is in tab 15 of your bundle
18 Mr Owens, {D2/778.1} do you see it, "Our Pricing"?

19 A. I do, yes.

20 Q. On the left-hand side there is a "Pay-as-you-go"
21 price which is, I understand, the 5 per cent plus 50
22 cents price?

23 A. That is correct, yes.

24 Q. We can see there is a button on the left-hand side
25 that allows a developer to sign up on that basis?

- 1 A. Yes.
- 2 Q. And then we see an asterisk underneath those boxes
- 3 that says:
- 4 "If you're selling products under \$10" -- do
- 5 you see that, the font is rather small?
- 6 A. I do see it.
- 7 Q. "If you're selling products under \$10 or require
- 8 invoicing contact us for custom pricing."
- 9 A. I see that, yes.
- 10 Q. So your website is not actively promoting a 10 per
- 11 cent rate for microtransactions, is it?
- 12 A. I am not sure if it is elsewhere on the website but
- 13 on this pricing page specifically, I do not know if
- 14 it does.
- 15 Q. Well, this page is not actively promoting a 10 per
- 16 cent rate for microtransactions, is it?
- 17 A. Not the specific rate, no.
- 18 Q. When you say it may be somewhere else on your
- 19 website, is that just a guess or do you think it is
- 20 somewhere else on your website? It is your website,
- 21 Mr Owens, you probably should know. It is a very
- 22 important point, is it not, the pricing?
- 23 A. I do not know, the website is very large. I am not
- 24 responsible for every single page on the website.
- 25 Q. Would you be surprised if I told you that we cannot

1 find it on your website?

2 A. It would not surprise me.

3 Q. The fact that it is presented in this way, the fact
4 that you emphasise the 5 per cent plus 50 cents and
5 not the microtransaction 10 per cent is because your
6 business is not currently oriented around
7 facilitating in-app purchases for mobile app
8 developers?

9 A. We are currently not able to sort of transact with
10 developers for in-app purchases on mobile devices,
11 so, no.

12 Q. We will come back to that, Mr Owens. Looking again
13 at your additional charges, again sticking with your
14 pricing for the moment. I would ask you to turn up
15 tab 17 this time. It is {D1/1865.1}. It is your
16 "Master Services Agreement". Do you see that?

17 A. I do, yes.

18 Q. If you go please to page 8, there is a clear picture
19 of how you price. Do you see clause 8, "Fees and
20 Charges", 8.1, could you just read that to yourself
21 please, Mr Owens.

22 A. Yes.

23 Q. So if an American customer were to purchase software
24 in dollars where the developer of the software
25 wanted to be paid in pounds, Paddle would charge a

1 2 per cent foreign exchange fee to convert those
2 sales proceeds into sterling?

3 A. In the instance that they wished to be paid in
4 pounds, yes.

5 Q. It could go up to 3 per cent for other currencies,
6 such as, I think Swiss francs, just to give you an
7 example?

8 A. I am not sure whether Swiss francs incurs a higher
9 free.

10 Q. It is not a long list, "USD, EUR, GBP, CZK, DKK,
11 NOK, THB", that is it, everything else is 3 per
12 cent, is that correct?

13 A. Yes, I guess so.

14 Q. Over the page, page 9, clause 8.4. Could you read
15 this to yourself, please?

16 A. Yes.

17 Q. So if payments are made to a developer using an
18 international bank transfer, then you apply a charge
19 of £15?

20 A. Yes.

21 Q. We see at the bottom of that paragraph, if a
22 developer wants to be paid in a currency other than
23 the one they have initially indicated, you reserve
24 the right to charge an additional fee of 1.5 per
25 cent?

- 1 A. Yes.
- 2 Q. So these are possible additional charges which would
3 be payable on top of the 10 per cent or 5 per cent
4 plus 50 cents that you apply?
- 5 A. Yes.
- 6 Q. Now, coming back to that point you just made a
7 moment ago, Mr Owens, about not being allowed to
8 provide services for in-app purchases, could I ask
9 you to turn, please, to one of the expert reports in
10 the case. Just to reassure the Tribunal, this is a
11 non-confidential version. Mr Owens, is not in the
12 ring. It is tab 16 in your hard copy bundle,
13 {C2/10/1}. Just so you see what it is, Mr Holt's
14 third expert report in these proceedings. If you
15 could go, please, to page 142. Do you see,
16 Mr Owens?
- 17 A. I do.
- 18 Q. Take your time. You see I am looking at table 7.4
19 "App distribution platform Commission for downloads
20 and in-app purchases". Do you see that?
- 21 A. Yes.
- 22 Q. I am focusing in particular on the fourth column,
23 the one with the heading "Tied In-App Aftermarket
24 Services". Do you see that?
- 25 A. I do, yes.

1 Q. Do you understand what that means in this context?

2 A. No.

3 Q. So this is where the platform does or does not
4 require developers to use its own payment system?

5 A. Okay.

6 Q. Do you see on that column, the third app
7 distribution platform, the Epic Games Store, do you
8 see that?

9 A. I do, yes.

10 Q. Mr Holt is recording the fact that Epic does not
11 require developers to use its own payment system?

12 A. That is what the table indicates, yes.

13 Q. Well, were you aware that Epic allows developers to
14 engage alternative payment systems like Paddle's?

15 A. I assume so on the basis of this table.

16 Q. Just looking back at the figure, the discount, do
17 you see the discount? It is beside the "No", beside
18 Epic Games Store?

19 A. Yes.

20 Q. Do you understand what that means in this context?

21 A. No.

22 Q. So the 12 per cent discount means you do not pay
23 commission to Epic if you use a different payment
24 system?

25 A. Okay, I understand.

1 Q. Were you aware of that when you produced your
2 statement?

3 A. I do not believe my statement was in regard to Epic
4 Games.

5 Q. But it is a very basic question. When you wrote
6 your statement, were you aware that it was possible
7 for services like Paddle, providers like Paddle to
8 offer their services to developers in the Epic Games
9 Store and those developers would receive a complete
10 discount; they would pay nothing to the Epic Games
11 Store and be required only to pay your fee?

12 A. I do not know a great deal about the Epic Games
13 Store.

14 Q. Mr Owens, how is that credible? Just to step back
15 for a second. It is true, is it not, that you were
16 a witness in the Epic and Google trial in the US in
17 2023?

18 A. I was, yes.

19 Q. You were a witness in the Epic and Apple trial in
20 Australia last year?

21 A. I was, yes.

22 Q. You filed a declaration in the Epic US proceedings
23 in March of last year?

24 A. Yes.

25 Q. You are intimately familiar with how the Epic Games

1 Store is engaging with Apple on this question of --

2 A. Of course I --

3 Q. What is called the tie-in for payment systems, that
4 is the very issue in the Epic case?

5 A. I am unaware if Paddle is able to -- because we do
6 not typically deal with games customers, we have a
7 handful. I am unsure if our APIs work on the
8 platforms that games customers use in this instance.
9 I do not believe the Epic Games Store works on
10 mobile, I thought it was a desktop application in a
11 similar context to Steam.

12 Q. So Mr Owens, I think are you agreeing then that when
13 you produced your evidence to this Tribunal, you
14 were aware that, at least in principle, Paddle could
15 offer its services to developers on the Epic Games
16 Store?

17 A. Yes, I think so.

18 Q. You were aware of the ostensible advantages to
19 developers who took up that option?

20 A. With regard --

21 Q. In terms of discount?

22 A. To pricing.

23 Q. You were aware of that too, were you not?

24 A. I had not looked at the specific details as to the
25 pricing, but yes.

1 Q. The reason why you have not taken up this generous
2 offer from Epic is because you are not sure if
3 Paddle's services would work or --

4 A. We do not typically contract with games companies.
5 We have a couple of games companies who use Paddle,
6 most notably a company called GeoGuessr who
7 primarily is a web based game that is priced similar
8 to a SAS product. The vast majority of games occur
9 on mobile or on consoles. We have never really had
10 many customers, gaming customers of the 5,000
11 customers that we have, I could probably on two
12 hands sort of have the number of gaming customers
13 that we have so ...

14 Q. Sure, Mr Owens, that is the current position, but
15 this is an opportunity, is it not? This is an
16 opportunity for you to offer your valuable services,
17 which are excellent, according to your evidence, to
18 developers on the Epic Games Store?

19 A. If we were going to make a substantial investment in
20 increasing kind of the scope of our business towards
21 gaming we would not choose the smallest possible
22 platform to be able to do it on. It requires a
23 significant amount of investment for us in order to
24 build the set of technologies suitable for a games
25 customer, and I do not think we would choose to go

1 to market on a smaller platform until the market was
2 large enough for us to be able to do it for more
3 developers. That, kind of the ROI of making that
4 investment, makes sense.

5 Q. Could we look down please to the Samsung Galaxy
6 Store, three lines up from the bottom, do you see
7 that?

8 A. Yes, I do.

9 Q. Were you aware that that app store is in a similar
10 position?

11 A. I was with the Samsung Galaxy Store, yes.

12 Q. And the extent of the discount available to the
13 developers who took up that option?

14 A. Not specifically, but I believe I kind of recall
15 seeing that before.

16 Q. There is nothing in your evidence either to show
17 that Paddle has provided services to app developers
18 on the Samsung Galaxy Store?

19 A. No, we have not.

20 Q. You have provided nothing, no developers at all?

21 A. No, we spoke to a number of developers and most of
22 them were interested in transacting on the Play
23 Store.

24 Q. Did you think the Samsung Galaxy Store was too small
25 to be worthwhile, not to justify the investment?

1 A. Yes, at the time.

2 Q. There was no -- I think you said little or no mobile
3 app developer interest?

4 A. With the app developers we were in contact with, who
5 used us for kind other areas of the business at the
6 time, who we would speak to about it, yes.

7 Q. Then with the One Store at the bottom of the table,
8 again were you aware when you produced your
9 statement, that the One Store allows developers to
10 engage a company like Paddle?

11 A. No, I have never heard of the One Store.

12 Q. You have never heard of it?

13 A. No.

14 Q. What about PC stores, Mr Owens, and the developers
15 who offer apps on PC stores?

16 A. We work with many developers who offer apps on the
17 PC or on the Mac or other kind of similar products.

18 Q. What proportion of your 5,000 customers do you think
19 offer apps on PC stores?

20 A. If we can use the term PC to mean just desktop
21 computers in general --

22 Q. Yes?

23 A. -- I would say probably a thousand or so.

24 Q. If it is not confidential, how much commerce are you
25 processing through those thousand customers?

- 1 A. I would --
- 2 Q. Roughly.
- 3 A. If it is a sort of straight line, kind of in line
4 with our business, probably \$400 or \$500 million.
- 5 Q. Focusing though back on to mobile app platforms, I
6 think what you have told us is that, as things
7 currently stand, Paddle has not developed a standard
8 pricing package that is aimed at microtransactions
9 for mobile app developers?
- 10 A. We have indicated the 10 per cent that we planned
11 for microtransactions for app developers, and
12 transactions regardless of where they were to occur.
- 13 Q. That is not one of the standard pricing options that
14 is available on your website, is it?
- 15 A. On the pricing pages? It is not there, no.
- 16 Q. Again, that reflects the fact that your business
17 model is currently focused on targeting upmarket
18 developers who are selling software in the higher
19 bracket, the plus \$10 -- \$10 plus bracket?
- 20 A. I think we have a range of customers across like the
21 whole spectrum. I would probably say that over half
22 of our business is consumer, by volume. I do not
23 know by number of customers.
- 24 Q. But are you not aiming to gear your offering towards
25 upmarket developers in the \$10 plus bracket?

1 A. I think we gear our business towards anybody who
2 wants to deal with us.

3 Q. Could I ask you to turn, please, to tab 21 in your
4 hard copy bundle, {D1/1610.1}?

5 A. Yes.

6 Q. The reason why I put the question to you is because
7 when I read this interview with you, perhaps it is
8 not an interview, an article about you and Paddle,
9 do you see the first paragraph below the photograph
10 of yourself?

11 A. I do.

12 Q. "Shoreditch-based payments unicorn Paddle's losses
13 widened to more than £34 million in 2022, as it
14 aimed to gear its product towards 'up market
15 developers'."

16 Do you see that?

17 A. I do, yes.

18 Q. Is that a correct statement?

19 A. We use the term "up market" internally to refer to
20 larger developers, not necessarily developers
21 selling to businesses. So I do not know, it's in
22 quotation marks, but I do not know where it is a
23 quotation from, but internally we use "up market
24 customer", for example, to mean a larger customer.

25 Q. Well, the information, as you can see from latest

1 filings, the financial information is from your
2 group accounts so that should not come as a
3 surprise. Have you any reason to doubt this summary
4 of your group accounts information?

5 A. No.

6 Q. And over the page, Paddle -- it is just below the
7 first line:

8 "Paddle said that much of the development work
9 was to improve its billing and subscription
10 management 'to align with the expectations of its up
11 market developers', which use Paddle to manage
12 payments for their software-as-a-service products."

13 Do you see that?

14 A. I do, yes.

15 Q. It is true, is it not, that ultimately your
16 business, currently, is focused on developers
17 selling software through websites.

18 A. The majority of our business is that, yes.

19 Q. The reason, the reason why Paddle has focused its
20 business model and its pricing plans, as we have
21 seen, is because there is no appreciable demand from
22 mobile app developers for alternative payment
23 systems?

24 A. There absolutely is. I think that the reason we
25 focus on there is because the web is an open

1 platform. It is the same reason we have substantial
2 demand for our products, and we power hundreds of
3 developers and hundreds of millions of dollars of
4 commerce on desktop computers as well because those
5 are open platforms that enable us to offer our
6 services on those platforms. In the instances where
7 we offer these services to developers, we tend to
8 sign those developers up and they tend to have very
9 happy relationships with Paddle.

10 Q. We are focusing on mobile app developers, I am
11 asking you only about mobile app developers.

12 A. Sorry I thought your previous question was about the
13 web.

14 Q. No, the focus is on the web and the reason why you
15 focused on the web in that way is because -- it is
16 not a criticism, it is a commercial judgment --
17 there's no appreciable demand from mobile app
18 developers, mobile app developers, for alternative
19 payment systems like Paddle's?

20 A. No, that is not correct.

21 Q. So let us just focus on that last answer, Mr Owens,
22 because it is true, is it not, that in 2021 Paddle
23 did develop a payment system, a payment solution
24 sorry, for iOS as an alternative to Apple's IAP
25 system, did it not?

1 A. We did, yes.

2 Q. Can I ask you to go back to your statement where you

3 discussed this. It's the first tab in your hard

4 copy bundle?

5 A. I can see it.

6 Q. It's {B1/1/5}.

7 THE CHAIRMAN: Which paragraph?

8 MR KENNELLY: Paragraph 14, sir. You say, it is the

9 third sentence:

10 "I note that Paddle developed a working payment

11 solution for iOS as an alternative to" -- what you

12 call the ASPPS -- "in 2021. This alternative

13 solution could be used for purchases within the App

14 Store (or alternative app stores) and within apps

15 ... and is ready to go."

16 Do you see that?

17 A. I do, yes.

18 Q. So Paddle has already incurred all of the

19 development costs associated with developing this

20 solution, has it not?

21 A. The iOS, yes.

22 Q. But Paddle has not launched this product in the EU,

23 has it?

24 A. I do not believe so.

25 Q. And it has not launched this product in South Korea,

1 where you know presumably that iOS was opened to
2 providers like Paddle in 2022?

3 A. Yes.

4 Q. And it did not launch this ready-to-go product in
5 the Netherlands either, when in the Netherlands
6 providers like Paddle were permitted to offer their
7 services to iOS dating apps also in 2022?

8 A. Paddle does not operate with dating apps.

9 Q. At all?

10 A. No.

11 Q. So you have not taken up these opportunities to go
12 into the EU or to South Korea, notwithstanding the
13 fact that you have this iOS app ready to go?

14 A. We have an iOS SDK ready to go for developers. We
15 have not kind of taken that opportunity because of
16 the substantial -- well, two sets of reasons. One,
17 the substantial barriers that are put in place on
18 the Paddle and developers' ability to use it
19 commercially; and two, from a development
20 standpoint, for developers most of these developers
21 develop one build of their application and
22 distribute it globally, hence the reason for
23 different tools offered by Paddle and by Apple on
24 localisation and things like this to enable
25 developers not to have to build a separate version

1 of their application for all these different
2 locations. Most developers we spoke to do not want
3 to build a separate versions of their applications
4 for different countries, including and excluding
5 certain pieces of code or SDKs for those places
6 because it becomes too developmentally burdensome
7 for them.

8 Q. You said in various places, is that the reason why
9 for example you have not launched in South Korea?

10 A. Yes.

11 Q. Would that be the situation here in the UK if the UK
12 was the only place where it could be done?

13 A. I do not know. We would take each market case by
14 case and evaluate each one. It was certainly the
15 case in South Korea. I do not know why we did not
16 launch in kind of Europe. That was not my decision
17 any more, I think by the time that decision came to
18 be a decision.

19 Q. What's -- sorry were you familiar with the decision
20 not to launch in South Korea?

21 A. Yes.

22 Q. So why did you not launch in South Korea?

23 A. We presently have one customer who transacts in a
24 meaningful way in South Korea as a market to end
25 consumers. A lot of South Korean commerce for a lot

1 of these apps tends to be from South Korean
2 developers, and we do not have a substantial
3 presence amongst South Korean developers today.

4 Q. It is a great opportunity for Paddle though, it is a
5 massive smartphone market, heavy use of apps.

6 A. There are many great opportunities. We have to pick
7 and choose. We are a relatively small business.

8 Q. You referred in your witness statement to receiving
9 requests over the years from iOS app developers.

10 Can I just take you back to that. It is in
11 {B1/1/6}, paragraph 17 of your witness statement.

12 Do you see this, Mr Owens?

13 A. I do, yes.

14 Q. You say to the Tribunal that:

15 "Paddle has received many requests over the
16 years from iOS app developers to use Paddle's
17 solution."

18 Do you see that?

19 A. Yes.

20 Q. But you have not provided the Tribunal with any of
21 these requests, have you?

22 A. I do not believe I was asked to.

23 Q. Well, it is your evidence, Mr Owens. If you had
24 received powerful requests that supported the point
25 you were making, would you not have exhibited them

1 yourself, would you not have wanted to show the
2 Tribunal that?

3 A. I am not a lawyer. I do not understand sort of
4 necessarily how this process works. I know
5 certainly in the two cases you mentioned that I gave
6 evidence in in other countries, sort of we provided
7 many instances of kind of screenshots and e-mails
8 and what not from customers to demonstrate that
9 point.

10 Q. All the more reason, Mr Owens, here if you felt that
11 those communications from customers supported the
12 point you were trying to make, to include them?

13 A. I would have loved to include them. I did not know
14 the exact kind of process in order to do that here.

15 Q. You did not know that you could show the Tribunal
16 the actual communications you received?

17 A. I did not understand the exact process. I was asked
18 to give a statement.

19 Q. Mr Owens, please, you are not seriously suggesting
20 that you did not know that had you got useful
21 communications making good your point, that you
22 could bring them to the Tribunal?

23 A. This is my first time in any kind of tribunal court
24 situation in the UK. Absolutely no idea.

25 Q. Mr Owens, just to remind you, you are uniquely

1 experienced in the ways of litigation like this. It
2 is rare indeed to have a civilian witness who has
3 already been involved in not one but three other
4 trials involving the same issues, two in the
5 United States and one in Australia. You knew well
6 that had you got good material, you could have
7 brought it.

8 A. I did not know that that was the process here. I
9 can only apologise for not submitting it. I would
10 have loved to, we certainly have many instances of
11 it that we could provide.

12 Q. You see the difficulty we have, Mr Owens. This
13 could be one, it could be ten, we have no idea. Do
14 you see the predicament you have put the Tribunal
15 in?

16 A. Yes, I can only apologise.

17 Q. And I am afraid I have to say to you that the
18 inference that I am drawing and putting to you, from
19 the fact that you have not included these documents,
20 is that they are not powerful support for the point
21 that you are trying to make?

22 A. If that is what you wish to infer from that, then
23 you can.

24 Q. Because we say if they were strong, you would have
25 included them?

1 A. I did not understand that there was a process to
2 include them.

3 Q. Now, even if you had received requests like that,
4 they could only have been of a general nature
5 because you have not actually launched an iOS
6 service in any of the jurisdictions where you are
7 able to do so; is that not correct? If you can
8 remember what these communications said?

9 A. They were specific requests from customers for
10 specific details/guidelines how they use Paddle's
11 services on iOS on mobile and trying to navigate
12 that kind of maize of different rules and APIs.

13 Q. Just how many of these communications, we can check,
14 how many of these communications specifically came
15 from mobile app developers referencing iOS mobile
16 apps?

17 A. I believe we submitted at least five or six in the
18 previous cases. There were certainly many more.

19 Q. Moving on then to what you would charge compared to
20 what Apple would charge in the counterfactual. Can
21 I ask you just to imagine for a moment a developer
22 who wants to make a game and collect \$10 per user
23 for it. I appreciate that you do not deal with
24 gaming apps, but just bear with me.

25 A. I can imagine.

1 Q. In order to achieve that, the developer first needs
2 to make the game and you can take it from me and I
3 think you accepted it earlier anyway, that in order
4 for a developer to do so it needs tools and
5 technology from Apple, just to make the game?

6 A. I am not sure. I have never made a game.

7 Q. Will you take it from me that that is a thing a
8 developer needs to make a game for iOS, are tools
9 and technology from Apple?

10 A. I do not know.

11 Q. And you would accept then, at least, that the next
12 thing the developer needs is to get the attention of
13 those iOS users?

14 A. Yes.

15 Q. It needs the users to find out about the game, to
16 understand enough about it to want to download it?

17 A. Yes.

18 Q. It needs end users to trust the platform that they
19 are downloading it from and trust it sufficiently to
20 choose to download the app from that platform?

21 A. Yes.

22 Q. If it sells the game for \$10, it needs someone to
23 process that financial transaction, handling
24 receipts, taxes and so on?

25 A. Yes.

1 Q. Again, it needs the customer to trust that process
2 too because it is money?

3 A. Of course.

4 Q. At the moment Apple provides all of those services,
5 does it not?

6 A. I believe so, yes.

7 Q. Apple charges the headline rate of 30 per cent for
8 them?

9 A. Yes, I think so.

10 Q. That is, if you look, \$3, if it is a \$10 purchase?

11 A. Yes.

12 Q. Suppose a developer takes a different approach and
13 makes the game free to download, but requires a \$10
14 payment inside the app to unlock something, say,
15 beyond the first level of the game?

16 A. Yes.

17 Q. At the moment Apple handles that part of the
18 transaction too?

19 A. Yes.

20 Q. And it would still be charging \$3 by way of
21 commission in total to the developer?

22 A. I think so, yes.

23 Q. What I understand you to be saying in your statement
24 is that if the rules allowed you to, you would like
25 to come in and compete with Apple at the last stage

- 1 of that process?
- 2 A. I would be very happy to compete with Apple on every
3 stage of that process.
- 4 Q. I admire your ambition Mr Owens, but as you said
5 yourself, based on Paddle's limited size and
6 capability right now, you could only compete with
7 Apple on the last stage of that process?
- 8 A. I think if the platform was opened, for example, to
9 allow developers to download these apps from
10 anywhere, then we would be competing for the whole
11 chain of that process.
- 12 Q. So you would want to be an app store yourself, you
13 would want distribution, everything, not just the
14 payment bit at the end?
- 15 A. I think it presumes that kind of applications need
16 to be sort of accessed or downloaded or purchased
17 through a store. That is not the case on the web and
18 it is not the case on desktop computers.
- 19 Q. Just focusing on what you said in your statement,
20 Mr Owens.
- 21 A. Yes.
- 22 Q. You agreed with me at the beginning of our
23 discussion that you were providing merchant of
24 record services, yes?
- 25 A. Among the other products that we listed.

1 Q. Something that you could provide and you were
2 proposing to provide on iOS is a merchant of record
3 service?

4 A. One of them, yes.

5 Q. That is the service you had told the Tribunal in
6 your statement that you want to provide. That is
7 the specific service you say you want to offer on
8 iOS. That is what your entire statement is about,
9 Mr Owens?

10 A. Yes, it is the primary product that we would like to
11 offer on iOS.

12 Q. That service is the last stage of the process that I
13 have described for the gaming app in this thought
14 experiment?

15 A. Yes.

16 Q. For that last stage that last stage, you were
17 proposing to charge 10 per cent?

18 A. Dependent on the price. If it is \$10, yes, it would
19 be \$1.

20 Q. So Apple would still have carried out all of the
21 steps I have described, the tools and technology,
22 the search and discoverability functions, the
23 generation of trust, so that user is happy to
24 download the app and spend the money on the app and
25 then handle the payment processing -- sorry not the

1 payment processing, that is the bit they do not do
2 under this experiment. So on the basis that Paddle
3 chooses you for the last step, you are the only one
4 getting paid?

5 A. No.

6 Q. Well, Apple is not getting any money?

7 A. Developers have to pay Apple in order to release
8 anything on the Apple platforms.

9 Q. No, no, in this thought experiment you are
10 contrasting your 10 per cent -- in your statement
11 you are contrasting your 10 per cent with Apple's
12 30 per cent. Are you with me so far?

13 A. Yes.

14 Q. Now, the service you are offering for 10 per cent is
15 the last stage of this process I am describing, the
16 merchant of record service?

17 A. Yes.

18 Q. You are telling the Tribunal that you can compete
19 with Apple's price, that you will be lower, cheaper
20 than Apple, because if the developer chooses you
21 they do not have to pay Apple's 30 per cent, they
22 only have to pay your 10 per cent?

23 A. Yes, they do not have to pay Apple's sort of
24 equivalent merchant of record fee.

25 Q. No, your evidence is that they do not have to pay

1 anything to Apple. Are you accepting that they
2 should have to pay something to Apple as well?

3 A. In the current paradigm they would have to pay the
4 developer enrolment registration fee and also a
5 subscription to Apple.

6 Q. The £79?

7 A. I do not determine how much Apple charges.

8 Q. I see so you get the 10 per cent and Apple is
9 getting what precisely? Just please be precise as
10 to what Apple is getting paid?

11 A. In the example that you gave, developing a \$10 app,
12 sort of in-app purchase, Apple would be charging the
13 developer whatever fee, £79, I think it differs by
14 country, for access to their tools and services and
15 things such as that, and Paddle would be charging
16 for the provision of the merchant of record
17 services.

18 Q. So you are charging 10 per cent of the value of the
19 transaction and Apple get £79?

20 A. The only thing that I can control in that is the
21 10 per cent. I do not control what Apple charges.

22 Q. You can see, can you not, the concern, Mr Owens.
23 That looks like you are free riding on all the work
24 that Apple has done to get the developer to the
25 point where they pay you the 10 per cent?

- 1 A. I wouldn't agree with that at all.
- 2 Q. Because Apple is getting £79?
- 3 A. I would argue that it is Apple undercharging.
- 4 Q. And is the reason why you say undercharging is
- 5 because you understand that Apple's position in this
- 6 litigation is that they should be paid for their
- 7 tools and technology that developers use to make
- 8 their apps?
- 9 A. They are entitled to charge for the tools and
- 10 technology if they wish to.
- 11 Q. For the distribution services that they offer, the
- 12 search and discoverability functions, the marketing
- 13 and promotion?
- 14 A. I think developers should be able to choose whether
- 15 they are forced to use those things in order to
- 16 distribute applications.
- 17 Q. When Apple is doing it, Apple should be paid too?
- 18 A. I do not know whether they should. It is entirely
- 19 up to Apple.
- 20 Q. And in terms again just switching to you, even if
- 21 there were savings, you accept, do you not, that
- 22 integrating Paddle's systems might be more
- 23 complicated and involved for some developers than
- 24 for others?
- 25 A. I do not know.

1 Q. Well one of the things you offered on that payment
2 sheet was customer migration services and
3 implementation support?

4 A. Yes.

5 Q. So that suggests that sometimes customers, there is
6 some friction in that switching process?

7 A. I believe Apple has technical support for developers
8 as well.

9 Q. So there will be some developers who will not switch
10 even if there is a potential cost saving because
11 they will not want the hassle of switching, the
12 administrative hassle of switching?

13 A. Potentially, yes.

14 Q. As the direct cost savings associated with switching
15 get smaller and smaller, the number of developers
16 willing to undergo the hassle of switching becomes
17 smaller and smaller too?

18 A. Each developer would have to make their own economic
19 argument. Price does not, just the financial
20 argument economic argument for a developer switching
21 is not necessarily the only factor that a developer
22 might consider through that process.

23 Q. So price is not the only thing to consider?

24 A. No.

25 Q. They might also consider things like safety and

1 privacy and security of the platforms?

2 A. They may consider that, yes.

3 Q. In fact for certain apps that might be very
4 important indeed?

5 A. Yes.

6 Q. With that in mind, I would ask you to consider, from
7 a developer's perspective, their concern to avoid
8 fraudulent purchases?

9 A. Yes.

10 Q. That is a major concern for developers who are
11 transacting through apps, among other things in
12 in-app purchases?

13 A. Yes.

14 Q. Now you say in your witness statement, that one of
15 the challenges with payments for digital content is
16 that you have a very short amount of time to make
17 fraud assessments before the content is delivered?

18 A. Yes.

19 Q. I am nearly at the end so we are in good time. This
20 is in your statement. It is paragraph 8(b),
21 {B1/1/3}, paragraph 8(b), "Additional challenges of
22 identifying fraud for Digital Purchases", you say:

23 "Physical Purchases tend to have more context
24 and information associated with them, which makes
25 fraud identification easier ... purchases of

1 physical products usually require both a billing and
2 shipping address - comparing these values is a
3 (useful) signal in fraud prevention", and the time
4 you have for physical stuff can be fairly extensive.
5 Then you say in the last sentence:

6 "However, with Digital Purchases these fraud
7 assessments" -- you make two points -- "need to be
8 made with fewer pieces of data, and in just hundreds
9 of milliseconds."

10 Do you see that?

11 A. I do, yes.

12 Q. So just looking at the first of those two points,
13 when it comes to identifying fraud from the customer
14 side of a transaction, the more data you have, the
15 better your systems will be at identifying
16 fraudulent patterns?

17 A. It is one factor, yes.

18 Q. Well, it is a major factor, is it not, for
19 identifying --

20 A. Yes.

21 Q. -- and preventing fraudulent transactions, the
22 amount of data you have?

23 A. From an individual customer or just overall?

24 Q. Both, the customers and the developers?

25 A. Yes.

1 Q. Would not a company like Apple, which is processing
2 billions of transactions worldwide each year, have
3 more data to work with in this crucial respect than
4 Paddle?

5 A. Very possibly. I do not know what data Apple
6 collects or does not.

7 Q. Just to give you a clue, can you turn to tab 23 of
8 your hard copy file. If you look at the first page
9 it is {D1/888/1}. That is it, "Analysis Group, How
10 Large is the Apple App Store Ecosystem?" Do you see
11 that?

12 A. I do, yes.

13 Q. "A Global Perspective for 2019". If you go please
14 to page 3, and I am looking at table 1 at the bottom
15 third of the page, "Total Estimated Billings and
16 Sales Facilitated by the Apple App Store Ecosystem
17 Worldwide 2019". Do you see that?

18 A. Yes.

19 Q. \$519 billion?

20 A. I see that, yes.

21 Q. So Apple should, based on the data alone that is
22 has, should have an advantage over Paddle at
23 spotting signs of fraud?

24 A. I actually think that if, this is the first time I
25 am seeing this sorry, I actually think if the

1 numbers in here are accurate, Paddle has more data
2 on digital goods and services than Apple does.

3 Q. Are you seriously proposing that Paddle has at its
4 disposal, putting this figure to one side and
5 whatever interpretation you take of the report, in
6 general terms, Paddle has more data available to it
7 than Apple in terms of spotting fraud on iOS?

8 A. We mentioned the data analytics products that we had
9 at the start of this, which was a company we
10 acquired a couple of years ago. I can say that the
11 number in this report says digital goods and
12 services of \$61 billion and I know for a fact that
13 we tracked transactional data in that product for
14 \$80 billion worth of commerce.

15 Q. Mr Owens, that is not an answer to the question I
16 asked. I asked you a very simple question. Are you
17 really suggesting that Paddle -- it is no criticism
18 of Paddle -- has more data available to it for the
19 purpose of spotting fraud on iOS?

20 A. I do not know because I do not know what data Apple
21 has. I can only understand the data that Paddle has
22 available to it.

23 Q. When we talk about ensuring security of customers,
24 obviously, from their perspective keeping payment
25 information secure is paramount, is it not?

- 1 A. Keeping the payment data secure?
- 2 Q. Yes.
- 3 A. Yes.
- 4 Q. You rely, Paddle relies on secure third parties to
- 5 store sensitive information such as credit card
- 6 information?
- 7 A. We do, yes.
- 8 Q. You do not yourself store sensitive customer
- 9 information, do you?
- 10 A. Not credit card information, no.
- 11 Q. So you are, Paddle is entirely reliant on these
- 12 third parties to keep that information safe, is it
- 13 not?
- 14 A. Yes.
- 15 Q. Presumably Paddle adopted that business model
- 16 because you were not confident that you would be
- 17 able to keep that information secure in your own
- 18 systems?
- 19 A. No, I think it sort of just well trodden industry
- 20 best practice to sort of utilise the underlying
- 21 payment processors, for example, for storing that
- 22 information.
- 23 Q. So they are the ones you are using to store the
- 24 information?
- 25 A. We use them as well as other third parties, yes.

1 Q. I have just been told, thank you Mr Owens, that when
2 I asked you how many of your 5,000 customers were
3 mobile app developers, you said, "hundreds of them
4 have mobile apps", but I am told later in your
5 evidence you said that Paddle cannot facilitate
6 in-app transactions for developers.

7 A. Yes.

8 Q. So I just want to confirm that when you said,
9 "hundreds of Paddle customers are offering mobile
10 apps", Paddle is not facilitating their in-app
11 purchases. So are you doing something else for
12 them?

13 A. They can have apps on other platforms as well.

14 Q. In terms of other platforms, the Epic Games Store
15 can be downloaded as an Android app, it is not just
16 a PC platform. So is your reason not to offer your
17 services on the Epic Games Store just because it is
18 games?

19 A. I think it is the primary reason, is that games are
20 not our core focus at Paddle.

21 MR KENNELLY: I have nothing further for, Mr Owens.

22 THE CHAIRMAN: Thank you.

23 MR KENNEDY: Mr Owens, I am one of the counsel team for
24 Dr Kent and I have three or four questions for you.
25 Could we have page 54 of the transcript up on the

1 EPE please and could we look at line 21. You will
2 see at line 21 you were asked a question by
3 Mr Kennelly and he said:

4 "(Q) And Apple provides its users (but it has
5 not been corrected yet) the ability to save their
6 payment information for purchases from different
7 developers", you replied, "(A) Yes", and at line 21,
8 I think it should read:

9 "(Q) So by linking a payment method to their
10 Apple ID or Apple account they can do that?" You
11 said, "(A) Yes." Then you were asked the question:

12 "(Q) And Paddle doesn't offer that sort of
13 functionality, does it?", to which you said, "(A) I
14 believe at this point we do, yes."

15 Can I ask you to explain the nature of the
16 functionality you refer to there to the Tribunal,
17 please?

18 A. Yes. When consumers check out products from
19 developers on Paddle, we obviously at that point
20 have a relationship with the consumer, we have an
21 interaction with them and it is a relatively recent
22 kind of development, but we allow consumers to save
23 their payment information at that point for future
24 transactions. Typically, that tends to be in the
25 instance that they want to make another transaction

1 with the same developer, but I believe we also offer
2 that for a handful of kind of circumstances where
3 that payment information can be saved and then
4 reused across multiple developers, providing the
5 customer can authenticate at that point of
6 transaction with an e-mail address or something
7 similar to they would with an Apple ID.

8 Q. Thank you. Could we have {D2/781/1} up on the EPE
9 please. Is this a page from Paddle's website?

10 A. Yes, it is.

11 Q. Can we go to page 2 please. You will see a sort of
12 table it does not have grid lines but it is a table,
13 you will see transactions below \$10 and you will see
14 Apple and Paddle. Could I ask you to read the first
15 line of that table please?

16 A. It is extremely white on white which is quite
17 difficult but I think it says 15-30 per cent and
18 10 per cent for Paddle.

19 Q. Do you have any comment on that?

20 A. That is the pricing of Paddle's microtransactions on
21 our website.

22 Q. Thank you. Then two final questions, Mr Owens.
23 Could we have page 119 of the transcript up on the
24 EPE and could we have lines 10 and 11. I think we
25 might have the wrong reference. Can you go back one

1 page -- forgive me, 10 and 11 and you gave a figure,
2 you say:

3 "(A) I know for a fact that we transact data in
4 that fortes" --

5 I think that is a typographical error. You
6 gave a figure then, could you repeat the figure that
7 you gave?

8 A. Sorry, I am a little bit lost as to where we are.

9 Q. Take your time. So the question that was put to you
10 was:

11 "(Q) Are you seriously proposing that Paddle
12 has at its disposal ..."

13 If you just want to read that to yourself?

14 A. Yes, yes.

15 Q. Can you see your answer:

16 "(A) We mentioned the data analytics
17 products" --

18 Then right at the end of your answer you gave a
19 figure, the figure has been missed off the
20 transcript, and I am asking you to repeat the
21 figure?

22 A. I think it is approximately 80 billion.

23 Q. Eight zero?

24 A. Eight zero.

25 Q. Thank you, and then if you go down to page 120 and

1 line 1, {day4/21/1}. You say -- the question is put
2 to you:

3 "(Q) And you rely, Paddle relies on secure
4 third parties to store sensitive information such as
5 credit card information? (A) We do, yes."

6 Could you just explain to the Tribunal who the
7 third parties are that you refer to in your answer,
8 or rather that you are referring back to in your
9 answer?

10 A. Yes, so we store specifically, it depends on the
11 type of payment information, but for simplicity,
12 credit card numbers and the kind of sensitive
13 information with credit cards we store with the
14 underlying payment providers that we use, so it
15 might be PayPal, Stripe, Worldpay and others, and we
16 also use a third party, I think it is called a
17 tokenization provider who stores and encrypts that
18 data as well. In the instances that, for example,
19 Stripe or PayPal has some sort of service outage, we
20 still have access to that data to provide to a
21 different third party payment processor, if we need
22 it to fail over transaction volume from one provider
23 to another. It exists outside of that individual
24 provider as well.

25 MR KENNELLY: Thank you Mr Owens, no further questions

1 from me.

2 Questions by the TRIBUNAL

3 THE CHAIRMAN: I have got one question, Mr Owens. Could
4 we have a look at page 103 of the transcript? You
5 will see you have just been previously asked a
6 question about opportunities in the EU and South
7 Korea and you say, I think one of, you say:

8 "(A) One, the substantial barriers that are
9 put in place on Paddle and developers' ability to
10 use it commercially."

11 Is the two reasons you were giving for not
12 taking advantage of those opportunities.

13 Can you just explain what you mean by, "the
14 substantial barriers that are put in place
15 commercially"?

16 A. I think the -- I think they are numerous but I think
17 the primary one is the amount of additional kind of
18 work that these developers have to go through in
19 order to release a separate build of their
20 application that is tailored for a specific market,
21 so that they can distribute that version of their
22 application in that market, including something like
23 Paddle's SDK within it. Whereas, they would have to
24 build a separate version of their application to
25 distribute in other markets as well.

1 THE CHAIRMAN: I thought that was the second point you
2 were making you say:

3 "And two, from a development standpoint ..."

4 Is that the same thing or are you saying
5 something different?

6 A. I guess primarily the same thing.

7 THE CHAIRMAN: So when you said just before that you say:

8 "Paddle and developers' ability to use it
9 commercially", I wondered if you were suggesting
10 something else?

11 A. I do not recall the specific kind of financial
12 restrictions or otherwise on developers in South
13 Korea. I remember there being some. There is
14 certainly a pretty substantial cost involved with
15 them building separate versions of their
16 application, as well as the work required. I do not
17 remember the specific kind of terms of South Korea.
18 Given the nature that we do not have very many
19 customers in South Korea, we ruled that out
20 relatively quickly sort of approaching it as a
21 market.

22 THE CHAIRMAN: Thank you. That is helpful. Is there
23 anything arising out of that?

24 MR KENNELLY: I do not think so, no.

25 THE CHAIRMAN: Thank you. Thank you, then we are done,

1 Mr Owens. Thank you very much for your evidence.

2 You are released from the witness box.

3 MR HOSKINS: Just for clarity, Mr Owens can be formally
4 released?

5 THE CHAIRMAN: Yes, I have just released him.

6 MR HOSKINS: I understood that, thank you. As you see,
7 we have got a division of labour and as long as the
8 Tribunal is content, we are not all planning to turn
9 up for all sessions of the evidence. I wanted to
10 make sure that you were content with that and you
11 would not be offended by that.

12 THE CHAIRMAN: No, we will not be at all and we will be
13 happy for people to come and go. We are assuming
14 that you are doing useful things.

15 MR HOSKINS: We are paddling furiously under the water.

16 THE CHAIRMAN: Understood, thank you.

17 Ms Demetriou?

18 MS DEMETRIOU: Sorry, just one short point of house
19 keeping is that we understand from the Registry that
20 in relation to evidence of Apple's witnesses, that
21 if that has to go into private session at any stage,
22 my solicitors have been told by the Registry that
23 the Registry is not planning on providing the link
24 to Apple personnel who are not in the
25 confidentiality ring.

1 THE CHAIRMAN: Yes.

2 MS DEMETRIOU: Now we would like the link provided to
3 them. My learned friend does not object to that
4 because all of the confidential information is
5 Apple's confidential information so it is not
6 confidential vis-a-vis them.

7 THE CHAIRMAN: I suppose the difficulty we had with that,
8 and there was some discussion about that in the
9 break earlier, is that if we are in closed session,
10 we are in closed session and it seems, there is a
11 sense of a loss of control, if one can put it that
12 way. So if there is a link which is open to anybody
13 and there is anyone who can come into that link and
14 see it, that control is now out of our hands. I was
15 a bit uncomfortable with that.

16 What is it that is proposed?

17 MS DEMETRIOU: So we certainly were not proposing that
18 the link be made public, but available to named
19 individuals within Apple that wanted to link in,
20 because obviously we will need them, certain Apple
21 personnel, to follow the evidence so we can take
22 instructions from them for our closing submissions.
23 The confidentiality is not obviously vis-a-vis them
24 because it is Apple's confidential information. Of
25 course, we were not suggesting that the link be made

1 public but that certain Apple personnel that want to
2 follow the evidence be granted access to the link
3 even when we are in private.

4 THE CHAIRMAN: I do not think there is any question about
5 it being public, I just think there is just a
6 question of people understanding the responsibility
7 of having the link. If it is going to Apple
8 personnel, then of course that is fine.

9 MS DEMETRIOU: Yes.

10 THE CHAIRMAN: If we have the names and an assurance that
11 people understand, obviously, if they are Apple
12 people, that is fine, but if they are not Apple
13 people then there is a bit of an issue, is there
14 not, because they are not in the ring. I appreciate
15 that is a slightly odd position perhaps for your
16 instructing solicitors but that is the deal we have,
17 is it not, that is what the confidentiality ring is
18 for.

19 MS DEMETRIOU: No, sir, we are only talking about Apple
20 people and we will provide the names of those
21 people.

22 THE CHAIRMAN: Yes, that is fine.

23 MS DEMETRIOU: Thank you very much.

24 THE CHAIRMAN: So we are running a little bit late. I
25 think in fairness, particularly to the transcript

1 provider, we really need to have a proper break and
2 I suspect everybody else feels the same way. So we
3 will take half an hour. What that might mean is
4 that we are going to have to start a bit later with
5 Mr Parekh. We might be 10 or 15 minutes later. How
6 long do you think you are going to be, Mr Piccinin,
7 you want to go through that before?

8 MR PICCININ: Yes, I suspect it can be done in under 20
9 minutes.

10 THE CHAIRMAN: I think we are expecting Mr Ward back and
11 he may have something else to say but that should be
12 manageable, I would have thought. Are you
13 comfortable that that is going to work? I do not
14 want to keep Mr Parekh waiting too long but
15 presumably 15 minutes is not going to test his
16 patience too much. Of course, if you need it, we
17 will make that up somewhere along the way.

18 So we will resume at quarter to 2, dealing with
19 Professor Hitt. Thank you.

20 (1.13 pm)

21 (Break for lunch)

22 (1.48 pm)

23 Submissions by MR PICCININ

24 MR PICCININ: Sir, overnight we have reflected on your
25 observations from yesterday and the day before and

1 we understand the concerns about prejudice to
2 Dr Kent and we have heard that loud and clear. So I
3 have what is I hope is a constructive proposal to
4 address those concerns but still allow the process
5 of cross-examination and hot tub in a few weeks'
6 time to run as smoothly as possible. That is really
7 what is motivating the proposal I am going to make.

8 I should say I have put this proposal to
9 Mr Ward.

10 THE CHAIRMAN: You have discussed it with Mr Ward.

11 MR PICCININ: I have, yes, I am afraid he still wants to
12 fight about it. So what I propose to do is to take
13 you through the whole of the report just to show you
14 which bits we need and do not need, but also to make
15 observations on where that leaves us on the bits
16 that we say we do not need. It may be that the
17 Tribunal will have a different view and may find
18 that the things we do not need would be more helpful
19 to leave in. I will explain why that might be as we
20 go through.

21 If we could pull up {C3/9/7}, which is the
22 beginning of the Netflix analysis, section 2. So we
23 can actually do without the whole of this section.
24 Just to explain how it fits together, so there is no
25 misunderstanding. Up to paragraph 6, so if you go

1 over the page, these are just either background
2 matters or they are matters that can easily be dealt
3 with in cross-examination either or both with
4 Dr Singer or Professor Hitt. Then in paragraph 7 we
5 have the new Chow Test which caused some
6 consternation yesterday. I should say that is not
7 something that we need to rely on positively. The
8 only reason it is there is there was a dispute or
9 there is a dispute between the parties as to which
10 time period we should be analysing. There is a Chow
11 Test in the case for the time period that we say is
12 the right one. Dr Singer has chosen not to put
13 forward any kind of statistical test for his
14 preferred time period, so we wanted to make
15 something available to the Tribunal in case it
16 wanted it, but if it is not wanted then we are very
17 happy to move forward with that lacuna in the case.
18 It is not our time period. Paragraph 8, please. I
19 think it is at the bottom, perhaps it is over the
20 page, sorry, in any event, we can do without
21 paragraph 8.

22 THE CHAIRMAN: This is responding to Dr Singer's
23 paragraph 9, is that right?

24 MR PICCININ: This is responding to the general points we
25 talked about yesterday.

1 THE CHAIRMAN: The earlier paragraphs, yes.

2 MR PICCININ: Exactly. That we do not need because it
3 can easily be dealt with in cross-examination, sir.
4 Over the page at paragraph 9 of Hitt 4 is in a
5 different category. So this is responding to, this
6 is the paragraph that Mr Ward actually called out
7 yesterday as responding to material that he
8 acknowledged was entirely new in Singer 4. This was
9 actually a new positive case for how to provide
10 evidence of incidence. You can see that there is
11 discussion there in the first sentence of
12 subparagraph (a) about Dr Singer's attempts to
13 substantiate his claim by citing to the literature
14 on behavioural economics. These were what Dr Singer
15 referred to as the experimental studies which are
16 entirely new.

17 Now, again, it is not essential in the sense
18 that everything that Professor Hitt is saying here
19 is going to have to be cross-examined on this
20 material and he could just say all of this in the
21 witness-box. Likewise, I am going to have to
22 cross-examine Dr Singer on those studies, so I could
23 put all of these points to him. But we do say it
24 would be helpful to the Tribunal to have both sets
25 of economists' evidence on this point just recorded

1 in writing in an orderly way.

2 That is what we say about that paragraph.

3 THE CHAIRMAN: What is that cross reference back to,
4 which paragraph of Singer does this relate to? Can
5 you help us with that?

6 MR PICCININ: Sorry, sir?

7 THE CHAIRMAN: Which paragraphs of Singer are we talking
8 about?

9 MR PICCININ: It is footnote 28 at the bottom, this is
10 the reference to paragraph 9.

11 THE CHAIRMAN: I cannot see the footnote 28. Exactly, so
12 this is paragraph 9, exactly. I think Mr Ward did
13 at some stage indicate that he accepted this was
14 perhaps in a slightly different category. We will
15 see what he says about it in a moment.

16 MR PICCININ: Yes. So then over the page, on pages 14 to
17 16, we have paragraphs 10 to 15. If these are
18 objected to and the Tribunal does not want them
19 because it does not find it helpful, then that is
20 fine. I am not going to press for them. But I do
21 just want to be clear what it is about just so we
22 know where we stand for the cross-examination.

23 THE CHAIRMAN: Yes.

24 MR PICCININ: So what this section concerns is what we
25 say is a black and white technical error in

1 Dr Singer's work in Singer 2. So if what Mr Ward
2 said about that yesterday is correct and it is
3 acknowledged you can see in paragraph 11, I am not
4 trying to pull a fast one. It definitely relates to
5 work that Dr Singer did in Singer 2. But Professor
6 Hitt spotted this error, as he says in that
7 paragraph, in the course of preparing his response
8 to Singer 4 and that is because, as he says at the
9 bottom of the page in footnote 39, there was a
10 comment in Singer 4 that gave the game away on this.
11 It made the error leap off the page in the way that
12 it had not leapt off the page before.

13 This material is also responsive to an argument
14 that Dr Singer is making in Singer 4 which is that
15 you do not need to test for IIA in the logit
16 regression, sorry, in his logit model because he has
17 a properly specified regression model that he says
18 has a high goodness of fit. We will ask where. So
19 it was responsive to that and Professor Hitt had
20 noticed there was this fundamental error and so we
21 thought we ought to bring it to everyone's
22 attention.

23 THE CHAIRMAN: Is that something you think you can deal
24 with in cross-examination?

25 MR PICCININ: Sir, I can. All I wanted to say about it

1 is this. Obviously Mr Ward is going to have to
2 cross-examine Professor Hitt on Dr Singer's point
3 that his well specified regression model allows you
4 to avoid -- so all of this is going to come out in
5 cross-examination of Professor Hitt, and likewise I
6 am going to have to cross-examine Dr Singer on his
7 use of the logit model. So this is a point I can
8 put to him.

9 I can, and I am sure Professor Hitt can explain
10 it, but it would be easier if we had the equations
11 on a page. I am not pressing for it. I am just
12 raising that this is what I meant by trying to help.
13 Sometimes it is more helpful than not to have the
14 material written down in one place rather than have
15 me go back to McFadden and ferret around in the
16 academic articles to, you know, produce the
17 equations.

18 THE CHAIRMAN: That is 10-15, then.

19 MR PICCININ: Yes, that takes us to 15. Then over the
20 page again, 16 to 18. These are just explaining how
21 the IIA issue arose, really. So if Mr Ward does
22 object to that I do not need that if it is really
23 objected to.

24 If we could go down to paragraph 19, this is
25 what I began to show you yesterday. So 19 is in the

1 body of it and then (a) which is what I read out
2 yesterday; and then over the page (b) is something
3 that we ask to have included. If I can just explain
4 what this is, it might be easier than trying to read
5 it and piece it all together.

6 You will recall that what triggered all of this
7 was that Professor Hitt included in the joint
8 statement a test for the presence or non-presence of
9 IIA in Dr Singer's logit model, and that was the
10 thing Dr Singer wanted to respond to. Dr Singer
11 came back in Singer 4 and said, "There's a problem,
12 when I rerun it what comes up is this error message
13 he says and because of that the test does not work",
14 says Dr Singer.

15 Well, Professor Hitt is responding to that.
16 This is obviously his first opportunity to respond
17 to it, and what he says is that if you read the
18 software manual, for the piece of software that is
19 conducting this test, and you go back and look at
20 the source material in Hausman and McFadden from
21 1984, what you see is that there is no problem with
22 the test, the test does still work. There is a
23 technical dispute between the economic experts as to
24 whether the test that has already been done -- this
25 is not new, the test that has already been done,

1 works or does not work. So I say again it would be
2 helpful to have this in. Again, in theory, I could
3 just cross-examine on this. Mr Ward is going to
4 have to cross-examine on it because he is going to
5 have to put to Professor Hitt that the test that
6 Professor Hitt has already done does not work. It
7 would be easier for all of us, in my submission, if
8 we had this material here rather than to have either
9 of us have to go into the matrix algebra for the
10 first time without having this material on the page.

11 Again, it is a practical suggestion to make
12 life easier for all of us actually, including
13 Mr Ward, but we do say that that should be allowed
14 in.

15 Next we have 19 (c). This was the other new
16 test that, sir, you expressed some concern about
17 yesterday. Just to explain I do not need that
18 either. Just to explain what it is doing there.
19 Again, it was really included to make everybody's
20 life a bit easier because what it did was it gave
21 you the option where you could actually maybe
22 Dr Bishop in particular does not need or want this
23 option. But it gave you a -- I should not say get
24 out of jail card, but it gave you a get out of
25 matrix algebra card, if I can put it that way, in

1 that in order to figure out whether Professor Hitt's
2 first test works, we are going to delve into the
3 Stata manual and you are going to need to write a
4 judgment that deals with all of that. There is this
5 alternative test which does not give out that
6 warning at all, so there is a way through for the
7 Tribunal to cut through all of that complexity and
8 just say, "There is a new test, maybe there is no
9 problem with it at all, maybe Dr Singer accepts that
10 test, in which case we can forget about the matrix
11 algebra, great."

12 So it was intended to be helpful but if it is
13 not appreciated --

14 THE CHAIRMAN: Things can be helpful if they are provided
15 at the right time. They can be unhelpful if they
16 are provided at the wrong time, that is what it is
17 all about, is it not?

18 MR PICCININ: I accept that, Sir, which is why I am not
19 pressing it at all. I am very happy to proceed on
20 the basis of the test Professor Hitt has already
21 done, which is already explained in the preceding
22 paragraph. I was just explaining how we got there.

23 CHAIRMAN: Yes?

24 MR PICCININ: That takes us to (d) at the bottom, which
25 is actually just the same point as I adverted to

1 before, which is that you cannot just run a logit
2 regression, even if it is a properly specified logit
3 regression, get a high R-squared, and say IIA is
4 satisfied. That just does not work as a matter of
5 economics. But I do not need Professor Hitt to have
6 written that down in (d). That can come out of the
7 evidence, I think, without any difficulties so I do
8 not need to ask for (d) either.

9 Then over the page, actually the same goes for
10 the rest of the document.

11 THE CHAIRMAN: So the bits just to be clear, the bits
12 that you say you really want are?

13 MR PICCININ: Paragraphs 9, 19 --

14 THE CHAIRMAN: Well, is there anything that you say you
15 absolutely have to have, as opposed to being
16 helpful?

17 MR PICCININ: I was asking for 9 and 19(a) and (b).

18 THE CHAIRMAN: But I think you have put them both as
19 helpful to have but not essential.

20 MR PICCININ: Nothing is absolutely essential, sir.

21 THE CHAIRMAN: The point you are making is it is going to
22 come out anyway and this is the stuff that might be
23 easier for cross-examination if it was on a bit of
24 paper rather than having to start --

25 MR PICCININ: That is true of all of it actually.

1 I should just say something about the *Spotify*
2 material at the end. Again, we certainly do not
3 need this. Contrary to my learned friend's
4 submission yesterday, I think he has just got the
5 wrong end of the stick as to what we were trying to
6 do here. Professor Hitt was in no way trying to
7 import expert evidence from the *Spotify*
8 proceedings. That is no part of what he was trying
9 to do or what we are trying to do in these
10 proceedings. We are not trying to relitigate
11 *Spotify* in this forum. It is Dr Kent who is trying
12 to rely on the *Spotify* decision in this forum.

13 The position is that, prior to 25 November, all
14 that there was in the world for Professor Hitt to
15 look at in relation to the *Spotify* decision was the
16 decision itself. He did not have any of the
17 evidence underlying it. That only came in at that
18 time. So it is true that Professor Hitt had not
19 discussed the *Spotify* decision before that, but our
20 submission is it is not actually appropriate for
21 economists to be citing decisions, as in just the
22 conclusions of other people reached on evidence that
23 they do not have access to, that they are not in a
24 position to interrogate, as though they are an
25 advocate citing authorities for propositions of law

1 in their favour. That is not the role of an expert.

2 THE CHAIRMAN: I think it is a timing point again, is it
3 not?

4 MR PICCININ: I am not asking for it to be in.

5 THE CHAIRMAN: The basis for the objection to it is the
6 timing point, there may be others as well.

7 Certainly my objection to it, put that it way.

8 MR PICCININ: We do not need any of that positively. It
9 was only there just so that you knew what Professor
10 Hitt thought about it once he saw the evidence that
11 is all.

12 THE CHAIRMAN: That is helpful. Thank you Mr Piccinin.
13 Mr Ward?

14 Submissions by MR WARD

15 MR WARD: Obviously this is a more moderate application
16 than as it began over the weekend, on Saturday
17 morning. Even now listening to Mr Piccinin, Apple
18 fails to acknowledge how late in the process this
19 really is. Serving detailed and complex expert
20 material on the Saturday prior to trial is just
21 contrary to the orderly process that you have
22 established. I am bound to say, Sir, it is
23 reminiscent of what happened in the *Ennis*
24 application, where an application to adjourn really
25 was made without any acknowledgment of what the

1 Tribunal process was that had been laid down.

2 So having said that as well there is behind
3 this, as I think I said yesterday, a false premise,
4 which is that the ping-pong process or drip feed
5 process, as you described it, should just carry on
6 all the way up to trial. So Professor Hitt is
7 entitled to sit there brainstorming on yet further
8 tests and rummaging in further material to try and
9 mount new attacks. But that is wrong. The correct
10 process is exactly as the Tribunal itself
11 established, which is an orderly process, leading to
12 an agree/disagree statement in good time for trial.
13 That is what we had. The tanks were on the lawns.
14 Preparation is well underway, obviously, and out of
15 the air comes this, I must say, highly disruptive
16 procedural move.

17 Now, having said that, on that basis we do
18 object to all of it and there is obviously, I cannot
19 stop Professor Hitt saying whatever he wants to say
20 in the box. Of course, I cannot. And Mr Piccinin
21 can put this material to Dr Singer if he wishes. As
22 I said, I think, yesterday, Dr Singer would wish to
23 respond to this material, absolutely. So the drip,
24 drip, drip process that has carried on beyond the
25 joint expert statement in principle persists if this

1 report goes in. Really that is my kind of
2 overarching submission about all of it.

3 If we go to the parts that Mr Piccinin is
4 hanging his hat on, so paragraph 9, which responds
5 to Singer 4 paragraph 9, I do accept this is of a
6 slightly different quality, but I do observe that
7 this point about steering is not new. Dr Singer
8 made the point in his earlier reports. It is at
9 {C2/5/116} if you want the look at it, paragraph
10 252. Sorry I have obviously given a completely
11 wrong reference, sorry.

12 THE CHAIRMAN: We will find it.

13 MR WARD: Try {C2/15}.

14 THE CHAIRMAN: In a way Mr Ward, I think the point
15 actually is that in some ways it might have been a
16 legitimate objection to Singer 4, which Apple did
17 not take, that he had gone beyond certainly what you
18 and I discussed on 15 November. And in a way this
19 is part of the problem with this process, is it not?
20 There is a difference in here which is quite
21 difficult for to us disentangle between people just
22 wanting to have the last word which is highly
23 unattractive and counterproductive.

24 MR WARD: That is what this is, sir, in our submission.

25 THE CHAIRMAN: And on the other hand the experts'

1 obligations to make sure that if they do see things
2 that are material, they have an obligation to tell
3 us about them.

4 MR WARD: Of course.

5 THE CHAIRMAN: I have to say I rather categorised Singer
6 4, paragraph 9, as being in the former category, as
7 is Hitt 4 paragraph 9. But in a way it is like an
8 equality, if I can put it that way. You can
9 continue your submissions.

10 MR WARD: I understand, sir, but let me just offer again,
11 at the risk of sounding monotonous, the orderly
12 process point.

13 THE CHAIRMAN: We have got that.

14 MR WARD: Here, in a more granular way of course, having
15 served this on 22 November, Apple just kept all of
16 its objections under its hat.

17 THE CHAIRMAN: I understand the point entirely. I have
18 not been mean to Mr Piccinin this morning because I
19 felt that I was direct enough with him yesterday and
20 I hoped that was completely understood. All the
21 points you are making have been relaid through me to
22 them. There is no question.

23 MR WARD: I know you have these points, sir.

24 THE CHAIRMAN: There is no question that I view the
25 situation as being an egregious one which should

1 never have arisen and there is no justification for.
2 I think I made that plain yesterday. Today is about
3 how we sort it out without spending too much more
4 time on it.

5 MR WARD: You did, sir, and all of that is duly noted,
6 and I do not mean to relitigate points from
7 yesterday, where, as you said, the Tribunal had some
8 sympathy with them. That is why that arose, but
9 what is being said now is but on the Saturday of
10 trial, we are going to play one more card against
11 you on this point.

12 That is why I respectfully submit, I do accept
13 it is in a slightly different category, but not
14 sufficiently so to justify yet another drip, if I
15 can put it that way.

16 Then the other part that is really being
17 maintained is paragraph 19, where again what is
18 being sought to do is advance more detailed argument
19 on highly technical matters. Again, Dr Singer will
20 have something to say about this. Ultimately, of
21 course, we cannot control in advance what is done in
22 the box, subject to rules of admissibility of
23 course. But undoubtedly it is not the case that
24 Professor Hitt is going to succeed in having the
25 last word on this in this form.

1 THE CHAIRMAN: I understand that. Just on that point, if
2 we were in a world where all that was in play was 9,
3 19(a) and (b), I do not think we would be inviting
4 Dr Singer to say anything more about paragraph 9,
5 unless you thought there was some basis to argue to
6 do so. It seems that is a fairly dead horse. I can
7 see that 19(a) and (b) might be in a different
8 category, but I do not think Mr Piccinin was
9 suggesting that there was any argument to the
10 contrary, if Dr Singer wanted to say anything about
11 it.

12 MR PICCININ: We are not in the business of trying to
13 shut Dr Singer up on any of these topics. So if he
14 wants to respond on 19(a) and (b) then I would like
15 to see what he has to say, frankly.

16 MR WARD: Very well.

17 THE CHAIRMAN: So one of the ways we could deal with it,
18 and I am happy to hear anything further you want to
19 say, but one of the ways you could deal with it is
20 to say Dr Singer should prepare a very short
21 response to what he wants to say on 19(a) and (b),
22 it needs to be provided and that will be it for
23 everybody before they get into the witness-box.

24 MR WARD: Sir, obviously I would prefer that to this
25 going in unanswered, but of course it goes without

1 saying that preparing that in the middle of the
2 trial obviously, inevitably with legal input to make
3 sure it is of assistance to the Tribunal, even
4 though the views are that of the expert as everyone
5 well understands, is already a considerable burden
6 on the team that is flat out fighting what can only
7 be described as no holds barred litigation.

8 THE CHAIRMAN: I appreciate that.

9 MR WARD: To get to this stage has been a very
10 significant diversion of our energy, fighting over
11 this report, which rightly now Apple has rowed a
12 very long way back from.

13 May I take this liberty, perhaps if there is a
14 response, it could be done in the form of a letter
15 which would be more by way of high level summary of
16 views than having to go through the kind of full
17 rigour of a Singer 5 expert report that would give
18 Apple advance notice of his view.

19 THE CHAIRMAN: What we could do is you could do that and
20 then lead it as evidence-in-chief.

21 MR WARD: Very good.

22 THE CHAIRMAN: I do not know whether you object to that
23 Mr Piccinin, but that may be a fair way take the
24 pressure off, you would get the gist of it without
25 getting a -- you would get advance notice by prior

1 letter.

2 MR PICCININ: That is absolutely fine, sir.

3 THE CHAIRMAN: Then clearly, if you felt he was leading
4 beyond what was in the gist of the letter, then you
5 would have something to say about it.

6 MR PICCININ: That is fine. It can be written in a
7 letter and he can confirm it in his
8 evidence-in-chief as you say.

9 THE CHAIRMAN: It is just the question of the date.
10 Maybe just give us a moment.

11 MR WARD: Sir, thank you. Is the proposal that
12 paragraphs 9, 19(a) and (b) would be admitted?

13 THE CHAIRMAN: Yes. So basically we will have a new Hitt
14 4, version two, and it will have only in it
15 paragraphs 9, 19(a) and (b).

16 MR PICCININ: A fresh document you mean, two pages long.

17 THE CHAIRMAN: Exactly, and nothing else, thank you very
18 much. There will be permission for Dr Singer to
19 give further evidence on 19(a) and (b), should he
20 wish, which is to be dealt with by way of a letter
21 from your solicitors to Mr Piccinin's solicitors.
22 When do you think you can do that by, Mr Ward?

23 MR WARD: Sir, I do not know. We are busy. Could we
24 have until one week before evidence-in-chief,
25 whenever that is?

1 THE CHAIRMAN: That seems reasonable. It is a short
2 point, Mr Piccinin?

3 MR PICCININ: Sir, that is fine.

4 THE CHAIRMAN: If you are happy with that, then we are
5 very happy with that. Just to be clear, it is
6 helpful, Mr Piccinin, the approach you have taken.
7 If you had not been prepared to narrow it and make
8 it more manageable, I think that the consequences
9 would have been otherwise.

10 MR PICCININ: I absolutely understand that, Sir. As I
11 said at the outset, we heard what you said
12 yesterday. We understand it. It certainly was not
13 intentional to cause any disruption but I can see it
14 has caused disruption and I apologise for that.

15 THE CHAIRMAN: That is helpful. Does that deal with that
16 issue?

17 MR WARD: Yes, thank you.

18 THE CHAIRMAN: I think we are keeping your client's CFO
19 waiting, so we probably ought to get on with things
20 I expect.

21 MR PICCININ: Yes. I call Mr Parekh remotely.

22 MR WARD: Mr Armitage is going to question Mr Parekh on
23 behalf of the Class Representative.

24 MR PICCININ: Sorry sir, just before we begin, I
25 anticipate that it may be that Mr Armitage needs to

1 look at some confidential documents at some point.
2 The arrangement, which we made last time that
3 happened, was that people who are not in the ring
4 shifted to the left, as in the back of the court.

5 THE CHAIRMAN: I see. So even if we are not in closed
6 session?

7 MR PICCININ: That is right.

8 THE CHAIRMAN: Can we just check are there people in the
9 courtroom who are not in the confidentiality ring?
10 Fine, on this side. Would you mind terribly coming
11 and sitting on this side? Sorry to ask you to move,
12 just to avoid any accidental sighting of documents
13 that are sensitive.

14 MR ARMITAGE: Would it help if I briefly explain
15 something on confidentiality? There is quite a lot
16 I think I can do in open with Mr Parekh. I will
17 obviously be careful. There are a lot of
18 confidentiality claims in relation to the documents.
19 What I hope to do, I cannot promise it will work
20 exactly this way, is to divide things up into an
21 open session today and then a closed session
22 tomorrow. I hope that works from a timing
23 standpoint and avoid us having to go into closed
24 session during the afternoon today.

25 It may be there are one or two documents that I

1 call up today to which this issue applies. I do not
2 think very many. We will see if we are moving on
3 with timing.

4 THE CHAIRMAN: It is very difficult to go into closed
5 session so whenever you are ready. Do we need to
6 swear Mr Parekh, has that happened yet? Presumably
7 not.

8 MR PICCININ: No.

9 THE CHAIRMAN: Have we made arrangements to do that.

10 Mr Parekh, are you expecting to be sworn in?

11 THE WITNESS: Yes, I was told I need to swear in.

12 THE CHAIRMAN: You should have information about what you
13 have to say, do you have that to hand? Would you
14 mind standing, I know it is a bit odd, on a video
15 conference but would you mind standing to do it.

16 THE WITNESS: Yes, of course.

17 KEVAN PAREKH sworn

18 THE CHAIRMAN: Thank you very much. Please do sit down
19 again. Can I just check with you, I think you have
20 some people in the room with you. Can you please
21 just identify who they are.

22 THE WITNESS: Yes, we have our solicitor Jack Crichton
23 and David Gidell(?), who does the technology set-up.

24 THE CHAIRMAN: You have access to documents I think on
25 screen. Is that right?

1 THE WITNESS: Yes, my understanding is there is a screen
2 set up here that will show the documents that are
3 going to be relevant during the testimony.

4 THE CHAIRMAN: If you have any technical issues, then
5 obviously you will let us know.

6 THE WITNESS: Yes, I will.

7 THE CHAIRMAN: Thank you. Mr Piccinin?

8 Examination-in-chief by MR PICCININ

9 Q. Mr Parekh, do you have a bundle of documents in
10 front of you as well that was provided by Gibson
11 Dunn?

12 A. Yes, I do.

13 Q. As in hard copy documents, yes?

14 A. Yes, hard copy document of certain items, yes.

15 Q. Could you please turn to the first tab in that
16 bundle, which for electronic purposes is {B2/4}?

17 A. Yes, I have it open.

18 Q. Could you tell us what that document is?

19 A. It is the first witness statement of Kevan Parekh,
20 myself.

21 Q. Could you turn to page 6 {B2/4/6}, please.

22 A. Okay.

23 Q. Could you confirm for us whose signature that is?

24 A. That is my signature.

25 Q. Could you go to the second tab in that bundle,

1 please.

2 A. {B2/7}?

3 Q. Yes.

4 A. Okay, yes, I have it open.

5 Q. Is that your second witness statement?

6 A. Yes.

7 Q. And could you turn to page 4, {B2/7/4} please. I

8 think it might be the previous --

9 A. I am on page 4.

10 Q. Sorry I am just getting the electronic version to

11 tally. Yes, sorry that is right. Is that your

12 signature as well, Mr Parekh?

13 A. Yes.

14 Q. So taken together across these two documents, are

15 the contents of those two statements the evidence

16 you wish to give to this Tribunal?

17 A. Yes.

18 Q. Are the contents of those documents true?

19 A. Yes.

20 MR PICCININ: Mr Parekh, my learned friend, Mr Armitage,

21 will have some questions for you.

22 Cross-examination by MR ARMITAGE

23 THE CHAIRMAN: Before you start Mr Armitage, can I just

24 check, Mr Parekh, can you see Mr Armitage? I am not

25 sure what the camera is focused on at this end.

1 THE WITNESS: I can now, it just moved over to him.

2 THE CHAIRMAN: I think it is probably helpful, just in
3 terms of the sequence, you are able to see him. If
4 you lose him, do please let us know.

5 THE WITNESS: I will, thank you.

6 MR ARMITAGE: I am grateful. Mr Parekh, I should say I
7 hope I am looking at you when I ask these questions.
8 If I do not quite attain that, you are floating on a
9 screen in the courtroom here, there is no
10 discourtesy intended. I do apologise for that but I
11 will attempt to look at you when I ask you
12 questions.

13 Mr Parekh, unlike a number of the other
14 witnesses we are going to be hearing from in this
15 case, you have not previously testified in
16 litigation concerning the App Store in either
17 Australia or the United States, have you?

18 A. No, I have not.

19 Q. I would like to start, if I may, by asking you about
20 some of the roles you have held at Apple. So we
21 know that this month you took up the role as Apple's
22 Chief Financial Officer, yes?

23 A. Yes.

24 Q. Before that you were Vice-President within Apple's
25 corporate financial planning and analysis team;

1 correct?

2 A. Yes, correct.

3 Q. You took up that role, I think, in October 2023?

4 A. Correct.

5 Q. You were reporting in that role to Apple's then CFO,

6 Mr Maestri?

7 A. Yes.

8 Q. And that was the role you held when you gave your

9 two witness statements in these proceedings;

10 correct?

11 A. That's correct.

12 Q. Could you please, I think you have this in hard

13 copy, look at paragraph 7 of your first witness

14 statement. For the EPE that is {B2/4/2}.

15 A. Page 7, is that right?

16 Q. I am sorry, paragraph 7.

17 A. Paragraph 7, I am sorry.

18 Q. Could you just read that to yourself, please

19 Mr Parekh.

20 A. Yes, I am finished.

21 Q. So that describes the role you held before you

22 becoming CFO and I think you held that role for

23 around one year in total or just over; is that

24 correct.

25 A. Yes, just over.

1 Q. The role, as we see here, involved managing Apple's
2 financial performance reporting and leading Apple's
3 overall forecasting and financial planning process;
4 yes?

5 A. Yes.

6 Q. So that role, as you say there, was concerned with
7 Apple's overall financial performance and financial
8 planning; yes?

9 A. Yes.

10 Q. So in that role you would have needed to be across
11 the finances, if I can put it like that, of Apple's
12 business as a whole. Is that right?

13 A. Yes.

14 Q. It follows it obviously was not a role that was
15 specifically focused on the App Store, was it?

16 A. It was not.

17 Q. Or indeed on any one part of the business?

18 A. Correct.

19 Q. Could we please call up {D1/1573} and Mr Parekh I am
20 hoping when I read out these numbers, documents that
21 you do not have in hard copy will appear on the
22 screen, so please stop me if that is not the case.
23 Can you see there a form 10-K for Apple?

24 A. Yes.

25 Q. Presumably you would be involved in the preparation

1 of this sort of document in your prior role as VP in
2 the corporate FP&A team. Is that right?

3 A. Yes.

4 Q. So just for your information this is just an
5 example, this is the 2023 10-K, could we go please
6 to page 31 within the document. This is Apple's
7 "Consolidated Statements of Operations". Can you
8 see that, Mr Parekh?

9 A. Yes, I can.

10 Q. We do not need to turn it back up but in your first
11 witness statement at paragraph 12, you talk about
12 these financial statements being audited and, as you
13 put it, fully-burdened at a company level.
14 Fully-burdened is a phrase we have heard quite a lot
15 about in this case already. That means, if I have
16 understood it correctly that all direct and indirect
17 costs will be included in the figures in this
18 document. Is that right?

19 A. That is correct.

20 Q. Now, we see here that for the purposes of this
21 financial reporting, Apple divides its business into
22 products and services. Is that right?

23 A. Yes, that is the way we report our results.

24 Q. Yes, so we see that under net sales for example,
25 there is an entry for products and an entry for

1 services?

2 A. That is correct.

3 Q. Broadly speaking, products is things like iPhones
4 and iPads?

5 A. Yes, that is right.

6 Q. Then services includes various things but among
7 other things it includes the App Store, does it not?

8 A. Yes.

9 Q. Just somewhat impressionistically, we see in terms
10 of overall revenues, just looking at net sales, the
11 products part of the business is a rather bigger
12 part of the business in terms of net sales than
13 services, yes?

14 A. Yes, that's correct.

15 Q. Could we go to page 2 of your witness statement,
16 please, that's {B2/4/2}.

17 A. Yes, I have it.

18 Q. Can you see paragraph 5 on your screen, Mr Parekh?
19 We cannot see it, thank you. Can you see paragraph
20 5 of your statement there?

21 A. I can now, yes.

22 Q. So you say there that you first joined Apple in June
23 2013 and you give some details of various roles that
24 you held, beginning with certain roles in Products
25 Finance. Paragraph 6, you refer to taking up

1 responsibility for supporting Apple's retail
2 business and you refer to that including, "Apple's
3 own physical and online store". Just to be clear
4 the reference there to an online store is not a
5 reference to the App Store, is it, Mr Parekh?

6 A. That is correct, it is not.

7 Q. If I have understood it, it is Apple's website,
8 where, for example, you can buy iPhones and iPads
9 and other Apple hardware. Is that right?

10 A. That is correct.

11 Q. In terms of the various roles you mention here, so
12 before you became Vice-President of corporate
13 financial planning and analysis, none of those
14 finance roles were specific to the App Store, were
15 they, Mr Parekh?

16 A. They were not.

17 Q. It is right, though, is it not, that the App Store
18 does have a dedicated finance team. Is that right?

19 A. We have a services finance team and the services
20 finance team helps support various parts of the
21 services business, so including the App Store.

22 Q. Those individuals would work directly with financial
23 matters in relation to the App Store, would that be
24 correct?

25 A. Yes.

1 Q. They would, I assume, have an in depth understanding
2 of financial matters concerning the App Store.

3 Would that be a fair characterisation?

4 A. Yes.

5 Q. Would you say they have a greater level of financial
6 understanding in relation to the App Store

7 specifically than you, Mr Parekh?

8 A. Yes, I believe they would.

9 Q. Mr Parekh, are you aware that that team was
10 responsible for pulling together regular profit and
11 loss statements for the App Store that were included
12 in annual presentations to senior executives?

13 A. Yes, I am aware that they pulled together financial
14 information relating to the App Store on a regular
15 basis.

16 Q. That they would present it to the senior executives?

17 A. Yes.

18 Q. We will look, I assure you, at some of the documents
19 later. Incidentally, did you yourself ever have any
20 involvement in assisting the App Store team or the
21 relevant financial team with producing documents of
22 that kind?

23 A. I do not recall being involved in those, no.

24 Q. Mr Parekh, I think you also have in hard copy a
25 declaration dated 12 April 2024 by a Mr Alex Roman

1 which was given in the course of the litigation in
2 the United States. Do you have a copy of that
3 document, Mr Parekh?

4 A. Yes, I believe it is in the packet. I believe it is
5 in tab {H/1/6}. Is that right?

6 Q. Yes, so for the EPE here as well it is {H/1/6}. You
7 refer to this document in your second witness
8 statement. We are going to come back to it in a
9 little more detail a bit later on. Could we just
10 turn over to paragraph 1 of the document on the next
11 page, please. Mr Roman says there that he is
12 Vice-President of Finance at Apple Inc and that he
13 is "responsible for, among other things, supporting
14 our Services business which includes the App Store."
15 Can you see that?

16 A. Yes, I can.

17 Q. Then paragraph 2, can you see that Mr Roman says
18 that he has a -- he worked extensively on financial
19 controllershship matters et cetera, "related to
20 Apple's key products and services, including the App
21 Store and have a deep knowledge and understanding of
22 the financial drivers and performance associated
23 with the App Store." Can you see that?

24 A. I can see that, yes.

25 Q. Would you say the same about yourself, Mr Parekh?

1 A. Related to the App Store or?

2 Q. Vis-a-vis your knowledge of the App Store
3 specifically?

4 A. I would say I have some knowledge, not as deep an
5 understanding as Alex would as he directly works
6 with that business more regularly.

7 Q. I would now like to ask you a few questions about
8 the process by which you prepared your witness
9 statements in these proceedings. Could we turn
10 please to paragraph 15 of your first witness
11 statement, which is {B2/4/4}?

12 A. Paragraph 18?

13 Q. Paragraph 15, please.

14 A. Okay.

15 Q. If you forgive me just reading this out you say
16 that:

17 "While Apple does not maintain individual
18 fully-burdened P&Ls for specific business products
19 or services, Apple does conduct a variety of
20 internal financial analyses at the product/service
21 level on an ad hoc basis."

22 Then you give an example there of something you
23 call "trend analyses". You say that those are one
24 such example of internal financial analysis, you are
25 not suggesting that they are the only type of

1 financial analysis, are you, Mr Parekh?

2 A. Correct.

3 Q. But you do not actually identify or discuss any of

4 the internal analyses you refer to there in your

5 statement, do you, Mr Parekh?

6 A. Just to make sure I understand the question, sorry,

7 you are saying beyond just the one such type example

8 that is provided in the paragraph?

9 Q. What I am saying is you do not actually mention any

10 specific documents, be they trend analysis, as you

11 put it, or otherwise, in this statement, do you?

12 A. Correct.

13 Q. You are aware, I am sure, that Apple has disclosed a

14 large number of documents in these proceedings?

15 A. Yes.

16 Q. Was it a deliberate decision, Mr Parekh, not to

17 comment on any of them in this statement?

18 A. No, I do not believe so.

19 Q. Could we look, please, at paragraph 11 of the same

20 document. Please just read that to yourself

21 Mr Parekh, if you would not mind?

22 A. Okay.

23 Q. That is a description of how you prepared this

24 witness statement and you describe it as "an

25 iterative process" between you and Apple's

1 solicitors. So essentially you had a discussion
2 with them, they prepared a draft and you ultimately
3 approved the draft, is that right, Mr Parekh?

4 A. That is correct that I might have made some
5 amendments but yes, ultimately I approved the draft.

6 Q. Then can you see just above that, you say at
7 paragraph 10 that you are aware of and have read the
8 affidavit filed by Saori Casey, filed on behalf of
9 Apple in the Epic Australia proceedings. Can you
10 see that?

11 A. Yes.

12 Q. Ms Casey was your predecessor as VP of corporate
13 financial planning and analysis, that's right, is it
14 not?

15 A. Yes, she was.

16 Q. She held that role, I think, for around a decade.
17 Do I have that about right?

18 A. Yes, I think that is right, about a decade.

19 Q. I think, as you say here, you read Ms Casey's
20 affidavit from the Australian proceedings in the
21 course of preparing this statement; yes?

22 A. Yes.

23 Q. Your statement, as we have said, does not mention
24 any other documents specifically. Does that mean
25 you did not read any documents other than Ms Casey's

1 affidavit in the course of preparing this statement,
2 Mr Parekh?

3 A. I read a few other documents.

4 Q. Could we look, please, at {CB2/7/1}. I do not think
5 you have this in hard copy. Mr Parekh. It should
6 come up on the screen. Can you see this is a letter
7 from Gibson Dunn, so Apple's solicitors in these
8 proceedings?

9 A. Yes, I can see that.

10 Q. If we could just scroll down on the EPE, please. So
11 this is Gibson Dunn writing to Hausfeld & Co. LLP
12 who act for the Class Representative in these
13 proceedings and they are answering their question
14 about your witness statement, your first witness
15 statement. Can you see in the final sentence of the
16 third paragraph the letter says, this is Gibson Dunn
17 saying:

18 "For the avoidance of doubt, the only document
19 shown to Mr Parekh in the preparation of his witness
20 statement was the Australian Affidavit and its
21 exhibit ..."

22 So that is the exhibit to Ms Casey's statement.
23 Is that what you are referring to when you say that
24 you read some other documents in the course of
25 preparing this statement?

1 A. No, sorry, I misunderstood. I thought you meant in
2 general, but yes for the first statement at the time
3 I prepared it in January that was the only document
4 that I had reviewed.

5 Q. Just to be clear, just to distinguish, there is an
6 affidavit, so a statement from Ms Casey, you read
7 that, I think?

8 A. Correct.

9 Q. Ms Casey also exhibited a bundle of documents to
10 that statement. Are you saying you also read those
11 documents?

12 A. Yes, the exhibits as well, yes.

13 Q. You did not read any other documents in the course
14 of preparing this statement?

15 A. For this particular statement, the first one, no,
16 that is correct.

17 Q. Nothing else was drawn to your attention by Apple's
18 solicitors, so far as you recall?

19 A. Not that I recall.

20 Q. Thank you. Now could we look at your second
21 statement. That is something you do have in hard
22 copy I hope, that is {B2/7}?

23 A. Yes.

24 Q. Could we turn over the page, please, to paragraph 4.
25 You see again you described the process of preparing

1 the statement and you again use the same language of
2 "an iterative process". So essentially, it was the
3 same process as for the preparation of the first
4 statement. Is that right?

5 A. Yes, that is correct.

6 Q. Then can we look please at paragraph 8? There is
7 some confidential material in this statement. I am
8 not going to read anything out that is confidential
9 at the moment.

10 THE CHAIRMAN: Is Mr Parekh familiar with the colour
11 coding? You know, Mr Parekh, that where it is
12 coloured pink it is confidential, usually your
13 confidential information, so if you are reading
14 anything or referring to anything, do not refer to
15 items in pink.

16 THE WITNESS: Thank you, sir, I was made aware of the
17 highlighting.

18 MR ARMITAGE: So not reading out anything that is
19 highlighted in pink, you say here you have been
20 shown a document entitled -- the title of the
21 document is in pink but then it is defined using a
22 more neutral term "Price Committee Presentation". I
23 will be asking you about that but that will have to
24 be in the closed session so I will leave the detail
25 of that for now. But you say you were shown that

1 document and would have read that for the purposes
2 of preparing this statement; yes?

3 A. Yes.

4 Q. You also say in that paragraph, yes, this is not
5 confidential, that you were also provided with
6 paragraphs 21 to 28 of Mr Roman's declaration. Is
7 that right?

8 A. That is right.

9 Q. And you were not shown the whole declaration, you
10 were just shown particular paragraphs; is that
11 correct?

12 A. Yes, just the excerpt that was included in my
13 package here.

14 Q. Other than those documents, you did not read any
15 further documents in preparing this statement,
16 Mr Parekh?

17 A. That is correct, there was a reference to Mark
18 Rollins' witness statement, that is the only other
19 thing.

20 Q. Yes, I am so sorry, I should have said, you are
21 quite right to correct me. At paragraph 6, if we
22 could go back. Yes, I misspoke, you do say there
23 that also you reviewed the first witness statement
24 of Mark Rollins dated 12 January 2024. That was
25 provided in these proceedings and in fact there,

1 subject to one clarification, you say that you agree
2 with that witness statement; yes?

3 A. Yes, except for that clarification that I provided
4 in my statement.

5 Q. Subject to that clarification, yes. You will no
6 doubt have read that statement carefully before
7 adopting it in this way, Mr Parekh?

8 A. That is correct, yes.

9 Q. So Mr Rollins is the senior finance manager at
10 Apple. Is that right?

11 A. That is correct.

12 Q. Are you aware that Mr Rollins gave a deposition in
13 the US litigation concerning the App Store?

14 A. I do not recall. It is very well a possibility that
15 he did.

16 Q. Can we just turn that up at {H2/13/1}. Do you see
17 that is in "In Re Apple iPhone Antitrust Litigation"
18 and there is a reference to deposition of Mark
19 Rollins, Thursday February 11, 2021. Can you see
20 that on your screen, Mr Parekh?

21 A. Yes, I can.

22 Q. It is quite a long document I think about 458 pages
23 and I think it follows from your answer a moment ago
24 you did not read this deposition before reading and
25 adopting Mr Rollins' witness statement. Is that

1 right?

2 A. That is correct.

3 Q. Then if we could look at page 5. Can you see there,
4 there is a list of exhibits beginning at number 600?

5 A. Yes, I see the 600.

6 Q. If we go on to page 9 of the document. Can you see
7 that that list runs through to Exhibit 619?

8 A. Yes.

9 Q. Do I take it then that you did not read those
10 exhibits before adopting Mr Rollins' statement in
11 the present case?

12 A. Yes, I am not familiar with this document.

13 Q. Thank you. Could we just look at one point within
14 it concerning, Mr Rollins' experience of the App
15 Store. If we turn on to page 27, please, within the
16 deposition. Can you see at line 15, Mr Rollins --

17 A. I see line 15, yes.

18 Q. Mr Rollins is asked:

19 "(Q) And have you ever worked in the finance
20 group that works with the -- directly with the
21 financials for the app store?"

22 I think that is the team to which you referred
23 earlier when I asked you a question about the
24 specific finance team in relation to the App Store.
25 Does that sound right, Mr Parekh?

1 A. Yes, I think he is referring here, I believe he is
2 referring to the finance group of services, the
3 finance group.

4 Q. Can you see that his answer is that he works closely
5 with those individuals and works regularly with
6 those individuals in his day-to-day
7 responsibilities, can you see that?

8 A. Yes.

9 Q. Would the same be true of you, Mr Parekh, that you
10 work closely with those individuals and regularly
11 with those individuals in the course of your
12 day-to-day responsibilities?

13 A. Yes, I work regularly with the services finance
14 team.

15 Q. But the individuals who deal specifically with the
16 App Store?

17 A. Yes, as I mentioned, the services finance team has
18 people that cover the App Store and other parts of
19 the services business so I work regularly with that
20 entire team and various members of that team.

21 Q. And if we could go on to page 28, please. Can you
22 see at line 8 that Mr Rollins is asked what he did
23 to prepare for today's deposition?

24 A. I can see the question on line 8, yes.

25 Q. Then can you see what he says at line 15, he says:

1 "(A) ... in working with this case, I've
2 reviewed hundreds of documents ... and thousands of
3 pages."

4 Mr Parekh, I think it follows from our
5 discussion earlier you have not reviewed hundreds of
6 documents preparing for this case, have you?

7 A. I have not.

8 Q. Then can you see that Mr Rollins says that he spoke
9 to:

10 "... seven, or I believe six different finance
11 teams, seven if you include my own team" -- he says
12 -- "I've talked to at least four different
13 engineering teams" -- and then he says -- "I've
14 talked to other teams, for example the WWDR business
15 operations team."

16 How many finance or other teams did you speak
17 to in the course of preparing your statements,
18 Mr Parekh?

19 A. Yes, I did not discuss this with anyone, any
20 colleagues.

21 Q. Then if we could just go over the page, briefly.

22 A. The page that is on the screen?

23 Q. Yes, it should say page 29 in the top right corner?

24 A. Okay.

25 Q. You see that Mr Rollins says he spent easily

1 hundreds of hours working on this case. Have you
2 spent hundreds of hours working on this case,
3 Mr Parekh?

4 A. I have not.

5 Q. Thank you, so can we now turn directly to the
6 question of how Apple does or does not allocate
7 costs to individual parts of its business. As I
8 say, I am going to do as much of this as I can in
9 open. You say in your second statement that you
10 agree with Mr Rollins' witness statement, subject to
11 a caveat that does not concern us at this point.
12 Could we -- I am sorry, do you have Mr Rollins'
13 statement in hard copy? I have forgotten.

14 A. I do, yes.

15 Q. I am grateful. It is paragraph 23 of Mr Rollins'
16 statement, that is {B2/1/6} for the EPE.

17 A. Paragraph, I am sorry, 26 you said?

18 Q. 23, please.

19 A. 23, I'm sorry.

20 Q. Perhaps you could just read to yourself please, Mr
21 Parekh.

22 A. Yes, I have read it.

23 Q. So he says a number of things there, bearing in mind
24 that you have said you agree with his evidence. The
25 first thing he says is that:

1 Apple does not, "in the normal course of
2 business... attempt to (i) allocate all costs to an
3 individual products and services."

4 You agree with that, Mr Parekh?

5 A. Yes, I do.

6 Q. He says that:

7 "Apple does not generate fully-burdened P&L
8 statements at the individual, product or service
9 level."

10 You agree with that too?

11 A. Yes, I do.

12 Q. And then you also presumably agree with what he says
13 in the final sentence about doing so being contrary
14 to the rationale of organising the entire company
15 under one P&L. You also agree with that presumably?

16 A. Yes, I agree with that and I just wanted to point
17 out that his second statement says "actual P&L
18 statements".

19 Q. What's the significance of "actual" in that
20 sentence?

21 A. "Actual" means "accurate", you know, in my view.

22 Q. So if we could look at paragraph 14 of your first
23 witness statement?

24 A. My first one, okay? Hold on a moment.

25 Q. Yes, {B2/4/3}.

1 A. Page 3.

2 Q. Paragraph 14.

3 A. Okay.

4 Q. Mr Parekh, you say here that:

5 "Although Apple is able to: (i) track revenue
6 ...and (ii) allocate certain direct costs to certain
7 products or services, Apple cannot allocate all
8 indirect costs to specific products or services or
9 produce fully-burdened P&L statements for specific
10 products or services in any meaningfully accurate
11 way."

12 The caveat at the end "in any meaningfully
13 accurate way is" is that the point you just made
14 with reference to the word "actual". You are not
15 saying this is not done. You are saying it is not
16 done in a way you regard as accurate. Would that be
17 fair?

18 A. Yes.

19 Q. So Mr Parekh, Dr Kent disagrees with you on that, we
20 are going to be exploring that probably principally
21 when we get to the closed session in relation to
22 certain specific documents. But I just wanted to
23 put that on the table now, as it were. Mr Parekh, I
24 presume you are aware that the US District Court
25 found in the US litigation, brought by Epic Games,

1 that Apple did produce fully burden P&Ls for the App
2 Store in the ordinary course of business. Are you
3 aware of that?

4 A. Yes, I am aware of that.

5 Q. Can I just show you that very briefly. It is in
6 {AB5/7}, so I hope it comes up on your screen. Can
7 you see it is United States District Court for the
8 Northern District of California, Epic Games vs
9 Apple Inc and it is rule 52 trial on the merits. Do
10 you see that?

11 A. Yes, I do.

12 Q. That is what we would normally refer to as the
13 court's judgment in this country. Then if we look
14 at page 3, footnote 2, so we may need to zoom in.
15 Can you see there that the court describes the
16 length of the trial, a 16 day bench trial, and then
17 the number of exhibits that were admitted, over 900.
18 Can you see that?

19 A. I can see that, yes.

20 Q. I think you said this earlier, but just to be clear
21 you did not testify in this trial, did you
22 Mr Parekh?

23 A. No, I did not.

24 Q. Then if we can go within the document to page 42.
25 Can you see there is a heading, "App Store operating

1 margins"?

2 A. Yes, I see that.

3 Q. And I do not think any of this is confidential, and
4 can you see there that the court is describing the
5 plaintiff's expert Ned Barnes, through reverse
6 engineering and review of documents from Tim Cook's
7 files, calculated operating margins to be over
8 75 per cent for both fiscal years, 2018 and 2019,
9 and then can you see in the quotation from Mr Barnes
10 a definition of "operating margin" is given.

11 Operating margin is defined as net revenue minus
12 cost of goods sold or cogs and operating expenses,
13 OPEX. That is a fairly orthodox definition of
14 operating margin, would you agree, Mr Parekh?

15 A. Yes, that is right.

16 Q. Then it says:

17 "Operating margin percentage is calculated by
18 dividing the nominal amount of operating margin
19 dollars by the nominal amount of net revenue."

20 That is also an orthodox approach to
21 calculating operating margin percentage, would you
22 agree with that, Mr Parekh?

23 A. Yes, that is correct.

24 Q. Then if we go over to the next page. You will see
25 in the first paragraph there is a reference to

1 Mr Barnes having:

2 "... reviewed internal documents reflecting P&L
3 statements specific to the App Store and presented
4 to Apple executives. The report says that these
5 support Mr Barnes' independent conclusions" and then
6 "other documents indicate that at least by fiscal
7 year 2013 the margin percentages exceeded 72%."

8 I am sorry to read this out, and then I will
9 ask you some questions. Then could you read the
10 paragraph that begins with the words, "Apple
11 counters" to yourself?

12 A. Okay. Okay I have read the paragraph.

13 Q. So Mr Parekh, you see here that the US court is
14 finding, as a matter of fact following the trial
15 that it has conducted, that Apple does calculate
16 fully-burdened operating margins for the App Store.
17 Can you see that?

18 A. I see that in the paragraph, yes.

19 Q. Indeed that it does so as part of its normal
20 business operations?

21 A. Yes, I see it says that in the paragraph.

22 Q. And the reference in that paragraph to Apple's
23 financial planning and analysis team, do you see
24 that the court says that that team, a tracking
25 revenues, fixed and variable operating costs and

1 allocation of IT, R&D and corporate overheads to an
2 App Store P&L statement. That is the team, is it
3 not, that you were part of, indeed that you headed
4 up before you became CFO, is that right, Mr Parekh?

5 A. Yes, that is correct.

6 Q. Do you accept that the CFP&A team were doing what
7 the court says here?

8 A. I believe they were doing analysis that you have
9 referenced here. I cannot speak to exactly what
10 they were doing at the time because I was not
11 running that team.

12 Q. Yes this relates to a period before you were in that
13 team, does it not, Mr Parekh?

14 A. Correct.

15 Q. Can you see in the final line of that paragraph I
16 asked you to read, the court is finding that
17 Mr Barnes' calculations, so the calculations done by
18 Epic's experts, were reasonable assessments given
19 their consistency with Apple's internal documents?
20 We saw that he had found operating margins of over
21 75 per cent for two particular financial years?

22 A. I see the sentence.

23 Q. Then if we just turn over the page, before leaving
24 this. Then if you read the top paragraph, you see
25 that the US court says that:

1 "The record supports a finding that Apple's
2 operating margins tied to the App Store are
3 extraordinarily high. Apple did nothing to suggest
4 that operating margins over 70% would not be viewed
5 as such."

6 So Mr Parekh, it is clear that the US court
7 considered Apple's internal documents to provide
8 meaningful evidence of the App Store's
9 profitability, is it not?

10 A. Yes, it appears that way.

11 Q. If we could go back to your first witness statement
12 at paragraph 14, which I took you to a little
13 earlier.

14 A. Sorry, my witness statement?

15 Q. Your first witness statement, paragraph 14.

16 A. Okay, yes, I see it here.

17 Q. This is, as I say, I asked you about this a little
18 earlier, this is where you say that:

19 "Apple cannot allocate all indirect costs to
20 specific products or services or produce fully
21 burdened P&L statements for specific products or
22 services in any meaningfully accurate way."

23 Just to be clear, Mr Parekh, it must follow, I
24 think, from what you said here that you disagree
25 with the findings of the US courts that I just

1 showed you?

2 A. Yes, I would disagree.

3 Q. Let us leave aside the specific numbers. Is your
4 evidence that the US court was wrong to think that
5 the exercise could even be done meaningfully?

6 A. I guess it depends what you say meaningfully. I
7 think I described here some of the challenges of
8 trying to do the allocations.

9 Q. To be clear, what I mean by "meaningful", meaningful
10 in the sense of providing a reasonably accurate
11 estimate of the App Store's operating profitability?

12 A. I think again we have tried to use mathematical
13 methods to do the allocations. My example here
14 outlines some of the challenge of in reality lots
15 of -- we have very integrated system between our
16 hardware, software and services. So to specifically
17 determine, as we have given here on iCloud, what
18 part of the engineering effort related to the App
19 Store or other area of the business. It is
20 difficult to discern, it is very subjective.

21 Q. We are going to come to some of what you say about
22 that. Leaving the US court aside, are you aware
23 that the Class Representative's expert accountant,
24 Mr Dudney, has also produced an estimate of Apple's
25 operating margins in this case?

1 A. Yes.

2 Q. Have you read any of his reports?

3 A. Yes, I have.

4 Q. When did you read those, Mr Parekh?

5 A. I think that was very recently, maybe about a week
6 ago.

7 Q. Can we turn up, please {C2/7/11}. This is from
8 Mr Dudney's first report in these proceedings. And
9 at paragraph 2.1.1 he records his instructions.
10 Then he says:

11 "In my opinion, based on: (a) my analysis of
12 available management reporting and other financial
13 information relating to the App Store; and (b) the
14 reasonable assumptions I have made to address
15 deficiencies in the data available ... the revenues,
16 costs and profits of the App Store over the relevant
17 period ... were as follows."

18 Then can we go over to table 2 on the next
19 page, please. Can you see that in the first row of
20 that table he gives some return on revenue figures,
21 which he says is equivalent to operating margin.
22 Some of the later figures are highlighted in pink so
23 they are confidential. Can you see the figures for
24 the financial years FY16 to FY19?

25 A. Yes, I see them.

- 1 Q. They hover at around 75 per cent?
- 2 A. Yes, I see that.
- 3 Q. And that is more or less exactly in line with what
- 4 the US court found to be a reasonable assessment in
- 5 the Epic case, yes?
- 6 A. Yes.
- 7 Q. That rather suggests these figures are accurate, are
- 8 they not, Mr Parekh?
- 9 A. I would not say they are accurate.
- 10 Q. In terms of the exercise itself, the US court
- 11 considered itself to be able to form a reasonable
- 12 assessment of Apple's operating profitability; the
- 13 Class Representative's expert accountant considered
- 14 that he was able to do so. They have reached
- 15 similar conclusions. I would suggest to you
- 16 Mr Parekh, it is possible to do a meaningful
- 17 estimate of these matters; is that not right?
- 18 A. I think it is possible to do a directional estimate
- 19 which the team have done in the past.
- 20 Q. I am sorry I did not catch the adjective there?
- 21 A. Directional estimate.
- 22 Q. Directional estimate, and that is the point you make
- 23 in your witness statement about the trend analysis,
- 24 is it?
- 25 A. Correct.

1 Q. We are going to look at, as I say, the documents.
2 Mr Parekh, you know that Apple is facing scrutiny in
3 this case, perhaps in other cases around the world,
4 as to whether its commissions for the App Store are
5 excessive and unfair. You are aware of that?

6 A. Yes.

7 Q. You say the App Store's profitability cannot be
8 meaningfully estimated. You appreciate the effect
9 of what you are saying is that the App Store's
10 profitability just cannot be scrutinised by this
11 Tribunal or indeed anybody else?

12 A. I said I think it cannot be meaningfully estimated
13 in an accurate way, which is what my statement says.

14 Q. So the court should look at these figures and
15 essentially ignore them. Is that your position,
16 Mr Parekh?

17 A. I think they should understand the caveats that I
18 provided in my statement.

19 Q. Can we look please at paragraph 18 of your first
20 witness statement. I am going to ask you some
21 general questions now about costs allocation
22 methodologies. I cannot see the clock a bit like
23 Mr Hoskins the other day.

24 THE CHAIRMAN: It has just gone 3 o'clock, we started a
25 little bit early so any time is convenient from now

1 on Mr Armitage.

2 MR ARMITAGE: That would be convenient as I am about to
3 start another topic.

4 THE CHAIRMAN: Mr Parekh, we are going to take a short
5 break to give the transcriber a rest, about ten
6 minutes. While we are doing that, I do not know if
7 it has been explained to you, but you are not to
8 discuss your evidence with anybody else and that
9 includes the solicitor from Gibson Dunn in the room,
10 and, in fact, in particular the solicitor from
11 Gibson Dunn in the room. So if you would not mind
12 please avoiding any conversation on that, that would
13 be helpful. We will be back in around ten minutes.

14 THE WITNESS: Yes, sir, thank you.

15 (3.01 pm)

16 (Break)

17 (3.13 pm)

18 MR ARMITAGE: Hello again, Mr Parekh. I would like to
19 ask you now about some of the cost allocation
20 methodologies that you discussed in your first
21 witness statement?

22 A. Okay.

23 Q. Could we pick that up please at paragraph 18, that
24 is {B2/4/5}, paragraph 18.

25 A. Okay.

1 Q. You say there Mr Parekh:

2 "For the purpose of preparing trend analyses,
3 Apple generally allocates operating expenses using
4 two methods."

5 Then you refer to two methods there, the first
6 you say is allocation on a revenue basis, whereby
7 operating expenses are allocated proportionately
8 according to revenue earned by each product or
9 service. Then you also refer to allocation on a
10 direct cost basis. You say this is done for the
11 purpose of preparing trend analyses. It is also
12 done for the purposes of other internal analyses, is
13 it not, Mr Parekh?

14 A. I guess it depends, mainly for my experience it has
15 been done for looking at trends.

16 Q. Mr Parekh, the very fact that Apple has developed
17 specific methods for allocating operating
18 expenditure to individual products and services
19 suggests that this is something that is done with a
20 reasonable degree of frequency within the business.
21 Would you agree with that?

22 A. I would not say it is done with a reasonable degree
23 of frequency, no?

24 Q. And these allocation methods must be considered to
25 be sufficiently reliable for Apple's business

1 purposes. Would you agree with that?

2 A. No, I would not because it depends on what the
3 purpose is for.

4 Q. What purpose would they be reliable for, Mr Parekh?

5 A. Well, I think, as I mention here, a lot of time we
6 look at trends to see if a business is growing or
7 not, and I think it is really difficult to apply
8 comparability. From time to time, maybe it will be
9 used for a pricing decision, for example, but other
10 than that, we do not produce these regularly. As a
11 matter of fact, since I have been in the FP&A role,
12 or running FP&A, we have not done this analysis.

13 Q. Mr Parekh, as I understand it, your position here is
14 that the methods are not meaningless when they are
15 used in the context of a trend analysis. I do not
16 think you are disagreeing with me that these cost
17 allocation methodologies are also employed in other
18 contexts, or let me just check. Do you disagree
19 with that, that they are used in other contexts
20 which are not trend analyses?

21 A. Again, we typically are not doing this type of
22 analysis, so we have not even done this trend
23 analysis recently, to my recollection.

24 Q. As I say, that is another point we will have to pick
25 up I think in the closed session when we look at

- 1 some of documents.
- 2 A. Yes.
- 3 Q. We know that you agreed with the evidence given in
- 4 Mr Rollins' first witness statement, subject to the
- 5 caveat we mentioned earlier, which again does not
- 6 concern us here and Mr Rollins says that Apple also
- 7 uses a head count based methodology for allocating
- 8 OPEX, that's right, is it not?
- 9 A. I believe that's right, we have done it in the past.
- 10 Q. You say at paragraph 18 that the two allocation
- 11 methods to which you refer to here, so that is
- 12 revenue and direct cost basis, are simple,
- 13 mathematical exercises that do not provide precise
- 14 results. Mr Parekh, the fact that they are not
- 15 precise does not mean that they are not meaningful,
- 16 does it?
- 17 A. Yes, I guess it depends for what purpose.
- 18 Q. So again this is your trend analysis point. I would
- 19 suggest they are not just meaningful as trend
- 20 analyses, they can be meaningful in relation to
- 21 absolute levels of profitability as well, do you
- 22 agree with that?
- 23 A. I do not agree with that. I do not agree with that,
- 24 the last part of what you said.
- 25 Q. You say here that the allocation methods you refer

1 to are not an attempt to actually try and allocate
2 indirect costs systematically. When you use the
3 word "systematically" do you mean doing some sort of
4 assessment that involves looking at different
5 categories of OPEX and considering the extent to
6 which they can be attributed to the App Store or
7 indeed another product or service; is that the sort
8 of thing you mean by systematically?

9 A. I think systematically sometimes we can refer to
10 that in a couple of different ways. It is really we
11 do not have a system that can provide this type of
12 allocation and that methodology can, you know, the
13 mixes that are used to provide the mathematical
14 allocation can change from time to time, so I think
15 that is why we do not, you know, have it in any kind
16 of system.

17 Q. So you say you do not have that kind of system.
18 Apple could do a more systematic assessment of that
19 kind, if it put its mind to it, could it not,
20 Mr Parekh?

21 A. Yes, for sure we could attempt to do that, yes.

22 Q. Now, if we go down to paragraph 19 of your first
23 statement if you still have that open on the same
24 page?

25 A. Yes.

1 Q. You refer here to different accounting models being
2 used to calculate operating margin, and you
3 distinguish here between two different models, one
4 you call the agency model and one you call the
5 principal model. You say that when Apple does trend
6 analyses, it typically uses these models
7 consistently with how it is required to account for
8 the relevant portion of the business in its
9 published financials. Then in relation to the App
10 Store, you say that Apple records as revenue only
11 the net commission that Apple earns and it
12 disregards payments to developers. So just to be
13 clear about that, somebody pays for an app through
14 the App Store, a particular amount is billed to the
15 customer, but Apple then retains the Commission and
16 remits the remainder to the developer. That is
17 roughly how it works, is it not, Mr Parekh?

18 A. That is correct, yes.

19 Q. As you made clear here, the bit that you treat as
20 revenue is the bit that you retain, not total that
21 is billed, yes?

22 A. Yes, that is the way I have to account for it under
23 the accounting rules, yes.

24 Q. Under the accounting rules you also say it is
25 typically how you do it when you are doing internal

1 analyses in relation to operating margins, yes?

2 A. Let me clarify that because when we are doing the
3 trend analysis, we have to tie in what ultimately we
4 are reporting for revenue, so everybody understands
5 the numbers and recognises the numbers. So we were
6 just saying the reason why we look at it this way is
7 because when we are doing a trend analysis to
8 understand might be impacting operating margin, at a
9 total level which is what we are focused on, we want
10 to make sure the numbers that we are using are tied
11 to our reported results, revenue results, people
12 recognise, that the executives recognise, and that
13 is why it is done on the same basis we account for
14 it. The example I give is just a distinction of the
15 economic substance of the transaction. A customer
16 pays 99 cents for an app, Apple will get 30 cents
17 and the developer will get 69 cents, it is the same.
18 You can account for it two different ways depending
19 on the model. If Apple had a buy, sell or principal
20 model, it would purchase the app for 69 cents, sell
21 it for 99 cents and earn 30 cents. The economic
22 substance is the same, the customer pays 99 cents,
23 Apple retain 30 and the developer retains 69 cents.

24 Q. It is not though, Mr Parekh, a matter of accounting
25 preference. As you say here, this is how Apple is

1 required to account for App Store revenues in its
2 published financials, yes?

3 A. That is correct, under our generally accepted
4 accounting principles, that is right.

5 Q. Yes. Just to illustrate that, could we look at
6 {D1/775}. This is another of Apple's 10-Ks, this
7 happens to be the one for 2019. Then if we could go
8 into the statement of operations which is I think
9 page 39 within the document. You see there is a
10 heading "Revenue Recognition"?

11 A. Yes.

12 Q. There is reference to net sales. Net sales is a
13 synonym for revenue for these purposes, is it not
14 Mr Parekh?

15 A. Yes, that is correct, net revenue, yes.

16 Q. "Net sales consists of revenue from the sale of
17 iPhone, Mac, iPad services and other products. The
18 Company recognizes revenue at the amount to which it
19 expects to be entitled when the control of products
20 or services is transferred to its customers."

21 So that is the general position. Then if we
22 could go over the page, if we could blow that up,
23 please, just to see the paragraph at the top. Can
24 you see about halfway down the paragraph it says:

25 "For third-party applications sold through the

1 App Store (and certain other stores) ... the company
2 does not obtain control of the product before
3 transferring it to the customer. Therefore the
4 company accounts for such sales on a net basis by
5 recognizing in Services net sales only the
6 Commission it retained."

7 So that is the point you make in your statement
8 about how revenue is treated in the App Store?

9 A. That is correct.

10 Q. You say that that is a requirement under GAAP, so
11 under Generally Accepted Accounting Principles, yes?

12 A. Yes.

13 Q. But it also reflects the reality of Apple's
14 business, does it not, because Apple does not retain
15 the full amount that is billed to developers, it
16 only retains the commission. So the amount that is
17 billed in total is not Apple's revenue in any
18 meaningful sense, is it?

19 A. In the way our model is set up correct. Again, we
20 are an agent for developers. In the example I was
21 giving that you showed earlier, if we were
22 purchasing that app and reselling it, again the cash
23 is the same across the customer paying what Apple
24 gets and what the developer earns. That would have
25 a very different margin for calculation. It is the

1 same number, same amount for every party I
2 mentioned. It is just accounted for differently.

3 Q. Paragraph 20 of your statement, at {B2/4/5}, you
4 give there a worked example, if you like?

5 A. Yes.

6 Q. You say that under the two different models, Apples'
7 operating margin with the same inputs essentially
8 would be very different. Just to be clear, the
9 point you are making is, if Apple calculated
10 operating margins as a share of total billings
11 rather than as a share of the revenue, Apple's
12 operating margins would look much smaller. That is
13 the point you are seeking to illustrate with your
14 worked examples here, is it not?

15 A. Yes, correct or in the principal model we would
16 recognise the 99 cents as the revenue number.

17 Q. Yes but just to be clear the agency model is the
18 model that Apple has adopted for its business, yes?

19 A. Yes, for simplicity, the principal model would have
20 required us to have thousands of SKUs, and so it
21 just was much more practical using an agency model
22 for something like this, otherwise we would have to
23 negotiate and start pricing and manage thousands of
24 SKUs, so it was a much more practical model for
25 Apple to use.

1 Q. But it is not just that though, is it Mr Parekh,
2 because the economic reality is that the total
3 amount billed, that total amount is not Apple's
4 revenue, is it? 70 per cent of it goes to the
5 developer?

6 A. Yes, the way we have set up the model that is
7 correct, as an agent, that's correct.

8 Q. I would now like to turn to some of the documents.
9 Actually I think we can go to the 10-K one more time
10 first. So we will stay in open for now. You make
11 the point in your statement, Mr Parekh, that Apple
12 maintains a single profit and loss statement for the
13 compare entire companies, that is the consolidated
14 operations that we see in the 10-K, is it not?

15 A. That is correct, yes. A single fully-burdened
16 accurate set of financial statements, yes, at the
17 total company level.

18 Q. I think you confirmed earlier that "fully-burdened"
19 in this context means that the P&Ls for the company
20 included all direct and indirect costs, including
21 all operating expenditure. Is that right?

22 A. That is correct, yes.

23 Q. So the 2019, 10-K which we had a moment ago, let us
24 get it back up again at {D1/775/2}. We looked at a
25 different year earlier, but again we see this

1 distinction between the products and services part
2 of the business, do we not?

3 A. Yes.

4 Q. I think you also confirm that net sales is
5 synonymous with revenue in this context?

6 A. That is right.

7 Q. Do you have a pen and paper to hand, Mr Parekh?

8 A. Yes, I have one in front of me.

9 Q. Could I ask you just please to make a note of the
10 figure for year ending September 28, 2019 for total
11 net sales for services. So I think it is the 46.29
12 billion figure. Would you mind just writing that
13 down and perhaps just say "29 10-K services" or
14 something next to it.

15 A. All right. Okay.

16 Q. Just because we may come back to that figure and it
17 would be convenient to have it there. Then we see
18 in the 10-K cost of sales figures are also given
19 separately for cost of sales and services, do you
20 see that?

21 A. I do, yes.

22 Q. That is, putting it broadly, they are the direct
23 costs associated with those parts of the business?

24 A. That is correct.

25 Q. It is subtracting those direct costs from the net

1 sales figures that you get your gross margins
2 figures, yes?

3 A. That is correct.

4 Q. Those are split between products and services, but
5 when you look at operating expenses, those are split
6 instead by type. So you have research and develop
7 OPEX and then selling and general administrative
8 OPEX often SG&A?

9 A. Yes.

10 Q. But in this document those operating costs are not
11 apportioned between products and services, are they?

12 A. They are not.

13 Q. So when you see the figure of about \$34.46 billion
14 of total operating expenses, that is for Apple, as a
15 whole, for the whole financial year in question,
16 2019?

17 A. That is correct.

18 Q. Do you mind writing down that figure as well, so the
19 total OPEX figure for 2019. I am going to call up a
20 confidential document, it is {F/18} and it is one of
21 those where we will have to open up a spreadsheet.
22 Just for the Tribunal's benefit, this is one of the
23 two line of business reports that Mr Dudney relies
24 on in his report. Mr Ward showed you this in
25 hoping. I do have some hard copies in case anyone

1 would find that helpful. A3 hard copies. It may be
2 we can do without them. I cannot offer one to
3 Mr Parekh I am afraid.

4 THE CHAIRMAN: Are you going to do this in open session?

5 MR ARMITAGE: The figures in the document are marked as
6 confidential. I do not think for the moment I need
7 to read anything out.

8 THE CHAIRMAN: If you are going to compare the ones that
9 Mr Parekh has with anything in here --

10 MR ARMITAGE: That is true, you are right.

11 THE CHAIRMAN: So if that is where we are going, we
12 probably to need to go into closed session.

13 MR ARMITAGE: You are right, there is a risk there.

14 Could I just observe the figures are I think almost
15 all more than five years old.

16 THE CHAIRMAN: I am as anxious as you to stay in open,
17 Mr Armitage, but we are not going to have an
18 argument about confidentiality. So if that is where
19 we are, we just go into closed session.

20 MR ARMITAGE: I was only going to make the observation it
21 seemed to me, looking at Mr Dudney's reports,
22 Mr Dudney relies on these figures, we saw an extract
23 earlier where figures from FY 2019 backwards were
24 not marked confidential.

25 THE CHAIRMAN: I think what I am anxious to do is,

1 firstly obviously, stay in open court as long as we
2 sensibly can, but I also do not want to waste
3 Mr Parekh's time. So I think if you are at the
4 stage where you need to go into closed, let us do
5 that.

6 MR ARMITAGE: Let us do so. I can probably carry on
7 with -- Yes, let us go into it. I agree, let us not
8 waste anyone's time. That would be very helpful.

9 THE CHAIRMAN: Can we also please check, is there anyone
10 in the room who is not in the confidentiality ring?
11 No. Thank you.

12 (For confidential proceedings, see separate
13 transcript)

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