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6 **IN THE COMPETITION**
7 **APPEAL**
8 **TRIBUNAL**
9

Case No: 1689/7/7/24

10
11 Salisbury Square House
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14

6th March 2026

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16 Before:

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19 The Honourable Mr Justice Waksman (The Chair)
20 Michael Cutting
21 Professor Alasdair Smith
22

23 (Sitting as a Tribunal in England and Wales)
24

25
26 BETWEEN:

27 **Applicant / Proposed Class Representative**

28
29 **Consumers' Association ("Which?")**
30

31 And

32 **Respondents / Proposed Defendants**
33

34 **Apple Inc, Apple Distribution International Limited, Apple**
35 **Europe Limited and Apple Retail UK Limited**
36

37 **A P P E A R A N C E S**
38

39
40 Philip Woolfe KC & Jack Williams (instructed by Willkie Farr & Gallagher (UK) LLP) on
41 behalf of the Consumers' Association ("Which?")
42

43 Marie Demetriou KC, Max Schaefer & Michael Quayle (instructed by Covington & Burling
44 LLP) on behalf of Apple Inc, Apple Distribution International Limited, Apple Europe
45 Limited and Apple Retail UK Limited
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Friday, 6 March 2026

(10.30 am)

MR JUSTICE WAKSMAN: Some of you are joining us live stream on our website, so I start therefore with the couple of customary warnings. An official recording is being made and an authorised transcript will be produced but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Before we begin, can I just express the thanks of the Tribunal for the parties enabling us to have a further hearing to deal with the matters that we've set out in our questions. So, Ms Demetriou.

Submissions by MS DEMETRIOU

MS DEMETRIOU: May it please the Tribunal, I think I don't need to do introductions because it's the same people as the last hearing. I should say you've asked us to focus on responding to each other's skeleton argument, which is what I'll do. Mr Woolfe and I have agreed roughly an equal split of time, with us to have a short reply as is the usual form.

MR JUSTICE WAKSMAN: Thank you.

MS DEMETRIOU: We respectfully say that the Tribunal's questions have been helpful in drilling down to the essential issue between the parties on the strike out and I'd like to start by making a general observation about the difference between the parties that has been crystallised by the respective skeleton arguments and the observation is this, that it's important to distinguish between two different things. The first thing is

1 | what is the essential premise for the loss that the PCR seeks to claim on behalf of the
2 | non-paying users; and the second thing is if such a claim is permissible how
3 | evidentially might the Tribunal go about measuring the loss or quantifying it? We say
4 | that the fact that the Tribunal might use evidence which could be characterised in
5 | some way as objective evidence, for example market prices and volumes of sales
6 | which enable the construction of a demand curve, the fact the Tribunal might be able
7 | to do that should not obscure the basic objection that we have which is that the
8 | essential premise for the loss depends on consumers' subjective valuation of the
9 | service. They are separate things.

10 | That fundamental point about the premise for the claim, depending on subjective
11 | valuation, is common ground and can I just briefly take you back to the PCR's Claim
12 | Form, which you have in bundle A1 behind tab 3 and if we go to page 104.

13 | MR JUSTICE WAKSMAN: Just one moment please. I'm so sorry. Can you give us
14 | the reference again?

15 | MS DEMETRIOU: Of course. So it's bundle A, tab 3, page 104.

16 | Does the Tribunal have that?

17 | MR JUSTICE WAKSMAN: Just a moment. Yes.

18 | MS DEMETRIOU: To make sure we're working from the same pagination.

19 | MR JUSTICE WAKSMAN: I'm looking at the core bundle. Which is the paragraph
20 | number of the particulars --

21 | MS DEMETRIOU: 137. Paragraph 137 and 138.

22 | MR JUSTICE WAKSMAN: Oh yes. Just a moment.

23 | MS DEMETRIOU: And the Tribunal's obviously familiar with these paragraphs. They
24 | contain the claim for loss on behalf of the non-paying users which Apple seeks to strike
25 | out. As you can see from the opening words of paragraph 137, this category of class
26 | member did not in fact pay for iCloud so they've therefore not spent money or been

1 left out of pocket as a consequence of the alleged infringement. But their loss is said
2 to arise if, and I'm reading from 137.1, "if the class members valuation of cloud storage
3 services equivalent to iCloud was higher than the competitive price in the
4 counterfactual", and then you see from 138, "Class members have therefore suffered
5 loss and damage to the extent that their valuation of the service was higher than the
6 price that would have prevailed in the counterfactual."

7 So that's why I say that it's common ground that the premise for the claim turns on the
8 subjective valuation of the service by class members, however you go about
9 measuring that.

10 We say you can think of it this way. So assume as the Tribunal has done in some of
11 its questions, that the real world price for a certain capacity of storage is £10, but that
12 absent the alleged infringement it would have been £5. So what the PCR talks here
13 about, the counterfactual price would have been £5, and take a consumer, let's call
14 them Consumer A, who did not pay for additional storage in the real world because
15 they considered the price to be too high, but in the counterfactual they would have
16 paid, because everyone else would have done who wanted the service, £5. They
17 would have paid Apple the counterfactual price of £5.

18 Now, that consumer doesn't have a claim under paragraphs 135 to 136 of the Claim
19 Form, which is the claim for, if I can put it this way, conventional pecuniary loss,
20 because they haven't been left out of pocket. The premise for the PCR's allegation is
21 that as a result of the infringement Consumer A has been deprived of iCloud services
22 which they would have enjoyed and that this loss of enjoyment needs to be
23 compensated. That's the premise for the claim in 137 and 138. But the PCR accepts
24 that if Consumer A valued the service at £5 they would recover no damages. That's
25 because the alleged infringement would have deprived Consumer A of the opportunity
26 to pay £5 for a service they valued at £5. So the PCR accepts that no loss could arise

1 from that.

2 It's only if Consumer A subjectively valued the service at, say, £8 that the PCR makes
3 a claim and for that consumer the alleged loss would be £3 of foregone consumer
4 surplus. Now, Apple's position on our strike out application as the Tribunal knows is
5 that the longstanding position in the English law of damages is that this loss is not
6 recoverable. Pecuniary loss requires a change in the claimant's asset position and
7 there is no change in Consumer A's asset position. The only way in which the loss is
8 said to arise is on the basis that but for the infringement Consumer A would have
9 received something she thought was worth £8 whilst only paying £5. That's really the
10 essential issue between the parties and that's why I say it's common ground that
11 however you measure the foregone consumer surplus, it is in principle, the premise
12 for the claim is based on a consumer subjective valuation of the service.

13 So now turning to the Tribunal's questions, and it may be convenient to have them
14 open in the bundle prepared for this hearing. I think it's called bundle B2 and if we
15 turn behind tab 3 to page 41 we should find the Tribunal's questions.

16 MR JUSTICE WAKSMAN: Yes.

17 MS DEMETRIOU: The Tribunal has here reproduced the diagram in the
18 Commission's Staff Working Document that we debated at the previous hearing. At
19 paragraph 3, if we can go on to page 42, the Tribunal has precisely crystallised the
20 issue between the parties. So the Tribunal there says:

21 "The above shows that there can be a volume effect in a consumer market and the
22 question at issue is whether a volume effect, which is a loss of consumer surplus rather
23 than a loss of profit to firms and therefore not a financial or cash loss is nevertheless
24 a material loss which is actionable in damages as a pecuniary loss."

25 That is with respect precisely the issue that arises between the parties on this strike
26 out. Our answer to it is no, it's not an actionable loss in English law.

1 We can see in fact, just above that paragraph in paragraph 133 of the Staff Working
2 Document, that the Commission there crystallised exactly the same issue. So you can
3 see a reference to claiming reparation for loss of profit. Then it says:
4 "Other customers are end consumers. If these do not purchase at price P2 this means
5 that they fail to enjoy the utility of these products or services for which they would have
6 been prepared to pay price P1. Applicable legal rules may provide [and I'm
7 emphasising "may"] that some or all of such harm should be compensated for such
8 failure to enjoy the usefulness of the product. At a minimum, end consumers who
9 have to bear higher costs, for example for the purchase of a substitute good and who
10 therefore have suffered an actual loss, must be able to obtain compensation."
11 And so there again the Commission has drawn the same distinction as the Tribunal
12 has in the immediate next paragraph, paragraph 3. Our answer is again English law
13 has chosen not to compensate that loss and there's no requirement that it should.
14 Now the Tribunal's question 1 asks whether our answer would be different if damages
15 were to be calculated by reference to the demand curve rather than by reference to
16 individuals. We see that clearly from paragraph 10 on page 43. The Tribunal points
17 out that the use of a demand curve does not use individual valuations or individual
18 views of different consumers and at (9) the Tribunal says that this does not require
19 information about the identities of different consumers.
20 But this goes back to the observation I started with, which is this: when focusing on
21 how such a claim could be proved or quantified, that may well be so. It may well be
22 that the Tribunal doesn't need to delve into the position of individual consumers. But
23 it's critical to distinguish between the method for calculating loss and the question of
24 what is being measured, because what the demand curve is measuring is the
25 underlying willingness to pay of individual consumers. Indeed, as the Tribunal has
26 seen, that's the premise of the claim advanced by the PCR in paragraphs 137 and 138

1 of the Claim Form. If we go back to the diagram on page 41, pecuniary loss is
2 represented by the rectangle. It's a straight horizontal line because everyone paid the
3 same in the actual and then everyone paid the same counterfactual price. But by
4 contrast the foregone consumer surplus is a triangle. The bottom of the triangle is flat
5 because everyone would have paid the same counterfactual price but their willingness
6 to pay differs. So you end up with people on the left-hand side of the triangle having
7 higher willingness to pay. Those on the right have a lower willingness to pay and so
8 you end up with different amounts. And that is really again to crystallise the difference
9 between the two types of loss.

10 Turning to the PCR's skeleton argument, so if we go to their skeleton argument, so
11 supplemental bundle tab 1, page 6. The PCR -- and if we look, please, at
12 paragraph 8.2, paragraph 8.2 -- says that sales and prices are objective facts and the
13 relationship between them can be objectively observed and measured. So pausing
14 there, the PCR here is focusing on using the demand curve to measure the foregone
15 consumer surplus. But as I said that's a different point to the question of whether the
16 premise for the loss claimed is the subjective valuation of consumers and indeed we
17 see, if we go --

18 MR JUSTICE WAKSMAN: Sorry Ms Demetriou, can I just check. Did you say
19 paragraph 8.2?

20 MS DEMETRIOU: I did, sir, yes. On page 6. So "for present purposes the key point
21 is this". Do you have that?

22 MR JUSTICE WAKSMAN: I've got that as 9.2.

23 MS DEMETRIOU: Oh.

24 I think we all have it as 8.2.

25 MR WOOLFE: I certainly have it as 8.2.

26 MS DEMETRIOU: This is the PCR's skeleton that you've got, so --

1 MR JUSTICE WAKSMAN: It is. Well, we can work out where the difference is, but
2 I've got that paragraph beginning under section B, question 1 demand curve point.
3 I've got that then beginning at paragraph 9 and I've got 9.2 is "For present purposes".
4 MS DEMETRIOU: Oh, that's very curious.

5 MR JUSTICE WAKSMAN: Well, we can work out where that's emerged from but
6 anyway -- I printed it out, but anyway -- right, sorry, because I couldn't find -- can you
7 just repeat the submissions you've just made?

8 MS DEMETRIOU: Yes, of course. So the submission I've just made is that what you
9 see in paragraph 8.2 is the PCR saying that sales and prices are objective facts and
10 the relationship between them can be objectively observed and measured. Our point
11 is that that's not relevant to the question that the Tribunal has to determine on the
12 strike out, because the fact that there may be data which could in some sense be
13 described as objective data there which can be used to measure the loss does not
14 detract from the fact that the loss that's being claimed is itself based on the subjective
15 valuation of consumers. And in fact, if we look at paragraph 8.3, and in the Chair's
16 version it will be 9.3, I assume. Therefore, the PCR accepts, just to read the first
17 sentence:
18 "For completeness, whilst the shape of the demand curve can also be interpreted as
19 being the outcome of consumer preferences (which arise from individual valuations)."
20 And we say, well, yes. So that point is common ground and indeed it has to be
21 common ground because that is the very basis for the allegation at paragraphs 137
22 and 138. It's those valuations that are subjective and they form the basis for the PCR's
23 claim, albeit, as I've said, that measuring the aggregate foregone consumer surplus
24 might be done by constructing a demand curve or on the basis of market data, which
25 might be described in one sense as being objective. It's not really objective because
26 it's based on subjective valuations. So that is what we say about question 1 or rather

1 | what we say about the PCR's skeleton argument in relation to question 1.

2 | Turning to question 2, that refers, as the Tribunal knows, to a hypothetical
3 | pharmaceutical cartel, and it posits a claim for foregone consumer surplus arising from
4 | the decision of some patients not to purchase the drug. So that's the premise for the
5 | question.

6 | Our position is that that claim would fail for all the same reasons that we say that the
7 | PCR's claim for non-paying users fails in these proceedings.

8 | Now, the essential difference between scenario 2A and scenario 2B in the Tribunal's
9 | question is that, in scenario 2A, the evidence would be real market evidence of prices
10 | and volumes whereas, in scenario 2B, an economist would have to construct the
11 | evidence because there wouldn't be real market data. But we say that makes no
12 | difference to the answer and again it comes back to the critical observations I started
13 | with, whether there is real market evidence or whether there's expert economic
14 | evidence that's being used to measure the foregone consumer surplus is nothing to
15 | the point. In each case, what is being measured is willingness to pay and in neither
16 | case has the class of consumers suffered pecuniary loss. The consumers did not
17 | purchase the drug under the cartel and in the absence of the cartel they would have
18 | paid the non-cartelised price. That means no pecuniary loss.

19 | Now, turning to the PCR's skeleton on question 2, so we're back on behind tab 1 on
20 | page 7, the PCR takes the opposite view to us. So again, the PCR doesn't see a
21 | distinction, in common with us doesn't see a distinction between scenario 2A and
22 | scenario 2B, but they take the opposite view in terms of whether a claim would lie. We
23 | see why that is at paragraph 9. They say the PCR's case is that the loss of a consumer
24 | surplus is as a general matter a recoverable loss. That is where we fundamentally
25 | part company with the PCR. Not to rehash my submissions from last time, but it has
26 | shown this Tribunal no authority to establish this at all. So it's an assertion that the

1 loss of a consumer surplus is as a general matter a recoverable loss but that
2 submission, not only is there no authority to support that submission, but that
3 submission would bring about a revolutionary result in that it would cut across
4 centuries of authorities on damages on English law. As I say, I'm not going to repeat
5 the submissions I made last time.

6 Now, turning to question 3, this is the relevance of free storage.

7 MR JUSTICE WAKSMAN: Yes.

8 MS DEMETRIOU: The Tribunal has asked: "does it make a difference to the question
9 as to whether the contested loss is resolvable". Both in the actual and counterfactual
10 scenarios all customers receive free storage. Now, our position as you've seen from
11 our skeleton argument is that the existence of the free tier does not make a difference
12 to the question of whether the loss sought is recoverable. And again, turning to the
13 PCR's skeleton argument, so this is behind tab 1 on page 9 under the heading
14 "Question 3", and in fact if we go to the next page and we look at paragraphs 14 and
15 15, which may, sir, be 15 and 16 for you. So they start the first element and the next
16 paragraph I want to look at begins at the second element.

17 MR JUSTICE WAKSMAN: Just a moment, please.

18 Sorry, which paragraph did you want to start with? What you have as 12 or?

19 MS DEMETRIOU: The one that begins "The first element". It's for me 14.

20 MR JUSTICE WAKSMAN: Yes.

21 MS DEMETRIOU: And so those two paragraphs indicate that the PCR agrees that
22 the availability of free storage does not make a difference to the question of whether
23 there is a claim. So I think to that extent there's some common ground.

24 But then at paragraph 16, the PCR appears to place some significance on the fact that
25 Apple chooses to provide some free storage. It's not at all clear what that significance
26 is supposed to be. So it says at paragraph 16:

1 "The fact that Apple chooses to structure its iCloud product so as to provide all
2 customers with an entitlement to free storage is significant."

3 And then it says further down:

4 "If all non-paying class members had placed no value at all on cloud storage, the free
5 tier would simply be unused and the strategy would be pointless."

6 Now, it's unclear what Which? means by value here. It could only be willingness to
7 pay, but our strike out application takes willingness to pay as read. We're not
8 contesting that for the purposes of the strike out application. Our point is that foregone
9 consumer surplus is not a pecuniary loss recoverable in law. If Apple's right about that
10 as a matter of law, then there is no pecuniary loss and it does not matter that
11 consumers may be willing to pay for the free tier or for any part of the service.

12 Now, if I could turn please to question 4 and if we go back to the Tribunal's question
13 first, which is behind tab 3 of this bundle on page 45. If I could just remind the Tribunal
14 of the questions. So the Tribunal there says that:

15 "It would appear from paragraph 5.3.4 of Mr Hughes' report that the proposed class
16 will or may include consumers who may have subscribed for other cloud storage
17 services and that they may have paid to do so. Mr Hughes' hypothesis is that they
18 may nevertheless have suffered loss as in the counterfactual they may have received
19 more for free or lower cost."

20 So that's how the Tribunal has interpreted Mr Hughes' evidence.

21 Now, we do not agree that that is what Mr Hughes is saying. So first of all, just pausing
22 with the Tribunal's question: "if that were the claim, so if it were the claim that there
23 were consumers who had subscribed for other cloud storage services, let's say
24 Dropbox, and that in the counterfactual they would have received those for a lower
25 cost, would that be a conventional claim for pecuniary loss".

26 MR JUSTICE WAKSMAN: Just a moment, please.

1 MS DEMETRIOU: But it's not what Mr Hughes is saying and in fact it's not pleaded,
2 that claim is not pleaded and helpfully my learned friend confirmed before the hearing
3 this morning that they accept that that claim is not pleaded. So we can take this more
4 quickly than I was going to.

5 MR JUSTICE WAKSMAN: Thank you.

6 MS DEMETRIOU: Let me show you first of all what Mr Hughes said. Now, that's in
7 bundle B, behind tab 5 and if we go to page 140 of the bundle.
8 So Mr Hughes' report, bundle B, tab 5, page 140.

9 MR JUSTICE WAKSMAN: Just a moment, because I'm looking at -- yes, that's the
10 original supplementary bundle, isn't it?

11 MS DEMETRIOU: It's I think the original supplemental bundle, bundle B, yes.

12 MR JUSTICE WAKSMAN: Yes, let me just get that up. Thank you.
13 5.3.4, is that right?

14 MS DEMETRIOU: Yes. And the short point, and I can take it quite quickly in view of
15 what my learned friend confirmed this morning, is that whereas the Tribunal posited in
16 question 4 a conventional claim for pecuniary loss that someone's bought say, a
17 Dropbox service for £10 but in the counterfactual they would have paid less, that is a
18 conventional claim for pecuniary loss. That's not what Mr Hughes is saying at 5.3.4.
19 What he's saying there is that a consumer in fact paid a third party for OCSi, but would
20 have been prepared to pay £5 more for the FSCSi service and in the counterfactual
21 that FSCSi service would have been provided for £2 but Consumer A would have
22 valued it for £3 more and therefore benefited from £3 of consumer surplus. So that is
23 an impermissible claim we say for consumer surplus. It's not a claim for pecuniary
24 loss and it's different to the claim that the Tribunal canvassed in its question.
25 Now, going back to the pleading, so that is the bundle we had last time but volume A,
26 behind tab 3, page 103. Does the Tribunal have that?

1 MR JUSTICE WAKSMAN: Just a minute. Yes.

2 MS DEMETRIOU: So can you see that the claim for pecuniary loss is at 135 and 136
3 and it's confined to the class members who paid for iCloud, so in other words, who
4 paid for Apple's service, and it concerns class members who have purchased those
5 services from Apple but would have paid less in the counterfactual and that's a claim
6 for conventional loss. But as I say, it's confined to class members who in the real
7 world purchased services from Apple, not from alternative providers.

8 Now, 137 and 138 address the position canvassed by Mr Hughes at paragraph 5.3.4
9 of his report and you can see there in 137.1 the reference to "purchased services
10 equivalent to iCloud from an alternative provider of cloud storage at the counterfactual
11 price". But it's clear that, as with Mr Hughes' report, this allegation is one for foregone
12 consumer surplus and is not a claim based on change of asset position. You can see
13 that very clearly from paragraph 138.1. So class members have suffered loss and
14 damage to the extent that their valuation of FSCSi was higher than the price for such
15 services that would have prevailed from the counterfactual.

16 So that squarely pleads loss based on valuing paid storage by reference to willingness
17 to pay.

18 Now, 138.2 doesn't say in terms that's dealing with the free storage. It doesn't say
19 how that's to be valued, but on their case it must be the same approach or their case
20 would be internally inconsistent. We said in the first hearing that's how we understood
21 their case and it was never disputed. So we assume that again that's based on the
22 subjective valuation of consumers as to the value of that free storage.

23 Now, turning to what the PCR has said in its skeleton argument, so we're back to the
24 bundle for this hearing behind tab 1 and this time page 4 of the bundle. I want to look
25 at paragraph 7.2. Sir, that may be again one paragraph out. It starts by saying "In the
26 actual non-paying class members may either" do you have that?

1 So my paragraph --

2 MR JUSTICE WAKSMAN: So I've got that as my 8.1. The mystery deepens. We'll
3 sort it out in the break.

4 MS DEMETRIOU: Sir, can I hand up a clean copy of the version everyone else has?

5 MR JUSTICE WAKSMAN: I think that would be useful, otherwise I'm going to irritate
6 people here.

7 MS DEMETRIOU: Does the rest of the Tribunal have our version?

8 MR JUSTICE WAKSMAN: They're all in the conventional group, yes. Let me just...

9 MR CUTTING: We're all wondering what it says in his paragraphs!

10 MS DEMETRIOU: We're wondering that too.

11 MR JUSTICE WAKSMAN: I'll sort that out later.

12 MS DEMETRIOU: I think we're all now using the same numbering. It's paragraph 2,
13 internal page 4 as well as bundle page 4. That says:

14 "In the actual non-paying class members may either (a) have purchased relevant
15 services from a rival cloud storage provider rather than from Apple and so have paid
16 some money to those other providers, category 1, or never purchased any relevant
17 services from any provider and so have not paid any money to anyone in the actual,
18 category 2."

19 Then if you look at 7.3, category 1, you can see is -- and sorry, I should say that if you
20 turn to paragraph 17 of the PCR's skeleton argument, they say there that question 4
21 concerns category 1. So class members who have in fact purchased from a rival cloud
22 storage provider and you can see at paragraph 7.3, back on page 5, the claim that
23 those people were said at this stage of drafting the skeleton argument were said to
24 have had. It was essentially an umbrella claim. So it was said that in the
25 counterfactual the price would have been reduced. So they would have paid less in
26 the counterfactual, either from a rival or they would have switched to iCloud and paid

1 less. So that would be a conventional claim for pecuniary loss but it's not a claim that
2 has been pleaded and Mr Woolfe has helpfully now provided confirmation that in fact
3 the PCR has not pleaded a category 1 claim, nor is it a claim for which the PCR has
4 put forward any methodology in Mr Hughes' report. Of course, the short point is that
5 if the PCR wishes the Tribunal to consider such a claim it would need to apply to
6 amend its case and adduce a methodology, which it has not done.

7 Now just to pick up one further point on question 4, if we go back to what the PCR
8 says at paragraph 21, what they've done at paragraph 21 is they've tried -- they've
9 said here that:

10 "In respect of the second part of the Tribunal's question 4 this appears to reason by
11 analogy from category 1 to category 2. Given that category 2 non-paying class
12 members cannot be described as having to bear higher costs because their loss is
13 instead the non-receipt of an additional entitlement to free storage from which they
14 would have benefitted, there is no precise analogy between the two categories."

15 And we agree with that.

16 Then they say:

17 "However, the fact that category 1 non-paying class members are accepted to have a
18 claim..."

19 I anticipate Mr Woolfe will need to -- that will need to be amended in the sense they
20 don't actually have a claim, but maybe he means hypothetically.

21 So, "the fact that category 1 non-paying class members [might] have a claim indicates
22 that whether or not class members have paid sums to Apple for cloud storage cannot
23 be the touchstone for whether loss is recoverable". With respect we simply don't
24 understand that reasoning. The point is that category 1 umbrella claims, if they were
25 pleaded and if they were evidenced, would be recognisable claims for pecuniary loss.
26 But that has no bearing on category 2 as the PCR seems to have recognised in the

1 previous sentence. The problem with category 2 claims for foregone consumer
2 surplus is not that class members have not paid Apple, it's that they haven't suffered
3 any pecuniary loss. That's the problem.

4 MR JUSTICE WAKSMAN: Just a moment, please.

5 Thank you.

6 MS DEMETRIOU: I am going to now turn to question 5 of the Tribunal's questions.
7 So that you'll see on page 46 behind tab 3 relates to recital 12 of the Damages
8 Directive and asks whether there are any materials which assist on the scope of the
9 references to actual loss or gain deprived other than recital 12.

10 Now, of course we made submissions about that at the last hearing, I'm not going to
11 repeat those, but I am going to address briefly the PCR's skeleton argument. So it's
12 paragraph 27 of their skeleton argument. Page 15 behind tab 1 of the bundle. So
13 they've made a number of the points but I'm taking you to the punchline at
14 paragraph 27. So they've made a number of points about cases and so on. But the
15 punchline at paragraph 27 says:

16 "Accordingly, taking that material in the round, on any view the Damages Directive
17 does not prohibit [and again I emphasise those words] Member States from allowing
18 for claims for the consumer surplus on foregone volumes. On the contrary allowing
19 such claims is consistent with the broader principle of full compensation even if it is
20 not strictly required by the Damages Directive. Indeed not required at all."

21 So again we have some common ground. We agree that the Damages Directive does
22 not require Member States to provide compensation for foregone consumer surplus.
23 So that appears to be common ground. What must be compensated for under the
24 Damages Directive is actual pecuniary loss and loss of profits. Just turning back to
25 my learned friend's skeleton at paragraph 26.2, he cites there an old Advocate
26 General's opinion but the citation in fact supports us, because you can see there that

1 the Advocate General was talking about the legal concept of damage, covering both
2 the material loss *stricto sensu*, that's to say a reduction in a person's assets and also
3 a loss of an increase in those assets which would have occurred if the harmful act had
4 not taken place. That's a loss of profits. The object of compensation -- and again
5 these two alternatives are known respectively as *damnum emergens* and
6 *lucrum cessans*. The object of compensation is to restore the assets of the victim to
7 the condition in which they would have been but for the unlawful act. So there is a
8 focus on assets and I think very briefly if we take up -- do you have authorities bundle,
9 volume 4, we can see the Advocate General's opinion behind tab 56. If we go to 2094.
10 So that's authorities volume 4, tab 56, 2094. The paragraph in fact starts on 2093.

11 MR JUSTICE WAKSMAN: Sorry, just a moment, please.

12 Is this the original authorities bundle or the supplementary --

13 MS DEMETRIOU: It's the original, sorry. Apologies, yes. There were a number of
14 volumes and volume 4 in the hard copies but it's tab 56. It starts on page 2093.

15 MR JUSTICE WAKSMAN: Just a moment.

16 I just need to find a way of accessing that. Just a moment. Is it a different page? Ah,
17 right.

18 MS DEMETRIOU: Does it come in the supplementary bundle too? Apologies, I didn't
19 spot that. So in that it's behind tab 7 at page 343. That's where it begins.

20 MR JUSTICE WAKSMAN: Oh yes. Just a moment. Thank you.

21 MS DEMETRIOU: Oh sorry, my pagination has gone badly wrong here, but it may be
22 that yours is better. I'm going to take it -- I want to look at paragraph 9. My pagination
23 has gone wrong in the supplementary bundle.

24 Oh, 365. But look, mine's all in the wrong order.

25 Do you have it at 365 of the new bundle?

26 MR JUSTICE WAKSMAN: We've now got that. Thank you.

1 MS DEMETRIOU: So it's paragraph 9 and you can see the beginning of paragraph 9
2 is what's being set out by the PCR in their skeleton and we say, as I've just explained,
3 that that supports us.

4 If you go over the page, do you see a paragraph that says "In order to compensate
5 the applicants"? Does the Tribunal have that? Yes:

6 "In order to compensate the applicants in these places, in accordance with the concept
7 of damages which I referred to above, it is necessary to seek to restore the financial
8 situation in which they would have been placed."

9 So throughout this Advocate General's -- throughout this paragraph which deals with
10 the availability of damages, the Advocate General is in our respectful submission clear
11 that what he's talking about is loss arising from a change in asset position. And we do
12 say that it's telling that the PCR here is relying on an Advocate General's opinion from
13 1978 which, on analysis, supports us. There really is no CJEU authority which
14 establishes the proposition that the PCR would like, which is why ultimately it agrees
15 with us, we saw at paragraph 27 of their skeleton, that compensation for foregone
16 consumer surplus is not a requirement of EU law. So that's question 5.

17 Question 6 asks whether the aggregation of claim provisions under section 47B and
18 C of the Competition Act affect the recoverability of the disputed claims. I can take
19 this very shortly. If we look at the PCR skeleton at paragraph 29.2, page 16:

20 "For the avoidance of doubt, the PCR does not contend that the concept of
21 aggregation in section 47C [...] means that a claim can be advanced for a type of loss
22 which is simply not recoverable as a matter of law in an action for breach of
23 competition law."

24 And we agree.

25 So thinking about a consumer bringing a single claim, the consumer comes to the
26 Tribunal and says "in the actual world I didn't pay Apple or anyone else anything for

1 cloud storage services. In the counterfactual world I would have bought those services
2 at the counterfactual price", we say no pecuniary loss. If that consumer said, "Ah, well,
3 I've got some loss, because I would have subjectively valued that service at £8,
4 therefore court, please award me £3", that would not be recognised in the same way
5 that if consumer B came along the next day and said "I would have valued it for £9,
6 therefore please pay me £4 of foregone consumer surplus", that would not be
7 recognised in English law and you can see why. Apart from all the submissions I've
8 made, if that were so it would lead to a position where different claimants received
9 different amounts not because of anything different in terms of the objective facts of
10 the case, what they paid in the actual and what they paid in the counterfactual, but
11 because of their differing willingness to pay. So a very wealthy person who might be
12 prepared to have paid Apple £100 rather than the £5 counterfactual price would have
13 a claim for £95 whereas a less wealthy person who would only perhaps have been
14 prepared to pay £5.50 would have had a claim for only 50p and someone who valued
15 the product at the same price as the counterfactual price, £5, would have had no claim
16 at all and that simply is not a situation that English law countenances.

17 If that's right for individual claims, then we have common ground. If that type of claim
18 is not recognised for an individual claim, we have common ground that the
19 aggregation, the collective nature of the regime and the ability to seek an aggravating
20 award of damages doesn't change the position. It can't salvage it.

21 Question 7, which is the Tribunal's final question, asks this. So the background,
22 paragraph 30:

23 "It is possible to envisage a situation where the firms which purchase [and again
24 I emphasise purchase] the overcharged product are all small surprises without the
25 resources to pursue private actions against the over charger with no reasonably
26 feasible means of distinguishing the losses of individual firms. Question: could a

1 collective action on behalf of such firms in principle succeed and, if so, how do they
2 differ from a collective consumer action for foregone consumer surplus?"

3 The short answer to question 7 is that such proceedings would not suffer from the
4 defect which is the subject of our application to strike out, because question 7
5 envisages a claim by firms which purchase the overcharged product and that would
6 appear to be a standard claim for direct pecuniary loss by way of overcharge.

7 Now, there may be a situation in which an individual firm doesn't have the resources
8 to bring such a claim for pecuniary loss before the Tribunal because their individual
9 loss would be low and the proceedings would be expensive. It may be that a collective
10 action could be brought for practical reasons. But that doesn't bear on the question
11 raised by our strike out application and if we look at the class representative -- the
12 PCR's skeleton at paragraph 33.2, they say:

13 "It may be said (by Apple) that the difference between the two cases is that the loss of
14 the firms would be a loss of profit (whether it is a claim for an overcharge or a claim
15 for loss of profit in consequence of a volume effect), whereas the claim for the
16 consumer surplus is not a claim for loss of profit."

17 And, yes, that is what we say. The PCR's response does not assist because, again,
18 their response is that they say the consumer surplus is not unduly subjective because
19 it can be assessed on an objective based on market-wide information and disclosure
20 from Apple. Again, going back to the point I made at the outset, that is to focus on the
21 wrong thing, which is how the loss can be proved. It's not grappling with the essential
22 defect in the case which is that the claim for loss is premised on the subjective
23 valuation placed on the service by consumers.

24 So, sir, members of the Tribunal, I've finished a little early. Those are our submissions
25 focusing I hope on the skeleton argument of the PCR as we were asked to do. Unless
26 you have any questions.

1 MR JUSTICE WAKSMAN: Yes, we do.

2 MS DEMETRIOU: Right.

3 MR JUSTICE WAKSMAN: Thank you very much. I'm going to start with
4 Professor Smith.

5 PROFESSOR SMITH: You want me to take the questions now?

6 MR JUSTICE WAKSMAN: Because Ms Demetriou has now finished her submissions
7 subject to questions.

8

9 **Questions from THE TRIBUNAL**

10 PROFESSOR SMITH: Thank you very much. Can I go back to question 1, with the
11 observation that in the argument that you've made today you've put much more
12 emphasis on how losses are to be assessed through valuations of assets rather than
13 on the element of subjectivity, which you've emphasised very heavily at the previous
14 hearing. Less emphasis on subjectivity today, but that's just an aside remark.

15 MS DEMETRIOU: I don't accept that. If that's important, I want to come back. I don't
16 accept that.

17 PROFESSOR SMITH: It's just the way I've read the --

18 MS DEMETRIOU: Yes.

19 PROFESSOR SMITH: But let's consider your response to question 1, which is
20 calculate damages in respect to the demand curve which is on our papers is it's
21 objectively derived, does that affect the argument made by Apple and you're saying
22 no, it doesn't, because there's still the underlying subjective approach to consumers'
23 willingness to pay. And there are no loss of assets associated with the foregone
24 consumers surplus. So I'll try to stick with the numbers you're using in your own
25 presentation, where we're looking at a counterfactual price, a fair price of £5, and
26 an actual price of £10 and there is a range of consumers who were willing to pay £5

1 and unwilling to pay £10 and we have an estimate of how many consumers there are
2 in the different parts of that price range that we know nothing about the individual
3 consumers. We don't know the names of the consumers whose willingness to pay is
4 a fact.

5 So let's think about a consumer who would have been willing to pay £9 but is not willing
6 to pay £10 and you're saying that consumer is paying nothing, he's receiving nothing,
7 there's no change in their asset position, so they have no claim.

8 MS DEMETRIOU: Right.

9 PROFESSOR SMITH: If the price had been £9, my hypothesis, that's a consumer
10 who would have bought the service at a price of £9.

11 MS DEMETRIOU: Yes.

12 PROFESSOR SMITH: The fair price would have been £4, that consumer would have
13 had a claim for damages --

14 MS DEMETRIOU: Correct.

15 PROFESSOR SMITH: -- of £4.

16 MS DEMETRIOU: £5. I think you said the price would be £4.

17 PROFESSOR SMITH: The fair price was £4. At the actual price of £9 they would
18 have bought.

19 MS DEMETRIOU: Yes, they've lost £5.

20 PROFESSOR SMITH: They've lost £4.

21 MR JUSTICE WAKSMAN: You've got it the other way round. If the fair price was £5
22 and they actually paid £9, then the difference would be £4.

23 PROFESSOR SMITH: They're paying £4 too much.

24 MR JUSTICE WAKSMAN: £4 too much. The excess.

25 PROFESSOR SMITH: Yes, the excess price is £4.

26 MS DEMETRIOU: Oh I see. They paid £4 too much.

1 PROFESSOR SMITH: The difference between the --

2 MS DEMETRIOU: So the price is £5 and they've paid £4 too much? Yes, correct.

3 Okay.

4 PROFESSOR SMITH: So they have a loss which, and I think we're all agreed now,

5 we've got the 5s and 4s sorted out, we're all agreed they've suffered a loss of £4 and

6 they're entitled to damages of £4.

7 MS DEMETRIOU: Correct.

8 PROFESSOR SMITH: Had the price been £9. But the price is actually £10, so they

9 don't buy.

10 MS DEMETRIOU: Yes.

11 PROFESSOR SMITH: And now their damage is zero.

12 MS DEMETRIOU: Correct.

13 PROFESSOR SMITH: They have no claim.

14 MS DEMETRIOU: No claim.

15 PROFESSOR SMITH: But they're worse off.

16 MS DEMETRIOU: They're worse off in a sense recognised by economics.

17 PROFESSOR SMITH: No, no, they are worse off in a sense recognised by logic.

18 MS DEMETRIOU: Not in a sense recognised by law and that's the point. So they are

19 not worse off in a way that the law recognises attracts compensation. And that's the

20 key point.

21 PROFESSOR SMITH: But they are worse off.

22 MS DEMETRIOU: I'm sorry?

23 PROFESSOR SMITH: But they are worse off?

24 MS DEMETRIOU: Well --

25 PROFESSOR SMITH: The only thing that's changed when the price went from £9 to

26 £10 is that a price of something they were buying has gone up. Nothing else has

1 | changed because we're looking at a conceptual experiment. So they're worse off.

2 | MS DEMETRIOU: So there's a distinction between the person who's overpaid and a
3 | person who hasn't paid at all. Obviously the person that's overpaid is worse off
4 | compared to the person that hadn't paid at all.

5 | PROFESSOR SMITH: But my question was a conceptual question of the same
6 | question. Had this person been changed £9, they would have been entitled to £4 of
7 | damages. Now the price is £10, so they're buying nothing and they have no claim.

8 | MS DEMETRIOU: Because they've overpaid. So they've expended £10 of their
9 | assets that, absent the infringement, they wouldn't have spent, and in your second
10 | example the person hasn't spent anything at all. They have not incurred any financial
11 | loss.

12 | PROFESSOR SMITH: And there's no change in their asset position and therefore
13 | they have no claim in damages.

14 | MS DEMETRIOU: Correct.

15 | PROFESSOR SMITH: Even though the excess price is now higher and they are worse
16 | off.

17 | MS DEMETRIOU: I'm not understanding the way in which you say they are worse off
18 | compared to the counterfactual.

19 | PROFESSOR SMITH: Not compared to the counterfactual, compared with the price
20 | of 9. They're worse off than they would be had the price been 9 rather than 10.

21 | MS DEMETRIOU: No, if -- so, sorry, you're saying that they're worse off because the
22 | price is 9?

23 | PROFESSOR SMITH: No, they're worse off if the price is £10 than if the price is £9
24 | and with respect, that's not a matter of economics or law but of common sense. If a
25 | price -- nothing else has changed except a price has gone up then a consumer is
26 | worse off.

1 MS DEMETRIOU: No, we don't accept that because if the price had been £10 then
2 the person would not have spent any money. Because it's £9, they haven't spent any
3 money -- sorry, if the price had been £10 they would not have spent any money. If it's
4 £9, then they would have spent money and they would have been £4 worse off. But
5 they didn't spend any money and so they're not worse off. So in fact if the price is £10
6 the person is not worse off.

7 PROFESSOR SMITH: At the price of £10 they are not buying the good any more.

8 MS DEMETRIOU: Yes.

9 PROFESSOR SMITH: So they haven't spent any money on this good. But that was
10 an option open to them when the price was £9. They could have chosen not to buy
11 the good at £9 and spent nothing. So the sense in which they're worse off at the price
12 of £10 is that something that they could get at the price of £9 is now not available to
13 them, whereas when the price --

14 MS DEMETRIOU: No, because if they had -- if they had chosen -- if the price had
15 been £9 and they'd chosen not to spend any money, they would still not have a claim --

16 PROFESSOR SMITH: No, I'm not saying they wouldn't have had a claim. I'm saying
17 when the price was £9, they had the option of not buying the good.

18 MS DEMETRIOU: Yes.

19 PROFESSOR SMITH: That was a possibility.

20 MS DEMETRIOU: Yes.

21 PROFESSOR SMITH: But they chose to buy the good at the price of £9, objectively
22 showing they preferred to buy the good at the price of £9 than not to buy the good at
23 all. At the price of £10 the option of buying the good at the price of £9 is closed off to
24 them, so they're worse off in the sense that something they could afford to do before
25 and chose to do is closed off to them. What they're doing at the price of £10 is
26 something that they had available to them at the price of £9. They're worse off at the

1 price of £10 because an option that they had at the lower price is not available to them.

2 MS DEMETRIOU: Sir, we see it in a simpler way, with respect. So the question is

3 'did the person in fact over pay, was there a change in their asset position'. So if they

4 valued it at £9, then whether or not they prevail -- so either in the situation where the

5 prevailing price was £10 and they didn't buy anything, or if the prevailing price was £9

6 and they chose not to buy anything, there has been no change in their asset position.

7 They haven't suffered any loss recognised by law and so there is no claim.

8 PROFESSOR SMITH: So at the price of £9 they have a claim for damages of £4.

9 MS DEMETRIOU: If they've purchased the product.

10 PROFESSOR SMITH: If they have purchased the product.

11 MS DEMETRIOU: Yes.

12 PROFESSOR SMITH: And when the price goes up to £10, they ceased to purchase

13 the product and they now have no claim for damages.

14 MS DEMETRIOU: Correct. And that's precisely the point, going back to the Tribunal's

15 question, it's precisely the point that's recognised by the Commission at

16 paragraph 133. That's precisely the point. They're saying there, the Commission says

17 that in some senses you could say that where a consumer, an end consumer, doesn't

18 purchase at the prevailing price, because they would have valued it somewhere

19 between the counterfactual price and the prevailing price, then they could be described

20 as having failed to enjoy the utility of the product or service. And that's what we're all

21 calling foregone consumer surplus. But as the Commission says at paragraph 133

22 that is not something that needs to be compensated. There's no requirement that that

23 is compensated for by law.

24 PROFESSOR SMITH: And you're not troubled by the notion that consumers are

25 entitled to compensation when the price is £9 but not entitled to compensation when

26 the price -- not entitled to compensation when the price goes up?

1 MS DEMETRIOU: Sir, no, I'm not troubled by that at all because the law of damages
2 as I have said proceeded for centuries on an objective basis and I would be troubled
3 by a situation in which Consumer A comes along to the Tribunal and says my valuation
4 was £9 and so I'm entitled to £4 and the next consumer comes along and says my
5 valuation happens to be £5, which is the price I've paid, so I'm not entitled to anything
6 and the third consumer comes along and says my valuation happened to be £6 and
7 so I'm entitled to -- that would trouble me much more. And that's not the way in which
8 the English law of damages proceeds.

9 PROFESSOR SMITH: Yes, indeed, and I completely agree with you, it would be very
10 hard to deal with individual damage claims in the way that you've described.
11 I completely agree. It's only because we're looking at the collective actions regime
12 that we're looking at it being feasible to consider this kind of claim or consider whether
13 it's valid in law and your argument, as I understand it, is that the claim is in principle
14 not admissible and whether it can be added up or not is not the issue.

15 MS DEMETRIOU: Sir yes. Just two brief points. The first is that the reason I'm
16 troubled by individual claims of that type is that essentially it would be a licence for
17 richer people to obtain more damages than poorer people.

18 PROFESSOR SMITH: We'll come back to that in due course.

19 MS DEMETRIOU: Now going back to your point, which is does it help that this is
20 an aggregate system, we say no. It may help in terms -- if there were an admissible
21 claim as a matter of law, then I can see that having a collective action with
22 an aggregate award of damages would avoid some of the unfairness. You could have
23 a sort of average -- find an average willingness to pay. But I come back to
24 paragraph 29.2 of my learned friend's skeleton where they correctly accept the
25 proposition that the concept of aggregation in section 47C of the Act does not mean
26 that a claim can be advanced in a collective manner if it were not admissible as

1 a matter of law if it were a single claim. And we're in agreement on that.

2 MR CUTTING: So in your conception of rectangle A, triangle B, does triangle B
3 represent a measure of loss either to the economy or to the class as a whole or to any
4 part of it?

5 MS DEMETRIOU: No. It's -- no, it's not -- there's no money lost to the class or the
6 economy. There's no pecuniary loss. That's our key point. So what the triangle
7 recognises is foregone consumer surplus: the fact that some consumers would have
8 valued a service somewhere between the actual and the counterfactual price.

9 MR CUTTING: But it's a fair valuation of that lost surplus.

10 MS DEMETRIOU: It is or it may be. This is obviously a -- yes, it may be a fair
11 valuation. I'm not quibbling with how that loss is measured at this stage. So obviously
12 if the claim were admitted, there would be a debate about how to measure it.

13 MR CUTTING: No, let's just -- I'm just trying to work out what in your conception
14 triangle B is?

15 MS DEMETRIOU: Triangle B is loss that's not pecuniary loss. So it doesn't represent
16 any change in asset position. It captures those consumers who in the real world didn't
17 pay for the product or service, in the counterfactual world would have paid the
18 counterfactual price, so they would have all paid the same price in the counterfactual,
19 but that they had different subjective valuations and that's why it's a triangle and not a
20 rectangle, different subjective valuations of what that was worth to them.

21 PROFESSOR SMITH: But you agree that they're worse off?

22 MS DEMETRIOU: I don't know what you mean by worse off. They're not worse off
23 as a matter of law.

24 PROFESSOR SMITH: They're worse off in the sense that the person in the street
25 would recognise them, not economists and not lawyers, but ordinary consumers who
26 used to purchase a good at a price of £5, the price is -- nothing else has changed

1 | except the price has gone up to £10 and a range of consumers have now ceased to
2 | buy this product, surely we can all agree that they're worse off?

3 | MS DEMETRIOU: Sir, it's a little bit -- with respect we say it's a little more complicated.
4 | Take the consumer that would in the counterfactual -- so take a consumer who -- so
5 | everybody who wanted the service in the counterfactual would have paid £5, that is
6 | the counterfactual price. Take a consumer that subjectively valued that service at £5,
7 | there would be no foregone consumer service for that consumer. So we're only -- this
8 | really is dependent on the question of the extent to which individual consumers valued
9 | the service. It's those consumers that valued it above £5. They all would have paid
10 | the same thing in the counterfactual. They all did not pay anything in the factual so
11 | we do say there's no loss. So I do recognise that the economists recognise this
12 | concept of foregone consumer service which focuses on the subjective enjoyment
13 | placed on a good or service. But, as I say, that's not something recognised by law.

14 | PROFESSOR SMITH: I'm trying to say I'm not referring to what economists think or
15 | indeed what lawyers think, I'm referring to what an everyday use of the term would be,
16 | and I think the person on the street surely recognises that if a price goes up and some
17 | people have been driven out of the market as a result, those people are worse off.
18 | That's all. Just as a matter of common sense.

19 | MS DEMETRIOU: Well, the person that valued it at £5 is in that broad position worse
20 | off as well.

21 | PROFESSOR SMITH: Okay, there are some people at the margin who are not
22 | affected but the broad mass of people who are no longer purchasing the good because
23 | the price has gone up £5 to £10 must be worse off.

24 | MS DEMETRIOU: Well, sir, I'm not sure it's helpful to press me on whether I think
25 | people are worse off or not, because really the only issue raised by our strike out
26 | application is whether or not the law recognises those people as worse off such that

1 they need to be compensated. That's the question I'm addressing and we say the
2 answer to that is no. Now, I do recognise that there is a concept of foregone consumer
3 surplus that recognises that people who would have valued a product somewhere
4 between the counterfactual and the factual price can in some sense be said to have
5 lost something, but that's not a sense recognised by the law.

6 MR CUTTING: But you say that the -- I suppose the question we're grappling with is
7 that since triangle B seems to be well established in the economic literature as a
8 measure of loss caused by infringements of competition law which move price and
9 quantity in that kind of relationship, we're looking at a form of loss to a class that can
10 in fact be measured and if we start from a proposition that there should be
11 compensation for competition, effective compensation for infringement of competition
12 law, then we are left with the challenge how do we deal with compensation for the
13 losses caused by triangle B.

14 MS DEMETRIOU: Sir --

15 MR CUTTING: And partly why we ask whether aggregation helps is that we have
16 Supreme Court authority saying the class action regime is novel and provides
17 mechanisms to think about the aggregation of both liability and quantum on a top-
18 down basis. So having regard to cases that date from before the introduction of the
19 class action regime begs a whole bunch of questions about how valuable those
20 precedents are. Whether we should be more creative or more open to the allocation
21 of responsibility and the derivation of loss than on an individualised claim. So that was
22 really the purpose behind my question of "what is your conception of triangle B".

23 MS DEMETRIOU: Sir, let me now tackle -- that's a very helpful if I may say
24 explanation. Let me just address that head on. So there are two very important points
25 that the PCR has accepted, two very important propositions of law which they accept
26 and of which there is common ground between us. The first proposition is that the

1 principle of effectiveness does not require this type of compensation. That was --

2 MR CUTTING: We don't need to get to require. I think it gives us a discretion and so

3 we accept that there's no requirement.

4 MS DEMETRIOU: The second proposition, and we've seen this at paragraph 29.2 is

5 that, if a claim is legally bad if it were brought as a single claim, it can't become a good

6 claim in law simply because it's under the collective regime. And so, sir, we would say

7 that you have no discretion. You have no discretion here because one has to ask

8 oneself what claim in law could be advanced by a single claimant and our strike out

9 application leaves aside questions of measurement. I'm happy to accept all of this can

10 be measured for the purposes of the strike out application. Our argument is that it is

11 bad as a matter of law and so, sir, you don't with respect have a discretion, because if

12 a claim is bad in law if brought as a single claim, it does not become a good claim

13 because of the top-down nature of the regime or the side-to-side nature or the bottom-

14 up or whatever you want to call it. The collective action regime does not convert a

15 claim which is bad in law to a claim which is good in law. And that is separate from

16 questions of proof. I'm very happy to accept for these purposes that the aggregate

17 nature of the award allows better ways of measuring the loss. I'm happy to accept that

18 for these purposes. The question is that it's not loss recognised by law and there is

19 nothing, there is with respect no authority that says that the Tribunal has to strive to

20 create new categories of claim. That would be impermissible and it would run against

21 the wording of the statute, which says that collective actions are individual proceedings

22 collected together.

23 So that discretion doesn't exist and if the Tribunal were to exercise that discretion it

24 would run up against the clear words of the statute and no doubt that's why my learned

25 friend has quite properly accepted, at paragraph 29.2, that if a claim is bad in law it's

26 not salvaged by the collective nature of the regime.

1 MR JUSTICE WAKSMAN: Should we take our break at this point for the transcriber.
2 We'll take ten minutes. Thanks.
3 **(11.42 pm)**
4 **(A short break)**
5 **(11.52 pm)**
6 MR JUSTICE WAKSMAN: So I think we're going to go back to the set of questions
7 that Professor Smith has been asking you.
8 PROFESSOR SMITH: So can I continue on question 1 and then I want to move on to
9 question 2.
10 MS DEMETRIOU: Yes.
11 PROFESSOR SMITH: Ms Demetriou, you made some points in your skeleton about
12 the difficulties of using consumer surplus and somewhere I think you say that you
13 quote someone as saying that the courts decline to satisfy the whims of the rich.
14 MS DEMETRIOU: Yes.
15 PROFESSOR SMITH: And you also somewhere else said that it would be
16 unconscionable if people were willing to pay more got compensated more because
17 that seemed to be unfair.
18 MS DEMETRIOU: Yes.
19 PROFESSOR SMITH: So those things would trouble you. But we're now in your
20 responses to question 1, saying the law allows compensation, gives compensation, to
21 those consumers who are able and willing to pay the higher price, the excess price.
22 MS DEMETRIOU: Yes.
23 PROFESSOR SMITH: But not willing to give compensation to those who are driven
24 out of the market by the rise in the price.
25 MS DEMETRIOU: Yes.
26 PROFESSOR SMITH: So the law there is treating differently the group of consumers

1 | who are driven out of the market by the higher price but compensating those who are
2 | able to afford to stay in the market and pay the higher price. You say, well, that's the
3 | outcome of the law and that is the way it is and we're not -- you wouldn't use the word
4 | unconscionable about that?

5 | MS DEMETRIOU: No, because there's clear difference between the situations which
6 | is that somebody who has expended money that they shouldn't have, because of
7 | an infringement, is worse off in terms of their asset position and that's what the law
8 | focuses on.

9 | PROFESSOR SMITH: So you're not troubled by the fact that the law focuses on the
10 | asset position and thereby gives compensation to people who are well enough off to
11 | pay for the excessively priced goods and thereby give up some assets to get the goods
12 | but the law does not provide compensation for those consumers, probably poorer
13 | consumers, who are unable to pay the higher price, have no diminution in their assets,
14 | have, and I hesitate of this because I'm not sure we agreed, have a loss because of
15 | the higher price but the loss is of a form that the law doesn't compensate.

16 | MS DEMETRIOU: No, I mean whether I'm troubled by it is nothing to the point. The
17 | point is that the law draws that distinction and it draws it for a good reason and that's
18 | because it proceeds to examine loss and compensation -- we dealt with this last time
19 | but all aspects of the law of damages, whether it's mitigation or compensatory loss or
20 | loss of profits, proceeds on an objective basis and so it doesn't matter who you are,
21 | you have to show that there's been some change in your asset position and then
22 | claimants are treated in the same way. This is loss in inverted commas of a different
23 | nature. It doesn't involve a change of asset position so the law does not compensate
24 | it.

25 | PROFESSOR SMITH: Perhaps I didn't express myself very well when we started off,
26 | but you're referring there to a change in the asset position. But this is a change in the

1 asset position in respect of customers who, by definition, we know something about
2 their willingness to pay. We have objective evidence on their willingness to pay and
3 you're saying this objective evidence of the willingness to pay of people who are driven
4 out of the market is not relevant because their asset position is not changing and
5 therefore they don't have a claim. And whereas the word "unconscionable" is used in
6 relation to some other comparisons you wouldn't use it in respect of this.

7 MS DEMETRIOU: No, no I wouldn't because there's a difference. It's different and
8 we see the difference also explained in the Staff Working Document. So the
9 Commission recognises it's different. It's a different thing. So the law of damages is
10 very well established, through centuries of jurisprudence, and you can get damages
11 for pecuniary loss and for certain categories of non-pecuniary loss which doesn't arise
12 here. Pecuniary loss is suffered by someone whose asset position has changed and
13 this is not it. We say also that, sir, you said that -- in your question you said, well,
14 someone who's foregone a consumer surplus that can be measured objectively. Well,
15 in one sense subjective, in the sense that the Tribunal's used and that my learned
16 friend has used in their skeleton, in the sense that you can gather market data which
17 might be characterised as objective. But what it's measuring is subjective willingness.
18 So stripping out an individual claim, we come back to the point that you only conjure
19 up a claim by saying that Consumer A would have valued it at £9 rather than £5 and
20 that will vary between consumers and that does -- that is flatly inconsistent with how
21 the whole of the law of damages has proceeded. And coming to back Mr Cutting's
22 point, that there is, as I've said, and we do say if we want to use the word -- well, I think
23 I'll leave that. I think coming back to Mr Cutting's point, we say there is no discretion
24 of the Tribunal simply to come up with, to change the longstanding English law of
25 damages because of the collective nature of the regime and that's really for the reason
26 that is recognised as well by the PCR at paragraph 27.2.

1 MR JUSTICE WAKSMAN: Well, we'll come on to that.

2 PROFESSOR SMITH: Can I move on to question 2, where, with respect, I feel that
3 both parties have missed the most important dimension of the question.

4 MS DEMETRIOU: Yes.

5 PROFESSOR SMITH: Which is it's a question about this drugs cartel -- perhaps
6 I should say pharmaceutical drugs cartel to avoid any other connotations -- where the
7 hypothetical cartel moves the price up over time and, I say, with respect neither of you
8 addressed the issue of what changing over time means. So can I pursue that with
9 you --

10 MS DEMETRIOU: Yes.

11 PROFESSOR SMITH: -- because I think the first scenario says let's start off with a
12 competitive price. So no cartel, no one driven out of the market, no losses and then
13 in month 1 the pharmaceutical cartel puts up the price by, shall which say, a pound.

14 MS DEMETRIOU: Yes.

15 PROFESSOR SMITH: And some people, though they in some sense need the drug,
16 decide they can't afford it anymore and they drop out. But there's no basis on which
17 to estimate any loss for them. You're agreeing, I think we're agreeing no loss for the
18 first pound, some people have dropped out of the market.

19 MS DEMETRIOU: No loss because they haven't --

20 PROFESSOR SMITH: They're not paying anything, they've not loss anything. Now
21 the price goes up to two pounds --

22 MS DEMETRIOU: Yes.

23 PROFESSOR SMITH: -- and more customers drop out of the market. But there are
24 customers now in the market who are paying -- sorry, can I go back.

25 MS DEMETRIOU: Yes.

26 PROFESSOR SMITH: At the price of £1, some customers drop out the market.

1 MS DEMETRIOU: Yes.

2 PROFESSOR SMITH: Most customers remain in the market but there's now
3 an excess price of £1 and if we were looking at the cartel retrospectively we would say
4 in this first month all of those customers who are still in the market are entitled to
5 damages of £1.

6 MS DEMETRIOU: Correct.

7 PROFESSOR SMITH: All of them.

8 MS DEMETRIOU: Correct.

9 PROFESSOR SMITH: Except the small number who had dropped out. The next
10 month the price goes up to £2 and some more customers drop out and they're not
11 entitled to any damages now. But the customers who remained in the market are now
12 entitled to £2 of damages every month because there's an excess price of £2.

13 Month 3 the price goes up, there's now an excess price of £3 and everyone who is still
14 in the market gets damages of £3 but those who have dropped out, some of them got
15 no compensation in month 1, some of them got compensation in month 2 but now
16 they're out of compensation.

17 MS DEMETRIOU: Yes.

18 PROFESSOR SMITH: And so we go on until, shall we say, the cartel ends up at this
19 target price of ten --

20 MS DEMETRIOU: Yes.

21 PROFESSOR SMITH: -- and a group of customers have now dropped out of the
22 market and they're now not receiving any damages. But on the way there the first
23 cohort were one pound in month 1 and then when they dropped out of the market their
24 entitlement to damages ended.

25 MS DEMETRIOU: Correct.

26 PROFESSOR SMITH: In month 2 there was a cohort who got damages of

1 £1 -- damages of £1 in month 1, £2 in month 2, and now, sorry, you've dropped out of
2 the market so you no longer have got a claim and they say, hold on I'm worse off.
3 I now can't afford this drug that I need. And you're saying I've now got no claim for
4 damages. Okay, let's go on. Month 3, there is a cohort who get £3 of damages but in
5 month 4 they drop out, things got worse for them. Is this -- you're saying this is the
6 English law of damages and we mustn't have a revolution, it strikes me as a very
7 unhappy kind of application of the law where damages come in at some stage and
8 then drop out.

9 MS DEMETRIOU: Sir, two points. So one is that we say -- of course because of the
10 factual scenario being necessary pharmaceutical drugs, it may be that those people
11 who have dropped out have a claim for non-pecuniary loss.

12 PROFESSOR SMITH: Can we leave that aside.

13 MS DEMETRIOU: Let's leave that aside. So I just raise that because of the context
14 in case it's said, well they may suffer harm as a result of not having access to the
15 drugs. Then yes, that's what the law provides. And it provides that, you say well that
16 is very strange but equally it would be very strange for different people to come to
17 court with the same objective situation, they've not paid in the factual, in the
18 counterfactual they would have paid £5, and they end up with different damages
19 because they might have been prepared to pay £2,000.

20 PROFESSOR SMITH: But isn't that the strength of the collective actions regime
21 because individuals don't come to court. I agree that individuals in this situation
22 coming to court would be an impossible situation for the court because different
23 individuals would have -- but here we have a cohort of individuals who would have
24 paid -- we have evidence they would have paid the counterfactual price. They don't
25 pay the factual price. We don't know their names. We don't know at what point
26 different individuals would have dropped out of the market but we have an objective

1 means of aggregating the claims and allowing those, dare I say deserving individuals,
2 to be compensated.

3 MS DEMETRIOU: Well, sir, that comes back to the same point that Mr Cutting put to
4 me, which is does the collective nature of the regime make a difference. So what
5 you're putting to me is that let's say we all accept that it wouldn't be open to an
6 individual claimant to make such a claim, is that changed by the collective nature of
7 the regime? And we say no. Can I just take you to what we say in our skeleton about
8 that, since this has become a more important point in debate. So if we go to our
9 skeleton behind tab 2 at page 36 of the bundle. So 17 of the skeleton. We deal with
10 it there and you'll see at paragraph 55 that we've picked up on a point from the PCR's
11 oral submissions, which they've now confirmed in their skeleton. So the oral
12 submissions were Apple's – "if the individual claims are not allowable in law you can't
13 add them all together" is "true, and we accept that". And then, 2, the aggregate nature
14 of the award sought "may make the quantification and valuation [...] a different
15 exercise from that which you're trying to do with an individual claimant but that's a point
16 about quantification". And we agree with that.

17 So at 56 which is on the same page and we say there that "That is a fair and accurate
18 statement of the relevance of the availability of aggregate damages under the
19 collective action proceedings regime". But it doesn't undermine our point which is that
20 this is not available as a matter of law for a single claim. It can't be then a good
21 claim -- the regime doesn't make it into a good claim. We see, if you go over the page
22 and look at our skeleton argument we see -- I mean, we see there -- in fact it may be
23 useful to look at the Evans case, the FX case, the recent Supreme Court decision in
24 Evans. Can we pick that up in the supplemental authorities, just on this point, because
25 it was put to me by Mr Cutting that it's important to -- it may be the Tribunal has a
26 discretion and it may be important to create a remedy if there's been something which

1 | might be thought of as a loss.

2 | If we take -- if we go to tab 6, these are the supplemental bundles, this is the recent
3 | judgment from last April of the Supreme Court in the FX Evans case.

4 | MR JUSTICE WAKSMAN: Sorry, wait a minute. Which one are we going to?

5 | MS DEMETRIOU: So we're going to the supplemental bundle. Evans in the Supreme
6 | Court.

7 | MR JUSTICE WAKSMAN: I've got that, but --

8 | MS DEMETRIOU: So page 331. We should see a heading "Other factors relied on
9 | by the Court of Appeal."

10 | MR JUSTICE WAKSMAN: Just a moment, please.

11 | Sorry, I was looking at the judgment date. You said April. That's the hearing date. It
12 | was December of last year, is that right?

13 | MS DEMETRIOU: I'm so sorry.

14 | MR JUSTICE WAKSMAN: I just thought I was looking at the wrong one.

15 | MS DEMETRIOU: As I said April, it seemed more recent than this, but time seems to
16 | merge as you get older.

17 | MR JUSTICE WAKSMAN: Which paragraph are we looking at?

18 | MS DEMETRIOU: Starting with paragraph 137.

19 | MR JUSTICE WAKSMAN: Just a moment please.

20 | MS DEMETRIOU: Page 331.

21 | MR JUSTICE WAKSMAN: Yes.

22 | MS DEMETRIOU: And so what the Supreme Court's saying here, so they say:
23 | "The defendants have argued as a separate ground of appeal that the Court of Appeal
24 | erred in holding that the principles of 'facilitating the vindication of rights' and 'detering
25 | future wrongdoings' are factors relevant in this case which point in favour of opt out
26 | proceedings."

1 Pausing here, it's a slightly different question what the Supreme Court was looking at,
2 whether or not the Tribunal and then the Court of Appeal -- whether the Tribunal had
3 erred or not in finding that the claim was not suitable for opt-out proceedings. So it's
4 a bit different. But it says some things that are relevant, because you see:
5 "[T]here is no doubt that, as Lord Briggs noted in Merricks para 2, these are indeed
6 policy goals which the availability of the statutory scheme for collective proceedings is
7 designed to further. Lord Briggs also considered that these factors fortify the approach
8 which courts apply even in ordinary civil proceedings that when claimants are shown
9 to have suffered loss as a result of the defendant's wrongdoing, the court will do the
10 best it can on the available evidence to quantify damages and will not be put off from
11 doing so by the difficulty or impossibility of precise calculation."
12 So pausing there, that goes back to the distinction I made at the outset which is that if
13 there is a good claim for loss, then the question of quantification is separate. And
14 I agree that. That's why we say there's no different answer for question 2A and 2B.
15 But we agree that the broad axe can be wielded at that stage. Then they say:
16 "[T]hese factors do not assist the Tribunal in making important distinctions with
17 operating the statutory scheme, such as a decision whether to certify collective
18 proceedings as opt-in or-out. That is because, as discussed earlier, there are
19 competing policy aims, which also underpin the regime, of protecting businesses from
20 the burden of defending unmeritorious or inflated claims. The Tribunal's required to
21 strike a balance in the way we have described between those interests."
22 I just point you to that -- in fact the earlier part that they're referring to, can we just look
23 at that on page 324. So paragraph 115:
24 "Another feature of the collective..."
25 MR CUTTING: Sorry, 215 did you say?
26 MS DEMETRIOU: 324 of the bundle, sir. Paragraph 115. It's at bottom of page 324.

1 MR JUSTICE WAKSMAN: Just a moment.

2 Yes.

3 MS DEMETRIOU: "Another feature of the collective proceedings regime is also
4 relevant. The regime provides additional opportunities for claims to be brought and
5 vindicated but it does not guarantee that this will be possible in every situation where
6 there has been a breach of competition law."

7 And then if we go forward in the judgment, please, to page 332 of the bundle. Can I
8 just ask you to read paragraph 141 to yourselves.

9 MR JUSTICE WAKSMAN: Just a moment.

10 MS DEMETRIOU: So what you see and what we take from this is that the policy aims
11 of the regime are not a one-way street at all. Our case is in fact it's a bit different to
12 whether or not to certify proceedings as opt-in or opt-out, but we are in a sense a
13 fortiori that, because we're saying that if a claim is bad in law if brought on an individual
14 basis, it's not a function of the collective actions regime to magic it into a good claim
15 in law.

16 MR JUSTICE WAKSMAN: Just a moment, please.

17 PROFESSOR SMITH: I understand that and I hesitate to pursue legal issues,
18 because that's not really what I'm here for. But that's where I'm struggling a little bit
19 with why a claim for foregone consumer surplus is in principle bad in law and the
20 distinction between whether it's because of subjectivity or because of the assets test.
21 Because it seems to me, again just asking a non-lawyer question, if it's because of
22 subjectivity that, for the reasons which you've explained very well in your skeleton, we
23 can't have individuals coming to the court and making statements about what their
24 subjective valuations are, you can't construct a case out of it, then in a collective
25 proceedings individuals are not coming to court, a class is coming to court, with
26 evidence of the harm suffered to an anonymous group of members of the class and

1 that on the face of it is not subjective evidence, it's objective evidence, but I understood
2 the emphasis of your skeleton today being that it's not so much about subjectivity, it's
3 about this asset test which the claim fails anyway. So you're saying a claim if -- and
4 then I will stop trying to show my imperfect grasp of the law and get on to a different
5 question. If a claim for foregone consumer surplus is fundamentally ruled out because
6 it fails the asset test, or the acid test or the asset test, then that's one issue and the
7 collective regime per se doesn't seem to help with that. If it's about subjectivity then
8 on the face of it the collective regime is helpful in allowing people to make claims that
9 they could not have made individually. Could not have made individually. Not that
10 they've been ruled out.

11 MS DEMETRIOU: So I understand the question. Let me answer it in two parts if
12 I may. So let me explain how we put our case, because the two points, the asset point
13 and the subjective point are very closely linked. It's really part and parcel of the same
14 point. Let me explain why that is. So we say that the general approach of the law of
15 damages to pecuniary loss is that there needs to be a change -- the infringement
16 needs to have resulted in a reduction in assets or a change to the asset position of the
17 claimant. So that can arise either because money has been spent that would not have
18 been spent absent the infringement or because there's been a lost opportunity to make
19 profits or because you've paid something under a contract and you haven't received
20 it.

21 Now the way that this claim is put, so the way that the claim is framed is as follows.
22 They say that as a matter of causation absent the alleged infringement then although
23 these consumers haven't paid anything in the real world, were it not for the
24 infringement they would have received -- they would have paid the counterfactual price
25 and received something which they valued more than the counterfactual price and
26 they've been deprived of that value. So that is the way that the claim is put, but that

1 value is subjective value, it is the subjective value of each consumer. Now, that's why
2 the points are linked. So we're tackling how they've put their claim and what we say,
3 and I'm not going to rehearse what we said at the last hearing, is that that's anathema
4 to the English law of damages.

5 Now, the second part of the answer is that you've put to me that the collective nature
6 of the regime somehow removes the subjectivity because you can use a demand
7 curve, you can look at things in the aggregate way and you can look at market data to
8 construct a demand curve. And that is underpinning quite a few of the Tribunal's
9 questions. That comes back to the proposition I said at the outset, which is what that
10 helps you with is proving, measuring the loss. So it helps you with measuring the loss
11 and it also helps you, if you have an aggregate award of damages, in a sense you're
12 covering up this issue about some people getting more than others. And you could
13 have a distribution mechanism which doesn't reward the rich. So it helps you with
14 those things. But what it doesn't help with is the fundamental premise for the claim
15 which is you can use all the objective market data you like but what that is measuring
16 is the subjective valuation of each consumer. You don't need to look at the consumers
17 in a collective claim, you may not need to identify particular consumers. So you can
18 avoid the issues that are attached to the measuring quantification. But what you can't
19 get away from is that the premise for the claim is dependent on all the various
20 valuations of the individual consumers, even if you don't even discuss that at the
21 hearing.

22 PROFESSOR SMITH: I'm not sure I understand that, because the evidence is
23 hypothetically that there are a group of however many hundreds or thousands of
24 consumers, for whom we have objective evidence that they would have bought the
25 product at a price of £9 and would not buy the product at a price of £10. One can state
26 that with no -- whatever the PCR has done in its, whatever wording the PCR has used

1 in its claim form, we can use words that refer only to the objective evidence of there
2 being a group of customers whose behaviour is as I've just described, and we can use
3 that to evidence the fact that they are, for the reasons I was arguing earlier, worse off
4 if the price is £10 than if the price was £9, and make some estimation of the loss of
5 this anonymous group of customers and we're not investigating -- we're not saying
6 anything about subjective preferences, we're only describing market behaviour.

7 MS DEMETRIOU: And, sir, my answer to that is that it's very important to distinguish
8 between two things. The first is: let me assume in the PCR's favour what you've just
9 put to me, that actually what you're looking at, you're not going to be investigating the
10 subjective views of each consumer member of the class or even groups of consumers
11 in the class at all. You're going to be looking at objective market data. Let me assume
12 all of that in the PCR's favour. What you've got in the demand curve, what that curve
13 reflects are differing subjective valuations. So it may be that you end up taking
14 an average, but what is reflects are differing subjective valuations. So when you ask
15 yourself the question, which the statute requires you to ask because the statute allows
16 the Tribunal to certify as collective proceedings individual claims which are grouped
17 together. When you ask yourself whether an individual claim of this nature would be
18 sustainable as a matter of law, the answer's no. And so I come back to the point I've
19 now made a few times which is questions of the aggregate nature of the regime, the
20 collective nature of the regime can't improve that position. It can make proof easier.
21 It can avoid you having to look at subjective intentions but the premise for the individual
22 claims that are collected together depends on necessarily varying as between
23 members of the class's subjective willingness to pay. And that's really the critical point.
24 That's why the claim is bad in law. So what the collective nature of the regime and the
25 aggregate award allows you to do is to avoid difficulties in measuring. You can look
26 at material which is objective in the sense that it's market data but that material is

1 | underpinning it, as the PCR accepts, that data is founded on individual willingness to
2 | pay as different individuals.

3 | PROFESSOR SMITH: Just one moment, please.

4 | We don't have a live transcript in front of us so I can't go back and quote your exact
5 | words but I think you just said something about it involves adding up the subjective
6 | willingness, the different subjective willingness to pay --

7 | MS DEMETRIOU: Reflects.

8 | PROFESSOR SMITH: Sorry?

9 | MS DEMETRIOU: Reflects.

10 | PROFESSOR SMITH: Reflects. And I would requote the sentence without the word
11 | "subjective" in it. It does involve the adding up of different individual willingnesses to
12 | pay as reflected in the objective demand.

13 | MS DEMETRIOU: Yes, exactly and that's the critical point.

14 | PROFESSOR SMITH: We've probably pursued this as far as it's sensible for me to
15 | pursue it. So can I move to the last issue that I want to raise with you, which is the
16 | small claims by firms.

17 | MS DEMETRIOU: Yes.

18 | PROFESSOR SMITH: Where it's agreed that firms, the diagram in the Staff Working
19 | Document that we're tired of looking at, it could be applied to a situation where the
20 | demand is from firms who are buying this excessively priced product as an input. Now
21 | the economics of looking at intermediate demand can get complicated because we
22 | start looking at demand curves of final consumers and the demand curves of
23 | intermediate firms but I'm not going to get into the technicalities of those things and
24 | just think about an example for us to consider --

25 | MS DEMETRIOU: Yes.

26 | PROFESSOR SMITH: -- of a possible -- and let me stress entirely hypothetical claim

1 on behalf of small firms.

2 Imagine we have a market where people are preparing for and sitting professional
3 examinations or some sort of exam, music examination, law examination, whatever,
4 perhaps we better not consider law examinations.

5 MS DEMETRIOU: No.

6 PROFESSOR SMITH: But we have an examination board that is managing a well-
7 accepted and accredited qualification and the examination board controls the
8 examination process and also controls the supply of teaching material, done all the
9 clearances of copyright and so on. So the examination board is in a strong position to
10 manage this whole process.

11 There are individual tutors who are operating --

12 MS DEMETRIOU: Sorry, individual tutors?

13 PROFESSOR SMITH: Individual tutors who are providing services to students who
14 are preparing for these examinations and the examination board supplies teaching
15 material to the tutors so that they can prepare the pupils for examination. And the
16 examination board is taken over by new owners who decide to exploit the monopoly
17 position and push up the prices of these. So the tutors now face having to pay higher
18 prices for the material that they use to teach their students and typically in a market
19 like this the tutors are not highly paid individuals, it's a pretty low paid profession. They
20 can't afford to absorb the cost, they have to pass on the increased cost to their pupils.
21 So the price to the pupils goes up and some pupils drop out. So the tutors lose some
22 of their market. Yes?

23 So I'm not making anything of the details --

24 MS DEMETRIOU: No, I understand.

25 PROFESSOR SMITH: -- but you're clear what the situation is.

26 MS DEMETRIOU: We're clear on the situation.

1 PROFESSOR SMITH: There are going to be three losers from these higher prices.
2 There are going to be the tutors who are going to lose income because there are fewer
3 pupils around to teach. So they're losers. If we were looking at demand curves we
4 could describe that as a demand curve. And there are going to be two types of pupils,
5 the pupils who get driven out of the market because the price is too high and the pupils
6 who can pay the higher price.

7 MS DEMETRIOU: Right.

8 PROFESSOR SMITH: And the position as you describe it of English law of damages
9 is that of these three groups two can claim for damages.

10 MS DEMETRIOU: Correct, 1 and 3 -- sorry, 1 and 2.

11 PROFESSOR SMITH: I don't know which 1, 2 and 3 are, but the tutors --

12 MS DEMETRIOU: The group that are driven out can't claim.

13 PROFESSOR SMITH: One of the groups who are driven out can't claim. The tutors
14 who have been driven out of the market can claim. They've got a reduced --

15 MS DEMETRIOU: Profit.

16 PROFESSOR SMITH: Yes. Their volume of business has reduced and that has
17 reduced their income and they can claim.

18 MS DEMETRIOU: Yes.

19 PROFESSOR SMITH: The pupils who are continuing to pay the higher price or whose
20 parents -- let's not be too tendentious. The pupils who can pay the higher price, they
21 can claim. But the third class, the people driven out of the market can't claim.

22 MS DEMETRIOU: They haven't suffered any pecuniary loss.

23 PROFESSOR SMITH: That is the position, and that's a position that the law of
24 damages should be happy with?

25 MS DEMETRIOU: Well, that's the position the law of damages takes, which is all
26 I need to show you. I don't need to convince you that -- I don't need to persuade you

1 that you think it's a good idea. I just need to persuade you that that's what the law of
2 damages says.

3 PROFESSOR SMITH: And it would be a revolution in the law of damages to change
4 that.

5 MS DEMETRIOU: It really would --

6 PROFESSOR SMITH: But I guess the man on the street might say 'roll on the
7 revolution'.

8 MS DEMETRIOU: Well, the man on the street might also say that, "if somebody hasn't
9 paid for any iCloud services, they shouldn't be allowed to come along and claim
10 damages when they haven't spent any money". Or the man in the street might also
11 say that "it would be wrong for a rich person to come and get damages because they
12 would have been willing to pay more when they didn't actually pay any money".

13 PROFESSOR SMITH: But in this case, it's not the rich people who are suffering the
14 uncompensated loss.

15 MS DEMETRIOU: No but it might be in other cases. But generally wealthier people
16 will have a greater willingness to pay.

17 PROFESSOR SMITH: Yes.

18 MS DEMETRIOU: And, sir, Mr Schaefer reminds me that the pupils that could never
19 afford tutors would have no claim for loss on any basis.

20 PROFESSOR SMITH: Yes, I take that point. I'm done.

21 MR JUSTICE WAKSMAN: So we'll go to Mr Cutting next.

22 MR CUTTING: So I think the next couple questions will go to both of you, but since
23 you're up first.

24 MS DEMETRIOU: Okay.

25 MR CUTTING: Loss of gain of benefit and asset position – I think I'm very clear on
26 what your case is. Can you take us through Liffen in that context, because my reading

1 of Liffen, but I may be misremembering it, is tortious action, I think it's a road traffic
2 accident or something like that. The plaintiff has a contract of employment, loses the
3 wages, was also getting the benefit of bed and board. Gets compensated for the loss
4 both of the wages and of bed and board, even though in the actual she has bed and
5 board for that period for free because she's staying with her parents I think. So she
6 gets damages as a result of a tort in compensation for something where her asset
7 position hadn't changed.

8 MS DEMETRIOU: Well, we say that Liffen fits with our position and the reason, sir,
9 that it fits with our position is the claimant had a loss because she had a right to that
10 board and lodging which she was going to get without paying for. So she was going
11 to receive that and that had a value. It had an objective value and she was going to
12 receive it. So we dealt with this -- we dealt with this, you can see what we said about
13 this at the last hearing. I think we dealt with this in more detail then. We've got the
14 transcript behind tab 6, page 194.

15 MR CUTTING: So in effect you're saying that she had an entitlement to --

16 MS DEMETRIOU: To a benefit in kind. She had an entitlement to a benefit in kind.
17 And here -- so she lost her entitlement to that benefit. So that's completely on all
18 fours --

19 MR CUTTING: That was restoring her assets to the position she would have been in
20 as a matter of contract.

21 MS DEMETRIOU: Exactly.

22 MR CUTTING: So it's not in your view a supply that was not obtained by virtue of the
23 tort, it was a contractual entitlement.

24 MS DEMETRIOU: Well, I -- it was -- I can't remember if it was decided as a contractual
25 point -- let me just go back to -- under the contract.

26 Yes, so she was injured but she was deprived of something that she was entitled to

1 get for free that she was -- so she had an entitlement to that thing. Not something she
2 was going to pay for, but valued differently. That's really the point. And, again, the
3 PCR relied on that case to say, well, you don't always have to have paid money. And
4 that's true. You don't always have to have paid out money but there does have to be
5 a change in asset position. And our skeleton before, so our skeleton below dealt with
6 this in more detail and we said there that, in Liffen, the injured claimant had lost her
7 employment and therefore also board and lodging provided by her employer which
8 was, we're quoting, "valued at 25 shillings a week". That valuation was not disputed.
9 The appeal concerned merely whether she had mitigated the loss by staying with her
10 father for free and it is held that she hadn't.

11 MR JUSTICE WAXMAN: I often think that really the point about Liffen, it's a res inter
12 alios acta point. It's you're entitled to this benefit which you haven't got. The fact that
13 you have got board and lodging from your father is neither here nor there. It's rather
14 like the argument that you would -- I've paid you for something and you were
15 obliged -- you've stolen my chair, you've converted my chair, which was worth £50.
16 The fact that you never sat on it or didn't like it is neither here nor there. It's that kind
17 of point, isn't it?

18 MS DEMETRIOU: Exactly right. She had an entitlement to something which had
19 an objective value which she was then not getting. So exactly --

20 MR JUSTICE WAXMAN: Or the fact that they didn't like the chair and would have
21 valued it as zero is neither here nor there. They went around telling their friends I hate
22 that chair, it wouldn't affect the fact that they would be entitled to be compensated for
23 the market value of that chair.

24 MS DEMETRIOU: Exactly right. Yes.

25 Yes, and if she'd been willing to pay a much higher sum for it, so 50 shillings instead
26 of 25 shillings, she wouldn't have been able to gain compensation for that difference.

1 MR CUTTING: So she wasn't contractually entitled to the lodging?

2 MS DEMETRIOU: I think she was under her contract of employment and the accident
3 meant she couldn't work and therefore didn't receive that contractual entitlement.

4 MR CUTTING: I'm just trying to work out whether the read across is that in the
5 counterfactual non-paying subscribers would have received more, in the same way as
6 but for the tort she would have got the bed and breakfast or lodging.

7 MS DEMETRIOU: No paying subscribers -- it's different because they don't start off
8 with a right to some asset.

9 MR CUTTING: No, the issue is not about -- I suppose the question is whether it's not
10 about the right, but it's about in the counterfactual she wouldn't have had a broken leg,
11 she would have had the board and lodging, in the counterfactual non-paying
12 subscribers would have got more for less.

13 MS DEMETRIOU: Yes, that is right. So if in the counterfactual Liffen had paid market
14 price for her board and lodging, then she wouldn't have had a claim. So it's -- I mean,
15 there is -- I think there is no read across to this. I mean, we did debate that I think at
16 some length at the first hearing, so --

17 MR JUSTICE WAKSMAN: I think the reason why Mr Cutting was going back to it was
18 because of the focus on change in asset position. I think that's why --

19 MR CUTTING: Absolutely.

20 MS DEMETRIOU: Right. So we do accept that you don't necessarily have to have
21 expended money and we accepted that at the last hearing.

22 MR JUSTICE WAKSMAN: Yes.

23 MS DEMETRIOU: But --

24 MR CUTTING: I'm just really trying to work out what the nature and extent of the
25 concept of a change in asset position is.

26 MS DEMETRIOU: I see. So if you've got an entitlement to an asset, if you have a

1 contractual entitlement to get something, and then you can no longer receive it either
2 because the contract has been breached or because in that case you've suffered
3 an accident and so can't work or can't receive that asset, then that's in a sense pretty
4 standard law that you've not received something which you had entitlement to receive
5 and as a result of the breach.

6 MR CUTTING: So, not in this case, but there might be other 102 cases where you
7 had to think about whether that applied in the context of a dominant company that
8 could not refuse to supply something, because, is it the case that if a dominant
9 company has a cannot refuse to supply, does his putative customers effectively have
10 a right to the supply such that, if that were foregone, you'd then have a right of action
11 in this way?

12 MS DEMETRIOU: If a company had a contractual right to be supplied.

13 MR CUTTING: What if they had a right under competition law not to be refused?

14 MS DEMETRIOU: Well, that's very far from this case, so --

15 MR CUTTING: It might be. I'm just trying to think -- whatever we say in relation to this
16 case will then be read in the context of other abuse of dominance cases. So I'm just
17 trying to work out what the limits are of your case and the plaintiff's case.

18 MS DEMETRIOU: Yes. So if a company was abusively not supplied, so if there was
19 an abusive refusal to supply, and the company can show that it would have suffered
20 pecuniary loss as a result that, had it been able to obtain that product, it would have
21 done X, Y and Z and made money, then that's a conventional claim for pecuniary loss.
22 If a consumer on the other hand -- well, it's quite difficult to out how refusal to supply
23 would work. It doesn't apply to consumers, so it's in a sense --

24 MR CUTTING: Well, it might do.

25 MS DEMETRIOU: Well, I don't think as a matter of law it would, because a refusal to
26 supply is where you need an input first.

1 MR CUTTING: Yes, or electricity companies. I mean, they actually have a statutory
2 duty to supply. But, absent that statutory duty to supply, presumably they'll have a
3 duty under section 18.

4 MS DEMETRIOU: Well, then if you've suffered loss as a result because you haven't
5 had electricity and that's caused you to suffer some pecuniary loss, then you would
6 have a claim. But if you didn't have electricity and you hadn't suffered any pecuniary
7 loss and you turned up and said, well -- I mean, it's difficult to see how it would work.
8 It's quite good to test arguments but this is very different because here we're talking
9 about willingness to pay above a counterfactual price, whereas, with a supply, there
10 wouldn't be any supply at all.

11 MR CUTTING: Okay. So if we go back to triangle B.

12 MS DEMETRIOU: Yes.

13 MR CUTTING: Is that a measure of a loss of utility or a loss of amenity from the
14 non-supply?

15 MS DEMETRIOU: I don't understand the difference.

16 MR CUTTING: Well, you've said very clearly it shouldn't sound in pecuniary damages.

17 MS DEMETRIOU: Yes.

18 MR CUTTING: So --

19 MR JUSTICE WAKSMAN: I think what Mr Cutting -- he's not drawing a distinction
20 between loss of amenity and loss of utility. He's asking the question, if it's not
21 quantified as a pecuniary --

22 MR CUTTING: What it's a measure of? If it's not a measure of pecuniary loss, is it a
23 measure of non-pecuniary loss?

24 MS DEMETRIOU: No. We've made all our points about non-pecuniary loss. I mean,
25 non-pecuniary loss has a particular meaning in the English law and there are various
26 categories of non-pecuniary loss which are recognised, including physical injury,

1 damages for physical injury. It doesn't fall into any of those categories.

2 So it's not a loss that's recognised by law. That's the whole premise of our strike out
3 application.

4 MR CUTTING: Well, what is it then?

5 MS DEMETRIOU: Well, it's what economists call foregone consumer surplus.

6 PROFESSOR SMITH: And what do ordinary human beings call it?

7 MS DEMETRIOU: I've no idea. I have no idea what the man in the street would call
8 foregone consumer surplus. "A person's feeling of being deprived of something which
9 they would have valued at more than they could have" -- I don't know. I don't know
10 what the man in the street -- it's not really a man in the street concept, at least not any
11 men in the street that I know.

12 MR CUTTING: You need to get out more.

13 MS DEMETRIOU: I'm obviously mixing with the wrong people.

14 MR CUTTING: Yes.

15 That's fine.

16 MR JUSTICE WAKSMAN: Okay. Anything else?

17 Well, I don't have any questions for you. Might I make a suggestion? As we've all
18 been concentrating quite hard this morning, should we take our lunch break now and
19 then we'll start with Mr Woolfe at quarter to two.

20 Thank you all very much.

21 **(12.44 pm)**

22 **(The luncheon adjournment)**

23 **(1.45 pm)**

24 MR JUSTICE WAKSMAN: Yes, Mr Woolfe.

25

26 **Submissions by MR WOOLFE**

1 MR WOOLFE: Thank you, sir. Well, in light of the exchange this morning, I'm hopeful
2 that I can be somewhat briefer than I was intending to be and can cut things down
3 somewhat. What I'm proposing to do is to dive into what we see to be the core points
4 of difference between us and the Apple and therefore I'm going to address you under
5 three major headings. The first is this Staff Working Document diagram and what it
6 actually means. There is a graph. The second is to clarify what Apple's objections
7 actually are and why we say those don't bite as a matter of law. And thirdly, deal with
8 the points that Apple makes in respect of contract law and their assertions that there
9 is some general law of damages principle that should apply in this case, that's the third
10 major heading. And then I'm going to go through and pick up a few incidental points
11 under each of the Tribunal's questions on what Apple says, but there shouldn't be
12 many of those at that stage.

13 As regards the Staff Working Document and what it means, it may be helpful if the
14 Tribunal has that open.

15 MR JUSTICE WAKSMAN: We've reproduced it in our questions, will that suffice?

16 MR WOOLFE: It will absolutely suffice. It's page 41 of the supplemental bundle, if
17 you have that there.

18 Now, Apple do say at paragraph 29 of their skeleton that they don't accept that a
19 demand curve of consumers' willingness to pay is objectively derived in any relevant
20 sense and their objection as they put it there, and I think it was maintained today, is
21 that the demand curve reflects the underlying willingness to pay of individual
22 consumers. We say this does fundamentally misunderstand what the demand curve
23 is.

24 I'm going to put five simple propositions about the graph and which we say show that
25 Apple is wrong.

26 The first point is simply to observe that the two axes on the graph are quantity and

1 price. Those are purely objective variables or dimensions. Quantities is measured in
2 units sold or purchased, price is measured in currency as a price per unit and
3 I emphasise the price per unit for a moment. The second proposition is this. The
4 demand curve plots the quantity demanded of a good at a given price. That is it simply
5 relates one of these two objective variables to the other. So on the diagram as
6 reproduced in front of you, at price P1, a quantity Q1 of goods is sold and at price P2
7 a quantity Q2 of goods is sold and that's all the demand curve is actually doing.
8 The third proposition is this, that any area on the graph, rectangle A, triangle B or
9 anything else, has dimensions in terms of P and Q, dimensions along the two axes.
10 In the same which would ordinarily refer to a rectangle as having the dimensions of
11 width and height on this graph, the horizontal dimension measures quantity and the
12 vertical dimension measures price. So if we look at rectangle A, it has the horizontal
13 dimension of Q2, because it runs from zero on the quantity axis to Q2 on the quantity
14 axis.
15 MR JUSTICE WAKSMAN: The horizontal --
16 MR WOOLFE: The quantity axis.
17 MR JUSTICE WAKSMAN: Zero up to Q2.
18 MR WOOLFE: So the length of that side of the rectangle is the Q2.
19 MR JUSTICE WAKSMAN: Yes.
20 MR WOOLFE: And it has a vertical dimension of P2 minus P1. If you look at the
21 left-hand side of the rectangle.
22 MR JUSTICE WAKSMAN: Yes.
23 MR WOOLFE: And so if you're calculating the area of that rectangle, you would write
24 it down as Q2 times P2 minus P1. That is for the fourth proposition which is this. Any
25 area on the graph represents a sum of money or money's worth and the units in which
26 you would measure area, given we're in Britain, are pounds. You simply measure the

1 area as a sum of currency. Because any rectangle has the dimensions of P and Q
2 and you are multiplying some value of P by some value of Q to get the area, the Q
3 measures numbers of units, P is price per unit and if you multiply a number of units by
4 a price per unit you simply end up with a sum of money. If we have ten boxes of
5 cornflakes at a pound a pack, if you multiply those two quantities together, you end up
6 with a quantity of £10. So analytically that's all an area on the graph is.

7 That leads to the fifth point which is there is no difference of the objectivity between
8 area A and area B. Both the size of area A and the size of area B are determined by
9 the demand curve.

10 Now, something was made of the fact by my learned friend that rectangle A is a
11 rectangle whereas triangle B is bordered by the demand curve. But nothing turns on
12 that because in fact the whole shape of rectangle A is determined by its top right-hand
13 corner. It's determined by the shape of the demand curve.

14 MR JUSTICE WAKSMAN: Just a moment, please. Just repeat that. Nothing turns
15 on the fact that A is a rectangle and B is a triangle, because?

16 MR WOOLFE: For a start, both are simply areas on the graph. But secondly, I think
17 the point that was being made was that in triangle B one of the sides of that rectangle
18 is the demand curve itself and therefore you have some variation within that triangle
19 based on the shape, the slope of the demand curve. But what I was pointing out was
20 that in fact the size of triangle A, so rectangle A rather, is also determined by the
21 demand curve because what determines the shape of rectangle A is the top right-hand
22 corner. That top right-hand corner will always be pinned to the demand curve. If you
23 change the shape and slope of the demand curve that top right-hand corner will move
24 and the whole size of rectangle A will move. So both rectangle A and triangle B
25 depend upon the demand curve.

26 The only reason Apple appears to be putting forward really to distinguish these two is

1 that in the factual situation the sales represented by rectangle A are made and in the
2 factual situation the sales represented by triangle B are not made. That's true. That's
3 the difference between the factual and the counterfactual.

4 But it doesn't make area B any less objective than area A. In the counterfactual
5 situation these are sales that are actually made. This is real consumption that would
6 happen at competitive market prices and that is the surplus value that real consumers
7 would in fact enjoy.

8 Both area A and area B represent value that at competitive prices consumers would
9 get but which they are deprived of in the factual situation where market price is raised.

10 The only real difference between the two is that the value represented by area A ends
11 up in the pockets of the supplier whereas the value represented by area B is simply
12 destroyed.

13 MR JUSTICE WAKSMAN: Just a minute.

14 Ends up with the supplier because they've been paid.

15 MR WOOLFE: So rectangle A, that's where the consumers have overpaid and the
16 supplier has got more money, whereas area B is just value that's simply lost when the
17 price is raised.

18 But that difference of where the value ends up in the factual doesn't make area B any
19 less objective, nor, and this is a key point, nor is it relevant given we are assessing
20 damages on a compensatory basis. We're not assessing damages on restitutionary
21 or disgorgement basis, where we're trying to strip the supplier of their ill-gotten gains,
22 we're assessing them on a compensatory basis where we're trying to make good the
23 wrong that was done to consumers.

24 MR JUSTICE WAKSMAN: I'm being a bit slow. After you said the only difference is
25 because the supplier actually gets more money, whereas in B the value is lost and
26 then you said that doesn't make any difference because?

1 MR WOOLFE: Because we are assessing damages on a compensatory basis. This
2 isn't an action for restitutionary disgorgement.

3 MR JUSTICE WAKSMAN: Where there would be nothing to disgorge in the B --

4 MR WOOLFE: Yes, exactly.

5 MR JUSTICE WAKSMAN: Just a moment.

6 Yes.

7 MR WOOLFE: The final point on the diagram, Apple say that the problem with the
8 demand curve is that it reflects, I think is the word my learned friend used, willingness
9 to pay. We have two objections to that. One, the word "reflects" is doing quite a lot of
10 work in that sentence. It is true you can pick a point on the demand curve and observe
11 that at that point there were a certain number of consumers who were willing to pay
12 that given price for that particular quantity. But the demand curve itself, as
13 Professor Smith points out, simply relates quantity to price.

14 The second point is this though, that if we are talking about willingness to pay, it is a
15 quantity which is inherently measured in money. It's not some abstract or woolly sense
16 of I like apricots or I like Apple. It is a willingness to hand over hard cash for a given
17 product and therefore it is inherently measurable in money. It's not something
18 non-financial to which we are arbitrarily applying a financial value. It is inherently and
19 of itself measured in money. So that's what we say the graph is and what it shows.

20 Now, turning to Apple's objections, perhaps I can just first clarify the loss for which we
21 are claiming. We do emphasise in our response, we do this in our skeleton, we've
22 done it before, that you distinguish between the actionable loss which you're claiming
23 and on the other hand the quantification of damages in respect of that loss. And the
24 loss for which we are claiming on behalf of non-paying class members is that the
25 non-paying class members have not received storage that in the counterfactual they
26 either would have purchased or would have had for free. And the consumer surplus,

1 it's in that sense, are means by which that loss could be measured and quantified in
2 the present case where it is advanced as a case on behalf of an entire class of
3 consumers.

4 If I can just take you, hopefully it will be the last time we have to look at it, you're
5 probably bored of staring at our pleading. So if I can take you to our pleading. This is
6 bundle A from the last hearing, tab 3, page 104 and as my learned friend correctly
7 pointed out, the previous paragraph pleads the claim for the overcharge on behalf of
8 the paying class members and this refers to the claims of non-paying class members.

9 Looking at 137, it identifies -- so the start of 137:

10 "But the preferential treatment abuse, class members who did not in fact pay for iCloud
11 in some parts of the claim period."

12 So those of the non-paying class members:

13 "Would in respect of that part of the claim period."

14 And then 137.1:

15 "If the valuation of cloud storage services equivalent to iCloud was higher than the
16 competitive price in the counterfactual, have purchased iCloud at the counterfactual
17 price or have purchased services equivalent to iCloud an alternative provider of cloud
18 storage at the counterfactual price and/or made use of a greater quantity of free
19 storage."

20 Now, my learned friend stressed the word there was a valuation in 137.1 and, yes,
21 that term is used there. However, that is not the loss that 137.1 itself pleads. The
22 valuation is followed by an "if". It pleads a certain condition. So if it is the case that
23 their valuation was higher than the competitive price, they would have purchased. The
24 assertion though, the loss that they suffered, was the fact that they didn't get to buy
25 iCloud at the counterfactual price and it is not being able to get the storage at the
26 counterfactual price or the free storage that is the loss that is pleaded in 137.

1 When we move to 138, the matter is somewhat different because there we plead in a
2 sense what the measure of loss is and we do plead at 138.1 that the class members
3 have suffered loss to the extent that their valuation of FSCSi -- and I apologise for the
4 abbreviation, I heard my learned friend trying to pronounce it, we'll try to come up with
5 a better pronunciation -- was higher than the price for such service that would have
6 prevailed in the counterfactual. In that paragraph we're not simply identifying the
7 consumers' valuation as a condition precedent to the suffering of loss, we are asserting
8 that that is the measure of loss in those circumstances.

9 So the key point to take from this, the loss the consumers have suffered is the loss of
10 the services and we say that that can properly be valued by reference to the consumer
11 surplus.

12 Now, I'm going to come to Liffen and so forth in a little bit.

13 Now in terms of what Apple's objection to our case is, I think Professor Smith is right,
14 it has shifted backwards and forwards somewhat. We had understood that the
15 objection as advanced in the second ground in their strike out application was that a
16 quantification -- sorry, the concept of consumer surplus was too subjective.

17 Now, at times my learned friend has been saying this, at times she's been saying it is
18 not a claim for pecuniary loss because it does not concern a change in net asset value.

19 Now, my learned friend seems to say those are two sides of the same coin. We think
20 there are two different points and I will try to answer them both if we can.

21 Now, in terms of -- can I deal with the pecuniary loss only applies to a change in net
22 assets point first. Now, we say it has never been the case that pecuniary loss is limited
23 to the situation where there is a change in net assets and in fact if we look at my
24 learned friend's skeleton for the November hearing, so that's in bundle A, tab 2, at
25 page 27 --

26 MR JUSTICE WAKSMAN: Just a moment, please.

1 MR WOOLFE: The first hearing skeleton, yes, and page 27, I think, of that.

2 MR JUSTICE WAKSMAN: Yes. Paragraph ...?

3 MR WOOLFE: Paragraph 23 and 24. So this was -- we in our response to the strike
4 out did pick up on this point, that it's being asserted that the complaint was that there
5 hadn't been a loss of a sum of money and we were making the point that in the
6 authorities there was a reference to a pecuniary loss being something that is inherently
7 susceptible to valuation in monetary terms. And this is Apple's response to our
8 position on that and they say that that is accepted but it misses the point and the
9 objection that Apple then raise is to say it's fine that the pecuniary loss means
10 something inherently susceptible to the valuation in monetary terms, the point is it has
11 to be an objective valuation. As in they don't at that stage take the change in net
12 assets is all that counts point. They go on to discuss H West & Son, Forster v Outred
13 and they go on then also to discuss at paragraph 24 the two cases on which we really
14 rely on this point, that I'm going to take you to myself now, the Liffen v Watson and
15 The Mediana, and the point they're making is not that there was no change of net
16 assets in these cases but that in these cases the damage was ascertained objectively.
17 In fact, in both cases as they correctly point out the valuation itself was not in dispute.
18 In the case of Liffen the value of the lodging I think was agreed or fixed by contract
19 and in The Mediana the value of the lightship was agreed.

20 So the point they're making now is in a sense purely about objectivity or not, they're
21 not taking the pure net assets point.

22 Now if we can actually look at those authorities itself.

23 Liffen, that, authorities bundle 10, starts at page 107 and the facts I think Mr Cutting is
24 correct in his recollection of them. So she was a domestic servant who had a contract
25 of employment under which she had board and lodging, she had wages and board
26 and lodging. She was run down I think by a taxi cab and as a result lost her job and

1 the relevant issue in the case that went to the Court of Appeal was whether or not she
2 could claim for the loss of the board and lodging.

3 Now, it is true that, when we get there, you're right, sir, that there is a res inter alios
4 acta point here, but the authority -- there's a sort of logically prior point that is there
5 before you ever get to the res inter alios acta point and we see that in the judgment of
6 Lord Justice Slesser, which is on page 106 and -- if you read his judgment from the
7 start. So the decision of the Court of Appeal was to remit it for a new trial. Okay.
8 I think it's important --

9 MR JUSTICE WAKSMAN: Sorry, Mr Woolfe, can you just bear with me one moment.

10 (Pause)

11 I am looking for -- oh, I'm sorry, I have it.

12 MR WOOLFE: It's tab 10. Starts at page 105, using the pagination on the right-hand
13 corner. I think it may be 10 of --

14 MR JUSTICE WAKSMAN: Yes, thank you very much. We've got that now.

15 MR WOOLFE: The point I was going to make was, if you look over the page, you've
16 got the essential facts in your mind, if you go to page 106, this is the judgment of
17 Lord Justice Slesser and actually they're saying is there needs to be a new trial. So
18 it's remitting the matter and it says if the judge at the new trial comes to the conclusion
19 that the plaintiff's contract with her employer was as she alleges that she should be
20 paid a certain amount of wages in cash and be given certain benefits in the shape of
21 board and lodging in kind, and he refers to some exception, there is no reason why in
22 the assessment of damages the loss of the board and lodging should not stand on the
23 same footing as the loss of cash and wages. That's point 1.

24 Then point 2, if since the plaintiff's discharge from hospital her father has provided her
25 with board and lodging in his home, that's no reason why she should not be heard to
26 say the loss of board and lodging previously provided to her by her employer was as

1 much of a loss as if she had lost the actual sum in money. That is not the res inter
2 alios acta collateral benefit point. It's not treated as relevant to the assessment of
3 damages. But there is a logically prior point, which is the one I would focus on before
4 that, which is they are willing to treat the loss of board and lodging as a loss on the
5 same terms as a loss of wages.

6 MR JUSTICE WAKSMAN: Yes.

7 MR WOOLFE: So it could have been the case for example that in respect of the wages
8 her father agreed to give her an allowance to cover the period in which she lost wages,
9 the same res inter alios acta point would arise. But there was a logically prior point as
10 to what is the loss and whether it is a pecuniary loss or not and it was for that reason
11 that we were citing Liffen.

12 Now, it's also a quite instructive fact when it comes to considering the point that is now
13 put about pecuniary loss depends on there being a change in net asset value.
14 Because if you think about a right to have board and lodging for tonight, tomorrow and
15 the day after, so if I have a right to board and lodging for tonight and tomorrow night,
16 Friday and Saturday night, in respect of Friday night I stay in the location where I have
17 that right and I make use of that right, and then the next day comes and that right in
18 the sense has gone, has evaporated. Now, the next night I don't make use of the
19 board and lodging, I go to a nightclub and I stay out all night and choose not to go
20 home. I have not made any use of that board and lodging but it has in that sense
21 evaporated. Hotels know this very well when they are operating their booking systems
22 their rooms are in fact perishable. Once the date passes they can't be sold any more.
23 And this entire period of time, in Liffen, was in the past. Board and lodging had not
24 been provided to her. If she had continued in her employment and stayed in the board
25 and lodging, she would have enjoyed it but she wouldn't have had any asset at the
26 end of that time. And in the actual fact she was deprived of that board and lodging but

1 she still didn't have any asset at that point in time. Ms Liffen's position in asset terms
2 is generally no different whether she had the accident or not. What's different is she
3 had the enjoyment of those services for a period of time. If she hadn't been injured
4 she would have had the enjoyment of those services for a period of time. And there's
5 no difference in net asset value before or after.

6 If net asset value was the touchstone, providing a loss with a pecuniary loss, then
7 Lord Justice Slesser in that case would not have been able to say there was no reason
8 why in the assessment of damages the loss of the board and lodging should not stand
9 on the same footing as the loss in cash of the wages.

10 We make a very similar point about *The Mediana*, which is in the same authorities
11 bundle at tab 9 immediately preceding. You'll see the facts of that from the headnote.
12 So that's on page 87 of the authorities bundle, sir. Do you have that?

13 MR JUSTICE WAKSMAN: Just a moment.

14 MR WOOLFE: Sorry, tab 8.

15 MR JUSTICE WAKSMAN: There it is. Great, thank you.

16 *Mediana*. Just a moment.

17 MR WOOLFE: The essential facts you get from the very short headnote straight under
18 the heading. So a lightship belonging to a harbour board and used for lighting
19 approaches was damaged in a collision caused by the negligence of the appellants.
20 The place of the damaged lightship was during her repair taken by another lightship
21 belonging to the board and maintained at an annual expense for the purpose of such
22 emergencies. So essentially a spare that was standing by and clearly they had to pay
23 for the damage. What was in issue was whether they had to pay for the loss of the
24 services of the damaged lightship during the time her place was taken by the
25 substituted lightship. And, as you'll see, the point -- if you go to page 88, at the very
26 bottom of the page you see the record of argument that was put for the appellants.

1 Joseph Walton QC and Horridge for the appellants. Do you see that, sir?

2 MR JUSTICE WAKSMAN: Yes.

3 MR WOOLFE: They said:

4 "The respondents cannot recover substantial damages for the loss of the use of the
5 Comet. A plaintiff is bound to mitigate not aggravate [...] the respondent's duty was
6 to substitute the Orion."

7 The spare ship for the Comet, the damaged ship:

8 "The Orion was lying idle and they were not put to additional expense by the use of
9 her."

10 And there was an argument about the different case decided.

11 This is the key point in the case. The other ship was literally lying idle, it was a spare
12 ship, there for those purposes and all the members of the House of Lords decided that
13 damages should be due.

14 Picking it up in the speech of Lord Halsbury and he starts off by discussing a case
15 called the Greta Holme. This is at the bottom of page 89 but he goes on to page 91,
16 starting a sentence towards the top of that page, "Now in the particular case before
17 us". Perhaps can I ask you to read that passage to yourselves, sir, down to --

18 MR JUSTICE WAKSMAN: It's page ...?

19 MR WOOLFE: Page 91, starting, "Now in the particular case before us", and if you
20 read that entire paragraph that runs over the page on to 92. (Pause)

21 It is somewhat familiar with some of the old language from the hearing of that case,
22 but the central point we're making is that the harbour board in The Mediana, there was
23 no loss of net assets. They had a spare vessel that would have been lying idle. It
24 would not have been used in any way, they would not have earned any money from
25 the use of it. They put that money to use in order to make up for the absence of the
26 damaged vessel and they were allowed to recover damages for that use,

1 notwithstanding there was no change in net asset value and the House of Lords had
2 no difficulty in awarding damages in that type of case.

3 MR JUSTICE WAKSMAN: That's another res inter alios acta point. The same thing,
4 isn't it? And he talks about why it is that someone deprived of the use of a chair can't
5 be deprived of damages on the basis of an argument that they never used the chair.
6 Why isn't this res alios – the same point?

7 MR WOOLFE: I don't think the point about the damages and the use of the chair is a
8 res inter alios acta point exactly, but there is a -- in the sense before you get to that
9 question of how much you use something, exactly what the quantification of the
10 damages should be, there's a prior question of can you claim damages even though
11 you haven't suffered any change in your net asset position? And that is the real reason
12 why the facts of The Mediana are important and none of the Lords hearing that had
13 trouble with reaching the conclusion that damages were available in those
14 circumstances.

15 MR JUSTICE WAKSMAN: Just remind me of the facts here. They made up for the
16 lack of use of the ship they should have had by using a spare ship.

17 MR WOOLFE: Yes.

18 MR JUSTICE WAKSMAN: Which was always there.

19 MR WOOLFE: It was also theirs. It was kept spare for those purposes.

20 MR JUSTICE WAKSMAN: Well, there was a change of net assets because what they
21 were deprived of was that ship that should have been delivered to them for a particular
22 period. That's what they should have had. You can't say there's no change in net
23 assets because the spare ship was always their asset. They were going to be given
24 something else.

25 MR WOOLFE: No, the facts were they had more, but they had two ships.

26 MR JUSTICE WAKSMAN: Yes.

1 MR WOOLFE: One lightship that was out on duty and one spare.

2 MR JUSTICE WAKSMAN: Yes.

3 MR WOOLFE: The one that was out on duty was collided with and had to go for
4 repairs so they moved the spare into its place.

5 MR JUSTICE WAKSMAN: That is what I meant, because absent the harm they would
6 have had their asset which they normally had, which was the other lightship that was
7 on duty but which they were deprived of having because of the collision.

8 MR WOOLFE: But in a balance sheet sense which is what I think -- you're right in the
9 sense that that is the problem, that's why they deserved some damages. But I think
10 the way my learned friend is putting the case is because in a sense there is no change
11 in the consumer's balance sheet, they haven't paid anything out for the use of a service
12 in the case we're talking about, they haven't suffered any loss. In a sense what The
13 Mediana -- the situation was they normally got to have a lightship standing by, have it
14 on standby and for this period of time they couldn't have a lightship on standby
15 because they were using it. In that sense they were deprived of the services of that
16 lightship. I completely agree with you, sir. But there was no balance sheet change in
17 their position.

18 MR JUSTICE WAKSMAN: All right. Let's perhaps not be as rigorous as using balance
19 sheet. But what I think the distinction that's being put forward by Apple is doing is
20 saying that your position -- leave aside the objective measurement question for the
21 moment. Your position is tangibly changed in some way or other. So either you
22 haven't got something that you are entitled to, whether it's a payment of money or a
23 benefit which can be measured in money. That's one possibility. Or the other
24 possibility is that you have lost something measurable in -- again, either a benefit or
25 the opportunity to make a profit if you can demonstrate that you would have made
26 a profit. Whereas -- and that's as I understand it what the net asset -- the asset thing

1 is about. How you describe it on a balance sheet may not be the best way of looking
2 at it. It's something external to you, something external to a value which you simply
3 place upon it and that, it is said against you, is the problem with your claim because in
4 circumstances where you don't have a right to something which you've been deprived
5 of, because you've already paid for it for example, and you haven't diminished your
6 assets in the sense of paying something, the only sense in which it's a loss is because
7 you've put a value on it. And that is what the law of damages is saying, that is what is
8 out with pecuniary loss, what is meant by pecuniary loss. It's obvious that pecuniary
9 loss is not limited to a sum of money. There's no doubt about that. That's the point,
10 I think, that's being put against you.

11 MR WOOLFE: I think that's helpful. When it's put on that broader basis it simply isn't
12 an objection to our claim and I'll explain why. As I said at the start, we are claiming for
13 the fact that these consumers did not get services that in the counterfactual they would
14 have got. They would have, some of them, chosen to pay in the counterfactual for
15 higher tiers of iCloud, and when they did they would have had those services. They
16 would have actually received them. And that is the tangible difference between the
17 counterfactual and the factual and that is what they have lost out on.

18 Now, then there's the question of how you actually measure that and then that possible
19 question of subjectivity will arise and that's a different question that we will come to.

20 But just on the question of "have those consumers lost something tangible", yes, they
21 have. They've lost the services which they would have got. Now, there would have
22 been a cost to them associated with purchasing those services, I fully accept that, but
23 they would have got the services and they would have paid the cost. And that is no
24 different from the board and lodging in the example of Ms Liffen. Yes, in that case it
25 was an accrued contractual entitlement that she had. In that sense it's not different.
26 Perhaps I'll take that back. She would have carried on working in return for the labour,

1 she would have paid for the board and lodging with her labour, she should have
2 received the right to the board and lodging. The wrong in Liffen was not that that she
3 was wrongfully fired, she was run down and lost her job and there was simply a
4 counterfactual point that, had she not been run down, she would have carried on
5 working and in return for working she would have got the board and lodging. In our
6 case, we say Apple has done wrongful things with the result that the price has gone
7 up. Were it not for that and a 'but for' basis, some of these consumers would have
8 paid for Apple iCloud, not with their labour but just with money. There is actually no
9 difference between the two and if you expand net assets so it simply means have you
10 lost something tangible, that's fine.

11 And we have lost something tangible, it's the services. Yes, and I'm reminded we also
12 need to remind of the possibility of free storage as well, which we say would have
13 accrued in the counterfactual.

14 MR JUSTICE WAKSMAN: Thank you.

15 MR WOOLFE: Now, can I move on to the subjectivity point. Now, you've got our
16 broad point that we simply say that the graph is not subjective.

17 MR JUSTICE WAKSMAN: Yes.

18 MR WOOLFE: Fine. Can I perhaps address you on two points really. The first is on
19 the collective action regime. I apprehend that's something that's of some importance
20 to the Panel. I just want to clarify what we say about that. My learned friend is
21 completely right. We do accept that, if there is some fundamental objection in law,
22 then simply aggregating the claims together doesn't magically make those problems
23 go away.

24 However we do, and we make this quite clear in our skeleton argument, say that there
25 are circumstances in which aggregation does make a difference and if I can perhaps
26 take you to that.

1 So this is in our skeleton for this hearing, which in my case is at tab 1 of the
2 supplementary bundle.

3 If I can pick it up at paragraph 29.

4 So this was in a sense responding to what we thought Apple's case was, but in a sense
5 perhaps take this as being our response on the 'pecuniary loss is a change in net asset
6 value only' point. So do you have this skeleton argument in front of you?

7 MR JUSTICE WAKSMAN: Give me the paragraph number again, please.

8 MR WOOLFE: Paragraph 29.

9 MR JUSTICE WAKSMAN: 29?

10 MR WOOLFE: 29.

11 MR JUSTICE WAKSMAN: Yes.

12 MR WOOLFE: And so our primary position is the loss of consumer surplus on
13 foregone volumes is a recoverable head of loss so an actionable loss in that sense,
14 whether it is an individual claim or a collective action, and we say essentially what we
15 have been arguing before you now, that the loss consists in the non-receipt of a benefit
16 or a service resulting in actual financial loss which isn't a recognised head of loss on
17 ordinary principles and we also refer in alternative to Ruxley v Forsyth and we clarify
18 at 29.2 that we are not saying the concept of aggregation in 47C means that a claim
19 can be advanced for a type of loss which is simply not recoverable as a matter of law.

20 So in a sense, if my learned friend is right that only changes in net assets are
21 recoverable and if they're also right we fall foul of that, that is the kind of objection to
22 which section 47C would not be an answer. But we do put 47C as being relevant to
23 what we understood their second ground of strike out to be, which is the subjectivity
24 point. And the point we're really making I think is summed up at -- well, perhaps
25 I should read 30.2:

26 "The collective actions regime is not merely a wrapper of a whole series of individual

1 claims. The point of the regime gives rise to a new head of loss. This is a claim in
2 collective proceeding where the loss suffered is an aggregate loss of the class."

3 And our key point is that which we're making at 30.3, which is you shouldn't start by
4 thinking, well, what would be the problem if this was a claim for an individual
5 consumer? We are advancing a claim on behalf of the class as a whole and that is
6 the action which Apple is trying to strike out, not a hypothetical individual claim, and
7 so when you are listening to anything that Apple has to say about subjectivity, you
8 have to read it the context of they're trying to strike out a claim for aggregate damages.
9 If I can just reinforce that by taking you to some further passages.

10 So the first is the Merricks Supreme Court judgment and that is at tab 32 of the original
11 authorities bundle. The judgment starts at page 924 of that bundle and where I want
12 to take you to within it is the judgment of Lord Briggs and then the judgment also of
13 Lord Sales and Lord Leggatt. So within that can I take you, please, to page 949. So
14 it's paragraphs 57 and 58 which -- sorry, on my bundle numbering is -- it is 946, using
15 the numbering at the bottom right-hand corner.

16 MR JUSTICE WAKSMAN: Yes.

17 MR WOOLFE: So at paragraph 57 Lord Briggs is making the point that -- he says:
18 "The pursuit of a multitude of individually assessed claims of damages, which is all
19 that is possible in individual claims under ordinary civil procedure, is both burdensome
20 for the court and usually disproportionate to the parties."

21 And then an interesting point:

22 "Individually assessed damages may also be pursued in collective proceedings, but
23 the alternative aggregate basis radically dissolves those disadvantages, both for the
24 court and for all the parties."

25 He generally points out defendants are only interested in the overall i.e. aggregate
26 liability. And then at 58 he refers to the compensatory principle. He says:

1 "It is another important element of the background against which the statutory scheme
2 for collective proceedings and aggregate awards of damages has to be understood.
3 But in sharp contrast with the principle that justice requires the court to do what it can
4 with the evidence when quantifying damages, which is unaffected by the new
5 structure, the compensatory principle is expressly, and radically, modified. Where
6 aggregate damages are to be awarded, section 47C of the Act removes the ordinary
7 requirement for the separate assessment of each claimant's loss in the plainest terms.
8 Nothing in the provisions of the Act or the Rules in relation to the distribution of a
9 collective award among the class puts it back again. The only requirement, implied
10 because distribution is judicially supervised, is that it should be just, in the sense of
11 being fair and reasonable."

12 So Lord Briggs is marking a very sharp distinction as regards to the proof of loss at
13 least between individual and collective proceedings and you can't simply assume
14 something that would be a good objection to an individual award would be
15 an objection to an aggregate award.

16 It may be, it may not be, but you have to assess it on its own terms. That's the point
17 to make.

18 If I can expand that by reference to page 955 and this is now the position of Lord Sales
19 and Lord Leggatt who gave a separate judgment. Yes, if we look at paragraphs 94
20 and 95. In the interests of time if you could read paragraphs 94 and 95 to yourself and
21 then I'll make --

22 MR JUSTICE WAKSMAN: Just a moment.

23 MR WOOLFE: So page 955. Paragraphs 94 and 95. (Pause)

24 MR JUSTICE WAKSMAN: Yes.

25 MR WOOLFE: And the point I want to make is the interesting contrast between
26 paragraph 94 and 95. One purpose is that you can simply quantify some things in an

1 aggregate basis that you can't do on an individual basis and that's a straight and more
2 straightforward point and that may indeed be enough for us. But at paragraph 95 he
3 is making a separate point which is that paragraph 47C may allow liability to be
4 established on class-wide basis so in fact loss as an element of the cause of action is
5 also now an element which is to be assessed on an aggregate basis.

6 So this is not simply us saying, "well, the fact we have lots of consumers makes this
7 easier to quantify". That is true. It is also that the element of a cause of action which
8 Apple have to try to strike out is an assertion of aggregate loss and an aggregate loss
9 is -- in a sense this is why the diagram is the relevant because it is inherently
10 something that can be valued in that way.

11 In order to succeed on the strike out, Apple, it's not enough for them simply to observe
12 that it will be difficult for us to prove something at trial. That is a summary judgment
13 type point. They actually have to strike out an element of our cause of action and what
14 I'm trying to point out is the element that they're trying to strike out is an assertion of
15 aggregate loss and therefore when they're putting forward the subjectivity objection,
16 you're moved on from the net asset objection to the subjectivity objection, when they're
17 putting that forward they have to explain why that is a valid objection to an assertion
18 of loss as an element of the cause of action that is put forward on an aggregate basis.

19 And time and again what Apple have tended to do is to veer back into talking about
20 individual consumers but that's not what this case is. This case is an aggregate claim
21 and that's the point that we're seeking to make at paragraph 30 of our skeleton.

22 Now, there was actually nor -- I'm afraid that we cite an authority at paragraph 30.2 of
23 our skeleton that didn't actually make its way into the authorities bundle. So I'm going
24 to hand up a copy of that now, if I may, and just take you to the relevant paragraphs.

25 So this was another Merricks judgment. This was in the Court of Appeal, but to be
26 very clear about this, this was not -- this was a later judgment than the Supreme Court

1 judgment. So the Supreme Court judgment was the judgment about certification in
2 2020. This is a judgment of the Court of Appeal in 2024 on a different point and it was
3 a case in which my learned friend appeared so I apologise if I get anything about the
4 facts a bit wrong. As I understand it, it related to a question of how applicable law was
5 to be determined in the proceedings and this was applicable law under the old 1995
6 Private International Law (Miscellaneous Provisions) Act, which as you will recall had
7 a primary rule under section 11 and that could be displaced under section 12 if on the
8 basis of all the circumstances a different law should be applied. And as I understand
9 the issue the question was whether you had to carry out that exercise separately in
10 respect of individual claims or whether you could in a sense get to a different result by
11 looking at it on the aggregate basis. And if I take you briefly to page 278, using the
12 numbering within this.

13 You'll recall the argument that was being put in fact by my learned friend at
14 paragraph 90 and it was submitted that not only was this case all about the loss
15 suffered in the UK by a large class of consumers but it was a collective claim seeking
16 an aggregate award and Mastercard was wrong in saying that collective action was a
17 procedural mechanism, a wrapper, and she refers to paragraph 58 of the Supreme
18 Court in Merricks, the quote there. And at paragraph 91 she submitted that this
19 demonstrated that it was not correct that this is simply an accumulation of different
20 individual claims but a claim for aggregate loss suffered by the class not for loss
21 suffered by an individual class member.

22 That's the submission. And then can I take you to the court's acceptance of that. That
23 is on page 291 at paragraph 148.

24 MR JUSTICE WAKSMAN: Just a moment, please?

25 MR WOOLFE: Sorry?

26 MR JUSTICE WAKSMAN: 148, yes.

1 MR WOOLFE: Paragraph 148. And this is the judgment of Lord Justice Green,
2 I think, which is on behalf of the whole court:

3 "I agree with Ms Demetriou QC that it is wrong to describe the collective proceedings
4 regime as a wrapper for a whole series of individual claims, each of which needs to be
5 considered separately for the purpose of this issue. As the passages from the Merricks
6 judgment in the Supreme Court refers to [the passage I have just shown you] the
7 collective proceedings regime has effected a radical change in the law under which
8 the claimant is not identified other than in the definition of the class and any damages
9 will be assessed on an aggregate basis."

10 He goes on to say:

11 "Given the issue of restriction of competition has been decided by the Commission
12 and this is a follow on claim by the class for aggregate damages, the issues of
13 causation and quantum are the most significant issues in the proceedings as they are
14 constituted [as aggregate issue] and those issues are clearly most closely connected
15 with the respective UK jurisdiction, it is substantially more appropriate for the issues
16 to be determined by English law."

17 So what he is doing is in effect then the aggregate nature of this claim is not just simply
18 a matter relevant to quantification, it actually determines how you determine applicable
19 law. Because the issues of causation and quantum are aggregate you can apply
20 Section 12 of the 1995 Act to them in aggregate. So it is a freestanding type of claim
21 and that underlines the point that what Apple has to do as opposed to just a this is not
22 pecuniary loss -- if they are relying on subjectivity they have to show why that is an
23 objection to a collective action advanced on this basis and we say they haven't done
24 that.

25 MR JUSTICE WAKSMAN: Yes, thank you.

26 MR WOOLFE: Further insofar as they rely on older authorities of English law for some

1 principle of objectivity, anyway you have to ask yourself whether those should properly
2 apply to this type of claim.

3 I am going to expand on that point a little more, if I may, which I think is the final
4 crosscutting point I was going to do before a few individual points.

5 Apple place a great deal of emphasis on contract law in their skeleton argument and
6 they make assertions about what the law of damages requires, in a sense taking the
7 contract example as being the core example. In respect of that I do have -- this will
8 take me about ten minutes to do, I would think. Do you want to take a break now?

9 MR JUSTICE WAKSMAN: No that is fine because we started at quarter to 2.

10 MR WOOLFE: I suddenly remembered that.

11 MR JUSTICE WAKSMAN: So we will do the usual hour and a quarter. So if this will
12 take you ten minutes, after that would be a good point to take our break. Thank you.

13 MR WOOLFE: Thank you. There are two points I want to make about that. One is
14 about why that's the wrong approach. It's wrong to start with contract law, establish a
15 rule in relation to that and then say that is the law and it must apply to competition law.
16 That's the first point I'm going make. The second is I do have a point of detail about
17 their contract stuff.

18 So if I can do the first point. The Tribunal should be careful about extrapolating from
19 how a loss is assessed in one cause of action to another.

20 In BritNed, which I took you to at the first hearing, Mr Justice Marcus Smith said, this
21 is at authorities bundle 29, page 776, perhaps we should go there. That's the start of
22 the judgment.

23 Sorry, it's page 776 and it's paragraphs 245 to 247 and the point he's making:
24 "It is necessary to be exceedingly careful in framing what constitutes actionable harm."
25 And he refers to the fact that in some cases loss of a chance can be recoverable where
26 sometimes it isn't.

1 426 he quotes Article 101, which is the provision he was concerned in that case, but
2 then at paragraph 427 he says:

3 "When seeking to articulate what constitutes actionable harm, it is necessary to have
4 regard to the object and scope of the statutory duty imposed. In this case the object
5 and scope of the provision is the preservation and protection of competition from
6 collusive efforts to undermine it. This purpose must inform the gist or actual damage
7 that a claimant must show when bringing a private action for damages."

8 And then he goes on to consider some points about the cartel cases. It's the simple
9 point of principle that this is a different cause of action from breach of contract and in
10 deciding what constitutes actionable harm here, you need to look at that by reference
11 to the purpose and scope of the tort, not by reference simply to a different cause of
12 action.

13 In terms of specifically the purpose of the chapter 2 prohibition, which is what we rely
14 upon, that is dealt with by Lord Justice Green in the Gutmann v Trains Court of Appeal
15 case. That is authorities bundle tab 37 and at page 1162 of the authorities bundle,
16 paragraph 93. 162 using the numbering at bottom right-hand corner. In the PDF it's
17 1170, but 1162 is the big black numbering.

18 MR JUSTICE WAKSMAN: 1162. Paragraph?

19 MR WOOLFE: 93. And really it's just the first three sentences, I think, of that
20 paragraph. What he is pointing out that is that the chapter 2 prohibition or article 102
21 are essentially concerned with consumer unfairness. And that is the purpose, the
22 statutory purpose -- a statutory purpose of chapter 2 prohibition, which you should
23 bear in mind. That goes along with the point about section 46.

24 If I can very briefly do what I was going to say about Apple's reliance on the contract
25 example. We do say that Apple overstates the extent to which the law of contract
26 values losses solely by reference to market price. And there is one authority I want to

1 show you on that, which I'm hoping has made its way into the supplemental authorities
2 bundle, so the authorities bundle to today's hearing. It should be in that bundle at
3 tab 6.1. This is the new authorities bundle, not the authorities bundle from November.

4 MR JUSTICE WAKSMAN: I don't have a 6.1. Do you have a page number?

5 MS DEMETRIOU: I have spare copies. This was an update to the bundle --

6 MR JUSTICE WAKSMAN: I haven't got that.

7 MR WOOLFE: We have copies here if you need it. There we are.

8 So the facts of case is the contract was for delivery of a cargo of wheat on standard
9 full terms, GAFTA terms, Grain And Feed Trade Association terms, and the contract
10 was repudiated in anticipation of an export ban that was about to come into force.
11 That is what the case is about. The detail of the facts is not important. What I want to
12 take you to is two passages. First of all, what Lord Sumption said about the
13 significance of market valuation and secondly what Lord Toulson said about the
14 reasons why you do commonly use market valuation, because I think those inform the
15 extent to which this is really a fundamental principle. And I should note all the other
16 Supreme Court Justices agreed with both Lord Sumption and Lord Toulson, so they
17 are both equally authoritative and they agreed as to the result.

18 So in Lord Sumption's judgment, if you look at pages 99 -- start on 993 at
19 paragraph 14 at the bottom. It's paragraphs 14 and 15 that I want to take you to.
20 Sorry, 14 down to 16 rather. Paragraph 14 he begins by restating the fundamental
21 compensatory principle. He says:

22 "The fundamental principle of the common law of damages is the compensatory
23 principle which requires that the injured party is so far as money can do it to be placed
24 in the same situation with respect to damages as if the contract had been performed.
25 In a contract of sale, where there is an available market this is ordinarily achieved by
26 comparing the contract price with the price that would have been agreed under a

1 notional substitute contract assumed to have been entered into in its place, at the
2 market rate, but otherwise on the same terms.

3 He goes on to cite section 51 of the Sale of Goods Act, which in fact was the provision
4 that Apple cited in their strike out application as embodying this principle.

5 The Chairman I'm sure will be very familiar with this provision.

6 Section 5 1(1) gives an action. Section 52 says that measure of damages is the
7 estimated loss directly and naturally resulting in the ordinary course of events, and
8 section 51(3) where there is an available market the measure of damages is prima
9 facie the difference between contract price and market price.

10 Then he goes on to say at paragraph 16:

11 "Sections 50 and 51 reproduce the corresponding provisions of the 1893 Act and
12 reflect the common law principles which had been established at the time of the earlier
13 Act.

14 "Section 51(2) states the compensatory principle in the context of a seller's
15 non-delivery ...(Reading to the words)... where there is an available market, but it is
16 not so much a rule as a technique which is prima facie to be treated as satisfying the
17 general principle expressed in (2)."

18 So in Lord Sumption's account it's not the market rate is given some sacrosanct status,
19 it is simply a technique that is commonly used. The fundamental principle given in the
20 case of non-delivery of goods under the Sale of Goods Act is -- that is stated in 51(2).

21 Now, Lord Toulson goes into this in slightly more depth.

22 If we start on page 1011 and what I want you to do is, in the sense, I want you to read
23 paragraphs 76 through to 82.

24 MR JUSTICE WAKSMAN: Sorry, 76 through?

25 MR WOOLFE: 76 through to 82. It's a full page.

26 MR JUSTICE WAKSMAN: Right. We'll do that.

1 MR WOOLFE: Sorry. 1011. (Pause)

2 If I can perhaps start to make the point.

3 MR JUSTICE WAKSMAN: Just bear with me. Yes.

4 MR WOOLFE: So the point I want to take in paragraph 79, which is -- really 79 through

5 to 81. What Lord Toulson is doing, he's situating the reason for adopting market value

6 in what is commonly called the duty to mitigate. He's saying essentially because

7 somebody doesn't deliver you goods but there is an available market you have the

8 option of going into the market and buying substitute goods as an alternative. And the

9 seller who failed to deliver can't be held liable for losses that you could have avoided

10 by going and purchasing substitute goods in the market and that is the substantial

11 rationale for why market value is used. As he says at paragraph 79, the rationale is

12 that in such a situation the measurer represents the loss which may fairly and

13 reasonably be considered as arising naturally from the breach of contract. And at the

14 bottom of that paragraph, the availability of a substitute market enables a market

15 valuation to be made of what the innocent party has lost.

16 At paragraph 82, the point he stresses there. First of all, this principle of using market

17 valuation there presupposes the existence of an available market in which to obtain a

18 substitute contract. Secondly it presupposes the substitute contract is a true

19 substitute. And thirdly, and the most important point, the purpose of the exercise is to

20 measure the extent to which the claimant is or would be financially worse off. So like

21 Lord Sumption this measure of damages is not fundamental, it's simply a technique

22 which is commonly used which arises in the situation where the buyer of commodity

23 goods has the option of entering an available market and buying a substitute.

24 Now, that is in a sense the kind of case that Apple is positing in their breach of contract

25 example. What they say is, if I can perhaps briefly turn to their skeleton before we

26 break. So in their skeleton argument for this hearing at paragraph 11 they are

1 | positing -- well, at paragraph 8 they are positing a failure to deliver goods. Having
2 | agreed to sell an apricot to each, they say Xavier fails to deliver. Each individual has
3 | a claim for breach of contract against Xavier, what is their loss. They refer to what
4 | an economist might say. They say tender losses otherwise encompasses for a
5 | pecuniary loss which reflects subjective not objective value, the difference between
6 | the claimant's asset position in the factual case and the counterfactual. They say at
7 | 11 each individual has been deprived of the same thing, an apricot.

8 | I have to read this quite carefully. If the objective value of the apricot is 50p, then each
9 | individual has suffered the same primary loss, the difference between the 40p they
10 | agreed to spend and the 50p value and they refer to the business and that example,
11 | having a consonant loss of profit. And importantly they have a footnote 2, and they
12 | say -- they assume the agreed price was not actually paid, so the money had not been
13 | handed over, that would also be recoverable, they say we ignore the impact of
14 | mitigation in these examples.

15 | So the way Apple are framing this example is to say an apricot has an objective view
16 | of 50p and mitigation doesn't matter. And they're using that to try to rebut economist,
17 | saying no, the law takes this view, the apricot has an objective value, the duty to
18 | mitigate is irrelevant. The economist with his measurement of consumer surplus can
19 | get lost.

20 | Now, actually what Lord Sumption and Lord Toulson are saying is, the reason why
21 | they would only get 10p in damages is because they're contracted to buy an apricot
22 | for 40p and when it wasn't delivered they had the option of going into the market and
23 | buying another apricot for 50p and that is where the 10p comes from. It is not some
24 | fundamental objective value to the apricot or some fundamental principle of how
25 | apricots are to be valued. It's simply that they had an outside option to go and buy the
26 | apricot. Now, in our case the loss to non-paying -- if you don't state the contract

1 example correctly, you can easily draw an analogy to our case that isn't there.
2 The loss to non-paying class members doesn't arise from non-delivery of goods under
3 a contract. It arises from the fact that Apple has raised the price of iCloud above the
4 level that would have pertained in the absence of the anti-competitive conduct, so that
5 the price for iCloud is more expensive than the non-paying class members are willing
6 to pay.

7 The consequence of that is that non-paying class members don't purchase and they
8 lose out on those services. Unlike in Apple's contract example, non-paying customers
9 or class members cannot mitigate that loss by purchasing an iCloud in some available
10 market. There is no available market for iCloud other than at the price it is provided
11 by Apple. And Apple --

12 MR JUSTICE WAKSMAN: Just -- sorry.

13 MR WOOLFE: Apple doesn't offer iCloud at a price which enables the non-paying
14 customers to mitigate this head of loss.

15 So in a sense there is a fundamental difference between their breach of contract
16 example and ours which is the availability of that option to mitigate and that is actually
17 what drives the quantification of loss, not that an apricot somehow has an objective
18 value of 50p.

19 Now --

20 MR JUSTICE WAKSMAN: Is that a convenient moment?

21 MR WOOLFE: It is a convenient moment. There will be a small miscellany of points
22 coming after this.

23 MR JUSTICE WAKSMAN: That's helpful. Thank you.

24 **(3.07 pm)**

25 **(A short break)**

26 **(3.19 pm)**

1 MR WOOLFE: You'll be relieved to hear I think I only have two more points I want to
2 touch on and it should only take five to ten minutes.

3 MR JUSTICE WAKSMAN: Very helpful. Thank you.

4 MR WOOLFE: The first point is to pick up on a point that Apple has made in respect
5 of question 2. My learned friend also made it several times on her feet today. So that
6 is in their skeleton argument for this hearing at paragraph 34. So tab 2, page 29 of
7 the bundle for today. And they say there that it would be unconscionable that those
8 with the lowest willingness to pay, generally the least well off, if they couldn't establish
9 liability or awarding them lower damages in consumers with a higher willingness to
10 pay. And the point that was made by my learned friend several times today on her
11 feet was that if you have some good that's the subject of anti-competitive action, if one
12 person has a valuation of it at £10 and somebody else values it at £2,000, why should
13 be person who values it at £2,000 get so much more.

14 The point that is being put is this would unfairly favour the wealthy and this would be
15 unconscionable under the regime.

16 Now, willingness to pay may or may not be correlated with wealth but if we accept
17 Apple's premise for the moment, it's important to note that what they're doing is
18 zooming in on the effect within the non-paying class. The non-paying class are those
19 people who valued iCloud at less than 99p. 99p was the first paying tier. And so if
20 those people had a much higher willingness to pay, they're no longer a non-paying
21 class member, they would be a paying class member.

22 MR JUSTICE WAKSMAN: Just run that past me again. I didn't quite understand it.

23 MR WOOLFE: So what Apple is doing is saying is that our approach would award
24 more damages to those with a higher willingness to pay, wealthier people. My point
25 is to say it only -- this point only applies up to the point where somebody's willingness
26 to pay is high enough that they in fact do purchase the goods in question because the

1 moment you have a class member who values iCloud at a pound, they in fact buy
2 iCloud for a pound.

3 MR JUSTICE WAKSMAN: Because someone who putatively would value it at -- I will
4 use different figures -- a thousand pounds, would obviously have been able to and
5 would have paid the original excessive price.

6 MR WOOLFE: So it wouldn't be a non-paying class member at all.

7 The non-paying class members are -- this cohort of non-paying class members are
8 therefore precisely those with a lower willingness to pay, who are on Apple's logic
9 likely to be less well off. An Apple strike out -- Apple thinks it is so unconscionable
10 that within this cohort of less well-off class members that they should get differential
11 amounts, that some should get a penny and some should get 98p, is that is so
12 unconscionable that all of them should get nothing. And whether you realise that that
13 is the implication of Apple's point, you realise what a bad point it is. So that's my
14 objection to that.

15 MR JUSTICE WAKSMAN: Yes.

16 MR WOOLFE: Then my second point was in relation to question 3 and free storage
17 because Apple picked up on a point about paragraph 3 of our skeleton argument and
18 my learned friend went to that. So paragraph 16 is on page 11 of our skeleton
19 argument where we make a point about the fact that Apple has chosen to structure
20 the iCloud product with an entitlement to free storage and we say that it indicates that
21 Apple considers that some proportion of customers do have a valuation willingness to
22 pay for cloud storage which is greater than zero but less than the paying tiers of iCloud.
23 Now, just to clarify what we do mean here. We're under some attack. Apple has
24 chosen the level of storage that is provided for free, which is five gigabytes. It has
25 also chosen the level of storage to be provided at the first paying tier and it has decided
26 on the price for that first paid tier and indeed it's set the level of storage to be provided

1 and the prices of all the subsequent tiers. For the Tribunal's note, those are all set out
2 in the table under paragraph 65 of our Claim Form which is on core bundle A, tab 3,
3 pages 65 to 66 and we think it's likely that Apple probably initially set those levels and
4 prices based on some form of assessment of what consumers were willing to pay for
5 very low levels of storage and what they were willing to pay for incrementally higher
6 levels of the storage.

7 This may well be or have been based on market research. We also note that Apple
8 has been offering iCloud for well over a decade now, I believe, and it has been able to
9 observe customer behaviour. They will have been able to observe the extent to which
10 customers transition through the tiers and start to pay for storage for the first time and
11 the extent to which they begin to pay for higher tiers. So Apple's ongoing assessment
12 of its pricing structure and what it offers for free is likely to have been informed by real
13 world data over time.

14 In fact we know for a fact, and we plead, it's set out in that table I just referred you to,
15 that in June 2023 the monthly price for 50 gigabytes, which was the lowest tier, went
16 up to 79p to 99p, and Apple will have been able to observe in the data the extent to
17 which they made a difference to people beginning to sign up for storage. That is
18 precisely the kind of data -- the fact that Apple structures its product in that way, has
19 a free tier and then payment begins to kick in implies they know the value of their own
20 product. And to be blunt about it, this is a product which generates billions of dollars
21 of revenue each year. It is I think between 1 and \$2 billion US worldwide. We don't
22 think it is likely in that context that Apple has set its tiers and pricing simply by pulling
23 numbers out of a hat. It is a highly sophisticated commercially entity. Apple has not
24 had to give any disclosure but that is the type of disclosure that Mr Hughes would seek
25 and would seek to use, to quantify, and if you're looking at any question of whether it's
26 an unduly subjective form of analysis, you can be very cautious on dismissing it on a

1 strike out basis when it may well be informed at trial, both by that kind of disclosure,
2 Mr Hughes' expert evidence based on that kind of disclosure, and you can see the
3 actual analysis that he would undertake and you can judge for yourself whether that
4 is unduly objective and indeed you would have the content of whatever Apple's own
5 expert economist says in response and it would be, we say, wrong in principle to
6 decide an important point of law, point of approach, as to whether or not these type of
7 damages are available on a strike out basis when it's not informed by that kind of
8 concrete evidence and analysis. That's everything I wanted to say.

9 MR JUSTICE WAKSMAN: Thank you. We do have some questions, and again I'll
10 start with Professor Smith.

11

12 **Questions from THE TRIBUNAL**

13 PROFESSOR SMITH: I'll hopefully be quite brief, but on the issues that I have raised
14 with Ms Demetriou, can I just first of all ask the question we asked Mr Demetriou, if we
15 have a customer that is willing paying a price of £9 and ceases to pay when the price
16 goes up to £10 and on her analysis thereby loses entitlement to a damages claim, do
17 you think that that customer is better off at £10 or worse off at £10?

18 MR WOOLFE: We are very clear they are worse off when the price goes up from the
19 £9 to the £10 and we fully agree with what you said. This is not simply an economist
20 point. An economist may put that in terms of a graph and if we look in terms of a graph
21 and that's super, we're happy with that. but it is also a man in the street point, because
22 when there is inflation and inflation means the prices in the shops go up, but people's
23 wages don't go up, say take the price of eggs, if it goes up and people can no longer
24 afford certain things, they don't think oh goody, I'm not spending £1.50 on a packet of
25 eggs -- I may be betraying I don't know the price of eggs -- they think I'm poorer, I am
26 less well off, I can't afford eggs anymore. And so it is a man in the street point. He's

1 worse off.

2 PROFESSOR SMITH: Just a few moments ago you were discussing in the Apple
3 skeleton the paragraphs on page 3, paragraphs 8 to 12 on breach of contract and why
4 that was, as I understood it, in your view not a helpful way to look at this issue.

5 But on the next page Apple, in paragraphs 13 to 18, discuss a breach of the Chapter
6 One prohibition and what their analysis would be in that case.

7 I'm not clear why you -- you haven't commented on -- having said that the analysis on
8 page 3 is not really apposite for this case, which I understand you have nothing to say
9 about the two pages that do seem a bit more relevant.

10 MR WOOLFE: The reason is that in a sense these then embed some of the errors
11 which we say creep into the analysis. So paragraph 15, they assert that this is in a
12 sense the real difference, they assert that who has suffered a pecuniary loss, the
13 answer requires comparing each individual's asset position in the factual and the
14 counterfactual case, and that's where we part company from them. We say that's not
15 the test of whether pecuniary loss has been suffered and that then affects everything
16 else they say under this.

17 So 16.1, they say neither Adam, Becky nor Doug lost or gained any assets as they
18 didn't purchase an apricot. We agree they didn't lose or gain any assets but we don't
19 think that is the relevant test and also it embeds in a sense the more subtle but
20 important error in paragraph 17 where they say in the counterfactual all individuals
21 would have spent 50p on an apricot with an effective market value of 50p. Now, I take
22 issue with the words "objective" there because it's not necessarily wrong, but it does
23 start to mislead.

24 The point is simply that within the counterfactual they would have spent 50p, because
25 that would have been the market price in the counterfactual. Labelling that as
26 somehow the objective price is where the error starts to creep in, where you start to

1 | move from thinking about somehow that this has an objective sort of value in itself of
2 | 50p whereas actually the point is just that that is the price that would have pertained
3 | in the counterfactual full stop and it's when you appreciate that, as our case is not in a
4 | sense this, this is -- well, the point is that these people in our case didn't have the
5 | option of mitigating by going out into the market and purchasing an alternative apricot.
6 | So we don't think the 50p is -- the counterfactual market value may be a relevant part
7 | of the analysis, but you don't just stop at that point and say that is the objective price.
8 | You plug it into the analysis and then you churn it through. Sorry, I didn't put that very
9 | well.

10 | PROFESSOR SMITH: And I think given the time I'll skip over confirming what
11 | I understand your position would be on the pharmaceutical cartel. I'm assuming that,
12 | as the price rises, the losses rise both for those who stay in the market and those who
13 | leave the market.

14 | MR WOOLFE: Yes.

15 | PROFESSOR SMITH: Am I right to assume that on the question about the collective
16 | claim from small producers, small profit makers, where I think with agreement there
17 | are three effective classes.

18 | MR WOOLFE: Yes.

19 | PROFESSOR SMITH: In your analysis all three effective classes would have a claim
20 | for damages.

21 | MR WOOLFE: Yes, it's the Turnbull example where you have -- I drew a grid with
22 | stays in the market, leaves the market, tutors and pupils, if you like, in two different
23 | classes and the point was that Apple was saying that pupils who leave the market
24 | have no claim but tutors who leave the market do have a claim. We say they would
25 | both have a claim in those circumstances. Yes.

26 | MR JUSTICE WAKSMAN: That is my understanding of your position. I just wanted

1 to be clear. I'm done.

2 MR CUTTING: So I'm doing this partly so that I test whether I'm understand what
3 you're saying. But if we sort of transmogrify what you said in relation to the triangle B,
4 I suppose the question for you is similar to the question I put to Apple, which is what
5 is triangle B measuring in the context of the loss and how does that translate into the
6 alternative values absent a market?

7 MR WOOLFE: Triangle B -- let us it in front of us. So that's tab 3 of the supplemental
8 bundle, page 41. So both -- can I answer that partly by also labelling the triangle that
9 sits above rectangle A.

10 MR CUTTING: Yes. Let's call that C.

11 MR WOOLFE: Let's call that C. Why not?

12 Now everything that sits above the line P1 in the counterfactual, so it's at the lower
13 price, represents value that the consumer gets from the product and that's A plus B
14 plus C, and in the counterfactual, where a sort of competitive price pertains, all that is
15 a value that consumers enjoy.

16 What happens when the price moves from the counterfactual to the factual price, it
17 goes from P1 to P2? That nice big triangle, A plus B plus C, gets fractured and goes
18 three ways and A goes to the pocket of the producer, C stays in the pocket of the
19 customers who stay in the market and B is value that is lost. So you have to look at
20 what it is -- in a sense you shouldn't look at what it is in the factual where it disappears,
21 you look at what it is in the counterfactual, where a price is P1, and in that
22 counterfactual it is no different from A or C. It is a value that is enjoyed by the
23 consumer.

24 Then in the factual world that goes three different ways, but all of A, B and C are the
25 same thing in the counterfactual. It's all just value that is enjoyed by the consumer.

26 So in our case it would be the loss of the benefit of iCloud storage.

1 MR CUTTING: So how are we valuing the loss to the consumer in scenario 2 when
2 the price goes from £9 to £10?

3 MR WOOLFE: So this is scenario 2 in the --

4 MR CUTTING: Yes. I mean, following Professor Smith's questions this morning.
5 When the price goes from £9 to £10, and that last consumer cohort stops buying, how
6 are we valuing what they've lost?

7 MR WOOLFE: Well, if you were doing it on the basis of this graph, you would be
8 having in a sense P_1 would be 9, P_2 would be 10 and so the price -- the dimensions
9 of triangle B are given by P_2 minus P_1 . Sorry, it's half -- it's all formula of a triangle.
10 You would calculate it as being a half times, open brackets, P_2 minus P_1 times
11 by -- sorry, close brackets, times by Q_1 minus Q_2 , close brackets. I hope,
12 Professor Smith, I've got that right.

13 But that is all you were doing and you multiply those together but that is still
14 fundamentally multiplying something that has the dimensions of a quantity, a number
15 of units, by something that has the dimensions of price per unit.

16 MR CUTTING: And absent the class action regime --

17 MR WOOLFE: Yes.

18 MR CUTTING: -- that's an action that that customer would have, is it?

19 MR WOOLFE: So we do say that actually that could be brought in the absence of the
20 class action regime in principle. Now, clearly, if you had one individual turning up to
21 the court and saying I really like whatever the product may be, Kellogg's Cornflakes,
22 there's going to be huge problems of that being self-serving and how do you test one
23 person's willingness to pay in any real sense and perhaps you can observe their
24 behaviour and perhaps you can see that but it's going to be very difficult for the reason
25 Professor Smith gave. If you had a large cohort for which you can draw a demand
26 curve, then you can do this kind of analysis. I think this is right, you don't actually have

1 to cover all consumers in a market to do this. You just have to have a hearing group
2 of consumers you can measure it for. So in principle you could perhaps do it.

3 But the difference that the aggregate damages regime makes is that you are moving
4 from having to assess each having to prove their loss on an individual basis to you
5 can prove loss on an aggregate basis. The element of the cause of action is aggregate
6 loss and the quantification is an aggregate basis and that also means that you can do
7 it in this way.

8 MR CUTTING: Okay. So then I'm not sure whether this follows on or whether it's
9 an independent question. But if we think about your argument that there's no market
10 price for the alternative acquisition of the iCloud service because there's only one price
11 and these customers haven't chosen to pay it, so you're saying nevertheless we have
12 to aggregate in some way or the combined willingness is to pay to come up with a
13 value of damage, I think.

14 What is that measuring if it's not a loss of amenity rather than a non-supply and, if it's
15 a loss of amenity, doesn't that suggest that it's a non-pecuniary loss?

16 MR WOOLFE: So it is -- again, I think it's perhaps worth looking at the graph, because
17 it's worth thinking about in a sense the fundamental limit on what can be claimed or
18 given by what it is reasonable for the consumer to do to place a limit on the loss they
19 suffer. If you look at the graph, for those who are in rectangle A, because they still
20 value this -- everybody who's in rectangle A values the product at at least level P2, the
21 higher line, and so, although the price has gone up, it's not reasonable for them to not
22 to purchase the product but that would to expose them to the loss in rectangle C.
23 What's reasonable for them to do is to pay the inflated market price and so that is the
24 limit to their loss.

25 For those who are in triangle B, buying the product is no longer the reasonable course
26 of action because the nature of the anti-competitive conduct is the price has gone up

1 beyond their willingness to pay and so their wider loss is limited by the demand curve
2 in a sense and it would exposing themselves to more loss by going beyond that.

3 Now in terms of what that actually is, as I said, this is represented value to the
4 consumer. Now, I know we talk about loss of amenity, but the consumers may have
5 lots of different values they place on products and if you think about something like
6 insurance, for example, that's quite a -- fundamentally it's a financial transaction in
7 which you're handing over sums of money to ensure yourself against certain types of
8 risk and the right level of insurance for you to buy depends upon risk appetite and a
9 whole range of circumstances as well. But you're trading in a sense a sum of money
10 for a perceived bundle of benefits that has more benefit to you than the sum of money.

11 Now, if you're looking at something like an insurance contract, would you say, oh,
12 that's just loss of amenity. So I think the loss of amenity term, is -- I think the simpler
13 thing would be say loss of value and, as I keep pointing out, the areas on this chart,
14 this graph, are all simply put because when you multiply price per unit by a quantity
15 you get something with the dimension of pounds, in the same way that we would
16 measure ordinary areas in meters square or square feet. Here on this chart it's
17 measured in pounds, that's what the area consists in, and that's the right analysis. It
18 is a measure of value.

19 Now, it may be that people are in a sense thinking very closely about the pounds,
20 schillings and pence or it may be that they are thinking about it in a more diffuse sense.

21 But what the demand curve shows is people have a very concrete willingness to pay
22 that is a sum of money. I'm willing to pay more than that or I am not.

23 MR CUTTING: Yes, but that sort of means that when we're doing -- if we're going
24 down that line, we sort of seem to be taking an infinite number of counterfactuals so
25 that, as we go from £9 to £10, we're saying that the counterfactual for the person who's
26 dropped out of the market at nine is some measure of loss of counterfactual if the price

1 was still £9, which is fine in the pharmaceutical example because we've managed a
2 staggered series of cartelised price rises. But if we just had an abuse of dominance
3 case, we have to get to B instead of the single counterfactual, as Apple say, of the
4 market price, we're having to take -- are we having to take a series of staggered
5 counterfactuals at each step down the demand curve?

6 MR WOOLFE: Therefore, we have 3 responses. The first is in a sense working out
7 the area under the graph, that is summing up all the little bits, that is what integral
8 calculus does, and if that's what one of the economists does in their model, that's the
9 way it will work. So it's not necessarily a huge problem of adding up lots of little figures.

10 MR CUTTING: No, but I keep testing it against the idea of the individual claim.

11 MR WOOLFE: Well, I think fundamentally we're not advancing an individual claim, we
12 are advancing an aggregate claim. But beyond that there's also the broad axe and
13 the fact that it may be tricky to do certain things to work that out, well, you can also
14 adopt a more simplified approach. As long as you can come up with a figure that you
15 think doesn't significantly under or over-compensate the claimant, you don't
16 necessarily have to do the adding up one-by-one approach if that's not what is
17 workable.

18 Also just to be clear, so we said a moment ago is this a loss of amenity. I mean, our
19 alternative case is, in reliance on the Ruxley case, that in a sense, even if it's loss of
20 amenity, we can still claim damages on that basis anyway.

21 I'm reminded that the objection that, as I understand it, is being put is one that this
22 may be methodologically difficult, that I don't think is part of the way the strike out is
23 put.

24 MR CUTTING: No, but I'm trying to understand it in terms of how this all tracks across
25 to individual claims that would need to be aggregated. So I'm trying to work out how
26 that would be formulated, you know, to meet the Apple point, which is there's no

1 individual claim here unless you make a revolutionary -- we're asking -- unless you've
2 got a revolution. That clearly goes to the nature of what are the individual claims you'll
3 be aggregating, because I don't think -- I mean, I'm wrong, but even on Mr Hughes'
4 analysis, 50 percent of the non-paying subscribers wouldn't have a claim. So I'm trying
5 to work out how you would identify any individual who would have a valid claim that
6 you then aggregate and I think obviously you're not going to do an individualised
7 version. But what would his or her characteristics be?

8 MR WOOLFE: We are expressly talking about doing a top-down aggregate valuation
9 of what is an aggregate claim for loss. I emphasise that point.

10 Now, there may be some tricky issues to get to on distribution but it would be better in
11 a sense for the right amount of money to be distributed among slightly the wrong pool
12 of people than it would be to have no claim at all.

13 MR JUSTICE WAKSMAN: Sorry, didn't catch that. One second. You said it would
14 be better to have --

15 MR WOOLFE: Well, the fact that there may be some tricky decision to be made on
16 distribution isn't a reason why this claim shouldn't proceed. That's true both as
17 a matter of authority but also just as a matter of justice. If we can sensibly value area
18 B and distribute damages in respect of it to the non-paying class, it is better that that
19 be done imperfectly than it not be done at all.

20 Yes, and the authority I said, Merricks Supreme Court does decide that they needn't
21 be a precise compensation of each individual class member. Yes, and at the
22 distribution stage as well.

23 MR CUTTING: So I don't know whether this is the right time to ask it, but then how do
24 you deal with something like paragraph 64 of CICC where the Tribunal says it's
25 unattractive to certify a class where a large number of the members would have no
26 claim or whose claim would fail?

1 MR WOOLFE: Well, sorry -- one point that really comes to mind is, as you'll note the
2 way we put our case -- I'm sorry, we may need to go back to paragraph 137 again, if I
3 can.

4 MR CUTTING: It feels like ages since we went there. I know.

5 MR WOOLFE: I said ten minutes. So bundle A, tab 3, page 13 -- 104. Thank you.

6 The words I want to focus on are in the top page of 137:

7 "But for the preferential treatment abuse, class members who did not in fact pay for
8 iCloud in some parts of the claim period would in respect of that part of the claim
9 period..."

10 And then the loss is pleaded. That's important because we've often talked about like
11 there's somehow a paying class and a non-paying class and they are static. The
12 reality is people get an iPhone and they have it for free for a while and then a very
13 significant proportion of them begin to use iCloud for free and then at some point they
14 hit the paying tiers and they start to pay.

15 So to a large extent this is actually about loss for people who became paying class
16 members but in respect of the period before they became class members and Apple
17 will know whether people in general used iCloud or didn't and, if they did use iCloud,
18 we can infer that they at least valued the free storage at more than nothing and, if they
19 carried on using it, even paid for a regular sort of thing, they would use the original
20 free storage; and, if we know that they went on to use paid storage, we would also
21 know that they would have in a sense, as in -- how I can I out this. The factual price
22 of the first tier of iCloud was 99p. We have somebody who doesn't buy in January,
23 doesn't buy in February, doesn't buy in March, buys in April. If the counterfactual price
24 of iCloud was not 99p but 50p, we can be confident that that person would have bought
25 at some earlier point because at some point their valuation passed the 99p threshold,
26 probably when they hit the free storage limit.

1 PROFESSOR SMITH: And presumably Apple could identify free storage customers
2 who don't use anything like the upper limit of their free storage.

3 MR WOOLFE: Yes. We would expect -- we don't know exactly what data Apple holds
4 but they're a sophisticated company and we would imagine they do know quantities.
5 They know who pays them for storage.

6 So this is the case we say where, well, we can't have the information as to who pays
7 and who doesn't and so forth over time. So although there may be many people who
8 just never use it, (a) we would never simply identify them but we can also track through
9 the cohort as a whole patterns of purchase and the like. So that's part of my response.
10 Again, this is not something that's been canvassed in detail and it may be that, if it had
11 been raised, Mr Hughes would have said something more sophisticated than what
12 I just said.

13 MR JUSTICE WAKSMAN: Just one moment.

14 MR WOOLFE: I'm afraid I can't give you chapter and verse on this. If it's required, we
15 can do it in writing.

16 I understand in CICC in that case there was a known cohort who had no loss. We can
17 identify who they were and somehow the constitution of the cast to include that named
18 cohort was wrong. That's different from a situation where you have a cohort where
19 you know in the broad sense that the suffered a certain amount of loss and on
20 distribution you may find that certain people didn't. But they're not identified, known
21 individuals at the start or a known identifiable group at the start.

22 MR CUTTING: I mean, just -- because I think the language these used in CICC at
23 one point is whether everybody in the class was exposed to the wrongful act, I think,
24 is the phrase they use. So how does that track against your class or classes?

25 MR WOOLFE: Well, everybody was exposed -- I mean, we do say everybody suffered
26 actionable loss in the sense that -- because we alleged everybody got more free

1 storage. So these are all people who are Apple customers and had a contract in the
2 sense if you have an Apple ID at all, which you need to operate a phone in any
3 meaningful sense, you have a contract with Apple and that contract, there are several
4 contracts but one of them entitles you to your free tier of iCloud storage and we say
5 that in the counterfactual that would have been higher. So, in fact, everybody in a
6 sense would have had a higher entitlement to free storage. Now, for some of those
7 people, if you have somebody and I once helped somebody with their phone, I recall,
8 and they didn't use anything at all and there may be somebody who they could be
9 given 50 gigabytes of free storage, they wouldn't use one drop of it. Fine. For
10 somebody who didn't use theirs, we would say they have suffered actionable loss in
11 that the terms of their contract are different between the counterfactual but there's no
12 pounds, shilling and pence identified with it, they would fall below line P1 in this
13 example. But they still have suffered actionable loss.

14 MR CUTTING: I think my last question, and there may be nothing in it, it may just be
15 over-lawyering. But one of the forms of relief you seek is an injunction and my
16 question was whether, if we concluded that the case for damages was below whatever
17 the test is, let's -- we don't need to repeat that now -- but that there might nevertheless
18 still be a problem. If we struck out the sub class or the sub claim, does that affect the
19 scope of the injunction you would seek later on?

20 MR WOOLFE: So the answer's on various levels. So level 1, because we say
21 everybody has suffered an actionable loss, even if there may be no award of damages
22 due to them, so --

23 MR CUTTING: Yes.

24 MR WOOLFE: So for us we say that covers the person who literally has a zero
25 evaluation of iCloud. Maybe Apple would say it includes some more people. But
26 everybody in a sense suffers actionable harm. We would say everybody is entitled to

1 the injunction, because that's what you need to show for an injunction. You don't need
2 to show quantified loss to get an injunction, to be deemed to have actionable harm or
3 at least the threat of actionable harm. That's point 1.

4 Point 2 I think would be if Apple is right that we haven't suffered any actionable harm
5 at all, this group of people, then that would lead to the conclusion that people in this
6 situation who are entirely priced out of a market can't even claim injunctive relief
7 because on Apple's view, the net asset view, there is no actionable harm at all, that
8 would imply that no relief can be sought and we say that is an unattractive conclusion
9 and a reason why that's wrong.

10 Third point. In terms of the actual scope of the injunction, I don't think it would change
11 it, because we'd still see the injunction on behalf of the existing class --

12 MR JUSTICE WAKSMAN: Well, that's what I was about to say.

13 MR WOOLFE: And I think that might be a mundane -- it might be an answer to the
14 actual terms --

15 MR JUSTICE WAKSMAN: If you succeeded and you succeeded on behalf of the
16 majority of the class and you succeeded in obtaining an injunction, the form of the
17 injunction would be essentially to prevent or prohibit that abuse which the Tribunal has
18 found.

19 MR WOOLFE: Yes.

20 MR JUSTICE WAKSMAN: If you did that, it would benefit everyone. You might say
21 the non-purchasing customers, if their claim was struck out, would be free riders but it
22 wouldn't make any difference. You could at that stage be distinguishing as to who
23 benefits from the injunction.

24 MR WOOLFE: And also, because it's important, what we're doing is utterly restrain
25 the abuse that we say has consequences in terms of the pricing. We wouldn't be
26 seeking an injunction that Apple cut the price from X to Y. I don't think.

1 MR JUSTICE WAKSMAN: Yes.

2 I've got one question which is this. You accept the law of damages here makes a
3 difference between pecuniary loss and non-pecuniary loss?

4 MR WOOLFE: Yes. We say that is a broad distinction that is commonly --

5 MR JUSTICE WAKSMAN: Sorry, I mean, are you saying that that's not how the law
6 of damages operates, because we spent a lot of time working on that distinction and --

7 MR WOOLFE: Yes, I do accept that is a distinction that the law of damages draws.

8 MR JUSTICE WAKSMAN: Right.

9 MR WOOLFE: My hesitation was simply that there is a broad assertion that the law
10 allows pecuniary loss and only allows "non-pecuniary loss in certain categories" and
11 that's where I do slightly disagree with my learned friend because I think the important
12 thing is to look at the tort in question and ask "is this a recoverable loss in respect of
13 this tort?" Pecuniary loss, yes, but, if it's a non-pecuniary loss, is it a non-pecuniary
14 loss that's recoverable in respect of this tort.

15 MR JUSTICE WAKSMAN: Well, I take your point that you may say, so far as
16 non-pecuniary loss is concerned, the categories may not be closed or the categories
17 may not be closed for a particular tort, like this one.

18 MR WOOLFE: And they may differ between --

19 MR JUSTICE WAKSMAN: All right, and they may differ. But nonetheless, I mean, the
20 way you've put your case is to say it is a pecuniary loss, but, even if it isn't a pecuniary
21 loss, it's a form of allowable non-pecuniary loss.

22 MR WOOLFE: That's right.

23 MR JUSTICE WAKSMAN: Right. So the question I want to ask you is 'what does
24 pecuniary mean to you for the law of damages, what's your case on it', because you've
25 rejected the asset change conception. You've rejected the subjective / objective
26 conception. So what is it that makes something a pecuniary loss?

1 MR WOOLFE: The best thing I can do is refer you to what we've put in our skeleton
2 argument for the first hearing, where we've put this in, and we say --

3 MR JUSTICE WAKSMAN: Just let me get it up first of all, because I haven't looked at
4 it for a while.

5 MR WOOLFE: It's paragraph 32. So bundle A, tab 1, paragraph 32.

6 MR JUSTICE WAKSMAN: Paragraph 32. Just a moment.

7 MR WOOLFE: Because we say susceptible to valuation in monetary terms, is
8 the -- and we dealt with this at more length, sorry, in our -- we had our Claim Form,
9 Apple put in their Response, which is also the strike out, and we put in our Reply to
10 Apple's Response. That Reply is at core bundle tab 5 and at page 155 --

11 MR JUSTICE WAKSMAN: This is your reply.

12 MR WOOLFE: This is our reply.

13 MR JUSTICE WAKSMAN: Just a moment. That's in the same bundle?

14 MR WOOLFE: It's the same bundle yes.

15 MR JUSTICE WAKSMAN: Let me just get that.

16 PROFESSOR SMITH: Page number, did you say?

17 MR WOOLFE: Page 155. It's paragraph 20 where we make the same point and 20.1
18 as well.

19 MR JUSTICE WAKSMAN: Therefore, going back to how you've defined it in your
20 skeleton argument, if you can just go back to that.

21 MR WOOLFE: Paragraph 32.

22 MR JUSTICE WAKSMAN: Yes. Just a second.

23 Right. So I want you to take the case individual. I heard the arguments about how
24 that may or may not be affected by the scheme of aggregation for collective cases.
25 Put that to one side. I just want to look at an individual claim, the individual who says
26 that I haven't bought because I was priced out of the market at £10, but, had it been

1 £5, I would have bought it and I would have valued it at £9. You say that's susceptible
2 of valuation in money terms. Right. How?

3 MR WOOLFE: Because they would have been willing to pay -- I'm sorry, I can't
4 remember the figures use.

5 MR JUSTICE WAKSMAN: Well, I said nine it doesn't really matter. Anything after
6 five.

7 MR WOOLFE: So they were willing to pay £9 for it and that is the fundamental point.
8 Now, if you think about how that might be evidenced, I can totally see if the witness
9 has asserted it why would the court believe him or not. But if that individual has a
10 record they can show you the receipts that every week for the last two years they've
11 bought this item when priced at £9 and they handed over cash for it and now the price
12 has gone up to ten they say I'm not willing to buy it any more, you've got evidence of
13 their valuation being £9, at least £9. There's nothing non-objective about that. There's
14 a real-world market-based transaction where they hand over the money and that's all
15 in a sense the demand curve is tracing.

16 MR JUSTICE WAKSMAN: That's very helpful. Thank you. We've got no further
17 questions. So I'll ask Ms Demetriou now to say what she wants to say in reply.

18

19 **Submissions in reply by MS DEMETRIOU**

20 MS DEMETRIOU: Thank you, sir.

21 We say, sir, with respect that you had hit the nail on the head in terms of the final
22 question that you asked my learned friend. It really is the critical question.

23 Taking the definition or the approach to pecuniary loss put forward by the PCR, how
24 do you compensate foregone consumer surplus in money and you heard my learned
25 friend's answer: it's nothing to do with what the counterfactual price is or what the price
26 is that's been paid. It's all dependent on subjectively what the claimant thinks the

1 service or the product is worth and that's what we say is anathema to the English law
2 of damages.

3 Now, my learned friend finally fronted up to that, but he started his submissions by
4 going back to his pleading and, I'm sorry, I'm going to ask to you do this one more
5 time. So bundle A, tab 3, page 104, paragraphs 137 to 138.

6 You heard him. He seemed to de-emphasise paragraph 138 and he said let's focus
7 on 137. What you've got in 137, he said, is that the loss is not receiving the service.
8 That's what he said. The loss is not receiving the service.

9 MR JUSTICE WAKSMAN: Just a moment.

10 MS DEMETRIOU: That's not right on the pleadings and it's not right substantively
11 either because, so if you look at paragraph 137, what that's saying is -- it says:

12 "Further, in the premises but for the alleged abuse, members who did not in fact pay
13 for iCloud in some of the claim period would in respect of that claim period, if their
14 valuation was higher than the competitive price in the counterfactual, have purchased.

15 So, so far nothing to do with any loss and then it says:

16 "Class members have therefore [and I'm reading from 138] suffered loss and damage
17 to the extent that their valuation [that their valuation] of the service was higher than the
18 price for such services that would have prevailed in the counterfactual."

19 So the loss, as my learned friend sought to suggest, is not simply not receiving the
20 service. That isn't right, because a person who valued the service at £4 would equally
21 not have received the service but they could not recover on any view, on the PCR's
22 view either, any damages. There would be no claim. So it's not simply not receiving
23 the service, it's completely contingent on the claimant's own valuation of what the
24 service is worth dependent on a consumer's subjective valuation being higher than the
25 counterfactual price but below the actual price. If their subjective valuation is the same
26 as the counterfactual price, they would recover no damages, even on the PCR's case.

1 MR JUSTICE WAKSMAN: Does this follow from what's said that it doesn't matter that
2 the individual claimant can say "I can prove to you that that is what my valuation is,
3 because look at what I have done before". It's still objectionable, in other words it's
4 not simply a question of, ah ha, how can you prove this, that's not the point. Is that
5 right? Because it's emanating from the consumer themselves.

6 MS DEMETRIOU: That's exactly the point. That's precisely the point. So it doesn't
7 matter. There may be the best proof in the world. It may be -- and my learned friend
8 sent some time looking at the demand curve and saying, "well, this is very objective,
9 look, there is good evidence in terms of market prices and demand and you can
10 construct a curve". But for these purposes we're not disputing any of that. We say
11 you can have the best evidence in the world but what you're measuring is a subjective
12 valuation and it's that thing that's anathema to the English law of damages.

13 Now, there was also a certain confusion in my learned friend's submissions as to our
14 case on change in asset value and how that interacts with the need for objectivity and
15 let me just explain again what our position is. We say that to assess whether or not
16 there's a change in asset position, which is what you need to do to establish pecuniary
17 loss, you have to consider whether pecuniary loss has been suffered on the basis of
18 an objective valuation of the relevant goods and services. The key defect here is that
19 the PCR is not advancing any claim for loss by non-paying consumers which is based
20 on any objective evaluation of the service.

21 Again, I come back to the point just put to me by the Chairman. That's nothing to do
22 with the proof and the evidence. That might look very objective but the fundamental
23 claim is based on subjective valuation and that's why we give the examples of the
24 apricot.

25 You heard my learned friend say in turn -- let's turn perhaps to the apricot example in
26 the supplemental bundle for this hearing in our skeleton argument. So we have that

1 behind tab 2, page 23 of the bundle for this hearing.

2 MR JUSTICE WAKSMAN: Sorry, supplemental bundle for this hearing?

3 MS DEMETRIOU: For this hearing, tab 2, page 23, sir. It's our skeleton and you
4 should see --

5 MR JUSTICE WAKSMAN: Oh, your skeleton?

6 MS DEMETRIOU: You may have that separately.

7 MR JUSTICE WAKSMAN: Yes, I do. Just a minute.

8 MS DEMETRIOU: So I'm looking at the heading. It's on page 4 internally of the
9 skeleton. The Tribunal put to my learned friend paragraph 15.

10 So this is the extension of our example about the apricots but to a hypothesis where
11 there's been a breach of the Chapter 1 prohibition and we said at 15 "who has suffered
12 a pecuniary loss because of the cartel?" The answer requires comparing each
13 individual's asset position in the factual and the counterfactual case.

14 Now, my learned friend said in terms we do not accept that.

15 Now, that is a crisp point of law that arises between the parties because we say our
16 case is that pecuniary loss, in order to establish pecuniary loss, that always involves
17 comparing the asset position in the factual and in the counterfactual.

18 Looking across to the example here, so looking at paragraph 17 of the skeleton, so all
19 four individuals would have spent 50p on an apricot with an objective market value of
20 50p because each was willing to pay more than 50p. So their net change in assets
21 from that transaction would have been zero and then we say as to Adam and Becky,
22 this is part 5, an economist might have observed they've suffered foregone consumer
23 surplus as a result of the cartel. Adam was willing to pay 60p, Becky was willing to
24 pay 90p, but we say Adam and Becky's net asset position in the counterfactual would
25 have been the same as it was in fact. They've suffered no pecuniary loss.

26 Now my learned friend said, oh well, this all assumes that there's a market and imagine

1 there's no market. There's no available evidence market information. But is his
2 position, I ask rhetorically, that in those circumstances is his position that Carla, for
3 example, has lost £9.60 and Adam has lost 20p, because that's how they individually
4 value the apricot. That has to be his position. We say that that really flies in the face
5 of the established case law on damages.

6 MR JUSTICE WAKSMAN: Sorry, do you want to go first?

7 PROFESSOR SMITH: Yes. It's just it's Friday afternoon and you need to go more
8 slowly through the --

9 MR JUSTICE WAKSMAN: Well, I think we were both asking the same point, which is
10 can we just go back, for my part, which is you say that they don't accept propositions
11 that you put forward in paragraphs 15 and 16.

12 MS DEMETRIOU: They don't accept that.

13 MR JUSTICE WAKSMAN: They don't and you say, well, if they don't accept that that's
14 a pure dispute of law.

15 MS DEMETRIOU: A point of law. Yes.

16 MR JUSTICE WAKSMAN: All right. But can you introduce the example you were
17 giving about when you talking about the availability of market information or market
18 value?

19 MS DEMETRIOU: Yes. Of course. You'll recall that -- maybe this is the way to put
20 it, that my learned friend took to you to a case on contract, a Supreme Court judgment
21 on contract, and he said, 'well, contract's different'. Our main response to 'contract's
22 different' is to say in this case, he says this case is different to a contractual claim
23 because here there was no on their case competitive market on which non-paying
24 consumers could go away and buy the service at a competitive price.

25 Our main response to that is to say that everybody has lost the same thing. So, as in
26 the apricot example everybody has lost an apricot. Now however you go about

1 establishing what the non-abusive price is or the non-cartelised price of the apricot is,
2 it's the same price for everyone. It doesn't depend on individual preferences. It doesn't
3 depend on whether Carla loves apricots and is quite wealthy and would be willing to
4 spend £10 on an apricot.

5 Sorry, I'm getting the names mixed up. So it doesn't -- thank you. It doesn't depend
6 on the individual valuation of the apricot. So, even if there's no competitive market
7 and what you have to do is find other ways of determining the competitive price, it's
8 still the same price for everyone. That's really the key point.

9 MR JUSTICE WAKSMAN: Just a moment.

10 MS DEMETRIOU: And there's simply no authority that the PCR has pointed to, to
11 establish there you can take a different price for different claimants. However, you go
12 about doing it, you're trying to establish a counterfactual price, call it a market price,
13 an objective price, it's still the same price for everyone.

14 Liffen is not an authority that assists the PCR because Liffen was a case of entitlement
15 to a benefit in kind that had an objective value. They stated what the objective value
16 was.

17 So the asset position of the claimant had changed. Before the accident she was
18 entitled to a benefit in kind worth 25 shillings and after the accident she could not
19 receive it. She was not entitled to it.

20 Mediana doesn't help the PCR. This was canvassed in some detail at the last hearing.
21 The owner of the spare vessel could have realised by renting it out. We deal with that.
22 I'm not going to take you back to it now in reply, but we dealt with it in our skeleton to
23 the previous hearing. It's just a different case.

24 Now, moving on very briefly to the collective nature of the regime and whether that
25 assists the PCR. Now my learned friend accepts that, if a claim by one claimant is
26 bad in law, then it can't be salvaged by the collective nature of the regime. He accepts

1 that. But the submission he does make is that the aggregate nature of the regime is
2 relevant to our point about subjective and objective. But it's not for the very reason
3 that the Chairman put to me a few moments ago, that our point is not concerned with
4 proof or evidence or how you measure the loss. Our point is that the loss, the premise
5 for the loss, is the subjective valuation of the claimants. It's nothing to do with proof.
6 We say it's bad in law because the premise for it is that it's not based on the loss of
7 anything measured by reference to objective value, but it's a claim that only arises
8 because of the subjective valuation of the service by particular claimants.

9 So the collective nature of the regime – Merricks – just simply does not help. If one
10 claim is bad in law, then collective claim is bad in law too, as my learned friend accepts.
11 Finally, the final point I wish to make is that my learned friend urged the Tribunal to be
12 cautious striking this out. He said, “oh well, it should all go to trial and there may be
13 evidence that bears on this and we say no”. We, for the purposes of this strike out
14 application, are happy to accept everything that the PCR says about evidence.
15 Whatever evidence may come up at trial, it may well be right that it's very easy to use
16 a demand curve and that that evidence looks pretty objective. Happy to accept all of
17 that.

18 This is not a question. Our objection is nothing to do with measurement or proof or
19 the objectivity of the evidence which are the only matters really that could be affected
20 by the trial. Our submission is this is not permissible in law and, if that's right, the
21 Tribunal should strike out this part of the claim because there is no respect in which
22 the trial will improve or change the position and, if the Tribunal refrained from striking
23 it out, there would be a whole lot of wasted expense and time taken in determining this
24 claim.

25 So those are my brief submissions by way of reply unless the Tribunal has any
26 questions for me.

1 MR JUSTICE WAKSMAN: I just wanted you to -- we were taken to -- just one moment,
2 please.

3 Yes, Merricks Court of Appeal case. Have I got the right one? Unless Merricks the
4 Supreme Court. The one that's at divider 32, which must be of the original.

5 No, it's not the Court of Appeal. It's the original one. The Supreme Court. At
6 page 955. Let's just get that.

7 MS DEMETRIOU: This is the innovation brought about by the statute permitting an
8 aggregate award of damages and then also that it permits liability to be established on
9 a class wide basis.

10 MR JUSTICE WAKSMAN: Yes, it's that one. Just a moment, I've got the wrong
11 bundle of authorities. Let me just get the right one.

12 I wanted to go back to 162, the start of it.

13 MS DEMETRIOU: Sorry, that must be a different case. Bundle 1.

14 MR JUSTICE WAKSMAN: Yes, that's not right. No, 946 I'm. Sorry. 946. Just
15 a moment.

16 MS DEMETRIOU: Yes.

17 MR JUSTICE WAKSMAN: We were referred to paragraphs 94 and 95 but I wanted
18 your comment on the support which Mr Woolfe said he'd got when using the
19 aggregation collective actions argument for the last sentence of paragraph 95.

20 MS DEMETRIOU: "An aggregate damages provision may dispense with this
21 requirement by permitting liability towards all members of the class to be established
22 by proof that the class as a whole suffered without the need to show that any individual
23 member of the class has done so."

24 So Mr Woolfe accepts, first of all, that if a claim brought by one claimant is bad in law
25 then this doesn't help him, the aggregate nature of the regime doesn't help him. This
26 is concerned with a situation where a claim is good in law and what the collective

1 nature of the regime and the aggregate damages provision permits a class
2 representative to do is to seek to prove liability at the level of the class referred to as
3 in a top-down way rather than focusing on liability as regards each individual member
4 of the class.

5 But that doesn't help my learned friend because we say that this category of
6 non-paying consumers does not have a good claim in law at all and Mr Woolfe accepts
7 that in those circumstances the aggregate provisions can't assist.

8 MR WOOLFE: Can I make sure there's no confusion about what we accept. Insofar
9 as what's being put is that pecuniary loss means changing net assets --

10 MR JUSTICE WAKSMAN: Sorry, insofar as...?.

11 MR WOOLFE: Insofar as what's being put is pecuniary loss means a loss of net
12 assets, then we accept these aggregation provisions don't help. We completely accept
13 that. Insofar as the objection is consumer surplus is too subjective, we do say you
14 have to consider the fact this is an aggregate claim when looking at that graph and --

15 MR JUSTICE WAKSMAN: That's helpful. Let me just make a note.

16 So, just to be clear, you say if the test for pecuniary loss is change of net assets --

17 MR WOOLFE: Yes. I mean, we say we satisfy that, but if we fail on that ground --

18 MR JUSTICE WAKSMAN: Ah, right. So you -- I'm still not clear whether you accept
19 that is the test.

20 MR WOOLFE: No, we don't accept. The test is susceptible as valuation in monetary
21 terms.

22 MR JUSTICE WAKSMAN: Right. So you say "if, which we deny, the change is net
23 assets".

24 MR WOOLFE: Yes, and --

25 MR JUSTICE WAKSMAN: And "if, which we deny, there isn't a change in net
26 assets" --

1 MR WOOLFE: Then we don't rely upon on section 47C to get us out of that.

2 MR JUSTICE WAKSMAN: Right. Just a moment.

3 MR WOOLFE: If the objection is the consumer surplus is too subjective -- I did have
4 grounds on two bases but the argument does keep on shifting -- and if that is the
5 objection then we do say section 47C is relevant because this is a claim for aggregate
6 damages brought on behalf of a class as a whole and, in assessing any assertion that
7 it is too subjective, you have to look at that claim not at an individual claim.
8 I hope that's clear. It's paragraph 30 of our skeleton for this hearing.
9 Yes, it is not simply a wrapper, is the point.

10 MS DEMETRIOU: Sir, my response to that is, yes, obviously we agree with the first
11 point but, again, my learned friend has misunderstood our objection based on
12 subjectivity. It's not about proof. It's the point that you put to me, sir, not about proof
13 or measuring and so the aggregate nature of the regime doesn't help, because we're
14 not raising -- we're not raising it as an evidential issue. We're saying that, when you
15 are considering whether there's been a net change in the asset position in the actual
16 as compared to the counterfactual, the court is only concerned with the objective value
17 of the assets. So it's part and parcel of the same objection. It's a legal objection and
18 it's not affected by the aggregate nature of the regime.

19 MR JUSTICE WAKSMAN: Let me just ask you this in the light of that, which may or
20 may not be the same point. I did put, when I was asking Mr Woolfe, well, in the case
21 of those who didn't purchase but who say that in the counterfactual they would have
22 done but they didn't and there's the loss of consumer surplus, and I put to him, well,
23 that situation can't be a change of asset, his response is, if that's the test, it is a change
24 of asset, I think on the basis that, yes, it's a change of asset because we weren't
25 supplied with the product, yes, it would have cost us something to buy it but we have
26 a higher value to it. That's how he said there was still a change of asset.

1 MS DEMETRIOU: Well, I'm not sure he accepted the change of asset test.

2 MR JUSTICE WAKSMAN: No, he didn't, but assuming it was. When I asked him he
3 said it was still -- and he just confirmed it now. He said if it was the test, it still was
4 a change of asset.

5 MS DEMETRIOU: Right. Well, to that we say that when the law is considering
6 whether or not there's been a change in the net asset position, in the actual as
7 compared with the counterfactual, it's only concerned with the objective value of the
8 product, or the goods or services or the money.

9 So it's not a change in the net asset position simply because somebody subjectively
10 used the service differently to the price, the market price --

11 MR JUSTICE WAKSMAN: And the reason why it wouldn't be a change of assets
12 would be if someone says you've deprived me of the opportunity of buying it and I
13 would then have made a profit on selling it. The reason is because your case is that
14 on a change of assets the only thing you could look at here would be what you called
15 the objective value of the asset which would be £5. But since they would have paid
16 £5, there's no loss.

17 MS DEMETRIOU: Exactly, and if a business has -- or, it doesn't have to be business,
18 if somebody would have paid £5 in the counterfactual, so somebody didn't buy it in the
19 actual because it was too expensive, in the counterfactual would have paid £5 and
20 what they also would have done is sold it on and made a profit, they can claim for that
21 loss of profits because that's a change in the net asset position.

22 MR JUSTICE WAKSMAN: Yes.

23 MR CUTTING: At the risk of asking a highly open question and being laughed out of
24 court, just thinking about that then. So if we're thinking about if in the actual they got
25 5 gigabytes of storage for free but in the counterfactual they would have got 25
26 gigabytes for free, then if the tort were established the tort has meant that there's a

1 difference in their asset accumulation of 20 gigabytes of storage as a result of the tort
2 and so then the question is whether that has a value.

3 MS DEMETRIOU: No, because -- yes. So the question is "how do you go about
4 valuing that". So is there a value, how do you value it, and in your example, in the
5 counterfactual, the value is zero. The value is zero because it's provided for free. So
6 that's the market value.

7 MR CUTTING: No, the price is zero.

8 MS DEMETRIOU: The price is zero.

9 MR CUTTING: The value might be something else.

10 MS DEMETRIOU: The subjective value might be something else.

11 MR CUTTING: Well, ironically the market price might be something else, because it
12 might be that, if I went into the market, Dropbox or a combination of Dropbox and
13 Google weren't going to charge me more. So you might be trying to buy my loyalty or
14 my customer with an extra level of free storage, the market value of which might be
15 something completely different. If that's right, then in the tortious case my asset value
16 so far as concerns iCloud storage would have been extra gigabytes of storage which
17 may have had a market value greater than zero and I -- that then is a change in asset
18 position, isn't it? I mean --

19 MS DEMETRIOU: I understand theoretically, sir, where you're coming from, but we
20 are not -- the PCR is not running a case that Apple would have priced under the
21 competitive price in the counterfactual. So their pleading is all about the competitive
22 price.

23 MR CUTTING: But their pleadings were also that customers would have got more
24 storage for free.

25 MS DEMETRIOU: Correct, but then that assumes that free is the competitive price,
26 that the competitive price in the counterfactual would be free. That's their pleading.

1 MR CUTTING: I'm just thinking about what it means for your case about the change
2 in the asset valuation. The customer in the counterfactual has a greater asset stock
3 in the form of the gigabytes of storage and that has a value.

4 MS DEMETRIOU: Well, yes, and the question is how do you value it. How do you
5 value it. My learned friend's case is you look at the subjective valuation placed on it
6 by -- so take one --

7 MR CUTTING: But your case is that i value it by reference to the market, which may
8 be that it's way more than zero.

9 MS DEMETRIOU: No, our case is that you -- so the claim that we're facing is that in
10 the counterfactual Apple would have charged a competitive price, not below a
11 competitive price, not engaged in below competitive price. Their case that we're
12 facing, this is the pleaded case we're seeking to strike out, not some other case that
13 the Tribunal --

14 MR CUTTING: Not, but it includes additional free storage, doesn't it?

15 MR JUSTICE WAKSMAN: Can I just help on that one, because I think it's quite
16 important and I do need to know if we've got this wrong. I specifically asked Mr Woolfe
17 last time about paragraph 137.2, which is the non-paying customers but in relation to
18 or they would have got free storage and I said there doesn't appear to be a
19 freestanding claim as far as that is concerned and Mr Woolfe agreed with me and he
20 said that's all wrapped up in or taken into account in the primary claim. In fact, also the
21 primary claim for the paying customers. That's what he said and he did say that it's
22 wrapped up in the subjective question as well.

23 At the moment, there is no separate claim for deprivation of increased storage whether
24 it's in relation to the paying customers or in relation to the non-paying customers.
25 That's what we got from the last hearing.

26 MR WOOLFE: I think we were talking about -- I think Mr Hughes methodology for the

1 paying customers is working out a weighted average cost per gigabyte.

2 MR JUSTICE WAKSMAN: Yes. He took it into account somehow.

3 MR WOOLFE: Yes, but that's a matter of methodology on working it out, because,
4 this is an important point, gigabytes of storage are fungible. So the free ones you get
5 are not magic ones that are different from the paying ones you get but they're all
6 bundles --

7 MR JUSTICE WAKSMAN: No. Yes.

8 MR WOOLFE: But as a matter of pleading at paragraph 135.2, paragraph 137.2 and
9 138.2, we do separately plead a claim in respect of the deprivation of free storage.

10 MR JUSTICE WAKSMAN: You do, but I asked you last time has that claim been
11 quantified in any way and you said it hadn't.

12 MR WOOLFE: I said it was all wrapped up --

13 MR JUSTICE WAKSMAN: You said it was all wrapped up and the reason I say it, and
14 we can cut through this, the reason I can say it is there may be some points to be
15 taken about whether they would have given free storage or not, but, as I see it, for the
16 claim which is the subject of the strike out application, 137.2 stands or falls with 137.1,
17 because there's no articulated separate claim.

18 MR WOOLFE: In respect of 137 and 381, which go together sir, these are --

19 MR JUSTICE WAKSMAN: Sorry, 137 is the primary claim, is the claim and then you've
20 got the loss of damage point --

21 MR WOOLFE: Yes, exactly. 137 and 138 together are the non-paying class
22 members.

23 MR JUSTICE WAKSMAN: Correct.

24 MR WOOLFE: And their claim is in respect of -- they would have had the enjoyment
25 effectively of the question as to storage, either the paid or unpaid. Yes.

26 MR JUSTICE WAKSMAN: Yes. The point I'm trying to get at is that a second bit of

1 137 which talks about "or they would have got increased storage", there's no separate
2 claim in relation to that, there's no separate claim about the deprivation of increased
3 storage, and when I asked you about it last time and you said that's still wrapped up
4 somehow with the 137.1 claim, just as the 136 or whatever it is for the paying
5 customers free storage bit is wrapped up with the other one. But there's no claim that
6 puts any kind of value or anything on the deprivation of free storage as distinct from
7 your principal claim here, which is under attack, which is a point about the loss of
8 consumer surplus.

9 MR WOOLFE: The reason I hesitate is because they have a slightly different factual
10 basis to the answer in slightly different ways. The first one expressly asserts -- 137.1
11 is expressed part of that claim that it's those people who would have purchased them
12 in the counterfactual, whereas 137.2 is in a sense everybody. But they are both
13 consumer surplus type valuations. We're not running the point --

14 MR JUSTICE WAKSMAN: That's the point. That's the point and therefore they stand
15 or fall together.

16 MS DEMETRIOU: Sir, that's right and just by way of footnote to my answer to
17 Mr Cutting's question, I think that's really the key point. So, sir, you might be right that
18 you could think of different ways of ascertaining the objective price of additional free
19 storage but nothing like that's been pleaded. The pleading that we're seeking to strike
20 out is an allegation that that is to be valued based on consumers' willingness to pay
21 and that is crystal clear from paragraph 138. So that's what we're seeking to submit.
22 They're not putting forward any different objective measure to the competitive price in
23 the pleading.

24 MR CUTTING: So they haven't pleaded the case I just put to you?

25 MS DEMETRIOU: They haven't, no. Their claim is based in that respect too on
26 individual willingness to pay.

1 PROFESSOR SMITH: Now, can I have hopefully one short question to go to back to
2 where we were about five minutes ago about objective evidence and subjective
3 evidence.

4 MS DEMETRIOU: Yes.

5 PROFESSOR SMITH: Would you accept that the price that a consumer actually pays
6 for a good is evidence of the value of the good to the consumer, objective evidence of
7 the value of the good to the consumer?

8 MS DEMETRIOU: Of their subjective valuation?

9 PROFESSOR SMITH: No, no. I said the price that a consumer actually pays for a
10 good, is that accepted as objective evidence of the value of the good to the consumer?

11 MS DEMETRIOU: Sorry, you're asking me is the price that's paid by the consumer
12 evidence of the subjective value --

13 PROFESSOR SMITH: No, sorry, I had a sentence that didn't have the word subjective
14 in it.

15 MS DEMETRIOU: Right.

16 PROFESSOR SMITH: Is that objective evidence of the value of the good to the
17 consumer?

18 MS DEMETRIOU: Yes, it's objective evidence of the value of the good to the
19 consumer but that is not what we're concerned with in the law of damages. We're not
20 concerned with the consumer's own value.

21 MR JUSTICE WAKSMAN: Thank you very much. I apologise that we've kept
22 everyone till quarter to five, especially when we started at quarter to two, and I'm very
23 grateful to the transcriber for indulging us.

24 Thank you all for dealing with the matter for today's hearing and we will get a judgment
25 out as soon as we now can.

26 Thank you so much.

1 (4.44 pm)

2 (Hearing concluded)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?